

Mediation and the Ombudsman: A Look to the Future

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*It is better to live in a society where agreement takes the place of violence. It is better to live in a society whose social culture is based upon a willingness to understand the other. It is better to live in a society in which social cohesion overcomes antagonism. Mediation can make a substantial contribution in all these areas.*⁴

Prof. Aharon Barak

*Mediation coexists well with the fundamental values of human dignity, autonomy of the individual, consideration for others, and peaceful relations between persons.*⁵

Prof. Yitzchak Zamir

1. Preface

Example A:

The Justice Ministries of the US and nineteen of the individual States initiate legal proceedings against a giant multinational corporation for infringement of anti-trust laws. The judge finds that offences were indeed committed, but suggests that the sides try to come to an arrangement regarding the ongoing relations between the company on the one hand and the authorities and the public on the other. A Federal judge is appointed to mediate. The mediation is unsuccessful. An alternate mediator is appointed and a strict timetable is adopted. The mediation is a success

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 - 4 Aharon Barak, "On Mediation", 3 *Sha'arei Mishpat* (2002) 9.
 - 5 Itzhak Zamir, "Mediation in Public Matters", 7 *Mishpat Umimshal: Law and Government in Israel* (2004) 119, 123.

and a solution is adopted which will not unduly harm the corporation, while at the same time providing substantial benefits for the consumer.

Example B:

A concern in the natural resources field is unable to coexist with another concern working in the same area; disagreements between workers on the two sides is a common occurrence. Instead of imposing a solution which might lead to future conflict, the respected authority in the region begins a mediation-like process. A solution is found, allowing each concern to flourish in its own separate area.

The stories of the Microsoft mediation in 2001⁶ and the agreement between Abraham and Lot a few millennia earlier⁷ are but two examples from among many, of successful use of mediation procedures, some more formal than others, to replace conflicts with agreements – or, in the words of Professor Barak, antagonism gives way to social cohesion. Given the success of mediation throughout the world, it has begun to be adopted in various frameworks whose purposes are to solve social conflicts.

The Israeli institution known as the State Comptroller's Office includes both the function of Auditor General and the function of Ombudsman. By law, the State Comptroller is also the National Ombudsman.⁸ The Ombudsman's Office is often called upon to find solutions to conflicts between members of the public and various governmental authorities. The expansion of mediation and other methods for conflict resolution (ADR – Alternative Dispute Resolution) is therefore a development that should be very relevant for the Ombudsman⁹, as well as for the State Comptroller, as we shall see.

The Israeli Ombudsman's Office was of the view that there were indeed elements connected to mediation that could be of service to the Office in performing its function. It was decided, therefore, to undertake a pilot program in which certain

6 For a description of some of the elements that enabled the success of the second round of mediation see: Eric Green & Jonathan Marks, "Mediating Microsoft", **Boston Globe**, Nov. 15, 2001.

7 For further discussion on mediation and alternative dispute resolution in Biblical Scholarship and the Jewish Law see: Elisheva & Aviad Hacohen, "Mediation, reconciliation & Conflict Resolution Daat", www.daat.ac.il/mishpat-ivri/skirot/54-2.htm/

8 Israel is, to the best of our knowledge, the only country in which the State Comptroller also fulfills the role of Ombudsman.

9 The Ombudsman itself is sometimes viewed as part of ADR. See: Luigi Cominelli, "An Ombudsman for the Europeans: Gradually Moving Towards 'Effective Dispute Resolution' Between Citizens and Public Administrations", *The International Ombudsman Yearbook* (2002) 143, 153.

complaints submitted to the Ombudsman would be directed to the 'mediation track', in an attempt to bring the sides to an agreed resolution of the complaint.

Following is a survey of some of the recent developments in the world of mediation, with an emphasis on methods used in relation to disputes in the public sphere. After a discussion of some of the basic principles of mediation, we will focus on the pilot project undertaken by the Ombudsman of Israel and its repercussions for dealing with complaints and for resolving conflicts related to state authorities. We will conclude by discussing how elements connected with mediation may be used in the future by the State Comptroller and National Ombudsman.

2. Development of Mediation and its Benefits

'Mediation' of disputes by community leaders and elders has existed in various societies from the earliest of times. In the Western world, though, methods for resolving conflicts by agreement were not to become part of the formal mechanisms for solving disagreements until the modern era. For generation upon generation, accepted wisdom in the West held that disputes were to be resolved through decisions made and enforced by the Sovereign or his appointees, based upon rules (laws) designed by the Sovereign or his representatives. Those involved in the conflict were expected, in general, to bring any disagreements to the proper authority and then to abide by the decision given by the Sovereign's representative.¹⁰

Methods of ADR, including mediation, were intended to change this paradigm and open up alternative avenues for resolving conflicts. Among other aspects, these methods were meant to enhance the role of the sides to the disputes within the mechanism for their resolution.

The first ADR mechanism that found its way into Western legal systems was Arbitration¹¹ -- a system in which the sides were empowered to decide the identity

10 It should be noted that there have been attempts to change this approach. For instance, during the French Revolution the *bureau de conciliation* was established in order to make conflict resolution more egalitarian by having the parties themselves nominated layman arbitrators. See: Amalia D. Kessler, "Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication," 10 *Theoretical Inquiries in Law* (2009), 2.

11 Already in the 19th century, arbitration appeared in the U.S. Following the Arbitration Act of 1888, an Arbitration Committee was established to resolve a dispute between the train company and the Labor Unions. Later on, the Federal Arbitration Act of 1925 established a national policy in support of Arbitration in labor relations. See: Jeffrey M. Senger, **Federal Dispute Resolution: Using ADR with the United States Government**, (2004).

of the person who would make the decision concerning their dispute.¹² Only during the second half of the twentieth century did the field of ADR begin to expand substantially beyond Arbitration, in part due to the increasing logjam of cases in front of the courts. In the U.S., this issue came to a head in 1976 at the *Pound Conference*, when a group of approximately 250 judges, lawyers and law professors met in order to find ways to open up the logjam, at least in regard to proceedings that could be resolved outside the courtroom.¹³

Professional mediation took a big step forward after the book 'Getting to Yes'¹⁴ was published by Yuri and Fisher in 1981, transforming mediation from a theoretical idea into a pseudo-scientific methodology and framework for practical training and application. With time, experimental projects were designed to introduce mediation as a substitute for the traditional adversarial systems for dispute resolution.¹⁵ Following the success of such projects, mediation began to find its place both within the institutionalized framework of the legal system and outside it.¹⁶

In Israel too the use of mediation has become more widespread in the last few decades. The Courts Law, 5744-1984 specified the courts' jurisdiction to transfer cases to a mediator, with the approval of the litigants. As part of the ongoing development of mediation, special Regulations were enacted in 1993, setting out the framework for the use of mediation within the context of litigation.¹⁷ Following the publication of the Report of the *Committee for Examination of Methods to Increase the Use of Mediation in the Courts* (known as the 'Rubinstein Committee') in 2006, a new program was implemented to expand the use of mediation in Israeli courts and a new chapter of procedures was added to the Regulations of Civil Procedure, 5744-1984 for this purpose.¹⁸

12 In Israel too, arbitration was adopted before the existence of professional mediation. See: Arbitration Act, 1968

13 See: Frank Sander & Stephen Goldberg, "Fitting the Forum to the Fuss. A User Friendly Guide to Selecting an ADR Procedure", *10 Negotiation Journal* (1994), 434-442; Stephen Goldberg, Frank Sander, & Nancy Rogers, **Dispute Resolution: Negotiation, Mediation and other Process** (1992).

14 Roger Fisher & William L. Ury, **Getting to Yes: Negotiating Agreement Without Giving up**, Harvard Negotiation Project (1981).

15 For a review of ADR and mediation projects around the world see: Report of the *Committee for Examination of Methods to Increase the Use of Mediation in the Courts* (known as the 'Rubinstein Committee') 2006.

16 Civil Justice Reform Act (1990); Administrative Dispute Resolution Act (1990); Negotiated Rulemaking Act; Dispute Resolution Act (1998).

17 Court Regulations (Mediation), 5753-1993.

18 The Regulations provided that in civil lawsuits in certain courts, which involved a claim of no more than 50,000 NIS (that amount is now a minimum of 75,000 NIS), there was an obligatory initial meeting aimed at examining the possibility of settling the case through mediation. The number of courts to which these Regulations applied was later expanded.

Mediation is a method for resolving disputes by agreement, where the mediator helps the parties to negotiate between themselves.¹⁹ Within this framework, with the aid of the mediator, the parties attempt to identify the different issues about which they disagree, as well as the real interests of each of the parties – both those which are clearly expressed and those which may be concealed, sometimes unknown even to the person himself or herself.

The person functioning as the mediator must be a neutral²⁰ third party – at least insofar as he or she has no personal interest in the result of the mediation.²¹ Professional mediation is usually performed by an 'external' mediator, with no previous personal acquaintanceship to any of the parties to the dispute. Such a mediator is generally chosen for his or her professional abilities and experience in the field of mediation. Often, a professional mediator will have no special knowledge of the specific field related to the dispute – whether from a legal, economic or any other perspective. This allows the mediator to concentrate on the proper administration of the mediation technique itself, with the purpose of bringing the sides themselves to an agreement, without the intervention of the mediator in regards to the subject-matter of the dispute.²²

The proceeding itself is considered faster and cheaper than a legal proceeding taking place in court. While the parties themselves may potentially save substantial sums in legal expenses and court costs, the State's coffers too are spared many of the expenses related to a legal proceeding, not the least of which being the salary of the judges who would have had to hear testimony and make their judgments.

Another benefit is that a mediation proceeding emphasizes individual autonomy, both from a philosophical²³ standpoint and from a practical standpoint. Within the mediation, the parties themselves are 'masters' of the process, from beginning to

19 "Mediation" is defined in the Courts Law, 1984 as a process in which a mediator, who does not have the power to decide on a binding resolution, assists the parties to negotiate a consent-based settlement.

20 Nonetheless, in some cases, a previous acquaintance between the mediator and the parties may be acceptable.

21 "A person should only act as a mediator is s/he is completely independent of both parties and has no interest in the outcome of the procedure. In addition to neutrality one also speaks in German of 'Allparteilichkeit'. This means a mediator needs to have empathy with all parties rather than neutrality in the sense of a reserved or disinterested attitude". Isaak Meier, "Mediation and Conciliation in Switzerland", in: Nadja Alexander (ed.), **Global Trends in Mediation** (2006), 371, 384.

22 See: Nadja Alexander, "The Mediation Metamodel: Understanding Practice", *26 Conflict Resolution Quarterly* (2008), 97, 101. Although in some cases it is preferable that the mediator has expertise in the area of the subject matter of the case.

23 See: C. Menkel-Meadow, "Whose Dispute is it anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)", 83 *Georgetown Law Journal* (1994-5), 2680.

end. In general, the process can only be initiated with the agreement of all the sides²⁴, and it comes to an end only when all the parties have come to an agreement regarding resolution of the dispute. The parties are the ones who 'own' the process, which at its heart is a negotiation between them, with some outside help.

In an article concerning mediation²⁵, Professor Zamir points out a number of additional benefits of the process. For instance, the inherent flexibility of the process may allow for easier resolution of complex disputes, including those involving multiple parties and varying interests. As well, mediation is conducive to developing creative solutions to disputes. Since the range of possible results of the mediation is, by definition, 'unlimited', it allows the parties to more easily arrive at a 'win-win' result, in which all parties may benefit.

Professor Zamir writes that mediation may also have benefits in regard to the implementation of the settlement going forward, since a resolution arrived at by the parties themselves is more likely to be honoured by them, without the need for further proceedings. Such considerations are especially important where there is an ongoing relationship between the parties that must be sustained – both for the benefit of the sides themselves and for the benefit of third parties.²⁶

Dr. Orna Deutch summarizes the benefits of mediation thus²⁷:

Mediated solutions are not just creative with the potential to bypass stumbling blocks between the parties; when the mediation is successful, the settlements are usually long-term and not limited to the specific disagreement that gave rise to the original mediation. The mediation proceeding itself often helps to build trust between the parties and foster a growing tolerance of opposing views. In this way, an ongoing conflict may be avoided... One can say that those who support mediation with relatively narrow interests in mind, may be surprised to find that the expansion of mediation leads to more general benefits for society: the development of a new attitude within society in which inter-personal relationships are strengthened along with communication among people and groups.

24 Except in some legal systems which involve obligatory mediation at the early stage of the legal proceedings. See: Hanna Tolsma, "How Can Mediation Be Implemented in the Current Administrative Decision-Making Process?", in: K.j. deGraaf, J.H. Jans, A.T. Marseille, & J. de Ridder (eds), **Quality of Decision-Making in Public Law: Studies in Administrative Decision-Making in the Netherlands** (2007), 69-80.

25 Supra, note 5, 122.

26 Ibid.

27 Orna Deutch, **The Giant Awakens**, Israel Bar Association Publishers, 1998 (translated from the Hebrew).

Thanks to these and other benefits, we are witness to a substantial increase in the number of disputes in all kinds of fields which are brought before mediators in order to try to find creative solutions to which all sides can agree.

3. Public Sector Mediation

The expansion of mediation has not been confined to the private sector. In the public sector as well there has been a noticeable increase in the use of mediation mechanisms and procedures.

In environmental matters, for instance, mediation has begun playing a central role in a number of countries.²⁸ In other matters as well, when issues of international importance have arisen, the authorities involved have sometimes turned to mediation in an attempt to come to a settlement. For example, following the violent demonstrations at the G-20 summit meeting in England, a Parliamentary Committee suggested that mediation should be used to help the police and the demonstrators develop agreed parameters for mass demonstrations in the future.²⁹

In some Western countries, it has been decided to make mediation a part of the system in place to deal with disputes involving public authorities (hereinafter: "public-sector mediation"). For example, in the U.S., a mediation service was set up as part of the Federal bureaucracy and specific legislation was passed in order to effectuate alternative mechanisms for dispute resolution.³⁰ As well, in 1998 the President sent out a Presidential memo to all the Federal authorities, instructing them to take the necessary steps to further the use of mediation and other methods of ADR to settle disputes by agreement. In England too, the Lord Chancellor, in 2001, published a directive forbidding State authorities from entering into legal proceedings before considering the possibility of using mediation instead; as well, authorities were directed to always agree to mediation if suggested by the other party to the dispute.³¹

Public-sector mediation may be a relevant option in many different types of disputes between the individual and the state authority, whether the substance of

28 First use of mediation in this field took place in 1975. See: Robert Zeinemann, "The Characterization of Public Sector Mediation", 24 *Environmental Law & Policy Journal* (2001) 49, 50.

29 Paul Lewis & Alan Travis, "Mediation Urged to Stop Repeat of G20 Violence", *The Guardian*, July 28, 2009.

30 Administrative Dispute Resolution Act 1990, Pub. Law 101-522, 5 U.S.C. 1990, 581; Administrative Dispute Resolution Act 1996, Pub. Law 104-0320, 5 U.S.C. 571.

31 "ADR and Government Departments - Do They Practice What They Preach?" in *ADR Update No. 8: Recent Developments in ADR* (March 2003) www.asauk.org.uk

the dispute is administrative (relating to an administrative power) or civil (for example, relating to a contractual matter vis a vis the authority).

On its face, civil disputes involving a public authority are no different from similar disputes in the private sector. Therefore, if such a dispute is conducive to the use of mediation, there would not seem to be any particular reason to disqualify such an option just because one of the sides to the dispute is a public authority.³²

The situation would seem to be different when the dispute revolves around an administrative matter, since the range of possible outcomes to which the public authority can agree is often much more limited than those open to a private actor, thereby making the mediation process much more difficult. The use of an administrative power is, after all, subject to the constraints set by the legislator. For example, a public authority would be forbidden to agree to end a dispute by granting a license or cancelling a liability if such actions were inconsistent with the law or with the authority's jurisdiction. As well, under certain circumstances, constitutional³³ or other fundamental considerations may limit the ability of the authority to compromise with the individual, even where formal jurisdiction to do so exists.³⁴

Other than jurisdictional issues, sometimes procedural or structural elements may make mediation more difficult when relating to the public sector. For instance, as a rule mediation is more successful when the parties are open about their positions in their communications with the mediator and/or the other parties; in order to facilitate such openness, the sides agree in advance to a high level of secrecy in regard to positions of the sides. Sometimes even the details concerning the outcome of the mediation and the final settlement are also kept secret. Such secrecy may not be compatible with principles relating to the right of the public to get information regarding state authorities and their actions, including actions taken as part of a mediation proceedings or settlement.³⁵

32 Prof. Zamir writes that public authorities are bound by certain rules which do not apply to other parties, even when what is involved is a civil dispute rather than an administrative dispute, such as the principles of equality and avoiding irrelevant considerations. Nevertheless, his conclusion is that the dual role of public authorities should not bar them, as a rule, from using mediation in torts disputes. *Supra* note 5, 140.

33 *"Disputes that revolve around constitutional questions, definitions of basic rights, and fundamental and moral values, generally cannot and should not be mediated."* Zeinemann, *supra* note 28 at 59.

34 Mary-Jane Ierodiaconou, "Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?", *Melbourne Law School Legal Studies Research Paper* (2005), No. 113, <http://ssrn.com/abstract=689981>

35 Jeffrey M. Senger, **Federal Dispute Resolution: Using ADR with the United States Government**, Jossey-Bass Publishing, California (2004), 10.

Some of these contradictory principles came to the fore in a recent case in the State of Washington in the U.S. The State was part of a mediation proceedings vis a vis the only coal factory in the State, which ended in a settlement which limited emissions from the factory which were dangerous to the environment. After the basic outline of the settlement was announced, critics claimed that a better settlement was possible and they demanded that its details be published – even though by law details of mediation agreements are not meant to be made public.³⁶

Mechanisms may be adopted in order to minimize some of the potential pitfalls of public-sector mediation, including frameworks for choosing the identity of the mediator and delineating his or her jurisdiction, declarations regarding the public norms that will govern possible settlements, etc. That said, given the potential problems, public authorities must weigh carefully which types of disputes are conducive to public-sector mediation and which mechanisms are necessary to maximize the chances for a successful outcome. The success of public authorities in making these decisions will enhance the prospects for positive results of public-sector mediation, both from the perspective of the parties themselves and from the perspective of the public good.

4. Public-Sector Mediation in Israel

Professor Zamir is of the opinion that proper judicial and social policy would lead to using mediation to resolve disputes involving state authorities – including disputes of an administrative nature.

According to Professor Zamir³⁷, when public-sector mediation leads to an agreed settlement, the result may be beneficial in a number of ways. First, it can minimize the potential harm to the individual arising from the use of authoritative power, without negatively impacting upon the goals of the authority or the purpose of the relevant legislation. This is a positive result in itself, and perhaps even required by basic democratic principles, including the requirement that government action be measured and reasonable. Beyond the potential benefits to the individual, even the public authority itself may benefit from the process; representatives of the authority may be made aware of new data or ideas for dealing with matters within their jurisdiction, thereby deriving positive results in

36 "The confidentiality of mediation is preventing dissemination of details about an agreement that was negotiated between the state of Washington and the only coal-fired power plant in the state. The owner of the plant agreed to significant emission reductions, but critics question whether the state could have done better. Open government advocates are concerned about the public-records exemption for mediation confidentiality." (*The News Tribune*, April 8, 2009).

37 *Supra* note 5, 147-149.

the interest of the authority itself. As well, an agreed settlement helps contribute to a positive atmosphere in the relations between the individual and the state – an atmosphere of openness, goodwill and cooperation – with its inherent benefits for the public service and indeed for the society as a whole.

Professor Zamir writes that there is a substantial difference between the resolution of a public-sector dispute through mediation and a resolution of the matter by way of arbitration. In the latter case, the actual power of decision is taken from the public authority and passed to the arbitrator, acting according to a normative framework (based on the Arbitration Law, 5728-1968) that is separate and different from that which governs the public authority and its decisions.³⁸ In a mediation context, by contrast, the mediator may make suggestions related to possible decisions or outcomes, but the authority is not bound by such suggestions; at the end of the day, it is the authority which makes the decisions and uses its powers. Within this voluntary framework, it is quite acceptable – sometimes even commendable – for the authority to adopt a suggestion raised in the mediation process.³⁹

With all this in mind, Professor Zamir suggests that the public interest, including the interest of the public service itself, dictates that in the case of public-sector disputes, the authority seriously considers whether the matter is conducive to mediation.

In fact, mediation proceedings have found their way into the public sector in Israel. As in other Western states, in Israel too a directive was given to public authorities to give careful consideration to the possibility of resolving given disputes outside the courtroom walls, including through mediation. In 1999, the Attorney General published a directive entitled 'Using Mediation to Resolve Disputes Involving the State'. The Directive included the following:

*The trend toward resolving disputes by alternative means is a positive one which should be encouraged in the appropriate cases, all the while ensuring that it is not exploited unfairly against the State. Therefore, when the State is party to a dispute, it is incumbent upon the State's representatives to examine the possibility of resolving the dispute outside the walls of the courtroom, whether through direct negotiations between the parties or by way of mediation.*⁴⁰

38 That said, it should be noted that a recent Directive of the Attorney General does in fact allow for the possibility that a public authority agree to arbitration under certain circumstances: Directive No. 6.1205, dated 12.10.09. Still, the discretion to use mediation is broader than the discretion to agree to mediation.

39 Supra note 5, at 150.

40 See: Directives of the Attorney General, www.justice.gov.il

The directive relates both to situations in which court proceedings are already ongoing, as well as those in which they have yet to be initiated but are likely. It is possible to transfer a matter to mediation at any stage in the process. The directive emphasizes that mediation is a forward-looking process, which may aid in building a positive framework for ongoing relations between the individual and the authority into the future. The procedure takes into consideration a wide range of interests and relationships among the parties. The Attorney General determined that mediation should be considered in appropriate cases, both for budgetary considerations and for policy considerations – for reasons connected to the burden faced by the court system due to the number of proceedings initiated, the quality of potential resolutions within mediation and the enhancement of the relations between the individual and the state.

According to the directive, a settlement arrived at by the parties themselves would serve them, and society itself, better. Moreover, it is posited that the level of confidence in the legal institutions and in the State, as well as the readiness to fulfill undertakings, would be enhanced as the role of the parties in resolving disputes is expanded.

The directive of the Attorney General was included in the Budgetary Regulations sent out to government Ministries by the Accountant General in the Ministry of Finance.

Due to the relatively large amount of lawsuits involving public authorities at any given time⁴¹, the widespread adoption of mediation within the public sector would have far-reaching consequences both in regard to the amount of mediation proceedings and in regard to the amount of legal proceedings ongoing.

A pro-mediation policy within the public sector would be important not only in relation to the State in its capacity as a party to disputes and a potential litigant, but also in its role as decision-maker and promoter of social policy. By actively adopting and acting according to the Attorney General's directive, the State itself could serve as an example for the public and the individual of the importance of striving toward agreed solutions, rather than endless conflict and litigation.

Unfortunately, the potential widespread influence of the Attorney General's directive has not come to pass, and the use of mediation has not expanded substantially in its wake.⁴²

41 According to the Justice Ministry's Centre for Mediation, the State is involved in more lawsuits than any other litigant. See: Ronit Zamir, "Using Mediation to Resolve Disputes Involving the State: A Guide for the Attorney" (2000).

42 Carmit Fenton, "Why Doesn't the State Mediate?", *Mediation Point* (March 2003).

According to the findings of a steering committee set up by the Attorney General in the matter, full-fledged adoption of mediation by State institutions would entail a serious modification of the prevailing organizational culture. Changes would be necessary in regard to forms of thought and action in place in such bodies, which are based upon an adversarial or litigious mentality. The committee found that it would be much more simple to arrive at agreed settlement at the stage in which the matter was still before the relevant government ministry, rather than after a legal proceeding had already been initiated.⁴³

In July 2006, the *Committee for Examination of Methods to Increase the Use of Mediation in the Courts* headed by Justice Rubinstein (the '*Rubinstein Committee*') set out its program for expanded use of mediation within the court system. Increased use of mediation, according to the Report, "may promote a more tolerant society, cognizant of the possibility of resolving conflicts through civil discourse focusing on the needs of the individual citizen".⁴⁴

5. Ombudsman Institutes and Public Sector Mediation

Complaint resolution by an Ombudsman is similar to the process of mediation and other types of ADR in that it is meant to be a relatively low-cost, swift and informal alternative to litigation. Usually, the Ombudsman's representatives examine the complaint and various types of 'testimony' and 'proof' without the need for rigid frameworks of 'civil procedure' or 'rules of evidence'.

This is meant to allow the Ombudsman's representatives to examine different aspects of the complaint, to receive responses from a variety of sources and to arrive at the most just outcome possible in connection with each specific case. Given the flexible nature of complaint resolution by Ombudsmen, is there any rationale for adding a mediation procedure or mediation techniques to the existing process for complaint resolution?

In principle, there may be a number of potential benefits for adding a mediation option to the Ombudsman process. First, mediation may serve to better delineate the matter that is at the heart of the dispute. Sometimes, despite any number of complaints and responses by the parties, it is difficult to arrive at a clear understanding of the basic problem which is in need of solution. In such cases, mediation might have techniques or tools that may help uncover and clarify some of the issues in conflict better than standard Ombudsman procedures – including

43 Report submitted to the Attorney General, June 2003.

44 Rubinstein Report (2006), p. 9

by finding cultural or other barriers which may be obstructing movement forward toward a solution.

Mediation techniques may be useful as well in less-complicated matters brought to the Ombudsman. For instance, sometimes complaints are received in which it would be preferable to arrive at a swift settlement rather than to begin an exhaustive examination of the matter. In such cases, a mediation process might yield a quick solution to the problem, which would be appreciated not only by the complainant but also by the government body, which would not have to invest the time and energy that a full-fledged examination by the Ombudsman might entail. Such a process may also minimize the amount of time and energy spent by the Ombudsman's representatives on the matter. In this way, the use of mediation may aid in finding quick solutions in certain cases, thereby allowing the workers of the Ombudsman's Office to concentrate on other complaints that may not be appropriate for mediation.

The use of mediation procedures by the Ombudsman may bring about a certain level of cooperation between the parties in the future, thereby limiting the number of serious disputes – and with it, the number of complaints filed with the Ombudsman. Such proceedings may also be preferred by the representatives of the public authority itself, since they focus on finding solutions acceptable to the complainant, rather than focusing on finding responsibility, and perhaps blameworthiness, among the State's representatives.

In addition to such benefits, mediation proceedings may generate positive by-products over and above the settlement itself – such as empowerment of the individual, improvement in communication and inter-personal relations, etc. Certainly it is not always possible to generate such outcomes within the standard Ombudsman proceeding in which an external decision is communicated to the parties as to whether the complaint was found to be justified.

Owing to the potential benefits of mediation, there are Ombudsman Offices in places such as Belgium⁴⁵ and Switzerland⁴⁶ where some complaints are indeed

45 According to a 2008 Report of the Ombudsman's Office in Belgium, mediation attempts are made in many cases: 23% in 2007 and 16% in 2008. See also p. 25 of the Report: *"The attempt to mediate is used in complaints that cannot be immediately considered as well-founded or ill-founded (the administrative authority has a discretionary power) or where a solution can be found rapidly without requiring to investigate further into the responsibilities."* www.federalombudsman.be

46 In Zurich, mediation has been used by the Ombudsman since 2002: Isaak Meier, *"Mediation and Conciliation in Switzerland"*, *Global Trends in Mediation*, (Nadja Alexander ed. 2d ed. 2006) 371, 376-7.

transferred to mediation.⁴⁷ Some of the more important successes of Ombudsmen may arise from cases in which mediation techniques were used.

In March of 2003, a study⁴⁸ was conducted in England for the purpose of determining which types of ADR were being used within Ombudsman proceedings conducted by Ombudsman institutions which were members of the British and Irish Ombudsman Association. Overall it was found that 12 of the 17 institutions which responded to the questionnaire did indeed use ADR. According to the report, when mediation was used, the process was run sometimes by an internal team of the Office, sometimes by a team made up only of senior Ombudsman officials and sometimes by mediators from outside the Ombudsman's Office, often from Mediation Centres.

Some organizational Ombudsmen are beginning to adopt mediation techniques as well – among them, Ombudsmen who examine complaints about the Police, which is an organization which certainly has the potential for very tense 'run-ins' with citizens. The English legislation regarding Police, for example, sets up informal methods for dealing with complaints that are lodged. In some States in the U.S., mediation is used in complaints against Police officers; this is the situation as well in Wales, Northern Ireland, Australia and Canada.⁴⁹

47 For example, see: Northern Territory of Australia, Act No. 5 of 2009 (Ombudsman Act 2009):

s. 37: "The Ombudsman may, at any time on the Ombudsman's own initiative or at the request of a party to a complaint, decide to deal with the complaint by conciliation or mediation...

s. 38 The conciliator or mediator must be a person who, in the Ombudsman's opinion, is appropriately qualified to act in the capacity.

s. 41 Participation by the parties to the complaint in the conciliation or mediation process is voluntary and a party may withdraw at any time.

s. 44(3) There is a cooling-off period for the agreement during which a party may, by written notice to the other parties, cancel the agreement.

(4) The cooling-off period starts when the agreement is made and ends 14 days after the day the period starts.

(5) If the agreement is not cancelled under subsection (3), it is binding on the parties after the end of the cooling-off period.

s. 46 (1) If the conciliation or mediation process is unsuccessful:

(a) the complaint must be treated as if the process had not taken place; and

(b) the conciliator or mediator must not be further involved in dealing with the complaint.

(2) However, subsection (1)(b) does not affect the Ombudsman's powers and functions under this Part in relation to the complaint."

48 See: "The Use of ADR in Ombudsman Processes: Results of a survey of members of the British and Irish Ombudsman Association (BIOA)" conducted by Margaret Doyle, Published on the website of the BIOA (www.bioa.org.uk) , March 2003 ; www.adrnow.org.uk

49 Hedy Vagshall, "Survey of Information Unit – Ministry of Internal Security: Mediation of Police Complaints", 2004.

As far as Israel's Police force⁵⁰ is concerned, a study conducted within the Information Unit of the Ministry of Internal Security led to a report being issued in 2003 by a joint steering committee including representatives of the Ministry of Justice and of the Ombudsman's Unit of the Police. This in turn led to a successful pilot project and the development of a Police directive according to which mediation is used within the procedure for examining complaints lodged with the Ombudsman Unit against officers. According to the website of the Israeli Police, the Israeli experience, as well as that of other countries, suggests that cases in which the complaint resolution process included mediation were resolved more successfully than those in which mediation was not used.

Mediation has begun to be utilized within the ranks of the Israeli Police itself, in disputes between commanders and other officers.⁵¹ When complaints involving allegations of degrading or humiliating conduct are received, it is suggested to the parties to try mediation, especially when the officers involved are likely to have an ongoing relationship within the same unit. According to the Police,⁵² when such mediations were indeed undertaken, they led to a settlement of the matter and improved the atmosphere between the parties.

6. The National Ombudsman and Public Sector Mediation

Israel's Ombudsman Office was set up in 1971, when the State Comptroller Law, 5718-1958 was amended and the State Comptroller was tasked with the additional role of National Ombudsman. According to the Law, any person is allowed to submit a complaint to the Ombudsman regarding an action of a public authority; the parties involved in the proceeding, then, are usually the complainant and representatives of the public authority.

According to section 41(a) of the Law, the Ombudsman may perform an examination of a complaint in any manner seen fit, without regard to issues of procedure or rules of evidence. It would seem, then, that the Ombudsman is not limited in the choice of procedures for examining complaints, and therefore may make use of mediation techniques or processes as well, in appropriate cases. As shown above, there are Ombudsman institutions that do make use of such

50 Israel's Police Force began using mediation as part of its community policing back in January 1995. Mediation is used in disputes between neighbours, commercial disputes, and conflicts between groups. The use of mediation in such instances, especially neighbourhood disputes, can save much time and effort if it is successful in bringing the sides to a modus vivendi that obviates the need for further complaints to the Police.

51 See: Annual Report No. 26 of the Israeli Police Ombudsman (2007).

52 Ibid.

processes. The question is whether the nature and functions of the Israeli Ombudsman lend themselves to significant use of mediation procedures or techniques.

To allow for a serious examination of this question, we thought it useful to attempt to compare some of the elements and principles at the root of the theory and practice of mediation with some of the elements and principles informing the framework of complaint resolution by the Israeli Ombudsman. The results are summarized in the following table:

Table of Comparison:

Complaint Resolution by Ombudsman vs. Mediation

Topic	Ombudsman	Mediation
Voluntary Participation in the Process	Voluntary on the side of the complainant, but obligatory on the side of the authority.	Voluntary
Procedural Flexibility & Freedom from Regulatory or Evidentiary Frameworks	Exists. S. 41(a) of the State Comptroller Law, 5718-1958.	Exists. Derived from the nature of the mediation process, as set out in s. 79C of the Courts Law, 5744-1984.
Determination of Procedure	By Ombudsman.	By Mediator. According to s. 11 of the Addendum to the Court Regulations (Mediation), 5753-1993.
Requirement of Disclosure of Relevant Information	Exists. S. 41(d) of the State Comptroller Law	Exists. According to s. 1 of the Addendum to the Court Regulations (Mediation).
Requirement of Disclosure of Documents	Exists. S. 41(d) of the State Comptroller Law and s. 3 of the Basic Law: State Comptroller	Does not exist.
Prohibition on Use of Information Uncovered in the Process as Evidence in a Later Proceeding	Exists. S. 30 of the State Comptroller Law	Exists. s. 79C(d) of the Courts Law and Reg. 3(b) of the Court Regulations (Mediation).
Limit on Use of Documentation and Notes from the Proceeding to Examiner/Mediator Only	Exists. S. 2 of the Freedom of Information Law, 5758-1998 (s. 4 of the Definition of 'Public Authority')	Exists. S. 11(c) of the Addendum to the Court Regulations (Mediation).

Topic	Ombudsman	Mediation
Examiner/Mediator Subject to Duty of Secrecy	Exists. S. 23 of the State Comptroller Law	Exists. Reg. 5(d), (e) & (f) of the Court Regulations (Mediation).
Meetings with Sides	Exists. Usually with each side separately.	Exists. Usually joint meetings including all parties.
Power to Meet With Parties Separately	Exists. S. 41(c) of the State Comptroller Law	Exists. s. 79C(c) of the Courts Law and Reg. 6(2) of the Court Regulations (Mediation).
Power to Meet a Represented Party without His/Her Lawyer	Exists.	Exists. s. 79C(c) of the Courts Law and Reg. 6(2) of the Court Regulations (Mediation).
Ability of Parties to Receive Legal Advice at Any Point in the Proceeding	Exists.	Exists. According to s. 3 of the Addendum to the Court Regulations (Mediation).
Power of Examiner/Mediator to Receive Expert Opinions	Exists. S. 22(c) of the State Comptroller Law	Exists. According to s. 11(d) of the Addendum to the Court Regulations (Mediation).
Prohibition on Examiner/Mediator Giving Professional Advice to the Parties	Exists.	Exists. Reg. 5(g) of the Court Regulations (Mediation).
Prohibition on Examiner/Mediator Being in a Position of Conflict of Interest	Exists.	Exists. Reg. 5(a) and (b) of the Court Regulations (Mediation) and s. 7 of the Addendum to the Court Regulations (Mediation).
Discontinuation of the Proceeding	By decision of the Ombudsman or the complainant. S. 42 of the State Comptroller Law	By decision of the Parties and the Mediator. Reg. 8 of the Court Regulations (Mediation).
Decision	By the Ombudsman. S. 43 of the State Comptroller Law	By the parties. s. 79C(1) and (2) of the Courts Law

As can be seen, there would seem to be much similarity between the principles at work in mediation and those in evidence within the examination of complaints by the Ombudsman. This suggests a real possibility of assimilating mediation techniques, and even entire mediation procedures, within the context of the work of the Ombudsman in appropriate cases. Such a scenario would benefit not only

from the built-in advantages of mediation, but also from the Israeli public's high level of trust in the Office of the State Comptroller and Ombudsman.

With this in mind, and given that many complaints received by the Ombudsman are not truly conducive to an adversarial 'winner take all' approach, it was decided to conduct a pilot project of mediation within the Israeli Ombudsman's Office.

7. Mediation in the Office of the Ombudsman: Sorting Procedures

The pilot project in public-sector mediation was begun in 2008, when a portion of the complaints received were considered for inclusion.⁵³ The mediation process itself was handled entirely in-house by lawyers working within the Ombudsman's Office who were given special training in the area of mediation. Each mediation involved (usually) one or two Ombudsman employees.⁵⁴

The mediation procedure would take place after the complaints underwent a sorting process to find complaints which were appropriate for mediation. The sorting process was most important.⁵⁵ An effective method for sorting complaints has the potential to become the key to the success of such a project and bring with it substantial savings in time and expense, as well as improving relations between the parties involved.⁵⁶

In the beginning stages of the pilot project, the lawyers working in the various branches of the Ombudsman's Office dealt with the sorting procedure, using their experience in the field to decide which complaints would be suitable for mediation. Different types of complaints were chosen, including cases focusing on licensing for businesses, on behaviour of civil servants, on allegations of discrimination or arbitrariness, etc. A variety of public authorities were involved, including government ministries, municipal bodies and government corporations.

53 See: Annual Report No. 35 of the Israeli Ombudsman (2009), p. 21.

54 The mediation often included a lawyer with expertise in the field involved in the dispute.

55 "Not all complaints are well-founded, and not all well-founded complaints are amenable to mediation." Roy W. Davis, *"Quasi-Judicial Review: The European Ombudsman as an Alternative to the European Courts"* [2000] 1 *Web JCLI*. See also: Frank Sander and Stephen Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure", 10 *Neg. J* (1994) 434-442.

56 Michal Alberstein, *Mediation Theory* (Magnus Publishing: 2007), 117-118.

With the establishment of a separate Branch for Sorting, Classification and Transfer⁵⁷, it is probable that much of the process of identifying cases suitable for the mediation track will be performed by this Branch.

In order to aid in the sorting process, criteria were developed for use by the workers tasked with selecting appropriate cases for mediation from among the myriad of complaints submitted to the Ombudsman.⁵⁸ It was determined that the following should be among the factors considered: whether the complaint reflects an ongoing relationship between the parties⁵⁹; whether the case seems to involve a substantial emotional aspect; whether non-legal interests seem to be at the heart of the matter; whether a resolution of the matter can only be achieved by reference to technical or professional knowledge of a complex nature, known to the complainant and the relevant authority; whether the complaint seems to be the result of a breakdown of communication between the complainant and the public authority, or a personal or cultural misunderstanding; whether it is a 'multi-party' dispute which fell 'between the cracks'; whether the complaint indicates the existence of conflicting versions of the matter, which cannot be thoroughly examined without the presence of both parties; whether the complaint involves sensitive matters such that a process of written responses is unlikely to bring about their clarification or the resolution of the underlying interests involved. It should be noted that, in some cases, the complainant's reasons for submitting the complaint may be somewhat different from those presented in the complaint itself; in such cases, mediation is more likely than the standard examination process to uncover the true interests of the complainant in the matter.

Before beginning a public sector mediation, it is sometimes wise to do a preliminary check to find out whether the relevant legislation is flexible enough to allow the public authority to agree to compromises with the complainant in the event of a successful mediation. That said, even in cases where the authority's

57 This Branch was set up to examine incoming complaints, to request necessary information or documentation from complainants and forward complaints to their proper 'addresses' within the Ombudsman's Office. A similar set-up was put in place in the Israeli court system following the 1999 'Ravivi' Commission Report, which also emphasized the importance of incorporating consensual procedures for conflict resolution, such as mediation, within the court framework.

58 It should be noted that Directive No. 60.125 of the Attorney General (1999) included a survey of some of the issues to weigh when deciding whether a public authority is to pursue mediation: the reasons for the conflict, the types of issues involved, level of complexity of the matter, technical nature of the issues, the parties' expectations, the relationship between the parties, the chances of rehabilitating the relationship, the amount of money involved, non-monetary matters, the need to create a precedent – or to prevent the creation of a precedent – in regard to the issue, etc.

59 Such as those involving employment matters, or relationships between a professional and the public regulatory body or between a person in need of health services and their Health Fund.

discretion is limited, mediation may sometimes be appropriate since it may uncover other ways in which the complainant's underlying interests and needs may be met which neither party had thought of beforehand.

As part of the pilot project, a number of cases which included one or more of the criteria listed above were transferred to the public sector mediation track.⁶⁰

8. Mediation in the Ombudsman's Office: Techniques and Examples

When a complaint is being considered for transfer to mediation, this must be agreed to by the parties and coordinated with them. The Ombudsman's Office sends the parties a written explanation of the process involved and of mediation in general.

The actual meetings with the parties are organized in a very structured manner. The procedure begins with a joint meeting in which, after a short explanation regarding the process, each side is invited to present his or her position on the matter. The position of each party is summarized by the mediator in a manner which is intended to tell the story in a less extreme way and retain a relatively positive atmosphere. If necessary, there are then separate meetings with the sides, in which they are able to express themselves freely and honestly. This sometimes brings out interests that had been below the surface, but that are important in order to understand the nature of the dispute and work towards its resolution.

Subsequently, the parties attempt together to clarify which issues should be the focus of the mediation, what are the issues which are important to the complainant, which questions remain in disagreement, what are the interests of the different parties and what are the possible options for a resolution of the matter. In this way, the parties themselves may be able to create solutions agreeable to both the individual and the representatives of the State.

This procedure is very different from the classic way in which a complaint is dealt with by the Ombudsman's Office. In a standard examination, the emphasis is on allegations of fact and law, with each side attempting to strengthen their own arguments and weaken the positions of the other side. In such a framework, even when there are actual meetings between the sides, the State representatives present a defensive front, trying to provide as strong a basis possible for their original action or decision. In contrast to this, the mediation process obligates the parties

60 It should be emphasized that at every stage the parties may request that the mediation be discontinued and then the matter is returned to the standard 'complaint' track (and this occurs as well when a mediation is unsuccessful).

to focus on understanding the other party's interests and on finding solutions to the questions raised in the course of the mediation.

Mediation may be particularly effective for cases where the standard examination process is unlikely to be able to come to a definitive decision, for example – cases involving conflicting allegations of fact which cannot be proven or disproven. As well, cases which involve a specific area of expertise may be difficult for the Ombudsman representative to resolve within the context of a standard examination. In such cases, mediation could hold the key, allowing the parties themselves, who have the necessary expertise to understand the issues, to exchange ideas for a possible resolution of the matter in a way that meets their needs and the needs of 'justice'. In general, it may be said that the active participation of the parties themselves, which is central to the mediation process, is more likely to lead to a resolution that takes into account all of the various interests of the parties than is a decision arrived at by the Ombudsman at the conclusion of a regular examination.

Cases involving 'serial' complainants – people who continually submit complaints about public officials, often using derogatory language – may also be more likely to find a more positive resolution through a process of mediation, rather than by way of another in a long line of standard Ombudsman examinations. In the context of a mediation, the representatives of the public authority actually meet the individual citizen, while the complainant sees opposite him an actual human being like himself – and not an amorphous bureaucracy. This encounter between the parties and the process of the State representatives actually listening to the complainant may appease the complainant somewhat, and perhaps lessen the tension and open the lines of communication between them.

In the course of the mediation, the sides learn to raise the level of their discourse, in a manner respecting the other side, and to move the process forward through listening and building mutual trust. In some cases, a forthright apology or an expression of empathy on the part of the State representative may be the key to bring the sides closer to a resolution of the dispute. In appropriate cases, an agreed framework can be developed to allow the sides to continue their ongoing relationship in a positive way into the future.

Another benefit of mediation, as opposed to a regular Ombudsman examination, is the direct nature of the communication between the parties as they lay out their arguments before the other side. There are no problems of 'broken telephone' or delays arising from waiting for one side or the other to respond in writing to an allegation or legal argument.

Mediation also has administrative benefits. There is less written correspondence involved and the matter is often resolved after only one meeting. At the end of the mediation, a summary document is prepared, which details the various topics that

were raised during the process and the agreements which were settled upon in regard to each topic. This document becomes part of the final 'decision' in the ombudsman file.

Often, after the settlement is signed, the public authority goes 'above and beyond' in order to show the complainant and the Ombudsman representatives that the settlement was indeed fulfilled. As mentioned above, resolution of the conflict by the parties themselves raises the level of mutual trust and deepens their commitment to implement the solution. This, of course, is not always the case during a 'classic' Ombudsman investigation.

Given that mediation can, in general, be beneficial in the proper cases, it is still important to tailor the specific mediation techniques to be used to the specific facts and circumstances of each case and the parties themselves.

The classical mediation approach – known as "pragmatic mediation"⁶¹ – is designed to arrive at practical results quickly. Therefore, this was the approach used in the pilot project at the Israeli Ombudsman's Office.

Within this approach, the basic working assumption is that, in many cases, the sides are unable to reach a successful compromise due to cognitive and communicative failures. Through a structured process known as "interest-based negotiation", an attempt is made to separate the parties from the problem – i.e. to separate the personal, ego-centred aspect of the issue from the substantive 'objective' problem that is in need of a solution. By clarifying the 'reality' of the problem and emphasizing communication and active listening within the discussions between the parties, the mediator forces them to focus on interests rather than positions, thereby creating the possibility of generating a solution that may fulfill the true needs of the parties.

For example, pragmatic mediation was used in a case involving a complainant and various public authorities. The complaint concerned the refusal by a municipality to pay the complainant, a professional who had provided services to the city, even though there was a high level of satisfaction regarding the level of service provided. Only during the mediation itself did it become evident that the 'real conflict' wasn't between the complainant and the municipality but rather between the municipality and a government ministry which, in the eyes of the municipality, had evaded its responsibility for a joint project involving the city. Once the representatives of that government ministry were persuaded to take responsibility, in writing, for the project which it had initiated, only then did the municipal representatives feel confident enough to cover the payment due to the

61 Originally modelled on 'Getting to Yes'.

complainant, without the need to worry about possible lawsuits of other contractors being directed at the municipality.

Another type of mediation used sometimes by the Ombudsman's representatives is "transformative mediation". The developers of this type of mediation⁶² see the process as an opportunity to bring about a true transformation of the situation which created the conflict – a transformation which could include changing how the parties relate to each other, healing aspects of their relationship, and corrective justice. Within a transformative mediation framework, the mediator attempts to create an atmosphere in which the parties can 'change the conversation' between them and empower each of them to properly express their own interests and wishes and to recognize those of the other side.

The transformative-type of mediation was used by the Ombudsman in the case of a complaint by a member of a minority group concerning a security check which he was forced to undergo and which left him with feelings of severe humiliation. Within the mediation process, representatives of the relevant authority were able to hear firsthand from the complainant about which security procedures he had to undergo and how they made him feel, and thus were able to draw conclusions concerning how such checks would be administered in the future. Proper apologies were made, as well as explanations regarding the basic security requirements which necessitate the practices undertaken. Strong interpersonal connections were made between the sides, leading to invitations to visit and continue the process in the future – results that reflect the true transformative character of the process, which would have been unlikely had the complaint been dealt with in another way.

Any type of mediation, the "narrative model"⁶³ is considered a 'post-modern' model, focusing on the narrative of each of the sides – the 'story' of each party, which reflects that party's world-view and represents their understanding of the facts from their particular perspective. This model is based on the presumption that for every 'conflictual narrative', another story can be developed through cooperation and trust between the sides.

At the beginning of this process, the narratives of the parties will often include blaming the other side for past events. Then, the parties are asked to try to view the conflict 'from the outside', with a less accusatory perspective. As the mediation progresses, an attempt is made to fit the parties' viewpoints within a

62 Joseph P. Folger and Robert A. Baruch Bush, "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice," 13 *Mediation Quarterly* (Summer 1996) 263-278.

63 John Winslade and Gerald Monk, 2001, *Narrative Mediation*, San Francisco: Jossey-Bass.

modified narrative, which will allow for the development of positive cooperation in the future relations between them.

Within the context of complaints to the Ombudsman, the narrative put forward has the complainant in the role of 'protagonist-victim', with the public authority cast as the 'antagonist-victimizer'.⁶⁴ Therefore, the success of the process entails a 're-telling' of the story and reconstruction of the relations between the citizen and the authority.⁶⁵

In a number of cases dealt with during the pilot project, the narrative model of mediation was utilized. One such example was the complaint of a single mother with three children against a public housing company. According to the complaint, the rental unit included broken doors and windows and other problems which did not allow for its use as a residential home for her family. Yet, the requisite repairs were not undertaken, leading the complainant to take her children to live in a cramped apartment with her mother.

It turned out that the narrative of the representatives of the public company was totally different. They viewed the complainant as having abandoned the apartment, and had in fact already begun the process of cancelling her entitlement to public housing.

Only through the mediation process, was each party able to hear the side of the other, thus creating a new comprehensive narrative, which allowed them to move forward toward creating new understandings for the purpose of undertaking the steps necessary for the family to move back to its home.

Discrepancies between narratives was also evident in another complaint, this time regarding an employment matter. The complainant saw himself as a diligent, senior employee with vast experience, whose future income and status were being threatened by the creation of a subsidiary company by the municipality where he worked. These apprehensions were unknown to the municipal representatives until the mediation undertaken by the Ombudsman. During the mediation, it was made clear to the employee-complainant that his status and income were secure for the coming years, and that any changes to be made in the future would be done in cooperation with him.

In general, mediation may be especially helpful in conflicts involving ongoing relations between the parties, such as the employment example just mentioned. In a similar case involving an independent contractor, new requirements by the

64 Nadja Alexander, "The Mediation Metamodel: Understanding Practice", 26 *Conflict Resolution Quarterly* (2008), 97, 116

65 Eduara Gutman, "Mediation In The Public Sector", Legislative & Legal Updates ,2006, www.nperla.org/legal/mediation0705.asp

government ministry threatened to bring about the loss of the license necessary for him to continue to work in his area of expertise. During the mediation process, which included elements of transformative mediation, the parties began to recognize and give expression to their long-standing cooperation over the years and the authority representatives made clear their respect for the complainant, thus leading to the development of a mutual closeness between the sides. The atmosphere created allowed for the parties to bridge the gaps between them and agree on which requirements would be waived for the complainant based on his extensive experience, as well as the practical steps involved in fulfilling the other requirements necessary for the complainant to continue working in this area.

Another example in which the sides began far apart involved a complaint by a tour guide and organizer regarding a case where his tour group was not allowed to cross the border from Israel to one of the neighbouring states, due to what were – in the opinion of the complainant – unworthy regulations enforced by the relevant authority. After the sides had clarified their positions during the mediation, the various interests involved were clear to all the parties and they were able to agree on an action plan for cooperation in the future in order that such events not recur.

Similar to the above examples, the relationship between a resident and the municipality in which he or she lives is also an ongoing one. Given that, and given the broad areas in which there is potential for conflict between the resident and the municipality, it is not surprising that the Ombudsman receives large volumes of complaints regarding actions or decisions by municipalities. In order to help develop more positive relations into the future, a number of such complaints were moved to the mediation track.

One example is that of a complaint of a resident concerning the refusal of a municipality to repair damage to his property, including the destruction of a structure in his yard and damage to his garden, which were caused by road construction undertaken by the municipality on his street. Before the mediation, the sides were unable to come to agreement on this matter. The municipal representatives were adamant in their refusal to rebuild the structure in its previous location, claiming that it would be a danger and that it was preferable to relocate it to the other side of the complainant's house. Only during the course of the mediation, a comment made by the complainant during his presentation of the matter provided a piece of information unknown until then by the authorities, and this allowed them to engineer a solution to the problem that had led them originally to demand the relocation of the structure. This mediation, again, illustrated the potential of the process to 'open the eyes' of the parties in ways that allow for creative solutions, to the benefit of all sides – solutions that are difficult to come by through other methods.

Complaints involving emotional issues often need special attention paid to such elements, and therefore mediation may be more successful in solving some of them, rather than a standard complaint examination. One such example was the case of a man who complained about the way the police dealt with him after he was robbed while attempting to pay homage to the memory of a loved one in a relatively isolated location. The complainant's strong feelings in the matter were obviously connected to the personal circumstances surrounding the event. During the course of the mediation, there was a dramatic change in the communication between the representatives of the police and the complainant. The police representatives expressed their understanding and their regret and the complainant was convinced that his complaint against the officers involved would be dealt with properly.

The above examples are just a small sample of the cases dealt with as part of the mediation pilot of the Ombudsman's Office. The results so far indicate that this framework has often allowed both the public authority and the complainant to stop 'digging in' and fortifying their original positions, and begin uncovering the true interests behind these positions; thus begins the possibility of thinking of options for truly solving the problem involved. The mediation process has allowed the parties to view matters from the opposite perspective; the representatives of the public authority see opposite them a citizen in need, while the complainant sees a human being rather than a bureaucratic entity wielding power arbitrarily. As mentioned, the 'meeting of the minds' between the two sides has sometimes led to dramatic changes in the future dialogue between them.

Another important by-product of the mediation pilot project has been that the authority has worked diligently to implement the agreed-upon solution, in an attempt to prove its *bona fides* to the citizen – and, of course, to the Ombudsman.

For a growing number of complainants – and for many public representatives as well – the mediation project of the Ombudsman's Office has turned into a personal, and public, success story.⁶⁶ The experience until now illustrates the positive effects that utilization of mediation techniques can have within the context of the work of the Ombudsman – for the benefit of the complainants, for the benefit of the public authorities and even for the benefit of the Ombudsman's Office itself.

⁶⁶ Experience has shown that usually one meeting has been enough to bring about a successful resolution of the complaint. See: Annual Report No. 35 of the Israeli Ombudsman (2009), 21.

**Mediation in the Office of the Ombudsman
Summary**

Number of Files Referred to Mediation Track	45
Number of Files Where Complainant Refused Mediation	3
Number of Files Where Public Authority Refused Mediation	3
Number of Files Where Parties Agreed to Mediation	39
Number of Files Where Mediation Was Successful	36
Number of Files Where Mediation Was Unsuccessful and File Was Returned to Regular Track	3
Average Time Spent in Mediation	2.5 hours