

7-1-2006

## Mediation in context

Kevin Hearn

---

### Recommended Citation

Hearn, Kevin (2006) "Mediation in context," *ADR Bulletin*: Vol. 8: No. 10, Article 2.  
Available at: <http://epublications.bond.edu.au/adr/vol8/iss10/2>

This Article is brought to you by [ePublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [ePublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).



## Reflections on mediation in society

# Mediation in context

**Kevin Hearn**

### Introduction

The conventional understanding of mediation is that it is one of a group of ADR processes operating within the shadow of the legal system. Understood in this way it represents an area of practice which many people find stimulating and challenging. However to limit mediation to such practice is to underestimate its potential enormously. There is a wider context to which mediation may have profoundly significant links as yet not adequately identified. This article attempts to uncover some of these links by using a perspective which is informed by a number of disciplines including law, history, sociology, anthropology, literature and philosophy, developed within the western tradition. Given that mediation is understood as belonging to a more general category called dispute resolution, which in turn is understood as a variety of processes seeking (but never finally experiencing)

something called justice, it would seem to follow that a key focus within such an interdisciplinary 'uncovering' will be justice, or the journey towards a just society.

### Justice – the way to a better world

Les Murray concludes his poem 'The Steel' with the words: 'justice is the people's otherworld'.<sup>1</sup> The belief that justice beckons from some otherworld, a better world, has been a significant part of western culture since its tentative beginnings in Ancient Greece 2500 years ago.

According to Plato this otherworld is composed of archetypal Forms which may be understood as the veiled essence of things in that they are manifesting themselves in every age but are themselves timeless.<sup>2</sup> For example, if a process or outcome is just it participates to some degree in the Form of justice. Although the ideal (the Form) is never

attained, Forms provide the standard against which things in the here-and-now may be judged. Forms are discerned primarily by individuals who have undertaken long intellectual discipline at the hands of authoritative teachers.<sup>3</sup> Although intellectual rigor is required, so also is the temperament of a lover in permitting oneself to be inwardly grasped by an intense emotional experience.<sup>4</sup>

Besides Ancient Greek culture, Christianity also had a significant influence on the development of the western justice tradition, in part by alerting people to the existence of an otherworld, the Kingdom of Heaven, which is announced by the founder.<sup>5</sup> Like the world of the Forms, this otherworld is not just some conceptual abstraction. It is present in the here-and-now through the life, death and resurrection of the founder but is 'hidden'.<sup>6</sup> It may be discerned by individuals who respond not so much to an intellectual challenge, as required in the tradition of the Forms,



but more to a 'call'<sup>7</sup> to follow a new commandment: love one another.<sup>8</sup> As with the Forms, there is an otherworld inspiring people to seek a better world.

With the emergence of the Modern Secular version of western culture 500 years ago, acknowledgments of an otherworld remain part of the broader culture but play a role of declining importance within the new public sphere. Here, the notion of 'the people' becomes the touchstone to determine what justice is. The elected representatives of 'the people', along with practitioners from within the legal profession selected by these representatives to act as judges, constitute the core of the modern legal system. Legislation enacted by parliament along with determinations by courts may be deemed just or unjust by commentators. However the primary concern is with issues of procedure and precedent. Provided such demands are met, justice is done. The emphasis is primarily on the pragmatic or utilitarian approach: take decisions based on things like standing orders, rules of court and rules of evidence so that people can 'get on with their lives'.<sup>9</sup> Perhaps there remains some awareness of an otherworld in the distinction sometimes made between the letter of the law and spirit of the law. When the latter is felt to have been abandoned, there is said to be a betrayal of justice.<sup>10</sup>

The Modern Secular version of western culture was understood initially as a work in progress; 'the people' were now 'in progress'. Within the new discourse of modernity, human reason continued to engage with various knowledges in innovative ways. But after 500 years of this engagement, disputes still all too readily escalate into issues that are irreconcilable. Human-to-human violence, both emotional<sup>11</sup> and physical, still becomes part of many such disputes with the likelihood of the compounding effects of unresolved psychological trauma.<sup>12</sup>

Over these last 500 years there has not been a lot of progress as regards reducing the frequency and destructiveness of disputes. So, since the 1980s, the focus has been on achieving order and stability rather than on seeking justice. Such order and stability is said to be attainable through good governance.

## Justice finally abandoned?

The word 'governance' has been in use in the English language for a long time. Weller cites its use by Henry IV in 1399.<sup>13</sup> Edwards<sup>14</sup> refers to its use by Shakespeare (1554–1615). In modern liberal democracies governance has usually been understood as the management of the collective interests of a community by their elected representatives; that is, management of public policy.<sup>15</sup> However over the final 20 years of the last century the boundary between 'public' and 'private' was blurred in terms of the development and management of public policy as ownership of traditionally publically-owned enterprises was transferred increasingly to the private sector and the outsourcing to private consultants of what were once key responsibilities of the public sector became central to the operation of government departments.<sup>16</sup>

What the word 'governance' symbolises has extended to such an extent that it may now be said to constitute a discourse, understood as a framework of beliefs and practices which produce and limit meaning, experience and identity.<sup>17</sup> The key enabler within this discourse may be understood as market logic. The discursive field designated 'Australia' has been colonised by market logic to the extent that it is appropriate to describe Australia as a 'market society':<sup>18</sup> a society wherein not just economic activities are market-driven but political, intellectual and spiritual pursuits, in the main, operate according to market logic.

A current interpretation of governance was provided in April 2000 by the Director of Australia's National Institute of Governance at the inaugural conference in Canberra: 'Governance is about guiding. It is about the processes by which human organisations, whether private, public or civic, steer themselves'.<sup>19</sup> Within this context governance is usually analysed as something that is continually evolving through ongoing management reform.

Corporations are engaged in this reform primarily to maintain or increase market share and to attract and retain capital investment.<sup>20</sup> In a globalising world of high-speed communication opportunities for investment are readily available so capital is rarely patient in

the sense of putting up with idiosyncratic management practices that lack sufficient transparency and predictability.<sup>21</sup> Another aspect of this management reform process is that corporations are expected to acknowledge responsibilities which extend beyond the bottom line by collaborating with governments and community groups to tackle environmental and social problems that governments working alone have failed to deal with adequately.<sup>22</sup>

Government departments in Australia and other western nations have also been engaged in this ongoing management reform process since the 1980s.<sup>23</sup> One expectation is that management in the public sector will be focused more on economic efficiency and on performance measured within the constraints of market logic and less on 'procedural integrity'.<sup>24</sup> Loudon sees this as a culture of compliance being replaced by a culture of creativity and change.<sup>25</sup>

A contrasting analysis understands the changes just outlined as representing a process whereby the good life is increasingly privatised because confidence in 'the people' progressively achieving a better public or common or shared life has eroded.<sup>26</sup> Barber describes the changes as the emergence of economic totalism whereby all social and cultural activities are subordinated to the demands of an overarching global market system.<sup>27</sup> According to Ormerod, the changes signal the death of economics: a set of assumptions about how the world *might* operate best at a particular time has been abandoned and replaced with a set of discovered truths about how the world *does* operate, now and forever.<sup>28</sup>

Central to the changes has been the marketing of celebrity which has reached 'unprecedented intensity'.<sup>29</sup> The otherworld relentlessly promoted is a private one: that of the rich and famous. The linking of product and celebrity is a potent strategy to maintain consumers in what may be described as 'a market-crazed state'.<sup>30</sup> How market-crazed Australians have become is perhaps indicated by a recent report claiming that \$10.4 billion is spent annually in this country on goods and services that are never used or hardly ever used.<sup>31</sup>

Perhaps the key conclusion to be drawn from this second analysis is



that the brave experiment whereby 'the people' became the touchstone to determine what is justice has failed. Justice is seen nowadays as a by-product of good governance. Governance becomes the means — and also the end — as 'the people' accept that a market-driven world is as good as it gets. Cohesion replaces justice as the overriding social concern. The notion that justice beckons from some otherworld is seen finally as intellectually unsafe.

At this point an attempt will be made to link the foregoing discussion to mediation. Most published material on mediation in Australia over recent years has focused on issues such as the institutionalisation or professionalisation of mediation, analysis of definable mediation processes, confidentiality, ethical standards for mediators, mediator liability, consumer confidence in mediation and, most recently, online mediation and a national mediator accreditation system. Such an inward-looking vision would seem to be primarily directed at enhancing the product called 'mediation' — part of a range of products within the broader category called 'justice'. Maintaining such a vision would seem to be enormously underestimating the potential of mediation. There is a context wider than the legal system, and the shadow that it casts, to which mediation may have profoundly significant links as yet not adequately understood. If the potential of mediation is to be realised, contemporary scholars of dispute resolution may need to focus not only on issues such as those listed above but also on exploring notions of mediation beyond 'process' and 'product'. This may include seeking to understand what it means for individuals to become empowered by the agency of reconciliation.

It is with this last-mentioned theme that the next section is mainly concerned. The possibility to be canvassed is the progressive reconciling of certain experiences of self, in part by drawing upon principles central to conventional mediation. What may emerge in the longer term is not only a renewed process of mediation but also an appreciation of justice which is responsive not only to market demands but to something beyond such demands.

## Exploring beyond conventional mediation

Mediation is being understood as a process in which an impartial third party, a mediator, facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to the dispute.<sup>32</sup> It is a consensual process, that is, parties attend voluntarily and may quit the process without giving an explanation. Even if parties enter into mediation as a result of a direction by a court, the element of voluntariness remains in that parties retain the option of 'no decision' in a way that is not open to judges and magistrates in the litigation process.

In the remainder of this section an attempt will be made to use this framework to explore the notion that during the mediation process parties to a dispute participate in the agency of reconciliation, to some extent, if they reach uncoerced agreement. Fundamental to this exploration are the following assumptions:

- (1) two experiences of self, the rational self and the embodied self, have become estranged and this has given rise to an anthropocentric perspective;
- (2) this perspective is severely limiting the ongoing emergence of humankind as a unique and distinct species, included in which are attempts to achieve progress in the field of dispute resolution.

The emergence of humankind as a unique and distinct species appears to have begun some 4.4 million years ago.<sup>33</sup> A significant stage in this process was the adoption of a bipedal mode of movement (*Homo erectus*) some 2 million years ago.<sup>34</sup> In our presently developed state (*Homo sapiens*) we have been around for some 200,000 years.<sup>35</sup> Somewhere in this process there developed what is called an 'anthropocentric perspective':<sup>36</sup> the conviction that this planet exists primarily to benefit our species, that we have a meaning and purpose independent of ecosystems which apparently stop when they reach us and somehow go around us! It may be useful to reflect on the following: if the life of planet Earth so far was condensed into a book of 1000 pages, humankind would appear for the first time on page 994!<sup>37</sup> Perhaps this anthropocentric perspective

represents the hubris or know-it-all approach of a very young species.

The development, some 100,000 years ago,<sup>38</sup> of the verbal mode of communication represents another significant stage in our ongoing evolution. However once human communication is subsumed within the cognitive — verbal nexus, our emerging (including finding better ways of resolving disputes) becomes dependent largely on ongoing processes of conceptual refinement. But human reason (or the rational self) is then, in a sense, working in a vacuum because input which previously had been coming through the *whole* body (the embodied self) is discarded as not reliable. The rational self and the embodied self have become estranged.

This estrangement may be understood as a manifestation of the disconnect operating between the right and left hemispheres of the brain. The right hemisphere has been called 'the old wise, right side'.<sup>39</sup> In the womb the right hemisphere is well on the way to maturation before the left hemisphere begins to develop.<sup>40</sup> The right hemisphere needs no symbolisation, such as speech, for meaning is obtained by what the poet Rilke calls 'conflagrations of clarity'.<sup>41</sup> Shlain suggests that the ongoing emerging of humankind as a species required a certain disconnection with the right hemisphere (a certain estrangement) so that awareness of linear time (as distinct from the time-of-this-place of the right hemisphere) could be developed by the left hemisphere.<sup>42</sup> He further proposes that this development of linear time was the crucial precondition for the development of (linear) speech.<sup>43</sup>

What is being suggested is that the experience of self before the development of linear time and speech (what may be called the embodied self) has become devalued. What is called 'the self' in contemporary society has largely 'forgotten' the older, more intimate way of relating. This is how an anthropocentric perspective may be understood. A claim now made is that the estrangement of the embodied self and the rational self may begin to be resolved through a more focused participation in the agency of reconciliation; participation in an



awareness that eventually ‘everything belongs’.<sup>44</sup> To develop such awareness an individual may need to draw upon principles central to conventional mediation.

Engagement in this process would seem to require a mode of communication that ‘goes beyond speech’,<sup>45</sup> tapping into what Berman calls kinesthetic knowing.<sup>46</sup> Maybe this is a way of understanding mindfulness, a term that has come into the literature of mediation and dispute resolution generally only in recent years. Fisher<sup>47</sup> suggests that mindfulness is something in which mediators, working effectively, participate. A further component of the process would surely be neutrality, again not an easy word to define but nevertheless something usually seen as critically important to mediation practice, though as Boulle reminds us, it is more a goal to aim for than a state achieved.<sup>48</sup> Another precondition of effective meditation is that parties sense that they are not being devalued through the process, that their input is worth something. This would also seem to be a necessary part of the awareness-building process being outlined.

Maybe the following lines by Les Murray get to the heart of the process.<sup>49</sup>

Everything except language  
knows the meaning of existence  
Trees, planets, rivers, time  
know nothing else. They express it  
moment by moment as the universe.  
Even this fool of a body  
lives it in part, and would  
have full dignity within it  
but for the ignorant freedom  
of my talking mind.

What is being assumed in this article is that my ‘talking mind’ is ‘ignorant’ in the sense that it has ‘forgotten’ the knowing of my silent/silenced body and in the course of this ‘forgetting’ there has arisen an anthropocentric perspective.

What Tarnas calls ‘the postmodern collapse of meaning’<sup>50</sup> in the latter part of the 20th century seems to have established that spoken and written words and other processes of symbolic communication can take us only so far in gaining insight in any field, including the field of dispute resolution. What is perceived initially as ‘silence’ or ‘space’ or ‘nothing happening’ may be a highly significant context in which to gain

further insight provided the individual has the necessary curiosity about the nature of uncoerced agreement in the resolution of disputes and the necessary perseverance to pursue the investigation of this process. This is the context suggested for the progressive reconciling of the rational self and the embodied self; for the progressive awareness of the agency of reconciliation.

Three points are now made to try to draw together the main themes of this article. First, stripped of its rhetoric, governance in contemporary Australia is concerned primarily with managing markets. Markets provide a certain stability or predictability or order. But when justice is structured by market logic and limited by an anthropocentric perspective, it is an order which is unsustainable. For example, can the ongoing damage to the ecology of this planet, which is driven largely by market logic, go on indefinitely? Insurers are beginning to rate global warming as a more significant threat to our long-term security than global terrorism.<sup>51</sup> How sustainable is the ongoing commodification of just about everything? Are human relationships progressively transforming into ‘transactional associations’:<sup>52</sup> two or more people relating solely in seeking and perhaps obtaining the satisfaction of their different current wants? A market-driven world achieves a fragile stability. The economic advantage of a particular group is pursued in ‘rational’ disregard of the good of others who, it is hoped, will remain largely unaware of this good and are hence unlikely to pose a significant threat to the economically advantaged group.

Second, what is being advocated above is *not* a world devoid of markets. Like any human system, a market is moulded by the individuals who participate in it. Last century, when communism was at its height, Arrupe was asked about the relative values of communism, socialism and capitalism. His reply was that a system is about as good or as bad as the people who use it.<sup>53</sup> Hence attention is being focused on the individual, on a process whereby individuals may develop awareness of risk beyond that of the investor, the insurer, the trader, the consumer — comprehensively, the market citizen. It may include:

- becoming aware of a world, not devoid of markets, but a world better than a market-driven world; and
- responding to such awareness without necessarily being able to explain precisely what such an otherworld would be like, other than saying it is accessible via the agency of reconciliation.

Third, the potential of mediation to illuminate the path to a world better than a market-driven world has scarcely begun to be realised. And as long as mediation remains limited to being one of a number of ADR processes in the shadow of the legal system, this potential will remain unrealised. For a legal system is constrained from carrying out such an illuminating role, and rightly so, through its commitment to rules, to procedure, to precedent, within the prevailing authoring discourse which currently would seem to be governance.

Recently two contemporary scholars of dispute resolution in Australia claimed that while lawyers are certainly not the only gatekeepers of dispute resolution processes, they are the main ones.<sup>54</sup> Perhaps this assertion is made to allay concerns voiced by Blechman that the field of dispute resolution has no gate, no boundary and no centre.<sup>55</sup> Yet this is precisely how the ecology of planet Earth may be described! The concluding claim of this article is that an intellectual appreciation of dispute resolution which does not identify an ecological perspective as crucial is profoundly out of touch with the core issues of conflict in the 21st century. Spencer and Altobelli point out that a key challenge for practitioners of dispute resolution in Australia is to articulate clearly their fundamental values.<sup>56</sup> Are these to be grounded primarily in exclusively human systems, such as the legal system and the market system? Or are they to be part of an ecological framework, acknowledging that humankind’s interactions take place within ecosystems — within the ecosphere?

## Summing up

As a learning species we are not learning much about justice by embracing the governance discourse which includes the unspoken assertion that a market-driven world is as good as it gets. There seems to have developed



a kind of deafness to calls from an otherworld attuned more to reconciling than to marketing. This has implications of some significance for practitioners of mediation, given that such practice seeks to empower parties in dispute to engage in the agency of reconciliation to the extent necessary to reach uncoerced agreement.

An important challenge for contemporary scholars of dispute resolution is to contribute to building up a body of understandings about disputes and dispute resolution which assists practitioners to move beyond an over-identification with 'process' and 'product' and out of the shadow cast by the legal system. This may be done, in part, by developing a vision or value base which balances concerns for the integrity of practice with concerns for the integrity of the discourse prevailing in the wider context in which such practice operates. If such discourse is not rooted in the ecology of this planet, it may be contributing more to the escalation of conflict than to conflict resolution.

Finally, if language is a cage, as Wittgenstein<sup>57</sup> claims, it may be understood as a cage in which human existence was tamed. But we still have to deal, at times, with the wild in ourselves and others. That is, disputes are inevitable. But progress in the field of dispute resolution can be achieved — in part by individuals regularly slipping through the bars, trusting that 'silence' or 'space' or 'nothing happening' is a context alive with meaning. This is a process crucial to accessing the agency of reconciliation which in turn is crucial to the resolution of disputes through uncoerced or consensual agreement. It is a process of engaging with an other-world of touch, taste, smell, hearing and sight that makes sense without words. ●

Kevin Hearn is a mediator with the Dispute Resolution Centre in Rockhampton and conducts training in conflict management and can be contacted at [blaurie2003@yahoo.com.au](mailto:blaurie2003@yahoo.com.au).

## Endnotes

1. Murray L 'The Steel' in Murray L *The People's Otherworld* Angus & Robertson, Sydney, 1983, p 36.

2. Cited in Tarnas R *The Passion of the Western World* Pimlico, London, 1996, p 6.

3. Macintyre A *A Short History of Ethics* Routledge, London, 1989, p 53.

4. Above note 2 at p 41.

5. 'The New Testament' in *The Jerusalem Bible* Darton, Longman & Todd, London, 1966, p 20.

6. Above note 5 at pp 35–7.

7. Above note 5 at p 20.

8. Above note 5 at p 176.

9. Thomas J 'Courting an injustice' *The Courier-Mail* Brisbane, 27 June 2005, p 11.

10. Saul J *On Equilibrium* Penguin Camberwell, 2002, p 109.

11. Hirigoyen M-F *Stalking the Soul: Emotional Abuse and the Erosion of Identity* Helen Marx Books, New York, 2000.

12. Herman J *Trauma and Recovery* Pandora, London, 1994, pp 7–114.

13. Weller P 'Introduction: in search of governance' in Davis G and Keating M (eds) *The Future of Governance* Allen & Unwin, St Leonards, 2000, p 1.

14. Edwards M 'Governance: meaning and issues' *Canberra Bulletin of Public Administration* No 96 June 2000 p 5.

15. Fliedner I 'The shifting boundaries of the public sector' *Canberra Bulletin of Public Administration* No 96 June 2000 p 15.

16. Loudon M 'Public and private: the shifting divide' *Canberra Bulletin of Public Administration* No 96 June 2000 pp 8–12.

17. Billington R, Hockey J and Strawbridge S *Exploring Self and Society* Macmillan, London, 1998, p 33.

18. Polanyi K *The Great Transformation* Beacon, London, 1959, p 43.

19. Above note 14 at p 25.

20. Witherell W 'Corporate governance: a basic foundation for the global economy' *OECD Observer* Agenda Publishing, London, 2000, pp 24–6.

21. Above note 20 at p 25.

22. Birch D 'Principles of partnership' *Community Quarterly* No 50 September 1999 pp 15–22.

23. Kettl D *The Global Public Management Revolution* Brookings Institute Press, Washington DC, 2000.

24. Pratchett L and Wingfield M *The Public Service in Local Government* Commission of Democracy, London, 1994, p 34.

25. Above note 16 at p 10.

26. Bauman Z *In Search of Politics* Polity, Cambridge, 1999, p 7.

27. Barber B *Jihad vs McWorld* Ballantine Books, New York, 1995, p 295.

28. Ormerod P *The Death of Economics* Faber & Faber, London, 1994, p 4.

29. Sandel M *Public Philosophy* Harvard University Press, Cambridge MAS, 2005, p 87.

30. Above note 29 at p 88.

31. 'Lid lifted on nation's excesses' *The Courier-Mail* Brisbane 9 May 2005 p 3.

32. 'Law Council's ethical standards for mediators' (2002) 4(9) *ADR Bulletin* 120.

33. O Murchu D *Evolutionary Faith* Orbis, New York, 2002, p 139.

34. Above note 33 at p 140.

35. Above note 33 at p 140.

36. Collins P cited in O Murchu D *Reclaiming Spirituality* Gill & McMillan, Dublin, 1997, p 88.

37. Above note 33 at p 138.

38. O Murchu D *Religion in Exile* Gateway, Dublin, 2000, p 55.

39. Shlain L *The Alphabet Versus the Goddess* Penguin/Compass, New York, 1994, p 18.

40. Above note 39 at p 18.

41. Cited in above note 39 at p 19.

42. Above note 39 at p 23.

43. Above note 39 at p 22.

44. Rohr R *Everything Belongs* Crossroad, New York, 1999.

45. Boff L *Ecology and Liberation* Orbis, New York, 1997, p 170.

46. Berman M *Coming to Our Senses* Unwin, London, 1990, pp 19–62.

47. Fisher T 'Who's minding the mediator? Mindfulness in mediation' (2003) 5(10) *ADR Bulletin* 165–171.

48. Boule L *Mediation: Principles, Process, Practice* (2nd edn) LexisNexis Butterworths, Australia, 2005, pp 30–35.

49. Murray L 'The Meaning of Existence' in Murray L *Learning Human* Duffy & Snellgrove, Sydney, 2003, p 199.

50. Above note 2 at p 404.

51. Grace E 'Counting the cost' *The Diplomat* 4(6) 2006 p 16.

52. Oakeshott M *On History and Other Essays* Blackwell, Oxford, 1983, p 121.

53. Cited in de Mello A *Awareness* Fount, London, 1990, p 151.

54. Spencer D and Altobelli T *Dispute Resolution in Australia* Lawbook Co Pyrmont NSW, 2005, p 45.

55. Blechman F cited in above note 54 at p 459.

56. Above note 54 at p 451.

57. Cited in above note 2 at p 399.