MASTER OF
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LORD NEUBERGER OF ABBOTSBURY MR

THE GORDON SLYNN MEMORIAL LECTURE 2010

HAS MEDIATION HAD ITS DAY?

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(1) Introduction

1. It is a great honour to be giving this, the first Gordon Slynn Memorial lecture, and I thought I would start with a quotation, which, perhaps appropriately for a lecture in memory of one of the foremost post-war European Jurists, comes from Anatole France's *Le Lys rouge* – the Red Lily. The quotation (translated of course, as I am not going to subject you to my French accent, which would have my Parisian grandmother rolling in her grave) is this,

'*The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.*[1]'

That remark expresses a view about what could be called the substantive justice of law: about the fairness of general laws. Should they treat all alike, all equally, when individuals are not socially or economically equal? The answer which Monsieur France looked for was that they should not. For him, law should not dispassionately treat all alike. Its majestic equality did not, he thought, affect all equally and this could not be countenanced. Others took a different view; as is the way of political thought; and that debate continues.

2. What though does this remark have to do with mediation or with the question, which you perhaps think is rhetorical, of whether mediation has had its day? Like a bad witness, I will answer that straightforward question in a thoroughly roundabout way[2].

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[1] France, *Le Lys Rouge*, (Paris) (1894) at 117.

[2] I should thank John Sorabji for all his help in preparing this lecture.

(2) Mediation and the Law's Majestic Equality

3. It might perhaps be considered strange even to suggest that mediation has had its day. In one form or another it has been around since time out of mind. It has, in the widest sense of consensual settlement, long been a part of litigation: whether it took the form of the last minute negotiated settlement at the door of the court, the negotiated agreement reached during the long course of litigation. In the narrow sense of formal mediation, facilitated by an experienced mediator, it has been in a state of development and expansion since the late 1970s, and has expanded almost exponentially since the adoption of Lord Woolf's reforms. Over the past ten years, mediation and ADR more widely have been rightly endorsed by many, including me. It plays a significant role in the satisfactory resolution of disputes. And, rightly used, in terms of the appropriate case and appropriate timing, mediation saves a lot of money, court time, heartache, and effort.

4. It might perhaps be thought even stranger to raise the question whether mediation has had its day in the same week that Mr Jonathan Djanogly MP, the Justice Minister, has reiterated Lord Woolf's view that litigation is an option of last resort and that the government will be considering how to encourage individuals to take alternative steps to resolve their disputes. With what seems to be likely continued, even increased, government support for mediation and other forms of ADR, it may well appear positively counter-intuitive even to suggest that mediation might have had its day. On the contrary, it might not unreasonably be thought that, far from having its day, mediation is about to move on from its dawn and early morning and have its day in the sun.

5. It is therefore appropriate to emphasise that I am a supporter, indeed a keen supporter, who has been vocal, in court and out of court, in favour of mediation and ADR. It is an important adjunct to, with a potentially strongly beneficial effect, on our civil justice system and can be highly effective in securing a relatively cheap and expeditious, and often imaginative, resolution of civil disputes. The question isn't whether mediation and ADR have such a role. The real question is: how significant that role can properly be? Can there be too much of a good thing? And here I return to Anatole France.

6. The law's majestic equality is for civil justice of fundamental importance. Notwithstanding the views of Anatole France to the contrary, equal access to justice for all underpins our commitment to the rule of law. It ensures that we live not under what Friedrich Meinecke characterised as a '*government of will [but under] a government of*

law.[3]' It ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent - whether that opponent is another such individual, a powerful corporation or the state itself. We should not, in light of this, be too surprised to note that equality before the law, isonomia, – of which equal access to the courts is one aspect – was for the citizens of Athens two and a half thousand years ago, the basis out of which democracy arose.

7. As von Hayek put it, for the Greeks, '*equal participation for all in the government*[4]' was one of the consequences of a belief in equality under the law (provided, it must be added -in case we get too starry eyed about the classical Athenians - they were not women, servants or foreigners, or indeed ostracised). It is interesting to think that equality before the law, and access to courts able to dispense justice without fear or favour, as the judicial oath puts it, predates the development of democracy. Without equal access to the courts, without equality before the law, the conclusion to draw is that democracy would not long survive.

8. I mention this because I think that there is a real question whether a concerted drive for an ever-expanding role for mediation, and indeed treating mediation as good and litigation as bad, is consistent with a commitment to equal access to justice. Uncritical encouragement, and ever increasing support of mediation and ADR, may well be antipathetic to our commitment to equal access to justice, to our commitment to a government of law. Care will therefore be needed in assessing how and to what extent we can further extend mediation's reach. As such it is imperative that all those with experience in mediation, not least everybody here today, engage constructively with the government when it consults in the near future. So far as the many mediators among you are concerned, I am sure that all of you fully comprehend the necessity and virtue, of a constructive dialogue, and that you and others well-versed in the art of ADR, will do so.

9. In this lecture I want to examine how our current emphasis on the benefits of mediation can further our commitment to a government of law and how too great an emphasis may, if we do not take care, begin to undermine that commitment. As with everything striking the right balance is fundamental. I perceive a tendency, which has in the past five years or so receded somewhat, to decry mediation as a trendy idea, with no real substance, and which will soon have had its day, so that dispute resolution in England and Wales will revert to being a mediation-free zone. I also perceive a tendency, which has found increasing favour in some circles particularly those in which saving money is the main aim, that mediation is a

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[3] Meinecke cited in von Hayek, *The Constitution of Liberty*, (Routledge) (2009 reprint) at 151.
[4] Von Hayek, *ibid* at 144.

sort of universal panacea, which, properly developed, should obviate the need for an effective civil courts system in England and Wales. Both tendencies are not merely wrong: they are misconceived, and actually risk undermining the very argument that their supporters wish to maintain. That is because, if policy is implemented on the basis of either of those arguments, that argument will very quickly be brought into disrepute – and quite rightly. Having made the point in general terms, I want to focus on three things: first, issues of principle; secondly, questions of fact; and third, possible paths for the future.

(3) Issues of Principle

10. On 16 May 1997, Sir Richard Scott VC and first Head of Civil Justice, now of course Lord Scott of Foscote, said this while discussing the decision to render the civil justice system self-financing,

'*A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.*[5]'

Such a policy, and the mistaken premise upon which it is based, is now too deeply embedded to be undone, at least at the current time when the Government's finances plainly do not permit us to draw back from it. In this age of austerity, it is not realistic for me to press the argument that the civil justice system cease to be self-financing, although it is only right to point out that it is certainly not self-financing, or intended to be so, in Australia. The recognition of that fact should not blind us however to the principle which Lord Scott was defending. To conceive of the civil justice system, any more than the family and criminal justice systems, merely as a self-financing service which the state offers, indeed which the state almost happens to offer by historical accident, is to make a profound and dangerous constitutional mistake.

11. It is an elementary constitutional proposition that the civil justice system is part of the third branch of government - hard though it sometimes seems to be for some people in the other two branches, the legislature and the executive, to grasp. The courts system is not like the National Health Service, a service which the state provides to the citizen, fundamentally important though the NHS clearly is. The courts system is part of the state itself. To suppose the civil justice system is by nature a provider of services to consumers akin to a dispensing chemist, a shoe shop, a train operator and so on, is fundamentally – and dangerously - wrong. The acceptance over the last two decades that the civil justice system should be self-

[5] Scott cited in Zander, *The State of Justice*, (Sweet & Maxwell) (2000) at 39.

financing can however mislead us to think that it is simply a service provider in the everyday sense. It can mislead us into thinking that it is not part of government and is not, as it is, a part of the constitutional framework of our society. And that is a framework without which none of us could safely and securely take advantage of all the myriad services available in towns and cities throughout England and Wales. Without a secure framework of general laws, provided by Parliament, and enforced by the judiciary, in this case the civil judiciary, we would have no such services.

12. Being misled this way can affect how we view mediation and ADR. If civil justice is nothing more than a service provided for consumers then there is no reason to view it as any different, in principle, to any similar service provided to consumers. There is no reason to view it as any different to mediation and ADR. On this false prospectus, the dispute resolution service provided both by the civil justice system, and by mediation and ADR providers, stands on the same footing. Particularly, in an age of austerity, if we were to assume that all systems of dispute resolution are of equal status so that one means of delivery is as good as another, the only means of differentiating one from the other is price. If one version can be supplied at less cost than the other, it makes sense to expand production of that version at the expense of the other.

13. The point of principle which Lord Scott highlighted in the context of the decision to render the civil justice system self-financing is equally important here. Mediation and other forms of ADR are services provided to those who are in dispute. They are often excellent means by which such disputes can be satisfactorily resolved. There is no doubt about that. But they are no more than services provided to disputants. Mediation and other forms of ADR are not part of the framework of government. They are not, nor can they be, an aspect of the state in the same way that the civil, family and criminal justice systems form part of the state. To imagine that they can be is to make the same profound and dangerous mistake regarding the nature of the justice system and its constitutional function of which Lord Scott warned us in 1997. Mediation and ADR are services provided as alternatives to formal adjudication. They gain their value because of, and only because of, the existence of formal adjudication and the branch of the state which delivers it. Without the civil and family justice systems there would be no mediation or ADR.

14. To confuse the civil justice system with the provision of mediation and ADR is not just to repeat that mistake however. It is to go beyond it and take a step towards unravelling our commitment to equality before the law. Our constitutional settlement is based on the idea, the Ancient Greek idea, of equal participation in government. Our elections are free and fair

and based on universal suffrage of all adults of 18 and over. We have long been committed to freedom of association. And we have for many long years now been committed to the principle that everyone has equal access to the courts. Of course, that principle has not always been easy to put into practice; as Sir James Mathew's famous 19th Century complaint had it, '*In England, justice is open to all - like the Ritz Hotel*'.

15. Sir James's comment remains as apposite now as it did in the 19th Century, and it expresses a similar sentiment to that of Anatole France's majesty of the law. Both observations are predicated on the understanding that a general law has differential effects: the door of the court may be open to all equally, but the cost of entry can be prohibitive for some, whilst not so for others. Equal in principle, unequal in practice. Anatole France would no doubt have nodded in agreement. Since at least Sir James Mathew's time, attempts have been made to mitigate the cost of litigation and enable any who need to come to the courts to be truly able to do so. Equal in principle, concerted effort to be equal in practice. To that end the justice system has been under near constant review and reform for the past 200 years.

16. Each review and reform aimed at rendering justice more economical and more efficient. Financial support, to those who needed it, has been available, since the Rushcliffe Committee's reforms were implemented and the Legal Aid and Advice Act came into force in 1949. In 1950, the Act provided 80% of the population with a means-tested entitlement to legal aid, by 1973 this had dropped to 40% and by 2008 it only covered 29% of the population.[6] Since 1999, conditional fee agreements have, of course, been available as a means, albeit a regrettably ill thought out and very imperfect, even rather damaging means, to ameliorate the reduction in legal aid. Lord Justice Jackson, in his most impressive Costs Review has made further, and much better, proposals to reduce the cost of litigation and better enable individuals to bring their disputes to justice. It is to be devoutly hoped that they will be implemented.

17. The many, various, and always ongoing, attempts to reduce litigation cost and provide the means by which any citizen can come to justice, are issues of implementation. They seek to render the principle of equal participation in government into a reality insofar as the judicial branch of government is concerned. This then is the second principle which must limit the development of mediation and ADR. Its proper role is one which focuses on its proper function as an adjunct to justice, as a complement to the justice system and not as a substitute for effective access to justice. If it is conceived of as a substitute for securing effective access to justice, the risk is run that we will institutionalise the denial of effective

[6] Hynes & Robins, *The Justice Gap*, (2009) (LAG) at 21.

access to justice for some citizens. And as US Chief Justice Fuller put in, in the context of the fourteenth amendment of the US Constitution, in *Caldwell v Texas*, '*no state can deprive particular persons or classes of persons of equal and impartial justice under the law.*'[7] If we expand mediation beyond its proper limits as a complement to justice we run the risk of depriving particular persons or classes of person of their right to equal and impartial justice under the law. Citizens are bearers of rights, they are not simply or merely consumers of services. The civil justice system exists to enable them to secure those rights. It does not exist to merely supply goods or services, like a bar of chocolate, a motor car, or even accountancy services or medical care.

18. Requiring all individuals to mediate before gaining access to the court door will necessarily have a greater impact on some classes of litigants than others. Some litigants will have the resources to afford both mediation and litigation. Others will not. Those who do not will then be faced with a choice. Accept a mediated solution, which may well not reflect their legal rights, because they cannot afford to first mediation and then litigate, or accept no solution at all. Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice. Such financially based fetters run the risk of depriving some citizens of their right of access to justice; they run the risk of depriving all citizens of an equal right of participation in government. We must be careful to ensure that this does not occur.

19. The points of principle which it seems to me should limit the expansion of our commitment to mediation are therefore twofold. First, that the justice system is part of our constitutional framework; it is part of government. The delivery of justice is not a service. On the other hand, the provision of mediation and other forms of ADR is a service. To conflate or confuse the two is to make a profound constitutional mistake. Secondly, our constitutional settlement is predicted on equal participation in government, which includes equal participation in justice, in other words it includes access to justice. Mediation should support that noble aim by helping to ensure that those disputes that can and should properly result in a mediated settlement do so. Insofar as it places a fetter on equal participation it cannot properly be supported. Our support for mediation and the benefits it can and does bring to many cannot be allowed to blind us to possibility that too great a faith in its benefits may result in the creation of a partial system of justice. If that occurs we undermine our constitutional framework and our constitutional settlement.

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[7] 137 US 692 (1891) at 699.

20. Those are issues of principle which should, it seems to me, guide us in developing mediation in the future. They provide absolute limits to its development. Within those limits it can properly develop. That development ought also however to be guided by fact: to use the modern language and principles, any proposals for the development of mediation should be evidence-based. I now turn to some of those factual issues, which ought to guide our considerations.

(4) Questions of Fact

21. As I have mentioned, there is a view that mediation and other forms of ADR are a sort of universal panacea. That theory proceeds on the basis that, if we increase use of ADR we will both benefit all those who have disputes, both in terms of the time and cost involved in resolving their dispute, as well as the justice system itself, because it will be able to focus its scarce resources on those for whom litigation is the proper forum. It is plainly true that for some cases mediation and ADR are, in the words of *1066 And All That*, a good thing; in that they produce better solutions; and do so at less cost both to the individuals and to the state. It is not plainly true however that increasing mediation and ADR will equally increase those benefits to ever more litigants. Equally, it is not clear that increasing the use of mediation and ADR will equally increase the benefit to the state. Professor Zander made this point in his 2000 Hamlyn lectures. He said this,

"*ADR is not some form of magic potion. The five-year Rand Corporation study of civil justice reforms (in America), based on 10,000 cases in federal courts in 16 states, looked also at ADR (mediation and early neutral evaluation) schemes. The report found no statistical evidence that these forms of ADR 'significantly affected time to disposition or litigation costs.*[8]"

22. A 10,000 case, five year study is, at any rate on the face of it, robust evidence in anyone's book. However, it has to be contrasted with other evidence. The Ontario mandatory mediation programme, which ran from January 1999 to December 2000, and which took account of the results of some 3000 mediations demonstrated that: there were significant reductions in the time taken to dispose of cases; and a reduction in litigation cost[9]. Accordingly, the evidence from across the Atlantic does not unequivocally bear out Professor Zander's point. But neither does it unequivocally support the opposite conclusion. The evidence here is equally equivocal, as Professor Genn's *Twisting arms* study from 2007

[8] Zander, *ibid* at 37 – 38.

[9] See Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07) (May 2007) at 9 (http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf).

shows. It demonstrated that where personal injury claims were automatically referred to mediation 71% settled. The figure for non-PI claims was 60%.[10] Is this statistically significantly higher than non-mediated cases? The evidence from the Jackson Costs review suggests that it might not be. Evidence submitted to it, for instance, showed that 95% of personal injury cases settle without the need for formal mediation[11]. If that evidence can be generalised it is suggestive of a conclusion that in most cases formal mediation does not increase settlement rates. The currently unresolved question is whether it can be generalised, and the answer to that question will be of crucial importance to assessing the benefit of extending the use of mediation.

23. What about cost and time? The evidence from Professor Genn's study bore out the Rand Corporation's conclusion. First, it showed that mediation did not result in speedier resolution of cases. There was, as the study put it, '*little suggestion from the [evidence] that mediated cases experience more or less delay to resolution than non-mediated cases.*[12]' It went on to conclude that,

"*The main finding from this analysis is that there is no strong evidence to suggest any difference in case durations between mediated and non-mediated cases. Similar proportions of each type of case were resolved within 2 years of issue.*[13]"

Insofar as cost was concerned, where the mediation was unsuccessful there was an increase in costs of around £1,000 - £2,000[14]. In addition to this, and particularly significantly in these present cash-strapped times, mediated cases showed an approximate increase in administrative costs of between 18 – 19%[15]. Other, and more recent, preliminary research in County Courts which I have seen suggests that mediation provided by the Court Service, rather than saving the court system money, costs it more money than having no mediation service. We must beware of deciding that, because a particular solution does not seem to be remedying a problem, the answer is to provide more of it.

24. The English figures which I have mentioned can only be indicative, but what they do tend to suggest is a similar ambiguity to that demonstrated by the contrasting results from America and Canada. What they most certainly do not show though is that there is a clear case for mediation and ADR to be viewed as a magic potion, as a universal panacea. They

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[10] Genn et al, *ibid* at 71.
[11] Evidence submitted from Trust Mediation Ltd, cited at Jackson Final Report (2009) at 358.
[12] Genn et al, *ibid* at 67.
[13] Genn et al, *ibid* at 70.
[14] Genn et al, *ibid* at 98
[15] Genn et al, *ibid* at 66.

show that if we are to properly expand the use of mediation and ADR, as the Ministry of Justice's Business Plan for 2011 – 2015[16] shows we are likely to, then we need to look at a number of issues. In looking at them we need hard evidence; hard evidence which supports the supposed benefits of mediation to the parties and to the state. We would need to ask a number of questions to elicit that evidence.

25. Those questions would be: first, to what extent does mediation and other forms of ADR increase settlement rates? Second, what cost and time savings are there through the increased use of these methods both to the parties and the state? If the answers to these questions are positive, are the results significant? If so, how significant, and are they significant only in some types of case, and only after or before a certain stage of litigation? Are they significant enough to support an expansion of the use of mediation and ADR generally? If so, how much of an expansion and what time of expansion?

26. Questions like these and the evidence obtained to answer them ought probably to inform the development of use of mediation. As Lord Justice Jackson noted in his Final Report, in the context of discussing the nature and availability of information about ADR to litigants, '*One of the problems at the moment is that information about ADR is fragmented.*[17]' Given that the evidence about the nature and extent of the benefits which individuals and the justice system gains from mediation, and any increase in it, is fragmented, I wholeheartedly support a rigorous and empirical examination of those benefits: one of the great flaws of previous civil justice reviews, a flaw which Lord Justice Jackson avoided, was the absence of such empirical evidence and cogent research to support both their premises and their conclusions[18]. We would have much to learn from such an examination.

27. Before turning briefly to look at how we might develop our use of mediation and ADR in future, a further question arises; one linked to the issue Lord Scott spoke so passionately against: self-financing. As I have mentioned, the civil justice system is self-financing. If we expand the use of mediation and ADR, particularly if that expansion is outside the scope of court proceedings, this will reduce court fee income, perhaps very substantially, and it is on such fee income that the civil justice almost exclusively relies to maintain its self-financing. Any consequent shortfall will need to be made up from elsewhere: this will have one of two consequences. It will either mean that court fees have to increase across the board when they are already too high in some areas: this will decrease access to justice, which is a

[16] http://www.justice.gov.uk/moj-business-plan2011-15-nov10.pdf at 3.6.
[17] Jackson (2009) at 362.
[18] A point recently made by Genn, *Judging Civil Justice* (2010) (Cambridge) at 62ff.

fundamental aim to which we all subscribe. Alternatively, it will convert a civil justice system which currently makes a modest profit, into a loss making operation, needing funds from the Treasury, which seems questionable to say the least in the present economic climate. At any rate from my perspective, this is another, and rather hard-nosed, reason for the Ministry of Justice to have well in mind over the coming year or so, as it considers how best to promote mediation and ADR.

(5) Paths for the Future

28. Where might we take mediation and ADR over the coming year? How might it be developed to properly complement our civil justice system? The starting point to answer these questions is the conclusion which Professor Genn and her co-authors drew in the 2007 *Twisting arms* report. They concluded as follows:

"*The indications from these evaluations are that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. The ultimate challenge in policy terms is to identify and articulate where the incentives might lie for the grass roots of the legal profession to embrace mediation on behalf of their clients.*[19]"

Lord Justice Jackson echoed the call for greater education, both on the part of the public and the legal profession, in his final report[20], and I reiterated that call earlier this year at the Civil Mediation Council's annual conference[21].

29. The need for greater education, both of the public and the legal profession, is one of the key challenges for the future. It is essential that the legal profession and the judiciary recognise the great benefits which mediation can offer, and, in appropriate cases, ensure that litigants actively consider those benefits. It is a difficult question to decide when a case is ready for mediation. Early in the course of a dispute may be too early, as each party may need to know more about the other's case, and it may entrench positions rather than facilitate a consensual settlement. Too late may increase the cost of settlement; indeed, in some cases too late may mean that the costs bills have got so great that they alone render a

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[19] Genn et al, *ibid* at 205.
[20] Jackson (2009) at 363.
[21] Educating Future Mediators (http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-cmc-conference-speech-11052010.pdf).

settlement impossible. As with everything else such decisions as when a claim may most beneficially resort to mediation is case sensitive. Much will depend on the parties, on the nature of the dispute, its wider context – is the dispute indicative of many more disputes of the same nature between the parties or between one of the parties and third parties, is an important point of construction involved, is injunctive relief being sought and so on. That being said, I agree with Dyson LJ's statement in *Halsey v Milton Keynes* [2004] 1 WLR 2002 at 3009 – 3010, that '*most cases are not by their very nature unsuitable for ADR.*'

30. That such decisions are inevitably case sensitive makes proper education all the more imperative. In the first instance, public legal education is essential. Individuals should be able to easily access information about litigation and ADR. That information should be available at an early stage; if not at the earliest stage. It should be clear. It should be concise. It should set out the advantages and disadvantages of the various different methods by which disputes can be resolved; and all the while individuals should know that if for whatever reason consensual settlement, through one of the various means available, is not appropriate or does not succeed, they have ready and effective access to the civil justice system. They should know that mediation – that ADR – stands in the shadow of justice. And that justice is available for those who have genuine legal disputes which require court adjudication in order to ensure that rights are upheld and enforced.

31. Furthermore, education of the legal profession and judiciary has to continue. Experienced mediators need to become ever more involved in the provision of training to those in the profession and judiciary; again as Lord Justice Jackson recommended. More than that though, the time is perhaps ripe to revisit the way in which we train lawyers. It is perhaps time to look at legal education in our universities and in the various bodies which provide vocational training. It remains the case that, apart from a few exceptions, civil justice, in particular civil procedure, remains a Cinderella subject, as it was once described by Sir Jack Jacob, in our universities. It is the opposite in the United States, where courses in civil justice and procedure form an essential aspect of law degrees. It seems to me that it is time for those who accredit law degrees to consider whether there should be a requirement for such courses, and for courses in ADR to become compulsory elements in any qualifying law degree. If we want to develop a truly effective litigation and mediation culture for the future, that development should start sooner rather than later and it should start at the outset of any lawyer's legal career.

32. Education is one aspect which should be considered and adopted. There are other aspects too, which could well be available. For example, we could look at is the development

of a form of mediation service which has emerged in the United States, but which is not as well-developed here as it might be: telephone mediation. This is described by Dr Sue Prince in her article *ADR after the CPR*[22]. Its most common use here is in small claims, and involves a mediator conducting a form of shuttle diplomacy between the parties via the phone. As Dr Prince puts it, '*the mediator telephones the claimant first and then telephones the defendant and relays agreed points between the parties. The mediator therefore acts as interpreter as well as negotiator, as the parties do not speak to each other as part of the mediation process*[23].' The obvious benefit of this process is its apparent cost-effectiveness. It has both cost and time savings for the parties and the court service[24]. The degree to which it is effective as a means of increasing settlement is another question, and one on which we need evidence. But if it, and similar means of effecting mediation using modern technology, can be implemented widely there seems to be no reason why not to do so. Such methods are cost-effective for all concerned, and can at no real, it would appear, additional cost, be factored into the litigation process. In that way they can made subject to court scrutiny, if necessary.

33. That is but one simple answer, which looks to building on a means of facilitating mediation which already exists to a small degree. Developing such ideas, and other innovative ones based on modern technology, is something we need to be looking at and which the legal profession, as well as those involved in mediation, needs to be considering to a far greater extent than they have already. The impetus which the Legal Services Act 2007 is giving, and will give over the coming years, to the development of the provision of legal services will no doubt have a crucial role to play here. The advent of new, alternative business structures – the supply of legal services by the Co-operative, by Tesco and so on, may provide the means to supply straightforward and low-cost mediation services.

(6) Conclusion

34. I started this evening by posing the question whether mediation had had its day. As many of you no doubt anticipated, my answer to that is that it clearly hasn't had its day. It has an important part to play in dispute resolution, as do all forms of ADR. Increasing the use of mediation and other forms of ADR to help individuals resolve their disputes is a social good. The consensual resolution of any dispute is a social good.

[22] Prince, *ADR after the CPR* in Dwyer (ed), *The Civil Procedure Rules Ten years On*, (OUP) (2010) at 327.
[23] Prince, *ibid* at 336 – 337.
[24] Prince, *ibid*

35. Increasing the use of mediation, it seems to me, is very much an issue of education of the public and the legal profession. Education will not just draw the public's attention to mediation and its benefits. One of the things Professor Genn's *Twisting arms* study demonstrated was the general lack of awareness of mediation. That cannot continue to be the case. Public legal education, including mediation education, is of fundamental importance. More needs to be done in that direction. Professional education also needs to develop, as I have said, starting in our universities.

36. Increasing education, and a proper collation and assessment of empirical evidence regarding the benefits, and the drawbacks, of mediation will better enable both professionals and their clients to make informed decisions whether and to what extent their dispute is suitable for mediation. Facilitation should be the name of the game. Facilitation – providing the means by which mediation can develop – may well be the best means by which it can properly develop. A properly educated group of professionals in the increasingly competitive legal services market place would seem to provide fertile ground for the further growth in mediation and its use.

37. Mediation has certainly not had its day. It will undoubtedly go from strength to strength. It can however only grow properly and consistently with our commitment to equal access to justice for all. Mediation is a complement to justice. It cannot ever be a substitute for justice.

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