

and lengthy formal legal process.⁴⁸ Quite apart from the Christian imperative to be reconciled with one's neighbour, the practical and pragmatic case for mediation is compelling.

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Mediation in the Church of England: Theology and Practice

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This paper¹ addresses the practical aspects of mediation. Experienced mediators will know what mediations look like and feel like and need no reminding how effective mediation has become as a means of resolving disputes. My own practice as a mediator – which tends to focus on inheritance and probate disputes, where the emotional element is often highly toxic – has some parallels with the mediation of Church disputes where an understanding of and sensitivity to theology is crucial.

My first question is a simple one: why bother to mediate at all? Why not let the instinct to dispute have its head and burn itself out? What benefits does mediation bring? In a difficult inheritance matter there were allegations that a daughter had failed to care for her father and that she had forged her father's signature or exercised undue influence over him. These were allegations made by her brothers and sisters – not uncommon but very ugly. There was substantial property involved, including works of art, and it was a very long day's mediation. It eventually settled on terms that dropped the forgery and undue influence claims, redistributed the property and acknowledged the contribution that the daughter had made to her father's care. Most unusually, the following day her husband telephoned me. He said: 'I want to thank you. My wife

⁴⁸ The Commission paper (ibid) advises bishops to proceed with caution with *pro bono* mediators: 'While many offers will be genuine and well motivated, some may come with an expectation of using the diocese's name and standing to promote the conciliator'.

¹ This is the revised text of a paper delivered in Lincoln's Inn in July 2010 as part of the Ecclesiastical Law Society's series of London Lectures.

bounded out of bed this morning and said that it was the first good night's sleep she had had in two years.'

One of the great benefits of mediation is freedom – a successful mediation, a dispute settled, brings freedom to the parties. And freedom is a religious idea, with its origins in the divine freedom – the 'I will be who I will be' of the God of the burning bush in the book of Exodus – pure, unconstrained freedom. It is the theme that runs right through the Old Testament scriptures, from the Exodus through to the liberation from exile in Babylon, and finally at its climax in the death and resurrection of Jesus. God wants us to be free because he himself is free. Whatever other benefits mediation may bring, it brings freedom. It is a kind of truth that is making us free, to quote St John: a truth going beyond simple dialectics of right and wrong, justice and injustice, or winners and losers. Maybe the truth that makes us free is that each party was partly right in a world beyond winners and losers, but with each able to walk away free because they have accepted something deeper, which may include responsibility as well as restitution and resolution.

If freedom is the consequence and justification of mediation, what of its method? There is a golden rule of mediation, a principle that has to be understood by parties to a mediation if it is to be successful. Both sides have to give something up. And that golden rule, which I regard as fundamental, taps into another biblical principle, namely, the principle of sacrifice. It hurts and it costs. There are great expenditures of creative energy involved. Again, the mediator brings something of great value to the process. The mediator deals in hope. The mediator has to convey the sense that things can be otherwise, and that things can be better. Just like the prophets of old, who got the children of Israel to believe that they would one day be free from exile and would without question return to Jerusalem. This quality of prophetic imagination – and the quality of our energy associated with it – is another biblical theme that we can discern in the practice of mediation. And the mediator's task is perhaps in that sense a priestly one – the task of one who reconciles.

And where does the whole practice take its cue and its origin from? The great scholar Professor CFD Moule stated that our own attempts at reconciliation are but reflections of the great reconciliation between humankind and God that we know as the atonement.² So then freedom as the benefit, sacrifice, prophetic imagination and the priestly task as the method, and an origin lying in the atonement – all these seem to me to be biblical or theological foundations on which the practice of mediation is founded. One may think that it is all rather simpler – that its origin and mainspring lie in the second great command to love your neighbour as yourself, or the injunction to be a peacemaker, with blessing as

2 CFD Moule, *Forgiveness and Reconciliation* (London, 1998) p 19.

its corollary. Or one may see the Pauline image and metaphor of the 'Body of Christ' as being helpful here, with every impairing of its unity, every tear in the fabric being a failing and a sin, and every repair and every healing a good and holy work. Or finally one may find the clue in the whole concept of the 'other', with its stress on dialogue and the movement towards another, a movement which may also be towards the 'wholly other'.³

At its simplest, mediation involves the presence of an independent third party – the mediator – working with the parties in dispute to bring about some kind of settlement. The 'independence' of the mediator is absolutely vital. The mediator must have no stake in the outcome, but must on the contrary be disinterested. A mediator who is independent has the capacity for building trust, which is the essential ingredient if the mediation process is to work. When parties to a mediation that concludes successfully express their surprise at the outcome, they are in effect acknowledging the impact which the independent mediator has brought. The mediator changes the dynamic; often the 'mere' presence of the mediator is what makes the difference by changing the dynamic. The mediator has altered the relationship between the antagonists. There are different aspects to this. Parties tell and retell their own stories to themselves, and can indeed entrench themselves further and further in their own narratives and their own points of view. But when a mediator having no axe to grind enters the picture, there is the possibility of a shift in perspective.

To the independence of the mediator is linked the requirement of 'confidentiality'. Whenever the mediator is alone with each party, it is vital that they can speak freely and without suspicion that what is said will somehow leak to the other side. These two factors of independence and confidentiality mean that the mediator is able to explore the issues with each party. The key question is always: what is the issue or what are the issues? This is best handled in advance of the mediation day. Preliminary conversations with the parties – or more usually with their advisers – are essential; and getting a grip on the issues – on what is really going on – is a key part of the process. To avoid the 'and another thing' syndrome, it is often helpful to have some simplification or bundling. At the actual mediation, part of the task will be to work with each side, whether together if at all possible or separately if not, to understand what has to be addressed – to get closer to the causes of the dispute, or to the levers which may be relevant, if the parties are to be able to move to a new place, the place of settlement.

Here the key question will be of a different type: What do you want from this mediation? What is the outcome you seek? Many mediators will agree that this is a crucial question – sometimes lost sight of amid the heat and passion of the

3 R Otto, *The Idea of the Holy* (Oxford, 1950).

battle, or as hurt and resentment are felt. We can be so immersed in our fights that we forget what resolving it might look like. And here a distinction, familiar to mediators, may be useful. Is party A moving away from something; or moving towards something? Is party B the type of person who is trying to avoid something or to embrace something? To adopt a golfing image: are you trying to avoid the bunker or are you trying to reach the green? It is important to know what the parties are trying to achieve. So we ask: what do you want?

Sometimes the best one can hope for is peaceful co-existence, especially in religious disputes. If beliefs are at stake, if you believe that what you stand for is being undermined or denigrated, what you may really want is simply to have your view respected or even tolerated. There may not be a change of mind on the part of the other; you may not be looking for a change of mind. You simply wish to reach a point where there is a tolerance and a respect for difference, no more and no less.

Other practical aspects merit comment. Most mediations tend to last a day. That tends to be the norm, though some may be shorter and others, more complex, may last longer. There may be something to learn from the family mediation sphere where you can have a series of very short sessions of mediation – say one and a half hours – spread over several weeks. It depends on the nature of the dispute. There will be a discerning of the issues, and an exploration of them. It is a mistake to move too quickly to negotiation, because you may then find that other issues creep back in. It is important to understand and be clear what the dispute is about. It is usually helpful to get the parties together in one room, but sometimes this is simply impossible – the parties will not come together because the feelings are too raw or the breakdown too intense. In these circumstances, the mediator will shuttle between rooms.

Can anything be mediated? More or less. As in the civil litigation sphere, more and more can be and is resolved by mediation. It simply involves a willingness to be open, a willingness to shift. And experience suggests that an apology – a genuine expression of regret – can be a really powerful solvent that begins the process of unlocking deadlock.

Does the Church of England need mediation? Can the undoubted and proven benefits of mediation be applied to the resolution of church disputes? Mediation could be of great value to the church: it would save money, it would protect reputations, it would model a Christian way of doing things.⁴ Apart from anything else, when we move towards another in a genuine attempt at reconciliation, then the Spirit moves. It is to be hoped that we can encourage one another to

4 For a practical discussion of occasions when mediation might helpfully be undertaken, see generally M Hill, 'Mediation: An Untapped Resource for the Church of England?' (2011) 13 *Ecc LJ* 57.

take the practical steps necessary to make mediation a widespread and permanent practice inside the Church of England.

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The Regulation of Islamic Finance in the United Kingdom

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INTRODUCTION

This article examines the unique risks associated with Islamic financial institutions and the secular state's reticence to directly regulate their religious dimension. It argues that the state's method of regulating the Islamic financial industry ignores special reputational risks associated with the religious and cultural distinctiveness of Islamic banks.

The Financial Services Authority (FSA), the body responsible for the authorisation and regulation of all financial services in the United Kingdom, applies conventional regulatory criteria and product definitions in authorising Islamic financial institutions. Yet these banks differentiate themselves from their conventional peers in that they house so-called Sharia supervisory boards. Sharia boards' principal remit is to audit products and services for their compatibility with Islamic principles, which developed over the course of centuries of Islamic jurisprudence. Products that comply with such principles earn the 'Islamic' label, which is crucial to their uptake by Muslim investors. Therefore, Sharia boards' direct responsibility for the religious interests of Muslim consumers creates a unique reputational risk in such institutions insofar as banks found to have contravened the Sharia may trigger a lack of confidence in them.

The article proceeds in highlighting these issues by first addressing the current state of Islamic finance in the UK and the government's objectives in creating an Islamic financial centre. Second, the government's *modus operandi* in facilitating and regulating Islamic finance is scrutinised with respect to the

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