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Towards Mediation: developing a theoretical framework to understanding alternative dispute resolution

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Citation:

RIDLEY-DUFF, Rory and BENNETT, Anthony (2011). Towards Mediation: developing a theoretical framework to understanding alternative dispute resolution. Industrial Relations Journal, 42 (2), 106-123. [Article]

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Towards mediation: developing a theoretical framework to understand alternative dispute resolution

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Abstract

This paper examines alternative approaches to conflict resolution by developing a theoretical framework that relates dispute resolution practice to philosophical assumptions about authority and knowledge. By investigating the assumptions underpinning interest-based bargaining and mediation, their link to direct democracy and challenge to managerial authority are revealed at the level of theory and practice.

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Introduction

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

The focus in this paper is on changes in law and management practice arising out of the enactment and repeal of the Employment Act 2002 (Dispute Resolutions) Regulations 2004. Consequently, discussion is mainly (but not exclusively) focussed on individual disciplinary and grievance issues rather than collective disputes. A further reason for focussing on individualised dispute resolution stems from the continuing fall in the number of UK workplaces where collective bargaining takes place (Kersley et al., 2006). As collective cultures are eroded, there is an increased likelihood that collective grievances will have to be expressed through individualised forms of action, and that management control will be exercised through disciplinary actions against individuals.

The Employment Act 2002 (Dispute Resolution) Regulations 2004 were established by the UK Government with the intention of establishing 'best practice' that would halt the rising number of individuals who take disputes to employment tribunals. When the regulations not only failed to stem the rising number of disputes, but were linked to further rises (Griffith, 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 the 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) 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 that restorative justice can be achieved for both victims and falsely accused persons through reconciliation processes that avoid punitive sanctions. Over time, restorative justice and mediation have gained a reputation for effectiveness in situations where issues are emotionally complex (Roche, 2003).

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 agency 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. Moreover, the scale and rigour of the USPS programme has provided an opportunity to conduct large scale research into the nature and effectiveness of alternative dispute resolution strategies.

This paper develops theory that relates dispute resolution practices to philosophical perspectives on authority, knowledge 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, the role of negotiation, conciliation, arbitration and mediation are clarified. The next section examines different perspectives on dispute resolution including a UK approach to *facilitative mediation* and US approach to *transformative mediation*. The

main body of the paper considers the philosophical underpinnings of different approaches, and develops theoretical perspectives on the efficacy of mediatory justice in challenging management prerogative. The effectiveness of mediation is discussed with reference to the findings from large-scale programmes of mediation research in the US Postal Service, and recent research by ACAS on mediation in the UK. After presenting a theoretical framework that locates mediation as a radical management practice, the paper outlines key criticisms and 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:

> *[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 the 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 a dispute.

At a deeper level, however, is the parties' belief about the possibility of aligning social and economic interests. In industrial 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 ideology.

Fox (1966, 1985) 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 by social groups that have competing values, interests and objectives. In industrial 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.

Lastly, Fox (1985) outlined a 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 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 arguments for 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 the most extreme, they can result in the withdrawal of 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 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 between individuals and groups about alleged actions, perceptions and beliefs, where patterns of conflict may be covert or overt, and enacted through passive or open 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 the formal hearing.

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, 2008a).

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 (Huang, 2006). 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 (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) make 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 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[1]. Transformative mediation, she argues, has a solid theoretical base that is shared with other therapeutic approaches and takes a holistic rather than narrow view of 'problems'. It 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 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 (see Appendix B) 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. In contrast, the UK model focuses very much on how the process is to be facilitated in order to deliver outcomes generated and agreed by the disputants. Crucially, the focus is also on the skills and qualities needed by the mediator to achieve this end.

It is important at this point to consider some of the distinctions and similarities between collective and individual conflict resolution. Traditionally in the UK ACAS has offered a collective mediation service (Goodman, 2000: 37-38). The purpose of this service, through the use of an independent non-ACAS mediator, is to 'direct' parties towards a collective resolution of a grievance or claim (ACAS, 2010 [online]). It is of note that this type of ADR:

> *"…is similar to collective arbitration in that it helps to resolve disputes between groups of employees (usually represented by their union) and employers…[However, it also] offers collective mediation where conciliation has failed and those involved don't wish to move to arbitration but remain committed to resolving the issues without recourse to law."*

Crucially, and in contrast to collective resolution, for individuals in dispute, the facilitative approach is utilised and promoted by ACAS.

With respect to similarities, if we consider collective dispute resolution and negotiation in the US, there has been a keen interest in a particular approach to collective bargaining in recent years that uses a model of *interest based negotiation* (IBN) (McKersie et al., 2004; McKersie et al., 2008). IBN's philosophy is similar to mediation in that it aims at:

> *"…replacing positional negotiations (negotiations where labor and management begin by overstating their real position, followed by a series of offers and counter-offers en route to an agreement) with a set of techniques for (1) identifying issues and interests critical to each party, (2) gathering and sharing information needed to analyze problems, (3) generating options for resolution, and (4) choosing options that offer the highest mutual gains for the parties".*
>
> (McKersie et al., 2008: 67)

Its success is evidenced by partnership working between health care and insurance provider Kaiser Permanente and its trade unions. Of interest here is the achievement of a range of *integrative* and *distributive* negotiated agreements that incorporated both national and local-level participation in the process. Integrative bargaining is understood as a process that focuses on joint problem solving in pursuit of common interests. In contrast, distributive bargaining involves negotiation over the respective parties' share of organisational benefits (e.g. 'shares of profit') (Rollinson and Dundon, 2007: 296-297).

While IBN is a collective rather than individual dispute resolution approach, there is a similarity in the way that IBN seeks to move disputants from the adoption of 'positions' to the identification of their 'interests'. Moreover, this approach is also utilised in the ACAS model of interest based bargaining (IBB) through strategies that help individual disputants to better understand their common interests in seeking solutions. The IBN collective approach can

also be 'directed' by a mediator (McKersie et al. (2004) report the use of independent mediators as part of the negotiation process). In IBB, a mediator can guide individuals towards identifying their common interests while leaving them to negotiate potential solutions.

So, while the focus of this paper is on individual dispute resolution, the philosophical debates that are affecting approaches to the resolution of individual disputes have their counter-part in collective dispute resolution. McKersie et al. (2008) note in their review of the second round of agreements at Kaiser Permanente that IBN (and we would argue other ADR approaches) offers a vehicle for a different approach to negotiating and resolving disputes that leaves the traditional routes open, should they be perceived as more appropriate. Secondly, mediation as discussed in this paper is not a usurper of collective dispute resolution and bargaining so much as a further contribution to *participative democracy* in the workplace (Pateman, 1970). Whilst the practical experience of the writers leads us to argue that union representation in individual mediation meetings adds little of value to the process or the union member's case, we support the argument that 'buy in' is necessary from the unions to ensure that mediation is part of the overall dispute resolution framework, and works to the benefit of union members (Hirsch et al., 2009).

Findings from the USPS

In an industrial relations 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 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). This is in stark contrast to the UK model where third party representation is seen as inappropriate (ACAS: 2007). 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 (participants could not choose between internal and external mediators), the results suggested 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 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 legal 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). In this case, outcome and satisfaction levels of those who chose mediation and legal 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 used legal proceedings. For example, 55% managed to maintain workable relationships two years after mediation, compared with only 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 roughly half the amount of court time.

Research in the UK

There remains a paucity of research studies on the practice of workplace mediation in the UK. Findings so far suggest that, from a management perspective at least, mediation is seen as a potentially valuable alternative dispute resolution tool. However, the majority of practitioners questioned have only limited knowledge of the process, with only a minority having utilised it on anything like a regular basis (ACAS, 2005; CIPD, 2007, 2008; Johnston, 2008).

A newer survey by ACAS (2008) of 500 SMEs largely supports the earlier findings, but also finds that the views of managers in SMEs portray a 'mixed picture' (ibid.:10). Only 7% of the respondents had used mediation, whilst 56% had heard of it but not used it. A large majority thought it sounded like a good tool for resolving disputes in the workplace, and that its wider use could reduce employment tribunal claims. However, two in three thought it should be used as a last resort, and many viewed the process as expensive.

The most comprehensive survey carried out so far by the CIPD (2008) suggests that it is being used more frequently, particularly by large and public sector organisations, and that the facilitative model (see Appendix B) is the main model in use. Based on the responses of 766 organisations, 327 were currently utilising mediation, and two out of three respondents said that their organisation had used mediation between one and five times in the last year.

Furthermore, half the respondents reported using mediation more than three years ago. While smaller than the US studies, it can be argued that these findings suggest mediation is beginning to develop into a significant vehicle for dispute resolution in the British workplace.

Discussion and Theory Development

Not withstanding these encouraging findings, there have been strong and repeated criticisms of mediation. Dickens (2008), for instance, counsels caution in embracing the concept and practice of mediation in the workplace. Commenting on the Gibbons Report, (2007) she argues that, 'there may well be a role for mediation but it needs to be recognized that disputes in the employment context may differ from the kind of interpersonal disputes found in family cases – differences which relate to the particular nature of the employment relationship' (ibid.:15). Similarly, a helpful review was undertaken by Golten and Smith (undated). 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 could apply to an employment tribunal as well was discarded. Two examples from the paper by Golten and Smith illustrate the justification for doing so. Firstly, they highlight concerns that ADR will suffer because there are 'power imbalances' arising from disparities in negotiating experience, or clients who may be disadvantaged by a lack of legal representation. Secondly, there is an argument that mediation is time consuming and inefficient ('like watching paint dry'). Both these criticisms might apply equally to employment tribunals. A claimant may choose not to have a legal representative, and power imbalances may persist even if they have. Financial resources will still influence the quality and availability of advice. If there are legal representatives, the scope for adversarial proceedings to be time consuming and inefficient also grows. Neither criticism, particularly in light of research findings regarding satisfaction

with self-representation and reduced court time after mediation, represents a solid argument against mediation (Bingham and Pitts, 2002; Kelly, 2004).

Taking all the criticisms into account, however, there remain a number that require further exploration. These can be grouped around two inter-related concerns: firstly, mediation undermines legitimate authority; secondly, mediation silences 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 industrial 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 (Center for Families, Children and Courts, 1993).

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 at 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 (1994) claims that disputes represent crises in human interaction, rather than conflicts of interest, it remains the case that disputants often construct disputes as conflicts of interest.

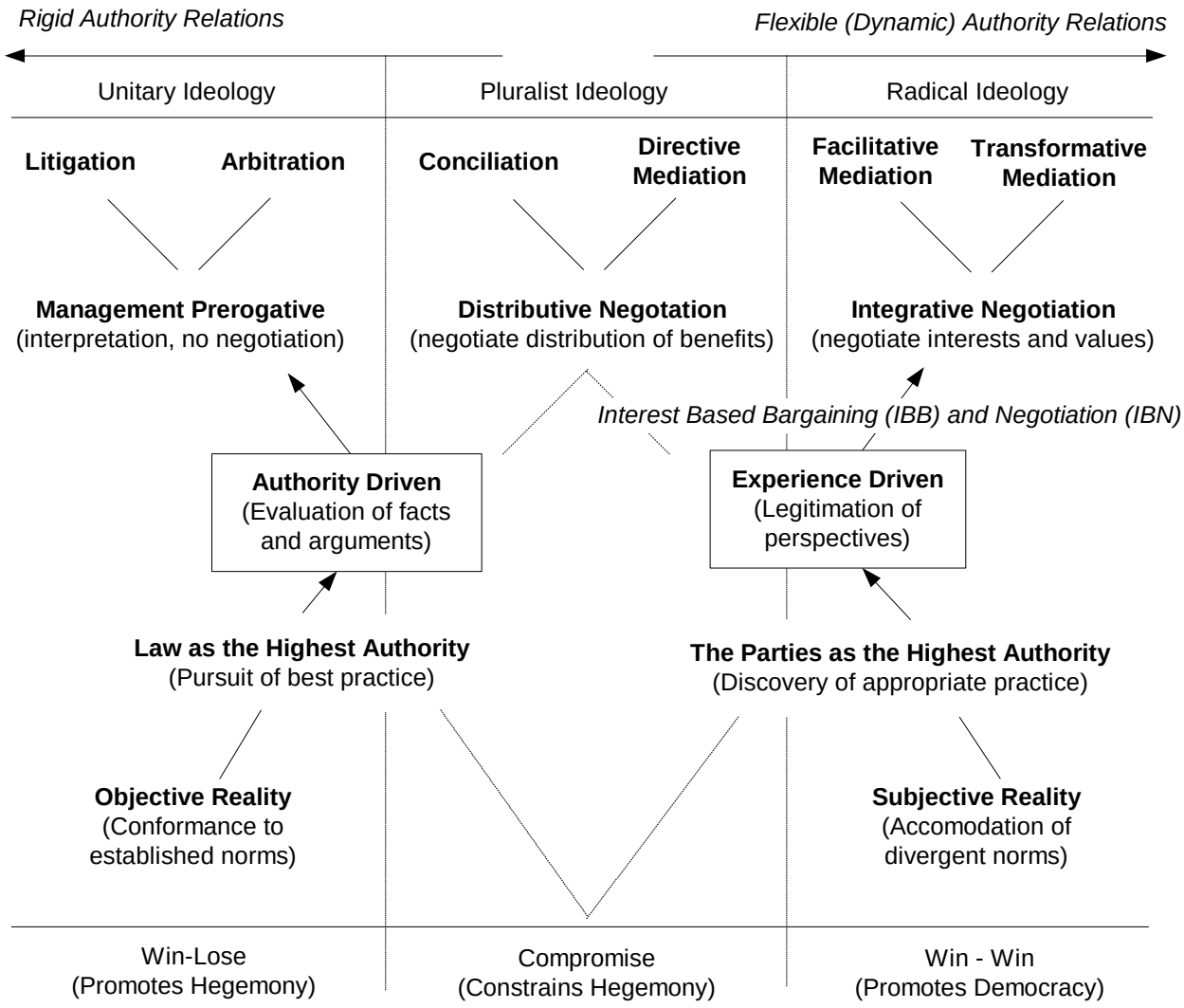
Underpinning both sets of criticisms is the question of how power should be used and distributed. Are public bodies more 'democratic' than private groups reaching their own agreements? Anyone approaching the question from a perspective favouring *direct participation* over *representative participation* will take a particular view (Pateman, 1970). 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, 1985). Should parties be required to uphold employment laws and rules established by governments, (remote) boards of directors and (remote) 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 the whole range of 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 social transformation. Traditional discipline and grievance practices operate within a framework that accepts (to varying degrees) management prerogative within a unitary ideology. While this might permit discussion of an issue or person, it prevents discussion about the nature of the relationship, or the legitimacy of hierarchical power.

There are underlying differences between disciplinary procedures, arbitration, conciliation and the various forms of negotiation and mediation (see Figure 1). Once these underlying differences are understood, negotiation and mediation present themselves as clear alternatives to current approaches to discipline and grievance (with their dependence on process and procedures set in advance). Both have the potential to undermine the social power base of managers who may be contractually (or legally) obliged to protect the interests of business owners (or charitable objects, in the case of a non-profit organisation). There is a difference between equal treatment that maintains a commitment to a framework of pre-agreed standards (unitary and pluralist) and a dispute resolution process that does not prejudge either the process or the outcome (radical). Mediation, in its transformative and facilitative implementations, removes pre-existing agreements and processes on the basis that the parties in dispute need to negotiate the outcome of (and perhaps also the process for managing) their dispute. This is fundamental to their *future* competence to handle any further conflicts.

Figure 1 - A Theoretical Framework for Understanding Dispute Resolution



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 and 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).

Returning to the CIPD (2008) research, applying the theoretical framework suggests it is useful as a way of analysing both the business case and the type of issue favoured in mediation research. Unsurprisingly, the business case is unitarist in argument, stressing the benefits in terms of better staff management and cost reduction through lower sickness absence, grievances and employment tribunal claims. Intriguingly, 55% of respondents highlighted its potential hegemonic influence through the development of organisational cultures focussed on managing and developing people. In contrast, the top two issues cited as appropriate for mediation were relationship breakdowns, then bullying and harassment. It can be argued that both centre on issues of power. The three issues listed next were: discrimination on the grounds of race; discrimination on the grounds of sex; and other forms of discrimination. Again, these are key equality issues that centre on the concepts and practice of power, control and resistance. This suggests that a radical perspective is most likely to provide the framework that enables HRM practitioners (and other staff) to take forward an agenda for equality in the workplace.

Mediation, potentially at least, provides a framework within which the appropriateness of social norms, and the underlying interests that support them, can be 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.*

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, but that they are inhibited from acting on their feelings. Strong support for this comes from Huang's (2006) study comparing Western and Asian approaches to dispute resolution. Viewed from a Chinese perspective, Huang (2006: 307) comments:

> *With [Western] insistence on beginning with abstract premises about rights, and of subsuming all legal decisions by deductive logic under such principles, formalist legal system can drive almost all disputes into an adversarial framework of rights violations and of fault, even when neither party is at fault or when both parties would prefer a compromise resolution.*

Moreover, Bradfield and Aquino (1999) found that a blame mentality is not something that necessarily 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 assumptions.

Huang outlines how the epistemological starting point for achieving justice in cultures based on Confucian and Maoist philosophy is based on an investigation of social "facts" *before* any decision is taken about *how* to resolve a dispute. Where an investigation determines there is no blame, joint blame, or joint rights and obligations in law, Chinese courts opt for mediation as the dispute resolution process. Where there are clear cases of legal right and wrong, an adjudicative (evaluative) approach is adopted to determine punishment. As Huang notes, Chinese law permits legal practitioners to switch between adjudicative and mediatory justice in light of findings that emerge during investigation. As a result, many cases are resolved without attempts to determine right and wrong, or apportion blame, by focussing on rebuilding relationships rather than ‘objectively’ determining punishments.

A potential strength of mediation, therefore, 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

forms of conflict resolution that are commonplace in Western societies. 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 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 the 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 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 located within the tradition of direct, rather than representative, democracy, while a public interest case exists when outcomes, rather than transparency, forms the basis of the argument. At a deeper level (see Figure 1), authority driven processes were theorised as a product of an 'objective' ontology, in which knowledge is used to promote normative forms of governance that protect management prerogative. Mediation to support negotiation, on the

other hand, was located in 'subjective' knowledge that elevates (even celebrates) difference, and 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 a legal system is still needed as an option. Interestingly, mediation can be used to resolve some parts of a complex conflict, while directly negotiating or accepting rulings on other matters. The so-called bifocal approach, therefore, has something to offer practitioners.

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 regards the mediator as the guardian of the process and differentiates between *directive* and *facilitative* approaches to

reflect what is done to encourage an outcome. ACAS (2006, 2007) have opted for the facilitative model (see Appendix B). Mediators are trained to take charge of the process and let disputants determine outcomes. The recommendations of the Gibbons report make interesting reading in light of the above research findings. Gibbons (2007) 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 legal 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 a unitary management ideology.

As authors, therefore, we draw attention again to the USPS research. This suggests that there may be considerable benefits in giving the tribunal system powers 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. As the CIPD (2008) findings suggest, it is precisely in the area of (perceived) harassment, bullying and discrimination that mediation makes its biggest impact.

The argument for mediation to support collective and individual dispute resolution can be made on either financial or moral grounds. Firstly, there is a reasonable, empirically grounded, expectation that fewer disputes will need resolution using a legal system (which may explain the joke amongst legal practitioners that ADR stands for ‘appalling drop in revenues’)[2]. 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.

In closing, and with respect to the UK in particular, there is a clear need to extend knowledge of alternative approaches to dispute resolution in the workplace by conducting further academic studies. It is the hope of the authors that the theoretical framework developed in this paper will be of value in the planning, process and conceptualisation of future research studies, as well as the development of mediation practices.

Acknowledgements: The authors would like to thank their colleagues in the HRM / OB subject group at Sheffield Hallam University for their support and interest in developing the issues highlighted by this paper. Particular thanks are given to Professor Liz Doherty and Keith Metcalf for commenting on earlier drafts, and working with us to introduce mediation into the curriculum of Employee Relations modules. The authors would also like to thank the reviewers of the IRJ for their helpful feedback and comments.

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 outcome 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 views 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.

Appendix B – Facilitative Mediation

Table 2: Indicators of a facilitative approach (adapted from the writers' own practice and ACAS training, advice and guidance material: 2006, 2007, 2008b).

1. Mediation is a confidential and voluntary process in which a neutral person helps people in dispute to explore and understand their differences so that they can find their own solution.
2. Mediation is based upon the principles of it being: voluntary, impartial, confidential, binding in honour, towards an agreed solution.
3. The key skills and qualities of a successful mediator are: fairness, being non-judgemental, empathy, building rapport, and facilitating agreements through questioning, active listening, summarising but not leading and adhering to practice standards.
4. The mediation process is based upon a five-stage model:
    a. A separate first contact meeting with each client.
    b. A subsequent joint meeting with the parties in dispute in order to:
        i. Set the scene
        ii. Explore the issues
        iii. Build agreement
        iv. Reach closure and agree follow up.
5. Mediation is about being clear and honest with disputants with respect to:
    d. What can and cannot be achieved.
    e. How the process works.
    f. What is expected off each person in terms of:
        i. Setting ground rules for behaviour
        ii. Respecting the other party
        iii. Their commitment to the process
        iv. Their commitment to seeking and agreeing a joint solution or solutions to the issue or issues causing the dispute
    g. The facilitative role of the mediator.
    h. Looking for ways to maintain an ongoing and future relationship rather than apportioning blame for actions in the past.

Footnotes

[1] Gestalt Theory rejects a positivistic view of knowledge creation based on the identification of causal links between stimuli and responses. Proposed by Austrian psychologist Ehrenfels in 1890, Gestalt proceeds from the assumption that learning is derived from the human ability to recognise patterns as a result of parallel (rather than linear) processing in the brain. The ability to filter and compare data patterns and 'rearrange the whole' replaces discovery of causal links as the basis of knowledge development.

[2] The authors would like to thank the director (and barrister) working for a local mediation organisation for this insight.

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