From Private Mediation to Public Engagement

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1. INTRODUCTION

It is 06.00 on Friday November 1, 1996. The main hall of the Queen Elizabeth II Conference Centre in Westminster looks like a film set. Cables snake in and out of high towers of aluminium tubing. Riggers are attaching large boards bearing engineering diagrams onto the gantries that line the hall. Computers are being linked into data projectors. Microphones and speakers are being tested. This ordered chaos is the prelude to the launch of a dialogue process intended to help resolve a conflict that has provoked fire-bombings in Europe and echoed across the entire corporate world. It is a process that will be repeated many times over the coming months and, while it will not be the final arbiter of the solution that resolves this conflict, it will contribute to the foundations of both a new understanding of corporate social responsibility and a new branch of alternative dispute resolution (ADR) in the United Kingdom.

Royal Dutch Shell had originally planned to sink its giant *Brent Spar* oil storage buoy in deep water off the north-west coast of Scotland. Greenpeace had different ideas and after a dramatic marine confrontation it became apparent to the company that its original plans would have to change.

The launch of the Brent Spar Dialogue Process was the result of months of careful brokering between Shell and the British Government by the Environment Council (EC), a small charity dedicated to convening dialogue around contentious environmental issues. Once it became apparent that this was the best way forward, there followed more months of thoughtful preparation by the EC's mediators. The diagrams so lovingly created by Shell's engineers to illustrate the technical challenges inherent in decommissioning such a massive structure were complemented by drawings depicting the most promising solutions and possible re-uses for the *Brent Spar* sent in from all over the world.

Ten years on, the *Brent Spar*, now in part a quay extension in the Norwegian port of Bergen, is largely remembered as a symbol of the moment that big business discovered the limits to its power. For those of us involved in the process that examined the underlying issues and debated possible solutions, it is a symbol of the moment that "consensus building", "stakeholder dialogue", "environmental mediation" or "public policy dispute resolution", as this type of ADR is variously known, came of age.

This article has several themes and purposes. The first is to explore the differences and similarities between the private mediation processes run by mediators in legal and commercial contexts, and the processes designed to address public issues such as the decommissioning of the *Brent Spar*, the future of the nuclear industry or the building of roads, runways and reservoirs.

The second is to examine how such processes relate to the more conventional public consultation processes that are part of public policy making and statutory requirements in, for example, the planning system.

The third is to suggest that there should be a greater and more official role for mediators in helping people to understand and untangle the issues that, from time to time, convulse public life.

2. DIFFERENT WORLDS, COMMON GROUND

Despite the *Brent Spar* and all the other situations in which there has been third-party intervention of this kind, there seems little awareness of this work among other ADR

practitioners, and similarly my colleagues in the world of public dialogue too rarely venture into the worlds of legal, commercial, matrimonial or neighbourhood dispute resolution. Despite periodic efforts by bodies such as Mediation UK, CEDR, the Civil Mediation Council and the Joint Mediation Forum, we have never really achieved a single gathering to which people from all corners of the ADR field can bring their particular skills and perspectives; we have yet to achieve the equivalent of, for example, the Association for Conflict Resolution in the United States,[1] that regularly brings together practitioners from diverse disciplines.

One of the aspects of mediation that first intrigued me, over 20 years ago now, was the fact that broadly similar processes do seem to work in wildly diverse circumstances. All mediation has certain constants: the importance of deep listening; the need to create a shared story of how the situation has arisen even if the parties interpret it differently; the value of building clarity and structure into how a situation is discussed. These are basic to all mediation and need no rehearsal here.

Third-party involvement in public issues such as environmental situations, however, does have dimensions that may be absent from mediation in other contexts. For a start, while it is recognisably part of the ADR canon, what is it an alternative to? Often it does not involve a "case" as such, unless it is the mediation of a legal dispute that happens to involve environmental issues, which is why I tend to talk about "situations". So it is not usually an alternative to a legal process, but more often to what is sometimes called "decide-announce-defend": the strategy of making a unilateral decision followed by an intensive use of the dark arts of public relations to "sell" it to the public and to stakeholders.[2]

So a business or a government department or a local council recognises that something it wants to do is likely to be contentious and, rather than bulldozing through the decision and taking the flak, it invests time and effort in trying to understand the likely objections and adjusting the decision accordingly. Sometimes the point of making a decision has not been reached, but the political radar has picked up icebergs to be avoided; sometimes the policy is still in conceptual form and the aim is not even to have to switch on the radar.

Then there is the difference between "mediation" as it is understood in the bulk of the ADR world and its use to address public issues. Mediation still tends to suggest people closeted in separate rooms with an individual shuttling between them, but this image is too restrictive. In the public context, the word "facilitation" is often used instead of "mediation" because the work is as frequently as much about the technicalities of running large and complex meetings as it is about the assisting of negotiation or the resolving of conflict. I usually describe myself as a mediator, however, because all my work involves conflict and this role describes most accurately what I do whatever the working structure and process[3]: mediation in situations of public conflict is no less about helping people to understand their differences and explore areas of common ground and potential solutions.

Perhaps it is also worth describing further exactly what is meant by "public issues mediation". In most situations, a number of bodies—any number from a handful to several dozen—are coming at the same issues from different angles and bringing with them different needs and interests, values, political, cultural or religious beliefs, fears and concerns. Because of this the issues are massively clouded, surrounded by uncertainty, distorted by widely differing perceptions of past, present and future. The challenge is usually not to find a "solution" as such—assuming one even exists—but to ensure there is real understanding of the decisions that need to be made and the consequences of the various choices

[1] *www.acrnet.org.*

[2] This ugly term is widely used in public policy mediation to identify people who literally have a stake in the issues and may be applied to anyone from individual householders to government departments or the public at large.

[3] There are occasions when it is better to avoid using "mediation" and its implications of deep and irresolvable conflict; if the idea of mediation is likely to raise anxieties then terms such as "facilitated dialogue" can be less alarming.

available for different stakeholders. You will notice how often the word "difference" appears here—because much of this work is really about helping people to appreciate the ramifications of difference.

This raises another contrast with legal and commercial mediation. Often this work is more about the future than the past: from pipelines that need to be decommissioned and reservoirs that may be built to problems that may arise as the consequence of new technology, industrial development or climate change. Sometimes the focus is the management of multiple uncertainties, the commissioning of research that needs to be done, or the gradual development of policy that must take account of many factors. Sometimes processes last not a day or two, as in the world of legal ADR, but roll over months and years.

For all these reasons the methods have to be different and this puts a premium on the skills of process design. A legal mediator can, more or less, stick to the well-trodden pattern of a joint session to hear initial presentations followed by separate caucus sessions in which the parties begin to reveal their real interests and test out the possibilities of settlement. In my world, each meeting, and in fact each session of each meeting, has to be designed from the ground up. It starts with a reconnaissance of the history and background, who exactly the stakeholders are, and which need to be present or represented in a meeting. Then the overall purpose of the process needs to be hammered out: is it merely to increase understanding, for example, or to build relationships, or to make decisions?

Once these preliminary points have been agreed there comes the detailed process design: *how* you get this group of people to discuss these issues in a way that results in that type of result (note *type* of result: we are talking about *process* results here, of course, not *content* results). What is the sequence of big public meetings, small working group meetings, expert research results, independent consultancy reports, external policy decisions and so on, that will get everyone from where they are to where they want to be? It means working out how a particular combination of people with their varying interests and concerns, professional backgrounds, cultural differences and political sympathies can most usefully discuss complex issues in a way that lays the foundations for the next stage in the process. Juggling all these interdependent variables is like creating a piece of theatre with highly opinionated actors, but no script, no prompter, and constantly shifting scenery.

Eventually experience teaches how long it will take a dozen people to identify and prioritise a range of issues, or whether 100 people with deep divisions should discuss their differences in a plenary meeting or work in small groups to do so. And when the careful design, honed over weeks of drafting and re-drafting, falls apart in the first half an hour because people are too angry, or too scared, or simply want to start somewhere else—then the mark of experience is not to panic, but to re-design on the hoof and suggest a new process.

The logistics of such processes are also very different from those of other streams of ADR. The numbers of people involved often dictate the use of methods that enable the rapid and transparent sharing of ideas. Sometimes the humble flipchart can visibly capture progress as it is made, or allow people to draw diagrams or pictures to explain what they mean[4]; in very large meetings it may mean using a laptop computer and data projector to ensure that progress can be followed and recorded. In one meeting, I remember a bank of video cameras being used to relay the results of small breakout meetings to a larger gathering. In this environment post-it notes advance from being irritating reminders of tasks undone to versatile tools that allow one to collect, collate and structure ideas quickly and visibly; having a bit of a stationery fetish is an advantage.[5]

[4] A colleague discovered that a "mind map" (*http://en.wikipedia.org*) using pictures was one of the best ways for Amazonian Indians to communicate to an energy company their concerns about gas exploration near their village.

[5] For the launch of the Brent Spar process we managed to choose about the only boarding material to which post-its will not adhere: an unwelcome discovery at the start of a difficult day.

In all this the third party becomes both master of ceremonies and choreographer of reluctant dancers. Those fundamental mediation skills are still the irreducible starting point and, like all mediators, we also need the ability to create a sense of calm and confidence when progress seems impossible and breakdown imminent: nervous participation can turn into outright rebellion if the participants do not believe the mediator can control the process. The old image of the swan—serene on the surface but paddling like hell underneath—was never more apt.

We are, however, spared the debate about whether mediators should be "evaluative" or merely "facilitative". Raise so much as a sceptical eyebrow in our world and your career can come to a speedy end: for us the independence of the third party means the absolute separation of process and content. If independent opinion is likely to be required it becomes a design issue.[6]

3. FROM DIALOGUE TO ENGAGEMENT

In the early days of my work much of it was fairly private and more akin to legal and commercial mediation than is the case now. People from a business and a pressure group, say, and a local council or government department, would gather to discuss their differences and the conclusions reached might be shared only among a small number of people. Some meetings were always public, either because the participants demanded that everything should be a matter of public record, or because there was media interest: it was difficult, for example, to hold meetings about the Newbury bypass without television cameras on hand to record any bloodletting.[7] In recent years the demand for transparency and accountability has become increasingly powerful and these days it is rare to have a meeting whose record is not openly available, though the use of the Chatham House Rule,[8] for example, enables people, especially public officials, to speak freely.

As the nature of this involvement in public issues has evolved, so also has the relationship with other public processes, and the final and probably most dramatic divergence of public-issues mediation from the rest of ADR. The language of mediation, conflict resolution, consensus building and stakeholder dialogue has begun to intermingle with the language of "public engagement" and "public consultation". It has gradually become apparent that much public-issues mediation is similar in function, if not in the methods used, to some of that carried out under the traditional heading of "public consultation". The word "engagement" is a useful halfway house, denoting something more active and, literally, "engaging" compared with the dry and lugubriously official-sounding "consultation". As an alternative it also has the merit of not being saddled with the baggage of consultation and connotations of sham efforts to consult the public when everyone knows the critical decision has already been taken.

In discovering engagement, however, we have also discovered that what we had previously considered to be stand-alone processes are in reality part of a spectrum of methods through which people can be connected to those making the decisions that affect their lives. Just as legal mediation can be put on a spectrum of dispute resolution methods stretching from partnering, prevention and negotiation at one end to arbitration, adjudication and judgment at the other, so methods of engagement are part of a wider spectrum.

At its simplest, engagement may consist of helping people to understand a situation better by distributing information through leaflets, websites or public exhibitions. Then there may be

[6] Through a long dialogue process reviewing the future of the nuclear industry this role was played by a number of independent scientists hired for the purpose.

[7] The cameras would always leave when it became apparent that properly run meetings need not entail violence.

[8] "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participants, may be revealed."

an effort to gather public views through surveys and questionnaires. Next comes the process usually known as "consultation": the government department publishing a Green Paper and asking for comment, or a local council holding a public meeting at which twitching officials stammer a presentation before being shouted at.

After this the spectrum of engagement becomes more interesting, and you begin to hear words such as "participation" and "involvement". This language indicates that the public is no longer a passive recipient of crumbs from the official table, but can take an active role in deciding what is to be discussed, and how. Beyond this comes the language of partnership and "empowerment": the devolution of authority and budgets to, for example, local community organisations.

The point is that the skills needed to design and run public engagement processes, or to broker and manage partnerships between the public and private sectors, are powerfully similar to those used by every jobbing mediator with a flair for process design. So the type of methods used, exceptionally at the time, to help nudge forward a solution to *Brent Spar*, are now used up and down the country by every type and level of government and organisation to help make meetings more amicable, manageable and productive. Even some of the electronic public consultation processes pioneered by my company, Dialogue by Design, rest on mediation methods.[9]

All of this suggests that our vision of mediation and of the role of mediators and the deployment of their skills has been curiously unambitious. By nestling in our various ghettoes we have perhaps overlooked the greater possibilities for what we do.

4. THE OFFICE OF THE PUBLIC MEDIATOR

One of the regular responses when I try to explain what I do is: "at least you will never be out of work". It is sadly true that while our understanding of the material world increases and with it our ability to create amazing inventions and incredible wealth, we are still pathetically bad at resolving some of the most basic of human problems. Of these, conflict between individuals and groups is the most significant because it prevents or complicates resolving so much else, whether it is famine in Africa or the dilemmas of multiculturalism at home. You can see this every day: an issue erupts, generates acres of newsprint and hours of airtime. Every interest group leaps into the fray and the columnists and the television pundits enjoy new opportunities to voice their opinions and prejudices. At no time, all too frequently, is any real effort made to set out the various arguments systematically, to examine how the language used is preventing or assisting effective communication, to analyse what different parties are trying to achieve, or to look for how different points of view might be reconciled. Opinions are easily polarised, errors of fact or reportage constantly reproduced and differences gleefully exacerbated in a culture that values sound bites more than sound arguments. The trenches are dug, the factions take up residence, and nobody really explores the validity of different points of view; nobody sits down with the various protagonists and helps them to listen to each other, to understand why people think the way they do. It is very easy to forget that the lessons mediators learn on their first day of training are unknown country to many in positions of authority or influence.

Public controversy can put government, police and other authorities into difficult positions, as the requirement to maintain public order comes up against the right of public protest, and the democratic rights of the majority have to be weighed against the need to safeguard the interests of minorities. In such situations there is currently an institutional vacuum. There is no equivalent of the Advisory, Conciliation and Arbitration Service (ACAS) to act as honest broker and impartial mediator in public disputes.

What if we invented the "Office of the Public Mediator"? What if, in situations of national convulsion around plans for new roads or airports, around the hunting of foxes or the culling

[9] For example, we have developed an electronic process enabling large numbers of people to comment on and revise documents: this emulates the Single Text Process used by mediators.

of badgers, around the planting of genetically modified crops or the building of new nuclear power stations—there was a body dedicated to ensuring that there is a process that gets to the heart of the issues and explores the pros and cons of different choices? What if it did not have to wait for official approval, but could react quickly to the need for fence-mending and bridge-building? The debate raging, as this is written, about the wearing of the *niqab* by Moslem women, is a perfect example of the dangers of generating heat without light.

Such an office would not, of course, be able to resolve all such issues—they are, by their nature, often beyond easy or quick resolution—but it could demonstrate the difference between mere debate and real dialogue, and it could help to create a place and moment of calm and a consensual process within which the issues could be properly set out and considered. An independent ACAS-like institution could meet some real needs in the years ahead as we grapple with the increasing pace of change and the clash of cultures. It could address issues of public concern where dispute has reached the streets and the media ahead of the ability of government to respond through the stately processes of public enquiry or new legislation.

In such situations the chief role of the Office of the Public Mediator (or whatever title was chosen) would be to move swiftly to describe, prevent, address or defuse them. It would begin with identifying the various stakeholders and appointing or recommending suitably trained and qualified third parties. It would support those third parties in working with stakeholders or their representatives to create a shared description and analysis of common problems before then exploring possible approaches to resolving the situation amicably or stabilising it sufficiently to enable stakeholders to negotiate their own solutions. This body could also have the job of spreading the knowledge and practice of everything that mediators have learned over the past 30 years. Demonstrating methods of dispute resolution and teaching people to negotiate effectively may even turn out, in the long run, to be more important than any single situation mediated successfully.

5. CONCLUSION

ADR is a broad church and one that can shelter many different approaches to conflict. I have tried to set out here my own sense of the relationship between legal and commercial ADR and mediation in the context of environmental and other public disputes.

For the last 15 years or so we have been working hard to bring ADR into the mainstream of legal life. The time has now come to go a step further and bring it into the mainstream of public life. We should start by creating an organisation, or developing the remit of an existing organisation, to end the artificial divisions between mediators operating in different spheres so that we start talking to each other—and learning from each other—on a regular basis.

When we are doing that we will then be in a position to promote the role that ADR can play in helping us to meet the challenges posed by the contemporary world.