

Mediation

Developing a Theoretical Framework for Understanding Alternative Dispute Resolution

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Abstract

The perceived failure of the 2004 Disciplinary and Grievance Regulations to stem the rising number of industrial tribunals has revived interest in alternative dispute resolution (ADR) techniques. With the publication of the Gibbons report in the UK, mediation was singled out as the process of choice for reform of the tribunal system. This paper examines research from the US / UK to develop a theoretical framework that relates forms of dispute resolution to underlying philosophical assumptions about authority and knowledge. The dominant discourse is rooted in top-down managerial authority driven by a belief in the legitimacy of disciplinary and grievance processes as a way of differentiating right from wrong. Research findings from the US suggest that improved employee relations can be achieved by adopting transformative mediation processes that support the development of conflict resolution skills. By investigating the philosophical assumptions of mediation, its link to direct democracy and challenge to managerial authority are revealed at the level of both theory and practice.

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Introduction

This article explores theories of, and research findings on, mediation by examining its recent development in the UK and US. The authors will argue that there are both practitioner and political implications that arise from the deployment of mediation as a dispute resolution strategy. Consequently, the article makes a contribution to knowledge by explicating the assumptions that underpin alternative dispute resolution strategies, and locating mediation as a strategy for the advancement of democracy in the workplace.

The Employment Act 2002 (Dispute Resolution) Regulations 2004 were established by the UK Government with the intention of establishing ‘best practice’ on HRM and halting the rising number of employment disputes. When the regulations not only failed to stem the rising number of employer-employee disputes, but were linked to further rapid increases (People Management, 2007), the Government commissioned further research to consider alternatives. The Gibbons report signalled the UK Government’s intention to repeal the 2004 regulations and increase use of mediation as a dispute resolution strategy to reduce the burden on the employment tribunal system (Gibbons, 2007). In response to the report, ACAS and the Chartered Institute for Personnel Development (CIPD) have produced guidance to coincide with the repeal of the 2004 dispute resolution regulations on 6th April 2009.

Mediation is one of several Alternative Dispute Resolution (ADR) strategies that ACAS began evaluating after recommendations were published by the Employment Tribunal and Better Regulations Taskforces in 2003. It first gained a profile when it was introduced into family disputes twenty five years ago (Kelly, 2004). More recently, this interest has been strengthened by new works on restorative justice that argue social justice can be achieved for both victims and falsely accused persons through reconciliation processes that avoid punitive sanctions. Over time, restorative justice and mediation has gained a reputation for effectiveness in situations where issues are emotionally complex (Roche, 2003).

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A mediation service has developed in the US where it is now claimed to be the leading dispute resolution method for the public sector (Mareschal, 2003). Unlike the UK, where statutory interventions still focus on advice, arbitration and conciliation (at ACAS), the US has developed a separate agency that focuses primarily on mediation (the Federal Mediation and Conciliation Service). This service developed its reputation through the provision of mediators to the United States Postal Service (USPS) after the courts imposed compulsory mediation on USPS to ward off a class action for racial discrimination in 1994. The scale and rigour of the USPS programme has provided an opportunity to conduct large scale research into the nature and effectiveness of mediation.

This paper develops theory that relates dispute resolution practices to philosophical perspectives on authority and power. In the first section, the authors define conflict and its effects, as well as perspectives on conflict that inform employee relations. In the course of this debate, conciliation, arbitration and mediation are distinguished. The next section examines different types of mediation and explores differences between the dominant approach in the UK based on *facilitative mediation* and the US approach based on *transformative mediation*. The main body of the paper considers the philosophical underpinning of different approaches, and compares them to authority-driven approaches. Their effectiveness is discussed with reference to the findings from large-scale programmes of mediation research in the US. After presenting a theoretical framework that locates transformative mediation as a radical management practice, the paper outlines key criticisms of mediation and critically reviews the implications for practice.

Perspectives on Conflict

In order to develop theory on conflict resolution, it is valuable to consider the nature of conflict itself. Huczynski and Buchanan (2007: 764) offer the following definition:

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[Conflict is] a process that begins when one party perceives that another party has negatively affected, or is about to negatively affect, something the first party cares about.

While the start of a conflict is framed as a product of perception, evidence of conflict does not surface until one or other party's actions are influenced by these perceptions. As Willmott (1993) argues, a considerable amount of conflict remains latent, and may be suppressed by the inability of the first party to articulate their perceptions to the second party. Conflict resolution processes, therefore, are likely to be more successful if they address both the actions and perceptions of both parties to the dispute.

At a deeper level, however, is the parties' belief about the possibility of aligning social and economic interests. In employee relations, the issue of whether the buyers and sellers of labour can align these interests informs their perspective on how to conduct themselves in the employment relationship. If one party believes interests can be aligned and the other does not, conflict exists not simply at the level of action and perception, but also at the level of philosophy.

Fox (1966) defined three ideological perspectives on conflict. Firstly, the acquisition of management power encourages a unitarist view of the employment relationship, typically supported by rhetorical strategies encouraging staff members to work in harmony towards common goals. Implicit in this view, is managers' 'right to manage', which – if internalised – regards conflict itself as irrational. Fox also identifies a pluralist perspective in which organisations are seen as comprised of competing groups that have different values, interests and objectives. In employee relations, this surfaces in the consideration of the interests of employers and employees, although postmodernist philosophers have urged broader use of the term based on inter-sections of gender identity, ethnicity and class (Barrett, 1992). From a pluralist perspective, conflict is both rational and inevitable, requiring employer and employee representatives (managers, unions and staff groups) to devise and utilise agreed conflict resolution processes.

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Lastly, Fox (1966) outlined a more radical perspective in which conflict is not simply viewed as inevitable, but as both a product and driver of change. As Hunt (1981:90) argues, conflict is 'desirable and constructive in any social system' as it can open up different solutions to a problem, encourage creativity, and surface emotive arguments. Approached in such a way, positive conflict is a useful means of challenging organisations norms, and empowering people so that change can occur.

The intellectual roots of the radical view can be traced to Marxist theory. Gramsci (1971) sets out the concept of hegemony: a circumstance where ruling elites propagate their values and beliefs in such a way that it shapes the thoughts and feelings of a population. Lukes (1974) draws on this concept to develop a coherent theory of power, identifying three levels of conflict: open conflict; agenda setting and hegemonic control. Hegemonic control (the most pervasive and difficult to challenge) is associated with a unitary outlook where consent is manufactured through a ruling elite's capacity to control information and communication, and embed its values and beliefs in governance and educational systems. A pluralist perspective is associated with the second domain of power. Control here is incomplete, and limited to setting the agenda for discussion. It is, however, possible to challenge the agenda set by a ruling elite, and force negotiations on the issues identified. Fox's radical perspective is associated with open conflict. At this level, alternative agendas may be put forward, even if pursuing them has a limited chance of success. Conflicts are not simply focussed on negotiations to re-stabilise the status quo, but are treated as *transformative* with the potential to redistribute power. This being the case, Fox's radical perspective is linked to participative democracy at work (Pateman, 1970; Willmott, 1993; Johnson, 2006).

Blyton and Turnbull (2004) identify both individual and collective consequences of industrial conflict. The outcomes of collective conflict are various and generally more visible. At their most extreme, it can result in the withdrawal of collective labour in the form of the

strike. Less extreme, but arguably no less damaging to the organisation is a slow down resulting from a decision to work-to-rule. There are also less visible incidences of ‘industrial action’ that can be taken by the individual. Kersley et al. (2006), in their analysis of the 2004 workplace employment relations survey (WERS) cite absenteeism and voluntary resignations as possible indicators of discontent. They suggest that (*ibid*: 350),

‘..studies have clearly indicated how absenteeism and resignations may be used by employees as alternative means of expressing discontent when ...[other forms]... of expression are either unavailable or are less attractive...’

Blyton and Turnbull (2004) concur with this view of absenteeism and turnover as elements of unorganised conflict. Other examples include spontaneous acts of sabotage or violence. Sabotage is a form of *covert conflict* and can vary from physically disabling the means of production to purposively holding back valuable information. Violence, on the other hand, is overt conflict where disempowerment leads to physical or verbal acts of aggression towards a manager, subordinate or co-worker.

Conflict resolution strategies, therefore, need to cope with a wide range of situations, involving conflicts over alleged actions, perceptions and beliefs, with patterns of conflict that are covert or overt, and enacted through passive or active aggression.

Defining and Distinguishing Between Types of Mediation

In attempting to define mediation, it is useful to define what it is not. It is not, for example, *conciliation*: a process whereby a third party, such as ACAS, will guide ‘the parties in dispute to try and reach a compromise that suits both parties’ (ACAS, 2006:21). So for instance, if a dispute has escalated to the stage where an employee submits a claim against their employer to an employment tribunal (ET), ACAS can offer its conciliation service to settle that dispute before a formal hearing at an ET is called.

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Similarly, mediation is not arbitration, which Liebmann (2000:11) defines as, ‘a process in which an impartial third party (after hearing from both sides) makes a final, usually binding, agreement. It:

‘Involves an impartial outsider being asked to make a decision on a dispute. The arbitrator makes a firm decision on a case based on the evidence presented by the parties. Arbitration is voluntary, so both sides must agree to go to arbitration; they should also agree in advance that they will abide by the arbitrator’s decision’

ACAS, 2008

In contrast, Liebmann (2000:10) defines mediation as:

‘A process by which an impartial third party helps two (or more) disputants work out how to resolve a conflict. The disputants, not the mediators, decide the terms of any agreement reached. Mediation focuses on future rather than past behaviour’

The decision as to which type of alternative dispute resolution may be utilised can depend on the type of dispute, the stage of the dispute and, crucially, what type of resolution is being sought.

In contrast to conciliation and arbitration, in mediation the onus is on the disputants to produce and agree an acceptable outcome. Mediation can be used at any point in the course of a dispute, but emphasis in the Gibbons report is on using mediation at the earliest stage to avoid dispute escalation (Gibbons, 2007).

Mediation processes have been conceived and labelled in different ways. In the US, a distinction is made between *problem-solving* and *transformative* approaches (Bush and Folger, 1994; Bingham and Pitts, 2002; Gaynier, 2005). In the UK, ACAS (2005) draw a distinction between *directive* and *facilitative* approaches. Whilst it is tempting to draw a parallel between problem-solving / directive approaches and contrast them with facilitative / transformative approaches, this misses some key differences in approach.

In the UK, the distinction between directive and facilitative approaches rests on the role of the mediator at the end of the mediation process. In directive mediation, the mediator

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makes non-binding recommendations that parties may or may not accept. In a facilitative mediation, the mediator focuses on encouraging the parties to find their own solution to the issue. In the US model, the distinction rests on whether the mediation process is focussed on task or relationship issues. Problem-solving (evaluative) mediation focuses on understanding the underlying causes of a conflict to explicate and resolve the 'problem'. Transformative mediation, however, is primarily concerned with empowerment and recognition of the parties to improve their conflict resolution skills for the future. As Bingham and Pitts comment (2002: 137):

The presence of empowerment and recognition can aid participants in addressing future conflict and often results in a settlement, though this is not the primary goal of the transformative model. Rather, transformative mediation seeks to equip participants with the necessary power and tools to approach and solve problems.

Gaynier (2005), whilst criticising the strident way Bush and Folger have promoted their transformative mediation model, nevertheless charts its heritage in Gestalt theory. Transformative mediation, she argues, has a solid theoretical base that is shared with other therapeutic approaches, takes a holistic rather than narrow view of 'problems' and has a similar commitment to personal empowerment. Transformative mediation shares some of Lukes assumptions about 'open conflict', in that there is an expectation of transformative change at both the personal and relational level. The focus on relationship issues, however, has been criticised as inappropriate for all situations. Mareschal (2003: 443) argues that deploying both problem-solving and transformative approaches (a 'bifocal approach') concurrently can be more effective.

There is, however, a deeper underlying difference between the UK and US conceptions of mediation. In the UK model, the mediator – regardless of a directive or facilitative brief - is seen as a party that controls the *process* while the disputants control the *outcome* (ACAS, 2005). In the US model, the problem-solving approach is associated with active interventions by the mediator (to facilitate an outcome), while the transformative

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emphasises the mediator's role is helping disputants control *both* the process and outcome.

The transformative approach (see Appendix A) can be seen as a departure from the UK model by insisting that the disputants decide the 'rules of the game' (the means by which they will reach the outcome) as well as the outcome itself.

Findings from the USPS

In an employment relation context, the USPS REDRESS programme is the only large scale opportunity that has afforded researchers a chance to review thousands of cases and outcomes. This research is reviewed by Bingham and Pitts (2002) prior to reporting their own findings on the effectiveness of representation and the impact of mediation in reducing tribunal hearings. The US REDRESS programme has several features that may, or may not, be adopted in any UK employment relations programme. Firstly, disputants on either side can bring any representative they wish to mediation meetings (including no representation at all). Secondly, mediation is compulsory for the employer, but optional for the employee: if an employee raises a grievance, the employer must mediate; the reverse is not the case.

Outcomes and satisfaction levels were studied. In nearly all cases, the best outcomes and highest satisfaction levels were achieved when trade unions represented the complainant (the person expressing a grievance) and lawyers represented the respondent (the person defending themselves against an accusation). Interestingly, parties representing themselves also expressed high levels of satisfaction. Bingham and Pitt (2002:142) concluded on the basis of studying 7,989 complainant surveys and 6,794 respondent surveys that "allowing participants to bring whatever representative they prefer will have no adverse impact on an employment dispute resolution programme".

Another aspect of the REDRESS programme was a comparison between the use of internal and external mediators. After a pilot programme using 'in-house neutrals' an external mediator programme was implemented. Although this took the form of a natural experiment

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(participants could not choose between internal and external mediators), the results confirmed that the more neutral disputants perceived the mediator to be, the higher their confidence and satisfaction with the mediation process. Nevertheless, the satisfaction levels on procedure were high in both cases (91% with internal mediator, 96% with external mediator), while satisfaction with outcomes was achieved in most cases (74% with internal mediators, 80% with external mediators). These high satisfaction levels indicate that internal mediation can still be effective in many cases and may be particularly cost effective. The same study also broke new ground by tracking the impact of mediation on litigation. The findings show substantial drops in the number of applications to court (nearly 4,000 cases over 2 years) immediately following the introduction of mediation. In the seven years prior to mediation, court claims rose steadily by 7,000 cases to a peak of 14,000. Given that the study only examined filings and mediations in the US Postal Service, these findings have validity.

A study in the UK by ACAS (2005) was less conclusive and sweeping in its endorsement of mediation, nor was it clear about the extent to which the transformative model was adopted. Nevertheless, there were some interesting and counter-intuitive findings. Firstly, most participants reported positive learning from the mediation process, to the extent that that they would choose to use mediation again if faced with a similar dispute. Moreover, organisations reported the greatest benefits in the most intractable disputes: mediation succeeded where other processes had failed or been exhausted. This raises the question of whether mediation is most effective at the start of a dispute or better used as the process to adopt when disputes escalate.

One weakness of the REDRESS studies is that satisfaction with court proceedings are not compared to those undergoing mediation. One area where this question has been considered is mediation in a family context (see Kelly, 2004 for a review article on 25 years of mediation research). In this case, outcome and satisfaction levels of those who chose

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mediation and court routes were compared. Moreover, follow-up studies (after 18 months and 24 months) were undertaken to compare satisfaction levels later on. Firstly, the number of disputes in family cases that could be resolved by mediation were far lower than in employment disputes. Nevertheless, similarly high levels of satisfaction were reported (86% said they would recommend mediation to others). These satisfaction levels, however, dropped substantially in follow up studies (between 20 to 30 percentage points, depending on the question). Nevertheless, satisfaction levels remained substantially higher than those who went through court proceedings. For example, 55% managed to maintain workable relationships two years after mediation, compared with on 34% who used legal processes.

Importantly - and perhaps counter-intuitively - there was a higher level of satisfaction with the level of detail in mediated agreements compared to agreements made in court (64% v 53%), and settlements were reached much quicker. Interestingly, Kelly also considers research from Colorado showing that mediation is capable of resolving some issues and allowing others to proceed to court. For example, in 39% of cases, full agreement was reached. In a further 55% of cases, partial agreement was reached. Where full agreement could not be reached, mediated cases took less court time to fully resolve (roughly half).

Discussion and Theory Development

Notwithstanding these encouraging findings, there have been strong and repeated criticisms of mediation. A helpful review was undertaken by Mary Golten and Medinda Smith (circa. 2002). Although written from a practitioner perspective in environmental disputes, their paper considers a range of criticisms that apply in other contexts.

For the purposes of this article, any criticism of mediation that applies equally to court proceedings (e.g. power or resource asymmetries between the parties) was discarded. After this, there remain a number of more valid criticisms grouped around two inter-related concerns: firstly, mediation undermines legitimate authority; secondly, mediation silences

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social criticism by hiding the process of conflict resolution from public scrutiny. The criticisms regarding authority contest that local parties should not be able to reach private agreements that undermine the authority of public agencies. In an employment relations context, there could be objections to local settlements that disregard nationally agreed standards or employment law. Delgado goes so far as to suggest that mediation can detract from embedded class and group conflicts (Delgado et al. 1985; Delgado, 2000). Public discussion of widespread social injustice may be silenced and the stronger party may be able to preserve the status quo. Undoubtedly, there are issues of public learning that will not occur if private proceedings are not documented. There is, therefore, a case to answer on democratic grounds (i.e. lack of accountability) and public interest grounds (i.e. lack of an ability to learn from the dispute).

Kelly's (2004) research on family mediation, however, does not support the view that mediation harms the interest of the weaker party or supports the status quo. She found that minority groups and those with low-educational achievement were positive about their experience of mediation. Moreover, the early concerns of feminist groups who objected on the basis that women would be strongly disadvantaged were not supported by later research that found that men more commonly made complaints about bias in mediation proceedings.

The public / private issue is grounded in a concern that the opportunity costs of private collaboration are not weighed against the opportunity costs of public debate. Firstly, there are contexts in which parties will not mediate (Brett et al, 1996): one party may perceive it is not in their immediate (or wider) interest to settle; alternatively, a party may perceive a 'jackpot' opportunity that inhibits their willingness to mediate. Despite Bush and Folger's claims that disputes represent crises in human interaction, rather than conflicts of interest, it remains that some cases are constructed (rightly or wrongly) by disputants in this way.

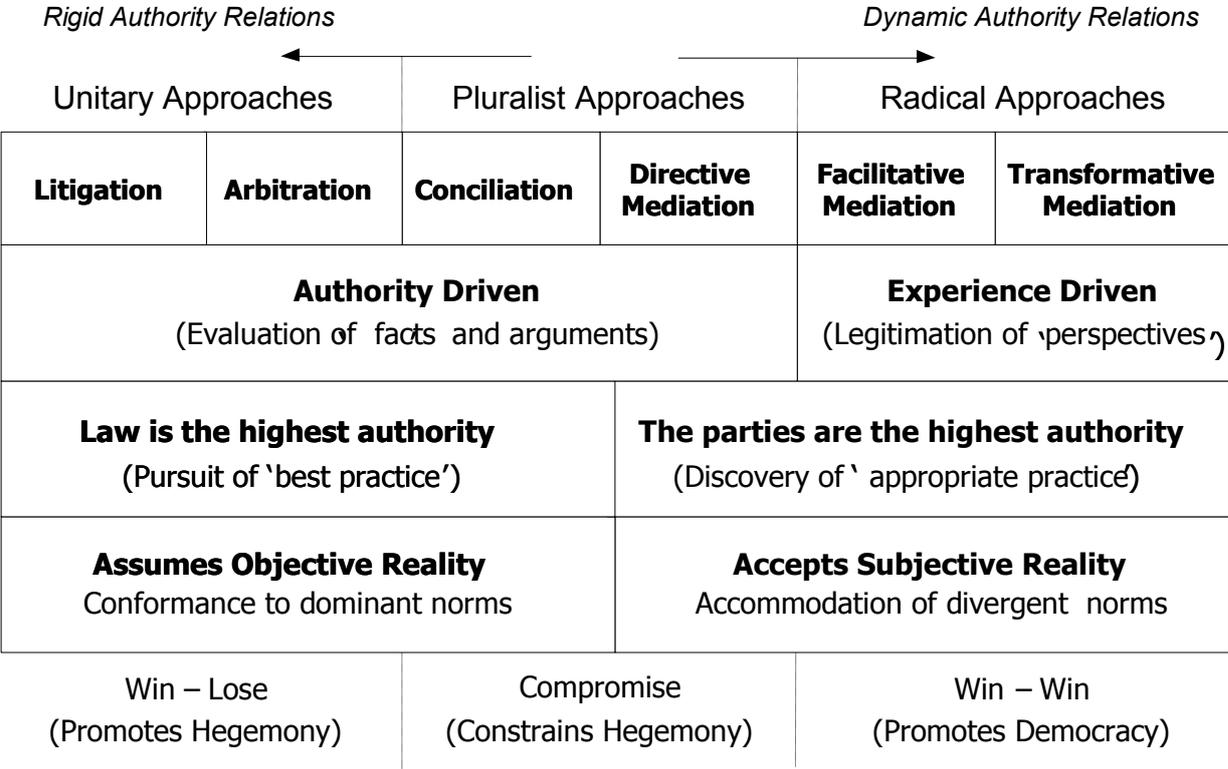
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Underpinning both sets of criticisms is the question of how power should be used and distributed. Are public bodies more 'democratic' than private groups reaching their own agreements? Anyone approaching the question from a perspective favouring *direct participation* over *representative participation* will take a particular view. From this perspective, public agency decisions over-riding local settlements is considered *anti-democratic* because it is axiomatic that a person should only be bound by a decision in which they participated *directly* (Ward, 1966). In contrast, those defending the legitimacy of public authorities will see the enforcement of regional, national or international agreements not only as their right, but also as an expression of a democratic society. This has a direct corollary in employment disputes (see Fox, 1966). Should parties be required to uphold employment laws and rules established by governments, boards of directors and executive groups? What if the laws or local rules are perceived as divisive and disruptive? To what extent should parties be able to make their own agreements according to rules they decide *in situ*?

Consideration of these questions leads us to philosophical issues that underpin different conflict resolution strategies (see Figure 1). One view is based on imposing and enforcing consistent standards of 'fairness' which operate on the basis of prosecuting or investigating allegations against an individual to discover their truthfulness (the object of investigation is a person and their actions, not a relationship). The other view is that accusations stem from relationship and communication issues, not personality characteristics. In this case, the object of investigation is the relationship and the goal is increasing the capacity of disputing parties to maintain and develop that relationship. Mediation, therefore, errs not just towards pluralism, but towards the Marxian perspective on emancipation and transformation. Traditional discipline and grievance practices work within a framework of line management and a unitary ideology. While they may permit discussion of an issue or

person, they prevent discussion about the nature of the relationship, or the legitimacy of hierarchical power.

Figure 1 - A Theoretical Framework For Understanding Dispute Resolution



There are underlying differences between disciplinary procedures, arbitration, conciliation and the various forms of mediation (see Figure 1). Once these underlying differences are understood, mediation appears to subvert traditional approaches to discipline and grievance (with its dependence on process and procedures set in advance). The rationale of equal treatment carries the potential to undermine the social power base of managers who are contractually, or legally, obliged to protect the interests of the owners of the business (or trustees, in the case of a non-profit enterprise). There is a difference between equal treatment that maintains a commitment to a framework of pre-agreed standards (unitary and pluralist) and equality in a dispute resolution process that does not prejudge beforehand what the process or potential outcomes will be (radical). Mediation, in its transformative

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implementation, removes pre-existing agreements and processes on the basis that the parties in dispute need to decide for themselves both the process and outcome of their dispute. This is fundamental to their *future* competence to handle any further conflicts.

If mediation does produce more desirable, if not uniform, outcomes, how is this achieved? An argument made in traditional disciplinary and grievance proceedings is that if a person is disciplined immediately and consistently when they transgress codes of conduct, they would not have engaged in the 'inappropriate' behaviour of which they later stand accused (Gennard & Judge, 2002). Such an argument might be used in mitigation of an offence in disciplinary cases, or against an employer at a tribunal. This assumption is only valid within a framework that uncritically accepts the moral and legal right of an elite to decide which behaviour is 'appropriate', and for members of the same elite to preside over hearings if a person is accused of transgressing standards. Mediation, on the other hand, does not accept this framework in an uncritical way. It can allow explorations of cases where authority is used in an arbitrary way to *create* a dispute (see Ridley-Duff, 2007, Chapter 4). For example, following a management decision, a person in a position of power may pursue a management objective in a way that managers consider legitimate (and legal) but which other parties consider illegitimate, immoral or illegal.

Mediation, potentially at least, provides a framework within which the appropriateness of the social norms, and the underlying interests that support them, can be more freely questioned and discussed. Secondly, particularly in the case of the transformative model, it provides a framework that allows questioning of the motives and underlying rationales of *both* parties regarding the origins of the dispute. As Ridley-Duff (2007: 232) comments:

For a person attempting to understand a conflict, the question that could start every investigation is “how is the accuser hurting?” or “why does the accuser feel a need to make an accusation?” It may be wise not to widen the scope of a dispute until the circumstances of the accusation are understood. To accuse, there must either be a moral principle at stake, an interest that has to be defended, or an anger than seeks an outlet.

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Bradfield and Aquino (1999) studied factors that lead people to blame and forgive other people in disputes, in particular the likeableness of the other party. In their results, they found that people often consider 'forgiveness' as a strategy for resolving the dispute, but that they are inhibited from acting on their feelings. Moreover, they found that a blame mentality is not something that surfaces quickly in workplace situations: it develops slowly as the meaning of past events and outcomes becomes clearer to people at work. The tendency to blame, therefore, can be deeply rooted in quite complex social relations and cultural values.

A potential strength of mediation is that it opens up opportunities both to explore the role of past injustices in the present situation (and sees this as legitimate, rather than illegitimate), and also facilitates and promotes the option of forgiveness inhibited by traditional forms of conflict resolution. As Bradfield and Aquino (1999:626) comment:

*...simply **thinking** about forgiveness is not enough to prevent a person from exacting revenge. Indeed...an awareness of forgiveness as an alternate coping strategy does not by itself counteract the natural tendency to reciprocate both positive and negative behavior. In the case of revenge cognitions, however, the results were more consistent...thinking about revenge encouraged its enactment and discouraged the expression of forgiveness.*

In their view, mediation is itself a strategy that makes it possible for people to enact 'forgiveness' by creating an environment in which it can be explicitly considered by both parties (and compared to the alternative revenge strategies). This materially changes the outcomes of *some* conflicts.

There are, however, limits to what mediation can achieve. While a focus on relationship issues can promote understanding and reconciliation (Tjosvold et al., 2005), it can only do so if both parties are open to the *possibility* of resolving their differences. Based on a study of governance, Ridley-Duff (2006:17) supports Tjosvold's view that conflict resolution focused on relationship issues can produce closer relationships, but he recognises limitations based on their disposition of the individual toward the future of the relationship.

...co-operative approaches to dissonance resolution (conflict) lead to closer and improved relationships. Unlike Tjosvold's model, however, the relationship context and each party's

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future intentions inform whether people are likely to approach the conflict co-operatively or competitively. This limits the applicability of Tjosvold's findings...

In this section, the authors have discussed criticisms of mediation from two key perspectives: firstly, from the perspective of public authorities keen to defend representative democracy; secondly, from the perspective of public accountability. In response, mediation was mediation within the tradition of direct, rather than representative, democracy, while a public interest cases exists when outcomes rather than the process transparency forms the basis of the argument. At a deeper level (see Figure 1), authority driven processes were theorised as biased toward 'objective' knowledge that promote normative forms of governance, while mediation was located in 'subjective' knowledge that elevates the notion of equity between the disputing parties. In the final section, the theoretical and practical implications of adopting alternative dispute resolution strategies are considered.

Conclusions

This paper has set out a number of contexts and perspectives on conflict, and shown how dispute resolution strategies are influenced by perspectives on the nature of the employment relationship. The idea that mediation should be used early in disputes to prevent escalation is only partly supported by existing research findings. ACAS (2005) found not only that mediation can be used early on, but also that the most intractable disputes often benefited from mediation. Sometimes mediation succeeded when all other approaches had failed. Nevertheless, family mediation research shows the reverse is also true: mediation cannot address all (perceived) conflicts of interest and that recourse to courts is still needed as an option. Interestingly, mediation could be used to resolve some parts of a complex conflict, while accepting court rulings on some matters. The so-called bifocal approach, therefore, has something to offer HRM practitioners.

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Inevitably, there is a difficult question of the contexts in which mediation may succeed or fail. The factors affecting this are complex and beyond the scope of this paper. However, it is possible to argue that solutions may lie both in the immediate issues of the situation (and amendable to a problem-solving approach) or be more deeply embedded in attitudes to authority (amendable to the transformative approach). Mediation can, ironically, help to establish what can and cannot be mediated by probing and establishing where 'battle lines' have been internalised.

In terms of approach, the UK concept of mediation typically regards the mediator as the guardian of the process and differentiates between *directive* and *facilitative* approaches on the basis of what is done to encourage an outcome. ACAS have opted for the facilitative model, with trained mediators in charge of process and disputants in charge of outcomes. The US models, and particularly the transformative model, have developed a track record of successfully resolving disputes with high levels of satisfaction. For this reason, the assumptions underpinning the transformative perspective have been included in Appendix A.

The recommendations of the Gibbons report make interesting reading in light of the above research findings. Gibbons continually characterises mediation as an 'early resolution technique'. Whilst the experiences of New Zealand are discussed, there does not appear to be consideration of using mediation in cases where both disciplinary and court proceedings have failed to address the drivers of conflict. Gibbons emphasises mediation as a pre-tribunal option and recommends that an employer or employee who does not mediate might be punished financially for their failure to do so. The report, however, stops short of arguing that the court be empowered to refer people to mediation, or that the court can require an employer to establish a mediation scheme. In the UK, at least, the Government continues to act to preserve unitary management authority in the workplace.

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As authors, therefore, we draw attention again to the USPS research. This suggests that there may be considerable benefits in giving the courts the power to require the introduction of a mediation scheme at a particular employer, if that employer fails to observe basic standards of human rights within a democratic society. The argument can be made on financial or moral grounds. Firstly, there is a reasonable, empirically grounded, expectation that fewer disputes will be brought to court in the future. Secondly, there is a compelling ethical argument: mediation, to date, has produced outcomes with higher levels of satisfaction for both disputing parties with a higher percentage of working relationships remaining intact in the aftermath of conflict.

APPENDIX A - Transformative Mediation

Table 1: Indicators of a Transformative Approach (from Mareschal, 2003)

1. "The Opening Statement Says It All": The mediator describes his or her role and objectives based on empowerment and recognition.
2. "The is ultimately the parties' choice": The mediator leaves the parties responsible for the outcome.
3. "The parties know best": The mediator is non-judgemental about the parties' views.
4. "The parties have what it takes": The mediator takes an optimistic view of the parties' competence and motives.
5. "There are facts in feelings": The mediator allows and is responsive to parties' emotions.
6. "Clarity emerges from confusion": The mediator allows for and explores parties' uncertainty.
7. "The action is in the room": The mediator remains focussed on the here and now of the conflict interaction.
8. "Discussing the past has value in the present": The mediator is responsive to statements about past events.
9. "Conflict can be a long-term affair": The mediator view the intervention as one point in a larger sequence of conflict interaction.
10. "Small steps count:" The mediator feels a sense of success even when progress is made in small degrees.

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