

***Mediation Law: Journey through  
Institutionalism to Juridification***  
**Penny Brooker (Routledge, 2013)**

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It is fitting that nearly twenty years (at the time of publication) since the Woolf Reforms a text has arrived which acknowledges the effect of those reforms in terms of the development of ‘mediation law’ as applicable to civil justice in England and Wales. As the author quite rightly indicates in her preface, encouragement to use alternative dispute resolution (ADR) is now, and has been since the introduction of the Civil Procedure Rules (CPR) in 1999 and subsequent Practice Directions, part of the expected practice approach for dispute resolution practitioners. Among other things, the CPR enable judges to impose costs penalties on litigants for unreasonably refusing offers to explore alternative ways (other than litigation) to resolve civil disputes; this we witnessed with the seminal Court of Appeal decision of *Dunnett v Railtrack Plc.* [2002] EWCA Civ 303.

Institutionalism is a word with which most will be familiar, it is helpful however that the author defines the word ‘juridification’ early on. Probably the most recognisable of the definitions provided by the author is the one which suggests that the word connotes the expansion of law into new areas. One interesting theme introduced by the author therefore is the extent to which state and court institutionalisation of mediation

has led to juridification, both through the expansion of mediation law and by lawyers as they seek to dominate the field.

The book is divided into six chapters preceded by tables of cases and statutes. Early on the author considers the initiation of mediation and this reveals a number of potential source avenues, not least the CPR and Practice Directions through judicial activism, but also through embedding carefully drafted mediation clauses within commercial contracts. A whole chapter is assigned to this, and in Chapter 2 the author engages in some useful comparative analysis with approaches taken in other jurisdictions. Such comparative analysis of other jurisdictional approaches continues throughout the book, and in her first chapter on the development of modern mediation, the author quite rightly acknowledges that the modern-day ADR movement, in the common law countries at least, originates from the USA.

What should also be celebrated about this text is the breadth of growing discipline-related source material acknowledged by the author – both theoretical and more practice-based – including from the UK. The author draws upon Roberts, Brown, Marriott, Mistelis and Zander, to name but a few, in order to produce what is a really comprehensive synthesis of the current body of work and commentary in this area. The list of case citations alone should indicate the importance that ‘mediation law’ now has and evidences the ‘juridification’ claim made by the author. There is also reference to North American academic dispute resolution literature; for instance Owen Fiss presents arguments against settlement and in favour of the judicial decision-making process, which gives acknowledgement to some of the jurisprudential argument which is influencing this subject area.

What this work also does successfully is make the link between mediation’s theoretical principles and the practice of civil mediation. This is useful for students of the discipline as it contextualises the classroom work in an attempt to bring the subject alive. This book could therefore be categorised as a socio-legal text, which presents the concept of mediation in a practically applied way and demonstrates to the reader that mediation is a developing area within legal practice. There is some usefully detailed case analysis of Appellate decisions where judicial activism has intervened to encourage parties to mediate.

The law surrounding mediation confidentiality attracts close attention; a whole chapter is devoted to this topic, which is helpful to the reader not only in better understanding both mediation confidentiality and its associated ethical boundaries, but also in understanding the ‘without

prejudice' principle. In this chapter the author acknowledges the tension which currently exists with this particular topic, not only in the UK but in other global jurisdictions, with reference to recent case law. The leading case of *Farm Assist (2) Ltd v Secretary of State for the Environment, Food and Rural Affairs (DEFRA)* [2009] (No. 2) EWCA 1102 (TCC) is covered quite comprehensively in this context. This particular chapter therefore has importance for enabling students and practitioners alike to understand the ethical dimensions of, and the implications for, mediation within legal practice.

If there is a criticism of this publication, it is the fact that neither of the debates relating to mediation regulation nor mediation mandating (for civil disputes) are sufficiently developed. In the UK, the former has been something of an 'elephant in the room' for some time now and the author misses the opportunity to properly engage with this important question and perhaps to draw comparatively from the experiences in other jurisdictions. Admittedly, the US *Uniform Mediation Act 2003* (UMA) attracts some consideration, mainly in the context of privilege and confidentiality, but there could be more engagement with the wider regulation debate perhaps, if only because the UMA seems to be the primary consolidating legislation present in westernised jurisdictions concerning mediation regulation. Similarly, compulsory mediation and the attendant debate is not addressed, another topic that has been the focus of some discussion within the UK in recent years. Here the author could have drawn comparison with private family legal procedure's MIAM requirement, and possibly also contribute to the broader debate about mandating mediation for certain categories of civil claim, as is the case in some other common law jurisdictions. Perhaps these are harsh criticisms given that the emphasis of the text is more on the encroachments of law into the area of mediation than the broader discipline debates.

In terms of audience, this book is useful for both the civil justice dispute resolution practitioner and the growing number of students (mostly studying law), both undergraduate and postgraduate, who are studying aspects of dispute resolution, and particularly civil and commercial mediation courses. At £29.99 it is affordable as recommended reading on all courses associated with the discipline. There are few, if any, current texts published in the UK with which to compare this text. In this way it is something of a unique publication, and is a welcome arrival at a time when the broad area of dispute resolution practice is developing and starting to be adopted as an academic subject within legal education.

