
MEDIATION: ALTERNATIVE? OR A FIRST CHOICE FOR RESOLVING DISPUTES

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Abstract

This article examines the place of mediation both internally and externally to the civil justice system. The growth of alternative dispute resolution (ADR) and the culture of settlement within formal justice has somewhat absorbed mediation as a process by which to resolve disputes at the door of the court. Yet, it can be argued that its origins lie within the community setting where social norms have a distinct role to play and where collective as well as individual interests have a significant impact. This paper considers the application of mediation in a much wider sense than simply as a tool for settlement. It explores the concept of mediation as an educative process that supports the generation and advocacy of social norms. Mediation can be understood as a form of self-regulation which relies on perceptions of fairness, justice and trust. In so doing, it can be argued that it provides a means of informal justice amounting to *dispute prevention* as far as its relationship to the justice system is concerned. Viewed in this way, mediation provides a genuine first choice as a means to address and resolve conflict rather than an alternative method by which to settle disputes.

Keywords: mediation; dispute resolution; dispute prevention; community norms; formal justice; informal justice; process pluralism; alternative; first choice.

Mediation rests on the premise that people have the capacity to make their own decisions about the issues that confront them, that people can and should assess their own risks, abilities, and limitations in making decisions and addressing issues (Bush & Folger 2012: 49).

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[A] INTRODUCTION

The growth of the alternative dispute resolution (ADR) movement has led to the increasing association of mediation with ADR and civil justice in a way that limits its potential for relationship-enhancing and conflict resolution and results in an emphasis on practical negotiation and settlement. While mediation undoubtedly has a valuable place within the justice system, I suggest in this article¹ that its application need not be restricted to this setting. In my opinion, the further development of the mediation profession would benefit from a collaborative reappraisal of purpose and practice. I would argue that it is essential to develop a common framework, recognized by all areas of mediation delivery, which stands in its own right, independently of the justice system and other formal processes that place a disproportionate weight on settlement. I am not alone in this view. Acland, for example, has pointed out:

Our vision of mediation and of the role of mediators and the deployment of their skills has been curiously unambitious. By nestling in our various ghettos we have perhaps overlooked the greater possibilities for what we do. For the last 15 years or so we have been working hard to bring ADR into the mainstream of legal life. The time has now come to go a step further and bring it into the mainstream of public life. We should start by creating an organisation, or developing the remit of an existing organisation, to end the artificial divisions between mediators operating in different spheres so that we start talking to each other 0150 – and learning from each other – on a regular basis (Acland 2007: 10-11).

Here, I explore the perspectives from which mediation can be viewed outside the ADR context, and in which, as Irvine suggests, it is often unreasonably ‘portrayed as a kind of rogue process: unregulated, private, informal and, potentially, unfair’ (Irvine 2014). In particular, I will turn to Auerbach’s consideration of mediation and its role within communities and explore ways in which this might be relevant today. I argue that the application of mediation could extend far more widely into the public domain, though its versatility makes it even more imperative that mediators define what they do with much greater clarity and consistency.

[B] MEDIATION AND COMMUNITY

In *Justice without Law*, Auerbach (1983) explores an ideology of communitarian justice and considers how far it can be applied without the need for formal law. As he describes it, success is dependent on

¹ The origins of this paper lie in chapter 5 of my doctoral dissertation at the University of Birmingham (Allport 2016).

well-understood community values that are defined and respected by its members, each of whom is committed to these values because they have an investment in maintaining their community. Since conflict can be destructive of both individuals and communities, finding effective mechanisms with which to resolve it becomes central to the functioning of healthy communities. Membership of the group demands that disputes are proactively dealt with at an early stage and that disputants take their own responsibility for doing so. Auerbach's conclusion is that our preoccupation with individual rights and formal justice makes this more and more difficult to realize. A further consideration is how this might be achieved when, with increased social mobility, communities are much harder to define. Nevertheless, I think it is useful to explore ways in which modern concepts of community may be understood, the role that mediation plays and the link that this may have with government initiatives other than those associated with the reforms of the civil justice system.

In the context of community education, Clark attempts to understand what 'community' means. He identifies three fundamental components: namely, significance, solidarity and security. A sense of community goes hand in hand with a feeling of belonging or togetherness. 'Solidarity', he says 'encompasses all those feelings which draw and hold people together – sympathy, loyalty, gratitude, trust' (Clark 1996: 43), and it incorporates shared purposes, implying a state of consensus. 'Significance' is described as the awareness of a valuable role to play within a community accompanied by sentiments of worth and achievement. 'Security' is concerned with safety and dependency both materially and psychologically, without which the community itself cannot survive. Clark states that:

The strength of community within any social system is revealed by the degree to which its members experience a sense of security, of significance and of solidarity within it (Clark 1996: 49).

Conflict, as Auerbach's account demonstrates, is a threat to these components and can result in divisions, the loss of social connection and consequent feelings of insecurity and low self-esteem. Mediation aims to mitigate these threats by providing a safe environment in which to address differences. By creating the space for parties both to be heard and understood non-judgmentally, the mediation process gives validity to each participant and builds a sense of significance that is not dissimilar to the two themes of empowerment and recognition that Bush and Folger describe in their writing about mediation. It affords parties the privacy they need to explore their disagreement without fear of reprisal. With its focus on building mutual understanding, mediation encourages a sense

of collaboration rather than competition. Folger and Bush also discuss the importance of recognizing mediation as a process which promotes values that are as important as those associated with social justice. Mediation, they say, fosters civility and, in doing so, offers an educational opportunity that builds community. As they put it:

Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And *that itself* is the public value that mediation promotes (original emphasis) (Bush & Folger 2005: 81-82; citing Bush 1989-1990: 14-17).

In contemporary society, they continue, people suffer learned dependency, mutual alienation and distrust which results in civic weakness and division. In Clark's framework, this is the result when communities are not functioning well. Folger and Bush observe:

[p]ersonal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value – and this is precisely what the process of mediation provides (Bush & Folger 2005: 81-82).

The concept of 'civil society' has its origins in Aristotle's *Politics* where he refers to '*koinōnía politiké*' (κοινωνία πολιτική). He describes a Greek city-state ('polis') which is defined by a shared set of norms and beliefs, in which free citizens are placed on an equal footing, living under the rule of law (Aristotle 335-323 BC: 1252a1-6). The aim of civil society is to achieve common wellbeing or 'eudaimonia'. Plato also describes the ideal state as being a just society in which people are committed to the common good and demonstrate this through the practice of civic virtues such as wisdom, courage, moderation and justice (Plato c375 BC: 427e).

But do these concepts still exist in contemporary society? A decade ago, in 2010, the Conservative Party manifesto promoted the idea of the 'Big Society' as an ideology which proposed to integrate the free market with a theory of social solidarity that would empower local people and communities, taking power away from politicians. It was based on the idea that, by voluntarily contributing to their community, people would invest in it and have some control in shaping it. This is a concept that presents an opportunity to build solidarity, security and significance. Although it was dropped three years later, some of the ideas have nevertheless been developed in other political initiatives. In particular the idea of eudaimonia forms a central part of the Well Being Agenda. This was a cross-party initiative exploring ways to measure the success of society other than through gross domestic product (GDP), and it had a specific focus on taking account of the wellbeing of its citizens. The published

report ‘[laid] out the case for using wellbeing as the overall measure of prosperity, and therefore as the yardstick for public policy’ (O’Donnell & Ors 2014). It considered how wellbeing could be quantified using three main measures:

- ◇ How do you feel (i.e. how happy are you)?
- ◇ How do you evaluate your life (i.e. how satisfied are you with your life)?
- ◇ Do you feel your life is worthwhile (i.e. the so-called eudaimonic measure)?

The report stated that family life, community life, values and the environment are crucial social determinants. It is clear that conflict can occur in all these areas, and it is not difficult to see, therefore, that it has a direct impact on personal wellbeing.² In my view, this was an agenda in which mediation, with its ideological aspirations to promote personal responsibility, empower individuals, restore relationships and encourage social connection, could be well placed.

[C] THE EDUCATIVE ROLE OF MEDIATION

As well as promoting civility, Folger and Bush outline a second benefit to mediation: the educational opportunity it offers in dealing with conflict constructively. This provides another perspective from which to view the role of mediation. Its educative value goes beyond both the current dispute (i.e. it equips people to better deal with conflict next time) and the individuals involved (it incorporates a sense of shared commitment to the community). This educative value of mediation is also discussed by Waldman. Out of the confusion of the debates in the United States surrounding the role and function of mediators, Waldman puts forward an alternative framework which attempts to take account of the role that social norms play in three different mediation models. In the *norm-generating* model, mediators encourage parties to decide their own standards of fairness without imposing norms on them—social, legal or otherwise. ‘The only relevant norms’, she says, ‘are those the parties identify and agree upon’ (Waldman 1997: 718). The model implies that the conflict is both specific and individual. It will have very little impact on the community at large, is of little consequence legally, or is one in which there is no societal consensus. An example might be a workplace

² The [What Works Centre for Wellbeing](#) was set up as a result of the Commission’s recommendations and is funding research in collaboration with the Economic and Social Research Council into four main areas concerning wellbeing: cross-cutting; work and learning; community; culture and sport. For further information see the [website](#).

dispute in which there is a breakdown in communication or a difference in working style. Waldman suggests that this approach:

is well-suited to conflicts in which the goals of enhancing disputant autonomy and preserving relationships are paramount. In these conflicts, the particular outcome reached is less important than the parties' active participation in its construction. Often, empowerment and relational concerns are primary because the competing goal of 'doing justice' through the application of legal or social norms may not be possible, sensible or conclusive (Waldman 1997: 720).

In the *norm-educating* model, the parties remain in control of the outcome; however, the mediator will bring relevant social and legal norms to their notice in order to 'enhance autonomy' and support well-informed decision-making. The model is one that applies particularly well where mediation operates as an alternative to an adjudicated agreement since it draws on features such as legal precedent or case law. For example, in family mediation, parents remain in control of their own arrangements but will nevertheless be influenced by expectations such as that children will spend time with each of their parents or that assets will be fairly divided on the basis of need. The mediator 'is active in ensuring that disputant negotiations are informed by relevant legal and social norms, either by educating the parties himself or by ensuring that they are educated by retained counsel' (Waldman 1997: 732). Waldman suggests that the significance of this model is in its application to disputes which:

invoke norms that embody certain societal conclusions about what is just and unjust and confer entitlements on those who might otherwise remain disadvantaged and marginalized in private bargaining (Waldman 1997: 732).

While parties may not necessarily act on these norms, the importance is in being made aware of them rather than making a decision in ignorance.

Waldman's third model is the 'norm-advocating' model, often used in rights disputes that rely on legal and social norms, but where there are grey areas for negotiation. These kinds of disputes benefit from the informality of the mediation environment but are not appropriate to the first two models because:

the conflict implicates important societal concerns, extending far beyond the parties' individual interests ... and ... [where] one party is so structurally disenfranchised that allowing her to negotiate away legal rights and entitlements would make the mediator complicit in her continued oppression (Waldman 1997: 754).

One such example can be found in the use of mediation in judicial reviews that are conducted in cases where an allegation has been made

against a public authority for not upholding obligations or not following due process. Research conducted in this field in 2009 (Bondy & Ors 2009) examined cases that were largely concerned with individuals who had particular needs (in their health care or educational provision) and who felt that the authority had deprived them of resources to which they were entitled or made decisions that infringed their rights. Working within the framework of legal obligations, mediators nevertheless managed an environment where claimants felt empowered to voice their opinions, and all parties were able to contribute to the drafting of more creative, detailed agreements. Mediators using this model facilitate communication and understanding but take active steps to ensure that relevant norms or legislation are built into the agreement and that ethical codes are not breached.

These models reinforce several of the ideas under discussion in this paper, in particular:

- ◇ that people are able to take responsibility for their own disputes and exercise civility when using mediation;
- ◇ that people are capable of reaching fair outcomes and creating their own justice; and
- ◇ that mediation can be both educative (i.e. it informs decision-making) and contributive (i.e. it builds and reinforces the values of communities and society).

This implies that different kinds of dispute require different processes and outcomes and that participants and practitioners alike have choices to make about what mediation can achieve in their specific situation. Those choices will also affect mediator behaviour, and so, I suggest, they still need to be considered alongside the core principles of mediation practice (Allport 2016).³ However, Mayer proposes that these principles, though important, should be viewed as aspirations: they are ‘tactics or stances we can take, but not essential defining characteristics of who we are’ (Mayer 2011-2012: 866). Instead, he and his colleagues place emphasis on setting up the right process (see Lande & Ors 2011-2012: 812-816) and creating the environment that allows parties to achieve the outcome they are looking for. Mayer encourages mediators to define themselves by their expertise as conflict resolvers:

Any attempt to define ourselves by what we do – by our methodologies, procedures, or systems of intervention – will inevitably run into the

³ See Allport (2016), chapter 8, which examines four key principles of mediation practice: voluntariness, confidentiality, party determination and impartiality. These were identified by respondents in my research taken from a cross-section of mediation practitioners.

incredibly broad variety of approaches that we take ... But we can, perhaps, identify some elements of a common knowledge base that define our field. While there are areas of particular knowledge we need depending on our particular role and area of expertise, as a field we can identify certain common areas of knowledge that we either have or should seek to have. These common areas include conflict dynamics, negotiation, communication, power dynamics, cultural practices, systems theory, intervention processes, and intervention roles (Mayer 2011-2012: 868–869).

Mayer underlines the role of an expert in conflict resolution which, in practice, may take many forms depending on the situation. Waldman's approach also points to the desirability of having a number of resolution processes on offer that take account of the context, the aims of those involved and any legislative or policy framework to ensure appropriate decision-making.

[D] PROCESS PLURALISM

Both writers, therefore, reinforce the notion of 'process pluralism' which has recently gained credibility among practitioners and scholars. Carrie Menkel-Meadow (2005-2006) built on the work of Lon Fuller who placed great weight on the adoption of the appropriate procedure to meet a particular objective.⁴ She asks: 'What human problems are best resolved, handled, or solved by what processes?'

Like Fuller, Menkel-Meadow recognizes that 'ends or goals depend not only on rationality but on emotions, intuitions, and feelings of what is right or fair' (Menkel-Meadow 2005-2006: 565). A variety of processes exist, some driven by reasoning, others by interests, yet others by emotion. Some are open, some closed, some led, some facilitated. The key point is in ensuring that parties are aware of the options available to them and can therefore make a well-informed choice.

Bondy and colleagues provide a good example of process pluralism in action in their study of mediation in judicial review cases (Bondy & Ors 2009). In this context, the issue of human rights is central: disputes are not about personal relationships, rather they often involve an individual against an authority, and a judgment is required.⁵ Despite this, the authors point out that several different procedures are offered

⁴ See Winston (2002). Fuller examined various procedures including contract, adjudication, mediation, legislation and administration.

⁵ Although Bondy & Ors (2009) observe that because the outcome of cases is so stark—generally rights have been breached or they have not—there is a culture of settlement, and this is often apparent at an early stage, particularly where authorities find themselves at fault.

within judicial review, with discussions and negotiations, ombuds, early neutral evaluation and mediation all being identified as separate options within the pre-application protocol. However, even though it is located in a context that is driving settlement, the authors found that mediation offered specific benefits. Their empirical evidence helps to define some of its distinguishing features. It gave aggrieved individuals an active voice and contributed to their sense of procedural fairness in a situation where they can often feel overlooked. The authors of the report state:

This sense of empowerment can in itself be regarded as a form of positive outcome. Research in this area suggests that procedural justice (process) is often perceived as being as important as substantive justice (outcome) and that satisfaction with both process and outcome can be interrelated. So, for instance, a disappointing result can be more acceptable to a party if it is reached in a way that is perceived as fair, or when a disputant feels heard and understood (Bondy & Ors 2009: 38).⁶

Mediation gave an opportunity for respondents in the study to exercise some control in the shaping of outcomes and highlighted more options than simply legal remedies. It offered a different, less intimidating environment for dialogue and time to pay attention to detail. Most of all it provided a platform for human interaction. Case Study 7 in the examination by Bondy and colleagues is a good illustration of this. It gives an account of a severely disabled woman in a long-term NHS facility whose intimate care routine was about to be taken over by a male nurse. They state that:

Marion's solicitor believed strongly that by meeting her client and hearing her tell her own story the PCT was made aware of the day-to-day reality of her disability and the depth of her concern about who should provide her intimate care. It was suggested that being faced with a human being made all the difference to the PCT's attitude (Bondy & Ors 2009: 78).

The report concludes that, whereas the opportunity to use mediation in judicial review is quite limited, it can, in a certain number of cases, be very beneficial. The authors make the point that unquestioning enthusiasm for mediation in all circumstances does not win the confidence of sceptics and suggest that:

mediation enthusiasts and lawyers alike must each be able to incorporate into their own perspectives the insights gained from the others' experience rather than set up litigation and mediation as mutually exclusive alternatives one of which is good and the other bad (Bondy & Ors 2009: 89).

⁶ See also Genn (2006) whose research is referred to in this quotation.

Effective process pluralism is, therefore, dependent on transparency and clarity of definition if disputants are to make good choices about what they want from a particular process. The attempt to make a clear distinction between the different processes has been made in other jurisdictions. In The Netherlands, for example, there is a recognition that factors such as the level of escalation of a particular conflict or the nature of the dispute (i.e. whether personal or commercial) have an influence on the most appropriate resolution tool. Judge Machted Pel describes how court-based mediation programmes formed part of a wider approach which included an initial conflict diagnosis before users were directed to a particular resolution process (Pel 2008).

[E] MEDIATION AS A MEANS OF INFORMAL JUSTICE

Other scholars have also attempted to describe multiple purposes of mediation operating outside the justice system. Wezel Stone, for example, considers the place of norms specifically within organizations. She proposes three conceptions of dispute resolution in workplaces. In the first, processes such as mediation and arbitration are viewed as ‘techniques’. They provide a faster and cheaper way of handling disputes and the goal is to avoid conflict. In the second, the ‘public policy view’, mediation and arbitration are seen as vehicles by which policy and law can be implemented on a more informal basis. Similar to Waldron’s norm-educating model, third-party interveners have a role in ensuring that substantive rights are not lost. The final concept is that of self-regulation. Dispute resolution processes are seen as:

method[s] for applying norms and resolving non-justiciable disputes that arise within a self-regulating, normative community. In the self-regulation view, the distinctive value of arbitration [and mediation] is not that it can enforce laws, but that it can enforce fairness norms that are not presently embodied in law. This view is based on the insight that face-to-face communities generate their own fairness norms (van Wezel Stone 2000-2001: 470).

This last perspective brings us back again to the value placed on the use of mediation in establishing and maintaining the cultural norms of a community, in this case within the workplace. Saundry and colleagues also point out that perceptions of fairness, justice and trust, together with organizational support, are crucial to the success of these kinds of informal processes. Once again, ‘justice’ is understood to be a concept that applies not only to outcome but to process and the quality of interaction:

Justice does not simply relate to the outcome of a decision (distributive justice) but critically to the way in which that decision was arrived at (procedural justice) and how this was dealt with by managers and/or colleagues (interactional justice). Accordingly, where decision and actions are seen to be 'just', employees are more likely to co-operate and reciprocate with increased discretionary effort (Saundry & Ors 2014: 11).

Wezel Stone also makes the connection between the delivery of 'justice', as it is described above, and its impact on 'organizational citizenship behavior'. Today, providers of workplace mediation training and dispute resolution services⁷ set out a philosophy which is not just about training mediators to facilitate disputes within the organization but also supports managers and the whole of the organization to promote a culture that is confident to deal with conflict. In other words, communities and organizations can foster norms that in themselves recognize and acknowledge difference and encourage people to address it positively.⁸ The same possibility exists within what Wenger has called 'communities of practice', or 'groups of people who share a concern or a passion for something they do and learn how to do it better as they interact regularly' (Wenger 2013).⁹ Similarly, in their book *Change, Conflict and Community*, Kenton and Penn explore at some length the idea of the workplace as a community of practice which is 'effective in enabling people to learn through change and conflict' and is 'dependent on the self-determination, fluidity and openness' of its members (Kenton and Penn 2009: 148ff).

⁷ For an example, see [CMP Resolutions Ltd](#).

⁸ The [CMP Resolutions website](#) states:

Supporting the development of intelligent conversations enables a positive, can-do culture that underpins strong performance: better working lives, solution finding and creativity. We call these Clear Air workplaces.

A key ingredient to our work is Conversational Integrity. These interpersonal soft skill capacities are essential for transforming cultures, translating differences and disputes into understanding, trust, collaboration and improved performance.

For 30 years, we have been working at the heart of workplaces, unpicking the issues that come between individuals, teams and departments. We understand the mechanics of interpersonal relationships, how they work and are affected by different structures and management approaches. Our insights give us the knowledge and expertise to better diagnose organisational challenges and recommend interventions that develop Conversational Integrity and build a Clear Air culture.

⁹ More information can be viewed at '[Introduction to Communities of Practice](#)'.

[F] MEDIATION AS DISPUTE PREVENTION

The value of establishing these norms is that, if they work effectively and, more specifically, if they are developed in relation to the managing of conflicts, dispute resolution becomes something more like dispute prevention. Martin Burns describes the increasing use of early intervention strategies by industry bodies in an effort to avoid the escalation of minor disagreements into disputes and to manage difficult commercial relationships. This is a good example of contemporary movements to embed cultural norms within communities of practice, particularly in the construction industry, which can be supported by early interventions such as mediation. Recognizing that ‘the reality to commercial relationships is that conflict is always possible’, Burns talks about the main objective of dispute prevention being ‘to focus minds on how potential problems will be resolved, and doing it early enough to avoid escalating into full blown disputes’. He observes that:

there is an increasing desire for culture change in the way disputes are handled. I see more and more evidence of attempts by decision makers and influencers within the construction industry to develop innovative techniques for managing relationships, reducing conflict and ‘nipping in the bud’ issues that could otherwise snowball their way into courts. There are a number of early intervention techniques that are currently being explored and adapted by industry bodies. Contracts are being amended to include ‘rules of engagement’ for dealing with potential conflicts as they arise. Procedures are being written into contracts with the intention of encouraging parties to sort out their problems straight away, and not let them drift into positioning and eventually entrenchment (Burns 2014: 15).¹⁰

It is interesting to notice that these concepts are well rooted in the past. Developments within the trading sector seem to mirror the efforts of the original merchant guilds of the 17th century (Auerbach, 1983) which successfully created and implemented their own trading rules. Auerbach writes that the use of processes such as mediation and arbitration have ‘historically expressed an ideology of communitarian justice without the need for formal law’ but rather based on mutual access, responsibility and trust. He writes:

Utopian Christians and mercenary merchants shared the understanding that the law begins where community ends. So they developed patterns and institutions of dispute management that contained conflict within their own community boundaries (Auerbach 1983: 5).¹¹

¹⁰ Martin Burns is head of ADR Research and Development, Royal Institute of Chartered Surveyors.

¹¹ It should be noted that the processes of mediation and arbitration were less conceptually distinct at Auerbach’s time of writing than they are today.

[G] MEDIATION AS A FIRST CHOICE

However, as Auerbach and others (for example, Abel 1982 and Nader 1986, 1995)¹² have observed, taking a historical perspective reveals a pattern of oscillation between formal and informal means of achieving justice. More recently, in the UK, the publication of the Woolf Reports (the Interim Report in 1995 and the Final Report in 1996) have had a significant impact on mediation, effectively sparking a revolution in the civil justice system and leading to the prioritization of settlement over adjudication. At the end of the 20th century, disputants were being encouraged to take up informal means of resolving disputes *within* the formal justice system as an alternative to an adjudicated decision.

Today, with the advent of the Children and Families Act 2014 (CFA), and, even more recently, the Divorce, Dissolution and Separation Act 2020 (DDSA), the drive is for disputes to be resolved outside that system wherever possible. Within the education sector, for example, the legislative changes contained in the CFA present the opportunity to establish a norm of early prevention. ‘Disagreement Resolution’, as it is described in the context of the Special Educational Needs Code of Practice (DfE & DoH 2015), is distinguished from mediation as an early, informal and completely voluntary option that can be used at any stage. The distinctions being made in the use of these two different terms are not concerned with process or structure but with the stage at which these processes are used.

In the workplace, a consultation conducted by the Department of Business Innovation and Skills (BIS & HMCTS) 2011: 13, para 25) led to the introduction of early conciliation by the government (implemented in 2014) as an alternative to litigation. Early conciliation requires that prospective claimants submit their details to the Advisory, Conciliation and Arbitration Service (ACAS) which offers conciliation as a first option. If either party rejects conciliation or there is no agreement, a claim can subsequently be filed at the tribunal.¹³ Within public-sector organizations, mediation as an early, informal intervention is increasingly incorporated into policy statements, coming under headings such as equality and diversity, dignity or respect at work, or people strategies.

¹² See Nader (1986) and, commenting in the context of the ‘shift in discourse’ of the late 20th century in the United States, Nader (1995).

¹³ The ACAS definition of conciliation is similar to that of mediation generally (in that it is voluntary, confidential, facilitated by an independent third party and leaves parties in control of decision-making). In the case of early conciliation, it is offered as a first step in going to an Employment Tribunal, whereas issues taken to mediation may be broader and less formal. For more information, see the [website](#) where there are guides on both processes.

In the context of family law, legislative changes have, for some years, strived to move cases out of court. The Norgrove Report (2011) recommended the establishment of a Family Justice Service with a single family court, stating that '[t]he emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible' (Norgrove 2011: para 4.6). This underlined the importance of trying mediation and, interestingly, implied that the use of the word 'alternative' was unhelpful:

It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service. To reinforce the primary nature of these services 'alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimize a deterrent to their use. Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard (Norgrove 2011: para 115).

While the Family Law Act of 1996 never succeeded in implementing the 'no fault' divorce, this has re-emerged again within the DDSA which seeks to make the legal process of divorce less adversarial and adopts a change in language to reflect this.¹⁴

In 2020 the Family Solutions Group, a multidisciplinary subgroup of the Private Law Working Group, was formed by Mr Justice Cobb with the specific purpose of looking at the 'pre-court' space for families when they separate. Their findings once again call for a change of culture in which a legal response to divorce does not have to be the default option. The recommendations steer separating parents away from acrimonious court proceedings and propose the development of two pathways: a 'safety pathway' for the estimated 20-24 per cent of families that need the protection of the courts for specific reasons; and a 'co-operative parenting pathway' for most families, which recognizes that a whole package of therapeutic and practical support should be available for children and parents outside the justice system. The report states that:

We need to move away from old assumptions that family breakdown is automatically a legal issue in which parents work against each other and towards an acceptance of 'working together' as the norm where appropriate, with professional support alongside to resolve issues (Family Solutions Group 2020: 41 para 133).

¹⁴ It will be possible to make a joint application to divorce, and there will be no possibility of contesting an application. Decree nisi and decree absolute are to be replaced by conditional and final orders.

[H] CONCLUSION

In this article, I have explored ways of understanding mediation from different perspectives, particularly as a process that can be used within communities of work, communities of practice and communities of interest, to support and build the fundamental elements of solidarity, significance and security. Through party determination and individual validation, mediation is a process that supports people to participate in the creation and implementation of community norms that can be experienced as just and fair. Critics such as Genn (2010: 195-205) have argued that mediation within the ADR context is seen as providing an alternative to adjudication and is now largely concerned with settlement. In that sense it should be described more accurately as *another* alternative. However, viewing the use of mediation within communities as a means by which to establish and maintain norms of justice and fairness means that it can be offered as the first choice for resolving conflict rather than an alternative to formal justice. Described in this way, mediation can contribute to the kind of culture change to which recent governments in the UK have aspired. This is not to say that additional support measures are not also required or that mediation can replace the need for trial and adjudication where norm generation or education are inappropriate. In my view, these are perspectives that present a more rounded view of mediation and its ideological aspirations, as well as its practical application. For that reason, they are worthy of more detailed exploration by the mediation community. To conclude, it seems to me that there would be benefit in re-examining the use of mediation in communities as a way to foster wellbeing and build a sense of significance, solidarity and security in the face of conflict and disagreement.

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