

Designing mediation for Scottish Civil Courts: Options and opportunity

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Abstract

In this article, the author examines whether the dispute resolution processes proposed in 2019 for civil courts in Scotland are suitable for the context of civil justice in Scotland in 2020 and the future. They are measured according to the policy context, what is known about the purposes of litigation, dispute system design and the needs and cultures of an adversarial civil justice system currently grappling with the impact of coronavirus restrictions.

Keywords

Topics, dispute resolution, law (any form other than contract, i.e. civil), mediation, civil justice, Scotland

Introduction

There has been hesitance about embedding dispute resolution processes in the civil courts system in Scotland (Ahmed, 2020; Clark, 2020; Ross, 2021). Traditional concerns of those within the legal establishment are not unique to Scotland. Fears exist that civil justice in the traditional, adversarial sense will be undermined by locating a dispute resolution process such as mediation within it, thus removing the scope for argument in open court and jurisprudence to emerge from civil cases (Bird, 2017; Clark, 2012; Zuckerman, 2020). Fears focused on loss of fees for disputants' lawyers presenting cases in the civil courts, sit alongside the uncertain effect on civil justice funding, historically from the public purse but increasingly funded by process fees charged to the parties (Combe, 2020). Only in low-value cases are courts required by law to consider 'alternative dispute resolution' (a term which is not defined) before allowing a case to move to evidential hearing.¹ For the purposes of this article mediation is the only dispute resolution process under consideration.

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In 2019, a tide of analysis of evidence and proposals for change has come together. Review by the Justice Committee of the Scottish Parliament (Committee, 2018 (Session 5)) was followed by consultation on a draft private member's Mediation Bill.² An International Evidence Review (APS Group Scotland, 2019) was commissioned by the Scottish Government, and an Expert Group established by Scottish Mediation reported (Scottish Mediation, 2019) and was acknowledged by the Scottish Government (Ross, 2021). Collectively, these air the prospect of parties being steered towards mediation as a form of court annexed dispute resolution in the early stages of civil cases by provision of early information on mediation, and presumptive steer towards mediation in civil cases (with some excepted categories). The prospect has attracted government interest in principle³ but has met hesitance from the leadership of civil courts themselves.⁴

In view of this tide of interest on a policy stage it is timely to examine the backdrop for Scotland of policy, litigation theory, dispute resolution design and civil litigation culture when considering the pragmatics of proposed integration of mediation in civil cases in Scottish courts. These differing angles give a depth of field to understanding the environment in Scotland in which changes in practice and policy would require to be implemented. Viewed from these angles this article notes a convergence of interests and concludes that there could be productive coexistence (Irvine, 2020) between civil justice norms and mediation within Scotland. If it can be the subject of robust and open discussion, it can be promoted in a way that meets policy aims and theoretical challenges.

Policy backdrop

The Scottish Government's *National Performance Framework*⁵ and annual published justice priorities⁶ point towards choice, empowerment and resilience for individuals and communities.⁷ The Scottish Government has extolled access to a range of dispute resolution options for decades,⁸ but without putting sustained public funding behind them. Responding to the 2009 *Report of the Scottish Civil Courts Review* (the Gill Report),⁹ the Scottish Government sought to 'modernise civil and criminal law and the justice system to meet the needs of people in Scotland in the 21st century'.¹⁰ A specific work package was dedicated to Dispute Resolution for which the Scottish Legal Aid Board was the lead agency,¹¹ until the establishment of a Scottish Civil Justice Council by legislation in 2013.¹²

The Scottish Government's modernisation agenda has included commissioning, in 2017 and 2018, independent reviews¹³ of publicly aided funding for legal services, and separately the regulation of legal services. Funding for legal services was subject to independent review from 2017 onwards. *Rethinking Legal Aid: An Independent Strategic Review* in February 2018 promoted the idea of wider support for a range of dispute resolution for disputants, not all in the hands of lawyers (Evans, 2018). The independent *Fit for the Future: Report of the Independent Review of Legal Services Regulation* aired support for lawyers to work alongside mediators and others in multi-option firms and notes that early resolution options for complaints about legal services should exist akin to mediation that had been offered successfully by the Scottish Legal Complaints Commission (Robertson, 2018). Some of the recommendations made in these independent reports have met resistance from the legal profession¹⁴ and were being deliberated upon by the Scottish Government prior to absorption of government time on coronavirus issues. The concerns of the legal profession about the impact of coronavirus on business and financial sustainability of lawyers is unlikely to increase, from its low level, their appetite for sharing the legal services market.

The impact of coronavirus on the work of the civil courts in Scotland was swift, with closure of courts to the public in March 2020 and localisation of national work into 10 hub courts. A national moratorium on rent or mortgage arrears proceedings will at some point come to an end and potentially swamp the sheriff courts with such proceedings. Meantime actions for orders needed in cases of family breakdown and child protection have been dealt with as far as possible remotely, by telephone or video conference calls. Simple procedure had been introduced in 2016 for claims of up to £5000, with its express focus on dispute resolution and not being taken to an evidential hearing unless there is no other alternative.¹⁵ Although an online filing and handling system had been created for a simple procedure, the use of online rather than paper process had been patchy. However, in the wake of coronavirus restrictions there has been a move to only online filing from 1 December 2020, with paper filing an exception for which court approval is required.¹⁶ These swift changes to litigation approaches have been taken in order to keep business moving as much as possible while coronavirus restrictions apply, and in the knowledge that a growing backlog of criminal trials will dominate courtroom space and time for the foreseeable future. It has been seen that civil business can change for instrumental reasons, producing a good enough experience for the parties and embracing dispute resolution processes where they are available. Instrumental or utilitarian approaches need not be undesirable, less robust or undermining of civil justice, but that is anathema to those committed to litigation for litigation's sake.

Should litigation contain dispute resolution?

In considering the question of embedding mediation, it is essential to consider what a civil justice system sets out to do and what civil litigation is for. Not least it is key to the question about what the goals of dispute system design are, discussed in the next section. Academic discussion continues about procedural justice, particularly the intentional diminution of open justice (Bird, 2017; Prince, 2019; Sorabji, 2017). Some recent court decisions in England repeat the public importance of what comes into the courts by way of private dispute.¹⁷ Jolowicz (1990, 2000) has long noted the blurring of what litigation is for as a public process and what the parties want it to do for them. There is a public interest in having issues subjected to judicial determination for the purpose of making clear that there are remedies in law accessible to the public. This is also building jurisprudence on the interpretation and application of laws. However, at its most pure, litigation is a private, 'voluntary and selfish' step by litigants (Jolowicz, 2000). The public interest is thus advanced by the private disputes of individual claimants. However, it is questionable that it should be so; many have only approached the court to lever movement by the other side, believing in the right of their claim over the other (Jolowicz, 2000).

Jolowicz (2000) feared that the reforms of civil procedure in England and Wales prompted by Lord Woolf's reports on Access to Justice (Woolf, 1996) concentrated too much on aligning civil litigation with access to justice and with dispute resolution. He did acknowledge that the latter had always been an inherent aim of the former (Jolowicz, 2000). He argued that this added confusion for the litigant. When Jolowicz explored the key features of civil litigation on a comparative basis, extracting the core elements from common law and civil law systems, he noted that in both there has been a blurring of traditional elements, for efficacy. In a similar comparative exercise Zuckerman goes on to state that he does not expect that everyone will be able to insist on a dispute being taken to a full determination in a fully funded system (Zuckerman, 1999). Noting that 'we cannot expect perfect justice but we should expect a just procedure' (Zuckerman, 1999) he extols the system in the Netherlands where

the legal profession and various institutions have created a variety of processes that, overall, work better and faster and at less cost to the disputant than other countries (Zuckerman, 1999).

Key to that success was collective engagement in creating a variety of processes for the disputant.¹⁸ One might have hoped that this would be the outcome of having a Scottish Civil Justice Council in Scotland but, with the exception of creating a simple procedure for low-value claims, there is limited evidence of fruitful collaboration to date. For comments on missed opportunity for the Council to lever integration see Ross (2021).

Perhaps the model of the Expert Group brought together by Scottish Mediation to publish *Bringing Mediation into the Mainstream* (hereafter the Expert Group Report)¹⁹ has been more nimble than the Scottish Civil Justice Council, its members weighed down less by establishment boundaries while still each reflecting in their personal capacity their understanding of establishment culture. That Expert Group Report prompted the Scottish Government to note ‘the time is right to re-examine how best to embed mediation in the civil justice system’. This took the form of a commitment to consult publicly and ‘bring together representatives of delivery bodies’ before considering reform on a ‘whole system’ basis.²⁰ They stressed their

focus on the user of the system to ensure that the reforms empower our people, our organisations and our communities to resolve disputes and other civil justice problems at the earliest opportunity and in the most appropriate way, whilst always retaining the rights of people in Scotland to access courts in determination of their rights.²¹

The public good of litigation for elucidating the law and promoting the power of the civil courts in litigation does not of itself trump an aim of the initial dispute being handled to conclusion without a determining order of the court. Indeed, if the primary aim of litigation was to be the elucidation of law in the public good it could be argued that it always must be fully funded from the public purse (Hodges, 2019) and taken to its adversarial conclusion in aid of advancing jurisprudence. If the sanctity of litigation as a public good to define our law more closely is to be maintained, funding for that needs to be separated out from testing the means of the particular disputants. It should not be necessary to rely on their personal means or crowdfunding to generate a public good.

It would be entirely possible to design a process whereby a moot or novel point of law arising in a civil case that is heading for mediation could be argued at public expense (with the court’s permission and the benefit of legal aid) while the dispute resolution for the parties runs parallel.²² In Scotland, there is experience in the context of serious criminal cases of a procedure for debating a matter of law which lacks clarity at the conclusion of the case for the mere purpose of achieving a direction that will build the jurisprudence,²³ with public funding accessible to ensure that the issue is debated. Furthermore, the scope of the Scottish courts to admit party minuters or intervenors in civil proceedings is predicated upon the idea that some points beyond those directly relevant to the original litigants may require a hearing in court.²⁴ Taking the narrow view that litigation is a process chosen by the parties for the elucidation of a legal point for the public good is not sustainable in the context of litigation as it has developed in Scotland, albeit that formal dispute resolution processes such as mediation have not been integrated in the way that they have in other countries. Therefore, for the purposes of this article it is suggested that resolution of the parties’ dispute is a legitimate goal of civil justice and, can be offered within litigation itself. Civil courts in Scotland have already shown an appetite for there to be such an option for the parties in cases where a no cost mediation option exists (Blake Stevenson Ltd, 2016; Ross and Bain, 2010).

Judicial case management and dispute resolution

The change towards case management culture within an adversarial system, that was initiated in earnest by the Woolf reforms and to a lesser extent by Gill reforms, has been noted to be more than merely 'mechanical' and requiring a new philosophy (Sorabji, 2014). The role of the legal profession in resisting culture change in what they perceive to be their domain is sometimes brushed off as apocryphal. However, it is well documented and globally widespread (Clark, 2012; Sorabji, 2014; Zuckerman, 1999). A legal profession and judiciary brought up on the importance of substantive and procedural justice norms, and the public good of litigation, may in the absence of another reason to embrace the importance of the parties having access to dispute resolution, adhere to familiar process and outcomes (McAdoo and Welsh, 1997), and see, for example, *Cabot Financial UK Ltd v McGregor, Gardner and Brown* (2018) SAC (Civ) 12 at para (72).

Nonetheless, there are some instrumental reasons that make lawyers and the judiciary embrace mediated options. In family cases, lawyers and judges know that they do not have answers for the complicated personal situations that arise in the breakdown of family relationships. Some reviews of mediation options in civil justice have omitted experience derived from family cases just because they are so different (APS Group Scotland, 2019). Other dispute situations have been withdrawn completely from the jurisdiction of the court, the main example being employment disputes that sit in the jurisdiction of a specialist tribunal. The introduction of active case management and judicial mediation within that tribunal system meets no challenges from litigators or the judiciary (Scottish Mediation, 2019).

While the Woolf report had been firm that (judicial determination in) litigation should be the last resort, the development of the relationship of mediation and courts in England has been criticised as mandatory dressed up as voluntary (for example, Girolamo, 2016). No equivalent 'last resort' has been made in such terms in Scotland, except in simple procedure for low-value claims (discussed critically in Clark (2020), described at 45 as 'cheap option for cheap cases'). Sorabji (2014) paints a somewhat depressing picture of how long it may take to change cultures of civil justice when these motives are felt to fly in the face of substantive justice. He notes that judges (and their feeder legal profession) have, by virtue of their legal education, a shared sense of what substantive justice looks like, but very differing values on what constitutes proportionate justice. Hence, he argues, there is inconsistent adherence to new rules when scope exists to exercise discretion, such as to decide whether a cost sanction is merited after refusal to engage in mediation (Sorabji, 2014). Proportionality here is in the sense of taking account of the limits of public and private resource to secure access to justice for all, not just for the parties in a given case. Although associated in England and Wales with the Woolf reforms and playing out in judgements thereafter, it has wider and deeper roots in theories of justice and in human rights of access to justice (Campbell, 1976; Sorabji, 2014). Reforms to civil justice that embed mediation in England and Wales have continued to be driven by an efficiency agenda to reduce cost (Jackson, 2010), and more recently, increase digitisation (Lord Justice Briggs, 2013, 2015).

Throughout the tide of recent Scottish examination of dispute resolution is a more meritorious theme of providing disputants with greater choice. To date it is spared the primary aims of proportionality and efficiency that, according to Sorabji's argument, have inhibited the cultural acceptance of civil justice reform in England and Wales. Resource to make the choice accessible for parties may require redistribution of justice and legal aid budgets, but is not paired with overt criticism of the value of budgets currently distributed although there is little baseline for civil justice value for money in general against which to compare a mediation option (discussed by Ross, 2021).

Open justice and interdependency

In the new world of electronic submissions and online courtrooms, it is potentially harder to know if a judge making a case-management or substantive decision electronically is being fair or perverse in so doing. One can evaluate the merits of any public decision but cannot see the decision-making process. By contrast, if the parties and their representatives are present in court, they can see whether the judge is reading the documents, listening to argument, and asking questions in a balanced and impartial way. If unhappy with the decision-making process they can challenge the outcome on that basis. But it may not be the case that the visibility of hearing and deciding makes that a substantively better outcome. Although second nature to lawyers, to a litigant it may seem perverse that a substantively sound outcome can be cast aside on appeal because it has not obviously been reached by an even-handed process. It might in fact become easier to check how robust the judge's process of consideration was in a digital environment by having access to data on how long was taken to read papers and reach a decision. Technology exists for decision making that is driven by artificial intelligence, reliant on algorithmic adaption to accumulated knowledge as studied by Sela (2018). Despite not seeing or understanding the science of this we accept it and rely upon it in many consumer dispute resolution contexts. The demands of consumers accustomed to the fast response, self-service world of commerce require that we engage with these options seriously at the court end of the civil justice environment (Sorabji, 2017). All of this developing fast-paced field of options in resolution of disputes makes hesitation about merely embedding some mediation in civil courts in Scotland seem rather staid.

A criticism of court-ordered mediation has been that no-one is to know if the parties mediating in private are reaching an outcome that would be considered fair and reasonable; or, to be more precise, that applying a legal normative framework we lawyers would consider it fair and reasonable. The *International Review of Evidence* notes that mediation fares well in that regard ((APS Group Scotland, 2019), although in the methodology section there is no mention of 'procedural' or 'procedural justice' as a search term). However Genn's study of mandatory mediation in the Central London County Court published in 2007 (Genn et al., 2007) and her views in the Hamlyn lectures ((Genn, 2008) in chapter 3 'ADR and civil justice: what's justice got to do with it') and elsewhere (Genn, 2013), created an unease about fairness of mediation outcomes. For engagement with this from the mediator standpoint see (Irvine, 2009). They built up to the oft-quoted phrase 'the outcome of mediation is not about *just* settlement, it is *just about settlement*' (Genn, 2008). They echoed concerns that she aired 15 years previously in relation to the tribunal system, namely that the most vulnerable of users did not necessarily stand to do better out of informal processes (Genn, 1993). Genn had noted the risk in relation to tribunals that 'cases with merit may be lost by default' (Genn, 1993) in informal justice. Yet the jurisdiction of tribunals has been expanded enormously across the UK, removing some very complex areas of law into the specialist tribunal chambers, adapting there to proactive case-management, judicial mediation and desktop hearings at first instance.

Genn does note that there is not and should not be a binary approach to litigation versus mediation (Genn, 2008). The two need to co-exist. They have different approaches and purposes, but each has a part to play in parties' dispute resolution. The interdependency which Genn and others expect, is described by Andrews instead as a 'double helix' (Andrews, 2018). That interdependency is consistent with the multitude of variable factors in court-annexed mediation that are evident from findings of the *International Evidence Review* (APS Group Scotland, 2019). Koo (2018) has referred to

'neglect of the hierarchical relationship between court adjudication and ADR' which needs to be addressed for reform in England to move forward.

The tone of interdependency in the *Expert Group Report* is strong. Instead of this being presented as a reason for a caution it is set out in a confident, mature but conciliatory tone. It acknowledges the need for flexibility and dependency for its operation on many people outside the authors and their expert group. Nonetheless, the *Expert Group Report* proposes that all civil cases in Scotland should be considered for mediation, and, unless inherently unsuitable due to concern about an abusive situation, scheduled for an initial mediation meeting with an Early Dispute Resolution Office. It refers to engagement with mediation on a 'continuum of mandatoriness' with five points on its scale drawing from the *International Evidence Review*.²⁵ The scale is

- (i) Categorical or discretionary referral with no sanctions;
- (ii) Requirement to attend mediation orientation session or case conference;
- (iii) Soft sanctions;
- (iv) Opt-out scheme;
- (v) No exemptions (Scottish Mediation, 2019).

The *Expert Group Report* model is said to contain aspects of the first four most permissive of these. It has similarities to the models for accommodation of mediation in civil justice discussed by Roberts in 1993 (Roberts, 1993).²⁶ The nearer one gets to the fifth (no exemptions) end of the continuum the more there is a fear of coerced decision making where

[T]he authority of the court, historically deployed in the delivery of 'judgment' becomes linked to 'settlement' so eroding the line between negotiated outcome and imposed decision which it has hitherto been in the hands of the parties to cross (Roberts, 1993).

Irvine has subsequently written about the potential that user views can bring to the design of dispute resolution options, noting the scope for co-constructing both process and outcomes (Irvine, 2020). In parallel we need to acknowledge that by educating and exposing people to methods of resolving their own disputes we should see further decline in numbers embarking on civil litigation or seeking outcomes required from civil litigation (McEntegart, 2019). We may also deprive ourselves of the very evidence that we crave of its potential and effectiveness within the civil justice system if mediation comes to the aid of the parties before litigation is attempted. But since we have so little baseline data as to the effectiveness of the civil justice system absent mediation, we have little to lose in its introduction. What we can do is think carefully about how we design and embed mediation so that it can be measured as far as possible alongside other civil justice options.

Design of a dispute resolution system for Scotland

There is a body of literature on dispute system design (DSD) which informs organisational management and complaints but also civil dispute processes. It is not engaged directly in the *Expert Group Report*, which advocates court annexed mediation in the form of the Early Dispute Resolution Office. However, some correlation can be identified. The design literature asks the principal question 'who is the client in dispute resolution design?' (Amsler et al., 2019, 2020) which is not addressed expressly in the *Expert Group Report*.

Drawing upon the work of Christina Merchant on DSD, Amsler et al. (2015) break their question down as follows:

what are the goals; who are the stakeholders; what is the context and culture; what are the processes and structure; what are the resources; and how does one allocate success and accountability as well as secure learning from the process? (Amsler et al., 2019).

These authors describe court-annexed dispute resolution as being ‘nested’ within a court which in turn is ‘nested’ within a justice system. By reference to disciplines outside law (such as anthropology or social psychology) they note this nesting would be seen as ‘community’ rather than a mere product of a set of court rules and legislation (Amsler et al., 2015). In a wider institutional implementation of dispute resolution design (as distinct from a formal legal process) this would expand to the following:

1. Goals a. What do the system’s decision makers seek to accomplish? b. Which types of conflicts does the system seek to address?
2. Stakeholders a. Who are the stakeholders? b. What is their relative power? c. What are their interests, and how are their interests represented in the system?
3. Context and Culture a. How does the context of the DSD affect its viability and success? b. What aspects of culture (organizational, social, national, or other) affect the workings of the system? c. What are the norms for communication and conflict management?
4. Processes and Structure a. Which processes are used to prevent, manage, and resolve disputes? b. If there is more than one process, are they linked or integrated? c. What are the incentives and disincentives for using the system? d. What is the system’s interaction with the formal legal system?
5. Resources a. What financial resources support the system? b. What human resources support the system?
6. Success, Accountability, and Learning a. How transparent is the system? b. Does the system include monitoring, learning, and evaluation components? c. Is the system successful? (Amsler et al., 2015).

While this appears a lengthy list of questions it teases out the elements that need to be addressed in further discussion focussed on court-annexed dispute resolution. They can bring to the surface issues that may predicate against a culture for mediation to flourish in Scotland. Whoever is the ‘client’ of dispute resolution, it is not in anyone’s interest for it to be designed to fail. That idea of a civil justice ‘community’ within which mediation is nested is not only positive in its tone, but becomes particularly important when considering how to prepare, allocate success, manage learning and manage accountability. This will be crucial to how cultures develop or can be changed. In the *Expert Group Report*, without drawing upon this literature on DSD the authors lay out most of the same key issues and can take confidence from the DSD literature to support deeper and overt conversations about these questions.

A Report authored in Scotland for the Legal Ombudsman in England and Wales contains much interesting comparative material²⁷ on design for ombudsmen contexts and a robust toolkit for design, albeit not for a court context (Gill et al., 2014). Knowing as we do that those who litigate may be already experienced in using other such processes we can draw upon such material to begin to think more clearly about where the court annexed dispute resolution sits, and what it offers in particular. Hodges’ ideas for a holistic approach whereby disputes can move as needed in and out of different processes fits well with such thinking. By engaging a range of experts in civil

justice to produce the *Expert Group Report* paper, it is clear that the importance of some of these factors in design has been recognised. Some of the stakeholders who stand to be affected by the proposals have been identified, although not in a capacity to engage as a representative or spokesperson for their stakeholder group. However, without even wider attention to the needs of the disputants (as explored by Irvine, 2020), the risk still arises that the context is considered through a legal establishment lens with the court as the starting point rather than the endpoint.

Aligning interests in embedding dispute resolution

On the question of who the client is, in the thinking of the *Expert Group Report* a cynic might ask whether it is for the promotion of mediation work. However, the paper points out that to *impose* a design or outcome would be anathema to the ethos of mediation, where the parties construct their own resolution. It thereby acknowledges the interdependency of disputant preference and the surrounding providers of advice, mediation and court services (Scottish Mediation, 2019). It has been influenced by players in the justice system, but with a less evident focus on the user member of society. Some voices with consumer, business, public and third sector views were at the table of the expert group, but most were voices involved in delivering services (litigation or mediation) on which the proposals have effect. The user member of society is clearly in the focus of the Scottish Government in their response.²⁸

The *International Evidence Review* notes that the interests of disputants may indeed sit in conflict with other stakeholders. Some in-court schemes established and evaluated in other countries have been very happily received *by courts* because they have helped reduce waiting lists for court time. However they may have been less popular with disputants in terms of substantive outcomes (APS Group Scotland, 2019). While attention has been paid in many evaluations to whether the disputants were satisfied with their experiences in mediation (in the short if not longer term), there has been relatively little attention to the disputant as the 'client' in dispute resolution design. Prince notes in relation to the digitisation project in England and Wales, that the 'user' view is rarely sought (Prince, 2019).

What attention has been paid can uncover factors that fly in the face of what mediation proponents articulate. The concept of self-determination used to promote mediation is not necessarily recognised by disputants as a driving factor for resolution choice.²⁹ Yet theorists consider this of primary importance (Welsh, 2014).³⁰ Only by bringing to the surface motivations of the actors in the civil justice system can we acknowledge them and respect that not all actors will feel the same. The respective motivations do not need to be the same but have more potential for alignment if they are aired. The enemy of success for embedding a process of dispute resolution is any assumption that one's own attitude to civil justice is the same as that of others whose experience or knowledge may be entirely different. It is suggested that it would be perverse to see the system design as only for the disputants, treating that group as users in the narrowest sense. If the design is to be embedded and to meet its full potential the wider view of the civil justice community nesting the user seems more apt. In that sense the *Expert Group Report* has set off on the right path.

We should aim to reach a mutual acceptance that success and accountability are in the interests of, and also reliant upon, all who are involved in this 'community' of civil justice. Ali notes that

[P]rogramme achievements largely depend on the [functioning of the civil litigation system, the qualities and skill of the mediators, safeguards against bias, participant education, and cultural and institutional support (Ali, 2018, 2019).

Yu notes the importance of a 'home-grown' country-specific approach (Yu, 2009). As Welsh (2001) points out the design will be at its most successful if it builds upon, rather than flies against, cultural norms but this may include a coercive approach by judges to achieving settlement. Whether lawyer understanding of what the process can offer disputants is as important as that of judges will depend on the role of the legal profession in a particular country (Welsh, 2001) or in relation to particular levels of court (Ross and Bain, 2010).

In the USA, in 1992 the State Justice Institute provided funding for the development of *National Standard for Court-Connected Mediation Programmes* under the direction of an expert Advisory Board.³¹ Revisited for relevance to today's context in April 2019³² these national standards that were developed interdependently by key players in mediation and justice were found to hold good almost 30 years later. They show what strength can emerge from an expert group collaborative approach. In both process of preparing their ideas and in its substantive content the *Expert Group Report* echoes that approach and builds upon that durable blueprint against which a design for Scotland could be adapted.

It sits more comfortably with court-annexed mediation for Scotland for it to be a complementary step that a party or parties have taken to bring their dispute to the court. The court is adding to options that are available rather than seeming to cast the case away to mediation, and the disputant's personal and selfish motives are not encroached upon. The court is providing the formality of listening, and potentially granting an enforceable decree but not assuming that judicial determination (limited as it is by the substantive law and procedure) will be the resolution to what brought the parties into dispute in the first place. By suggesting in the *Expert Group Report* that a questionnaire, akin to that used in the Netherlands, be completed by each party to reveal their motivations and scope for the court order sought to satisfy those motivations, the court is being given the opportunity to be open with the parties in a formal conversation as to what the parties wish and what the court can and cannot do.

Conclusion

When it comes to considering dispute resolution as an active stage within the civil courts, the language and speed of reform seems to continue to be driven much more by those who deliver justice than those who need to resort to it. Reflection on what it feels like to be a disputant, lay adviser or indeed any other person such as a witness, or a family member or colleague, who helps backfill for court attendance, is still minimal and requires further attention in any implementation and evaluation phase. It would be ideal if this could be approached in a consensual, interest-based way by, but with participants in the justice system being open about their motivations to press for change or resist it. Self-reflection as well as open minds and appetites for the education referred to in the *Expert Group Report* will all be needed.

It is possible that the design so far promoted may be situated too near to legal establishment norms to meet the needs of the public who require to resort to the courts, but too far from those norms to be welcomed openly by the legal establishment. There is a need to ask questions about success measures as part of the design process but bearing in mind that we do not have good baseline data about what success looks like in civil court processes and remedies of themselves. The design advocated in the *Expert Group Report* is based on elements from court-annexed processes that have shown reasonable success in Canada and the Netherlands, although both had the benefit of a strong top-down governmental and judicial steer for adoption of mediation across the civil context. The *International Evidence Review* makes clear that context is all important. It is well

known within comparative law theory that transplantation or transposition of rules or processes from one environment to another is not without difficulty and Orucu's discussion of the taxonomy is enlightening ((Orucu, 2002) in which she reviews the metaphor of transplantation as defined by earlier comparativists). There must be attention to the receiving legal culture, which has been considered in this article through differing fields of vision (policy, theory, design and practical culture) as they have developed organically in Scotland.

When designing for Scotland attention should be paid to how members of society in Scotland engage with public bodies and with one another in the present day. In that present day we cannot ignore that new means of communication and problem solving have been embraced of necessity as coronavirus restrictions impact the old way of doing things. The pressures on time of parliament and government away from legislation or whole system reform are inevitable by-products of coronavirus, but the opportunity exists for those engaged with civil justice at the delivery level to reflect on what design could work for Scotland. There is an opportunity to adopt practices that expand options to assist disputants without waiting for or relying upon legislation or whole system reform. If there is a will, those bodies and individuals who have engaged in the debate so far are in the best place to find the way.

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1. Courts Reform (Scotland) Act 2014 ss72-83; Act of Sederunt (Simple Procedure) 2016 No. 2016/200; Act of Sederunt (Simple Procedure) 2016 No. 2016/200, Schedule 1 paras 1.1–1.2.
2. Available here: https://www.parliament.scot/S5MembersBills/Mediation_consultation_document.pdf
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12. Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, 2013 asp 3.
13. Scottish Government *Justice in Scotland: Vision and Priorities* (for 2017–2020) available at <https://www.gov.scot/publications/justice-scotland-vision-priorities/>, Priority 3.
14. The Law Society of Scotland’s responses to the reports and any subsequent consultations are to be found at <https://www.lawsco.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/> and <https://www.lawsco.org.uk/research-and-policy/legal-services-review/> (accessed 21 October 2020).
15. Courts Reform (Scotland) Act 2014 ss72-83; Act of Sederunt (Simple Procedure) 2016 No. 2016/200; Act of Sederunt (Simple Procedure) 2016 No. 2016/200, Schedule 1 paras 1.1–1.2.
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17. For example, by Lord Reed in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
18. On which the development of an effective mediation proposal for parties and the courts was judge led, M Pel, *Referral to Mediation* (The Hague, 2018).
19. Scottish Mediation Publisher (based on work of an expert group, June 2019) ‘Bringing Mediation into the Mainstream’ <https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-in-Scotland.pdf> (accessed 21 October 2020).
20. Scottish Government ‘Independent Review of Mediation: Our Reponse’ (December 2019), <https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland>, Ministerial Foreword by Ash Denham, Minister for Community Safety. A National Delivery Group had been established and was making progress, but this was interrupted by coronavirus.

21. <https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland>, Ministerial Foreword by Ash Denham, Minister for Community Safety. A National Delivery Group had been established and was making progress, but this was interrupted by coronavirus, page 9.
22. This may already occur *de facto* in cases funded by insurers.
23. Criminal Procedure (Scotland) Act 1995 as amended, s123. 'Lord Advocate's Reference' procedure where the court can appoint an amicus curiae to engage in the debate if a party involved in the original proceedings elects not become involved. In either case, once the reference has been taken by the Lord Advocate, the costs of the party electing or being appointed as amicus curiae are met by the state via the Lord Advocate.
24. Sheriff Courts (Scotland) Act 1907 as amended Sched 1 *Ordinary Cause Rules*, Chapters 13, 13-1A and 13-1B.
25. S Roberts, 'Alternative Dispute Resolution and Civil Justice' (1993) 56(3) *Modern Law Review* 452 at 467–470. Quek (supra) also notes the coercive potential (at 487–488) commenting that party satisfaction with outcomes after mandatory referrals may make this less concerning than it seems, but that comparison of results of evaluations of mandatory with non-mandatory schemes may be pointless since they will have started out from different points of interest in the process (at 487–488). Further interesting questions are explored in D Quek Anderson et al. 'How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation' (2018) 23 *Harvard Negotiation Law Review* 265 (2018).
26. S Roberts, 'Alternative Dispute Resolution and Civil Justice' (1993) 56 (3) *Modern Law Review* 452 at 467–470. Quek (supra) also notes the coercive potential (at 487–488) commenting that party satisfaction with outcomes after mandatory referrals may make this less concerning than it seems, but that comparison of results of evaluations of mandatory with non-mandatory schemes may be pointless since they will have started out from different points of interest in the process (at 487–488). Further interesting questions are explored in D Quek Anderson et al. 'How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation' (2018) 23 *Harvard Negotiation Law Review* 265 (2018).
27. Drawing from empirical work about ombudsmen in the UK, Ireland, New Zealand, Australia, Canada and the USA.
28. Scottish Government 'Independent Review of Mediation: Our Reponse' (December 2019), <https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland>, page 9 (accessed 21 October 2020).
29. Evaluations by Harvard Negotiation and Mediation Clinical Programme of in-court schemes in New Hampshire and New York City Second Division found that self-determination did not feature in disputants aims, and the language used around the mediation offering was felt to be too legalistic and complex. It was written by lawyers who view the justice system from the inside, rather than by those disputants who sit on the outside. Presentation by S Budish, H Kulp and R Pirie 'Trust the Process?' *Understanding and Learning from Party Perceptions of Court-Connected ADR Programs*, ABA Dispute Resolution Section Meeting, April 2019.
30. Steffek et al in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*. Emphasise 'normative individualism'; Review of Steffek et al by N Welsh, 'Theory and Reality in Regulating Dispute Resolution' (2014, summer) *Dispute Resolution Magazine* 22–24.

31. Steffek et al. in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* emphasise 'normative individualism'.
32. US State Justice Institute, January 1992 (based on work of an expert advisory group) 'National Standard for Court-Connected Mediation Programmes', available at <https://www.aboutrsi.org/library/national-standards-for-court-connected-mediation-programs> (accessed 29 August 2019).
33. As debated at the ABA Dispute Resolution Meeting in April 2019.

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