

## Mediation in French administrative courts

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# **Mediation in French administrative courts: What lessons for administrative justice?**

## **Abstract**

In 2016, the French Parliament introduced a new chapter on mediation in the Code of Administrative Justice. To succeed, this reform needs to reverse repeated failures in this field. In view of the significant challenge of embedding administrative mediation in the French administrative justice system, the reform and its implementation were informed by empirical findings arising from a mediation pilot set up by the administrative court of Grenoble in Spring 2013. An empirical study of the pilot and of the experience of rolling out administrative mediation in France forms the core of this article and the context in which to revisit foundational questions about mediation and administrative justice. I argue that mediation is not ill-suited to administrative law disputes, but that to be integrated in a system of administrative justice, mediation requires the negotiation of a dedicated environment triggering in turn the emergence of a pluralist administrative justice system.

## **Keywords**

Mediation, Administrative Justice, Legal Pluralism, French Administrative Law, Legislative Reform, Alternative Dispute Resolution.

## Introduction

On 18 November 2016<sup>1</sup> the French Parliament adopted a wide-ranging reform modernising the justice system for the 21<sup>st</sup> century. Among other initiatives, it introduced a new chapter on administrative mediation in the Code of Administrative Justice (CAJ). While French administrative judges have had ‘a mission of conciliation’ since 1986,<sup>2</sup> in reality, conciliation or mediation<sup>3</sup> has been very long in coming to the French administrative courts. The new legislation aimed to ensure that this method of dispute resolution finally took root. To succeed, the 2016 reform would have to reverse long-standing failures and dismantle the barriers that stand in the path of administrative mediation in France.

This is no modest task. Ten years ago, I studied the seemingly parallel rise of mediation in administrative law disputes in England, France and Germany<sup>4</sup> and concluded that mediation would never flourish in the French administrative justice system as then configured. This skepticism reflected known concerns of speed and costs, remaining obstacles to the development of administrative mediation, and a sense that the French administrative justice system was unsuited to its introduction. The question, therefore, was whether these concerns could be addressed and the mindset and systemic challenges that long stymied embrace of administrative mediation in France overcome.

Conscious of the significant challenge of embedding administrative mediation, the reform and its implementation reflected empirical findings arising from a mediation

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<sup>1</sup> See Law n. 2016-1547 of 18 November 2016.

<sup>2</sup> See former article 211-4 of the Code of Administrative Justice (CAJ): ‘In the first instance administrative courts and in the administrative courts of appeal, the president of the court can, if the parties agree, set up a conciliation and appoint the person(s) charged with this mission’.

<sup>3</sup> The terms *conciliation* and *mediation* are used inter-changeably in this article. While there was a debate about their respective meanings in France, the 2016 reform uses the term ‘mediation’, effectively resolving the debate.

<sup>4</sup> All three countries sought to embed court-led mediation in their administrative justice systems; as the organisation of administrative justice had otherwise little in common in all three systems, this case of ‘spontaneous convergence’ piqued my interest, see **citation removed for review**.

pilot set up by the administrative court of Grenoble. I was afforded a rare opportunity to study this ground-breaking pilot in the Grenoble court, and to observe the process of implementing the 2016 reform. This enabled me to confront my earlier findings with recent empirical observations. Through the analysis of French administrative mediation reflecting on this pilot and presented in this paper, I aim to increase understanding of administrative mediation more widely by drawing lessons were appropriate and to explore the conceptualization of mediation for administrative justice.

Mediation is defined in the 2016 law as “a structured process, regardless of its name, by which two or more parties try to reach an agreement so as to solve their dispute amicably with the help of a third-party, the mediator, chosen by them or designated by the court with their consent”.<sup>5</sup> *Administrative* mediation refers to mediation in an administrative law setting in which at least one of the disputants is a public body.

While the literature on administrative mediation remains scant and often practice-oriented,<sup>6</sup> the notion of applying mediation to administrative law settings is challenging, with some suggestions that it is ill-suited to an administrative law context. There are a number of reasons for this. First, concerns regarding speed and costs of administrative mediation and consistency of outcomes must be addressed. Second the imbalance of power within an administrative dispute needs to be overcome. Third the tensions between public law principles of accountability and transparency, and the mediation principle of confidentiality, needs to be resolved. Fourth, the apparent incompatibility of adjudication and mediation as administrative justice mindsets and paradigms must be managed. However, until now there has been

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<sup>5</sup> See art. L 213-1.

<sup>6</sup> See for instance, J-M Le Gars, ‘La conciliation par le juge administratif’ 2008 AJDA 1468, B Blohorn-Brenneur & J Biancarelli (eds), *Conciliation et médiation devant la juridiction administrative* (L’Harmattan 2015), J-M Le Gars, ‘La juridiction administrative saisie par la médiation’ 2016 AJDA 2272, A Minet-Leleu, ‘La médiation administrative’ 2017 RDP 1191, S Deygas, ‘J 21: la médiation existe enfin en matière administrative’ Février 2017 (2) Procédures Etude 8; in the UK, V Bondy & L Mulcahy (with M Doyle & V Reid), ‘Mediation and Judicial Review: An empirical research study’ (PLP 2009).

limited empirically-grounded work that investigated these challenges and proposed remedies.

This paper and the empirical findings that underpin it challenge my earlier assessments of the likely success of administrative mediation in France. It offers an empirically-informed perspective on how groundwork, organisation and leadership can create the conditions in which administrative mediation can successfully be embraced. More broadly, it takes the experience of rolling out administrative mediation in France as the context in which to revisit foundational questions about mediation and administrative justice. I argue first that mediation is not ill-suited to administrative law disputes, second that mediation and adjudication can coexist despite their significant differences, and third that to be integrated in a system of administrative justice, mediation requires the negotiation of a dedicated environment triggering in turn the emergence of a pluralist administrative justice system. If that is the case, orthodox accounts of administrative justice are inadequate in light of this emerging reality, and the need to recognise and theorise the pluralism of administrative justice is pressing.

The paper is organised in five parts. First I provide a concise explanation of the challenging context and history of attempting to introduce administrative mediation in France (Part 1), after which I briefly outline the methodological approach adopted in the study (Part 2), and then, the Grenoble pilot and what it told us about the possibility of administrative mediation (Part 3). Part 4 outlines the 2016 law reform, showing how the lessons from Grenoble reflected its formation and informed its implementation in order to overcome the difficulties identified in Part 1. Finally, building on the French experience, Part 5 will expand the existing theoretical understanding of administrative mediation and the challenges it brings to a system of administrative justice.

## **1. The introduction of administrative mediation in France: a long history of failure**

France has repeatedly tried (and failed) to introduce administrative mediation. This long history of failure starts with Article 22 of the law of 6 January 1986, which

recognised a “mission of conciliation” in first instance administrative courts.<sup>7</sup> While this law refers to conciliation, efforts moved to mediation – a more widely known dispute resolution mechanism. Over the next 30 years, various initiatives were adopted to promote the use of administrative mediation/conciliation, however they were sporadic, irregular, and lacked follow up.<sup>8</sup> In 1993, the Conseil d’Etat produced a report entitled ‘Solving disputes differently’<sup>9</sup> that promoted the use of ADR in the administrative courts and the administration, leading to the adoption in 1995 of a circular ‘informing’ the civil service and all public bodies of the availability of settlements when solving disputes.<sup>10</sup>

In 1999, due to a lack of progress, a working group chaired by President Labetoulle, a senior member of the Conseil d’Etat, aimed to encourage the use of conciliation in the administrative courts. The committee drafted a set of informal guidelines, but judged it unnecessary to adopt any formal implementation. Consequently, obstacles such as the two-month time-limit for judicial review, the financial costs of mediation, and the bindingness of mediation agreements were never addressed, contributing to a lack of concrete progress. Finally, in 2002, at the request of the administrative court of Melun, the Conseil d’Etat recognised the practice of ‘certification’ of conciliation agreements, thereby granting them the same legal effect as court judgments.<sup>11</sup> This meant that one possible hurdle—enforceability and bindingness—was overcome, but there was nevertheless a distinct lack of progress. This only intensified in the period between 2002 and 2008 when momentum seemed to be lost and there was a dearth of initiatives oriented towards the adoption of administrative mediation.

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<sup>7</sup> See Article 22 of law n. 14-86 of 6 January 1986: ‘The administrative courts exercise also a mission of conciliation’.

<sup>8</sup> For instance, see J-M Le Gars, ‘La conciliation par le juge administratif’ AJDA 2008 p. 1468 and J-M Le Gars & S Wegner, ‘Evolution de la médiation et de la conciliation devant la juridiction administrative française’ in B Blohorn-Brenneur (ed.), *Les nouveaux enjeux de la médiation* (L’Harmattan 2016).

<sup>9</sup> *Résoudre autrement les conflits: conciliation, transaction, arbitrage en matière administrative* - Rapport du Conseil d’Etat (1993).

<sup>10</sup> Circular of 6 February 1995 concerning the development of settlements to solve disputes amicably, JO of 15 February 1995, p. 2518.

<sup>11</sup> CE Ass. 6 December 2002 Advice n. 249153 Haÿ-les-Roses.

However, EU law reignited matters in 2008, with the adoption of the Directive on Certain Aspects of Mediation in Civil and Commercial Matters.<sup>12</sup> While the Directive required that mediation be offered in the large majority of cross-border disputes, it aimed to promote access to mediation more generally. In response, the Conseil d'Etat published a report on 'developing mediation in the context of the European Union',<sup>13</sup> and the Directive was transposed into domestic law by the Ordinance of 16 November 2011. This Ordinance introduced mediation for trans-border disputes in the Code of Administrative Justice, finally lodging administrative mediation to at least some degree in the relevant domestic law. In December 2011, the mission of conciliation was extended to administrative courts of appeal,<sup>14</sup> and a further circular (replacing that of 1995) 'reminded' the administration that settlements should be used to prevent and solve disputes whenever possible.<sup>15</sup>

The 2008 Directive, thus, did lead to a limited doctrinal embrace of administrative mediation,<sup>16</sup> but systemic challenges to its full embrace remained. Even after 30 years of commitment to conciliation there was no formal implementation, judges had never received any mediation or conciliation training, and the various 'initiatives' failed to embed a practice of conciliation/mediation in the administrative courts. This was the context in which commentators, including me, had developed a skepticism about the likely success of administrative mediation in France.

That skepticism was only exacerbated by an awareness of the unsuitability of the French administrative justice system to the introduction of administrative mediation (and ADR more generally). Although, by 1986, administrative courts had developed an effective system of review of administrative decisions, administrative justice was remote from the citizens it aimed to serve. While administrative courts applied rigorous scrutiny to the question of the legality of administrative acts, remedies for

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<sup>12</sup> 2008/52/EC of 21 May 2008.

<sup>13</sup> *Développer la médiation dans le cadre de l'Union européenne* - Rapport du Conseil d'Etat (2010).

<sup>14</sup> Law n. 2011-1862 of 13 December 2011.

<sup>15</sup> Circular of 6 April 2011 concerning the development of settlements to solve disputes amicably, JO 8 April 2011.

<sup>16</sup> Mediation has never been used to solve a cross-border dispute as yet.

illegality were limited to quashing decisions,<sup>17</sup> delivering a rather abstract and often delayed kind of administrative justice.<sup>18</sup> Also, administrative courts were victims of their own success: they were struggling with a spiraling caseload and long delays in hearing cases. Furthermore, more claimants were complaining to the courts that judgments in their favour remained unexecuted. Finally, no thought had been given to how mediation might be pursued in a system of inquisitorial and written procedures. In this context it seemed optimistic, at best, to think that administrative courts could and would adopt a conciliation mission and have the resources and capacity to implement it within their already strained circumstances.

However, the situation has changed. First, while the caseload has continued to grow,<sup>19</sup> administrative courts are now more efficient and better resourced, and the average time for a judgment has been noticeably shortened.<sup>20</sup> Reforms have given administrative courts tools to intervene in urgent circumstances,<sup>21</sup> diversified the remedies available to judges,<sup>22</sup> and tried to ensure a more timely execution of

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<sup>17</sup> This is called *Recours pour Excès de Pouvoir* (or Review for Excess of Power) and it is the functional equivalent of Judicial Review.

<sup>18</sup> In the iconic *Benjamin* case regarding the ban of a literary conference (CE 19 May 1933), the Conseil d'Etat proclaimed the fundamental character of freedom of assembly, applied an 'anxious scrutiny' and vindicated Benjamin but handed down the decision three years after the ban.

<sup>19</sup> In 2016, 234 460 new cases were introduced in the administrative courts. This needs to be contrasted with the figures for 2006 (170 000), 1991(70 000) and 1976 (20 000).

<sup>20</sup> In the last decade, the average time for a judgment decreased from 2 years to 16 months in the administrative courts, from 3 years to 14 months in the administrative courts of appeal and from 14 months to less than 10 months in the Conseil d'Etat.

<sup>21</sup> Since 2001, administrative courts can issue *référé*s (interlocutory injunctions): the *référé-liberté* orders the administration to act/cease to act when a decision violates a claimant's fundamental right in a serious and manifestly illegal manner (art. L521-2 CAJ) and the *référé-suspension* stays an administrative decision for reasons of urgency when there are serious grounds for believing the decision to be illegal (art. L521-1 CAJ).

<sup>22</sup> This evolution results from a combination of legislation and case law, see F Blanco, *Pouvoirs du juge et contentieux administratif de la légalité: contribution à l'étude de l'évolution et du renouveau des techniques juridictionnelles dans le contentieux de l'excès de pouvoir* (PUAM 2010).



judgments.<sup>23</sup> Administrative justice has shifted its focus to embrace better the reality of claimants' experiences. By the time of the 2016 reform, the administrative justice system was arguably in a better position than it had ever been to fulfill the conciliation mission that had so long remained somewhat notional.

## 2. Methodology

This study of administrative mediation in France is based on my observation of the mediation pilot set-up in Spring 2013 by Vice-President Wegner of the *tribunal administratif* of Grenoble,<sup>24</sup> and on my participation in the implementation of the 2016 reform.

### 2.1.1 The Grenoble mediation pilot

Having established the pilot in Grenoble in Spring 2013, Vice-President Wegner engaged with me in Summer 2016 to co-design an observation study, which involved elements both inside and outside of the court. The study was designed to help me develop an opinion, but not a formal evaluation, of the pilot from which guidance might be developed on the nature of disputes suited to mediation. For my part, I was keen to investigate this rare pilot particularly given my earlier work. In designing the study, we were influenced by methodological and fieldwork accounts taken from anthropology and organisational research with the work of Bruno Latour<sup>25</sup>, a notable inspiration.<sup>26</sup>

Within the court, the study combined two months of participant observation (December 2016-January 2017) with complete access to all 45 mediation court files and full access to all activities relevant to the mediation pilot. Following the observation period I held a feedback session at which my preliminary findings were presented to and discuss with judges and clerks of the Grenoble court.

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<sup>23</sup> A law of 8 February 1995 gave administrative courts the power to issue a 'preventive' injunction detailing the steps for enforcement or issue an injunction once a judgment's execution is contested or delayed.

<sup>24</sup> Wegner was one of eight Vice-Presidents in the Grenoble court. Each Vice-President heads a chamber of the court.

<sup>25</sup> *La fabrique du droit*, (2009, Poche).

<sup>26</sup> See also B Morean *Ethnography at work*, (2006, Berg) and T Eriksen *small places, large issues: An introduction to social and cultural anthropology*, (2015, Pluto Press).

Outside the court, the study comprised three elements: participation in a one day mediation training workshop attended by all of the mediators acting for the administrative court, observation of the meetings of all live mediations over the period of observation (three in total), and semi-structured interviews with key actors in the mediation pilot: namely mediators regularly appointed by the court (6), public law barristers who had either proposed a mediation to the court or represented a party in mediation (5), and civil servants in local authorities' legal or HR departments who had been involved in at least one mediation (5), and finally, the coordinator of the Centre for Mediation, the court's main mediation provider.

During this period, I was careful to limit any direct participation in the pilot's activities. However, towards the end, I organised to survey all new cases of one chamber with a view to trialing my list of indicators for the identification of mediation disputes. I recommended mediation in those cases I judged suitable. Upon my departure, the few that met with the approval of the chamber's president were forwarded to the newly appointed mediation champion for his decision.

### 2.1.2 The implementation of the 2016 reform

In January 2017, I was invited to sit on the National Steering Committee on Administrative Justice and Mediation, which was the body charged with securing the implementation of the 2016 reform. The committee's president was interested in the Grenoble pilot and the identification of mediation cases, both of which I had insight on following my time observing the pilot. For myself, this was an opportunity to observe (and possibly inform) the implementation of a key reform. All but one of the committee meetings took place after the observation period in Grenoble. From February 2017, my participation in the meetings was informed by the practice of observant-participation.<sup>27</sup> Importantly, I only ever joined in the discussions and

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<sup>27</sup> This concept was coined by B. Morean 'From participant-observation to observant-participation: anthropology, fieldwork and organizational ethnography' Creative Encounters Working Papers n. 2 (July 2007). If the opportunity arises, he advocates increasing participation in the activities of the community or organisation under observation, to move from observant-participation to participant-observation for better access to and truer interactions with people.

argued points on the basis of my findings, understanding and experience of the Grenoble pilot.

### **3. The Grenoble pilot**

To understand the 2016 reform, it is important to begin with the mediation pilot. This pilot played a key role in the reform process: not only are its choices reflected in the law of 18 November 2016, but it trialed many solutions reproduced in the implementing legislation. In this section, I present an account of the Grenoble pilot, reflecting my experience of observing the pilot and, subsequently, participating in the implementation of the 2016 reform.

#### *3.1 The structure of the pilot*

To an outsider, the choice of Grenoble as a place to trial administrative mediation may seem random. However, mediation has been relied upon in Grenoble's private law courts since the mid-1990s. This meant that Grenoble has a local culture of mediation and a large pool of professional mediators available for the pilot. Vice-President Wegner was personally responsible for introducing and running the court-led pilot. Before the pilot's launch, the ground was carefully prepared outside the court by negotiating a formal agreement with key stakeholders: the court, the town of Grenoble, the *département* of Isère, Isère's centre for local government's civil service, the Bar of Grenoble, and the Centre for Mediation of the Chamber of Commerce and Industry. This agreement stated that it aimed to implement the mission of conciliation of the CAJ<sup>28</sup> and listed the substantive areas likely to attract a resolution via mediation (e.g. public employment, planning, public procurement, social welfare). In addition, it removed many of the practical obstacles to the development of administrative mediation by:

- indicating that mediation would be triggered by agreement from both parties after proposal by one party or judge

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<sup>28</sup> See former L. 211-4 CAJ.

- allowing the suspension of the two-month time-limit
- regulating the duration - three months renewable once
- granting the option of ‘certification’ by the court of a mediation agreement,
- regulating mediation costs - equal share of mediation costs between all disputants
- safeguarding both impartiality and confidentiality
- adopting an ethics charter

The conclusion of the agreement gave the opportunity to begin acculturating key actors – including from the public sector – as well as to ensure buy in from all stakeholders.

In France, introducing an action in the first instance administrative courts is free, does not require a barrister (although claimants usually instruct one) and legal aid is available, thereby creating financial incentive to go to court rather than mediation. Consequently, Vice-President Wegner tried to address the question of mediation costs: a €500 ceiling price per mediation was negotiated with the Centre for Mediation and free access to meeting rooms. Furthermore, the Grenoble court has two judges, both trained mediators, who acted for free when a disputant could not afford the mediation costs.<sup>29</sup> Finally, in employment disputes, public authorities were ‘encouraged’ to cover the mediator’s fee in full.<sup>30</sup> Still, mediation was not ‘the cheapest option’ for some disputants (especially if they had not planned to instruct a barrister for their court action).

This careful set-up contrasted markedly with the lack of organisation inside the court. There, responsibility and day to day running of the pilot rested entirely with Vice-President Wegner. No clerk was allocated to this new function and no process was put in place for the identification of mediation cases. While the pilot had the support of the court’s president, the extra work was simply shouldered by Vice-President

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<sup>29</sup> If the mediation failed, the judge-mediator would not be allowed to work on the case after it returned to court.

<sup>30</sup> Employment disputes are covered by the experiment in compulsory mediation and consequently mediation is now free for those disputes.

Wegner without workload adjustment. This had consequences for the development of the pilot.

### *3.2 Identifying disputes for mediation*

Vice-President Wegner played a pivotal role at the start of most mediations during the pilot by identifying suitable disputes and choosing the mediator.

With no internal process, mediation disputes were identified in an artisanal fashion: Vice-President Wegner reviewed at irregular intervals the case lists of chambers that dealt with public contracts, public employment disputes, public works etc. In addition, colleagues would signal to him cases they thought might be suitable early in the court's process. After perusing the file and discussing it with the judge responsible for the case, Vice-President Wegner would decide whether to propose mediation; if so, approval of the chamber's president was sought. For this to work, all interlocutors needed to be convinced of the benefit of mediation. As support for the pilot varied with individual judges, this identification was neither uniform nor systematic. Vice-President Wegner was not in a position 'to catch' all potential mediation disputes and would never have had the capacity to handle them. While the pilot was well-known in the court due to the seniority and standing of Vice-President Wegner, it was generally seen as sitting at the margins of the court's work due to the small numbers of cases involved.

Vice-President Wegner (and his colleagues) were driven by the belief (which itself motivated the pilot) that some disputes are better resolved through mediation. This mediation mantra drove the pilot and guided the identification of mediation disputes. In addition, and recognizing mediation as a voluntary process, the court tended to propose mediation (if appropriate) when one or both parties requested it.

Analysing the features of Grenoble's past mediation cases, at the end of the observation period I developed a list of indicators that systematised Vice-President Wegner's practice in identifying cases for mediation. These indicators were not applied during the observation period or to the pilot as a whole, and thus did not distort the existing practice of the court. These were that the dispute:

- i) has a degree of urgency;
- ii) requires a bespoke solution (beyond the range of judicial remedies);
- iii) is wider or the interests more numerous than the one(s) in litigation so that the judicial process would not resolve the real dispute or reach all disputants;
- iv) has complex facts with mediation being a better forum for their exploration than the court's written procedure;
- v) is emotionally charged (with the judicial process unable to pacify them);
- vi) concerned the disputants with an on-going relationship that may be compromised by the judicial process;
- vii) concerned disputants that are both public bodies (often a symptom of administrative dysfunction beyond the reach of the judicial process).

A review of the practice also suggested that some features tended against mediation. I identified these as follows:

- i) (psychological or mental) vulnerability of a disputant;
- ii) the need to decide a point of law;
- iii) public order considerations
- iv) the possible manipulation of the mediation by one or both disputants for harmful aims

### *3.3 Choosing the mediator*

Appointing the mediators was the responsibility of Vice-President Wegner. He knew (and had sometimes trained with) the mediators and took care to appoint who he considered to be the 'right' mediator for a given dispute, often after discussion with the coordinator of the Centre for Mediation. All mediators were fully qualified with years of mediation experience, but Vice-President Wegner chose individual mediators for their legal expertise and experience in the substantive area of the dispute (public procurement, public works, public employment etc). This enabled mediators to rely on their knowledge of the legal context, policy background and administrative landscape to strengthen their facilitative capabilities.

The court chose to appoint external mediators in 80% of mediation cases. For the remaining 20%, one of two in-house mediators was appointed to reduce costs for the parties or to reassure the parties in sensitive disputes.

### *3.4 The practice of mediation in the Grenoble pilot*

From my observation and interviews it became clear that through the Grenoble pilot a distinct practice of mediation had developed in respect of type, process, and duration of mediation. I consider all three of these in turn.

#### 3.4.1 Type of mediation

Although evaluative mediation tends to be favoured<sup>31</sup> in public law settings, mediators practiced facilitative mediation with quasi-systematic reliance on joint meetings. Sometimes called ‘pure mediation’, this concentrates on the needs and interests of the parties, favours problem solving, and limits the mediator’s role by making the parties (with their legal representatives) responsible for finding a solution.<sup>32</sup> In Grenoble, the use of facilitative mediation reflected a genuine attempt to move away from the limitations of legal discourse and strictures of inquisitorial judicial procedure. From my observations and interviews, it became clear that while mediators were careful to avoid suggesting solutions, they took an active role in shaping the resolution process, through restatements, judicious questioning and making demands.

The use of facilitative mediation arguably increases the risk of power imbalance in administrative mediation. However, it was clear from my observation and interviews that mediators were alive to this issue and sought to address it in several ways. First, they ensure that individual disputants had the time to explain the problem(s), present their demand(s) and formulate solutions. Second, mediators insisted on constructive participation of both disputants. For example, I witnessed mediators challenging the choice of the authority’s representative when this threatened to impede progress (e. g. because of the representative’s lack of authority); in the pilot, it was standard practice

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<sup>31</sup> Evaluative mediation tends to focus on the legal entitlements and rights of parties, the mediator playing an active role and bringing to bear her substantive expertise to provide advice, evaluate the claims and propose a solution.

<sup>32</sup> See L Boulle & M Nesic, *Mediation: principles, process and practices*, (Butterworths 2001) 27.

for a line manager or elected representative (e.g. mayor) to represent the public authority. I have also observed mediators (successfully) demand that public authorities brought viable solutions to the table. Third, mediators relied on legal representatives to generate a better level-playing field between the disputants. For the great majority of mediations I surveyed or observed in Grenoble, disputants were legally represented at the mediation meetings. By supporting their clients throughout the process particularly when formulating solutions or advising on proposals, barristers helped mediators to create a space for bona fide problem-solving. Fourth, mediators' practice of supporting the consultation of other public bodies or experts when necessary was often instrumental in bringing knowledge of possible solutions to the disputants, which tended to empower private disputants and further level the playing field.

#### 3.4.2 Process of mediation

In the Grenoble pilot, the search for a solution shaped the organisation of mediation meetings, the choice of participants and the consultation of other public bodies or experts.<sup>33</sup> This freedom in designing the mediation and its process is one main advantage. All 'interested parties' can be invited to participate, not just the parties in the case. For example, one case involved a local authority that had contracted a public works corporation to restore the confluence of two rivers. The work caused the adjoining road to subside and was stopped while repairs were undertaken. Then soon after the contracted work had been completed an exceptional flood mostly destroyed it. In this case, the contractor, sub-contractors, project manager and local authority all participated in the mediation, even though sub-contractors could never have been a party in the administrative court case.<sup>34</sup> Flexibility in process thus allowed a fuller dispute resolution to be pursued here.

Flexibility also allowed for public participation to be fostered. This is well illustrated by another case, which involved a sale of land from a local government. This was blocked because of strong opposition in the village, despite the buyer having fulfilled

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<sup>33</sup> The choice of participants is often key to success, see for instance, Boulle & Nesic, (n 32) 120.

<sup>34</sup> Because of the French public-private divide, all disputes involving sub-contractors come under the jurisdiction of the private law courts.



all the pre-conditions and acquired the right to buy. The case involved strong emotions among inhabitants and elected representatives. When the local council rejected the first mediation agreement, the mediation was opened to those who opposed the sale, even though they were not disputants in the case. This resulted in frank discussions between the opposition and the prospective buyer, in the re-drafting of land use restrictions in the mediation agreement, and ultimately of the sale being completed. Here mediation complemented the local government's decision-making process and gave a voice to the local community.

The Grenoble pilot also revealed the role that can be played by other public bodies when canvassing the viability of a solution in mediation. In one mediation concerned with damage caused in part by public works to a private but listed property, the *Bâtiments de France*'s<sup>35</sup> advice that the repairs need not use the same (expensive) traditional method as had been used prior to the damage, helped to lower the cost of repairs and for the parties to reach a financially viable agreement through mediation.

#### 3. 4. 3 Duration of mediation

Mediation is commonly presented as a time saving device. However, the pilot demonstrated that administrative mediation is not particularly speedy. On average, it took nine months for parties in a successful mediation to reach an agreement and withdraw their action. While the 2013 agreement imposed a limit of six months, in reality, Vice-President Wegner renewed on request while progress was being made. This flexibility in terms of duration proved to be important. It became very clear that bespoke solutions (discussed below) take time to be formulated and for their acceptability to be explored. In addition, there was often a significant period between signing the agreement and withdrawal of the action, explained mostly by the need for the agreement to be endorsed formally by the public authority. While the latter mode of endorsement is French specific and unlikely to happen elsewhere, with an average of eighteen months for a judgment in Grenoble, mediation is still quicker than the judicial process and carries no risk of appeal.

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<sup>35</sup> The *Bâtiments de France* is the public authority of State architects responsible for urban conservation and heritage.

### *3.5 The mediation agreements*

From my observations, interviews and survey of the pilot, it became clear that the mediation agreements arrived at in the Grenoble pilot aimed to frame bespoke but legal solutions.

#### 3.5.1 The outcomes

In the Grenoble pilot, many parties chose mediation to design bespoke solutions. In 60% of successful mediations, the agreement contained a solution that would not have been available (easily or at all) through the administrative court process. To give a flavour of these, are reproduced below four disputes with their outcomes:

Dispute 1: A dispute about the fee structure of a public domain concession contract for the management of a major regional transport infrastructure triggers the introduction in rapid succession of six court actions while the contract has still 14 years to run. The managing company argued that the fees' calculations rested on inaccurate forecasting of costs and of profits. The dispute threatened the continuity of the contract despite this transport infrastructure being central to the regional economy. The mediation resulted in the following: cancellation of the 2010 payment for the public service contribution fees and cancellation of the public domain occupancy fees for the first two years of the contract. In addition, the contractual provision containing the fee calculation was re-drafted and applied to year 3 and for the future.

Dispute 2: The sale of land from a local government was blocked by a local authority because of strong opposition in the village, despite the buyer (who was originally from the village) having fulfilled all the pre-conditions and acquired the right to buy. A first mediation between the buyer and the representative of the local authority led to an agreement. However, the council of the local authority when asked to endorse it, altered the drafting of the strict easements and use of land restrictions. An additional mediation meeting was organised with the buyer, the representative of the local government and those opposing the sale. After a frank discussion that helped clear several misunderstandings, a new agreement was arrived at with easements and use of

land restrictions redrafted to address local concerns. The sale was then approved by the local authority and completed.

Dispute 3: The Rectorate,<sup>36</sup> having committed itself to ‘lending’ a music teacher to a new local public authority for people living with disability, later ‘forgot’ to do so through loss of institutional memory, forcing the authority to employ a costly replacement. In addition to solving the immediate dispute - compensation for employing a replacement-, the mediation allowed the creation of processes and the identification of contacts in both authorities to avoid recurrence.

Dispute 4: A local authority contracted a public works corporation to restore the confluence of two rivers. The work caused the adjoining road to subside and was stopped while repairs were undertaken. Then soon after the contracted work had been completed an exceptional flood mostly destroyed it. The contractor, sub-contractors, project manager and local authority were all in dispute over the repairs, the various liabilities and the share of the costs. However, according to French administrative law sub-contractors cannot be a party in an action before the administrative courts. Consequently, there was a danger that the court failed to solve the dispute for all. The mediation allowed all disputants to agree on their individual share of liability, the repairs needed and the apportionment of costs.

The presence of legal professionals in the mediation I observed did not result in the ‘law-ification’ of the debates: legal claims were not made to justify demands (or their rejection). Instead, all present concentrated on solving the root cause of the dispute. Notwithstanding this, however bespoke the solution, my observations and interviews reveal a clear understanding among mediators, barristers and public authority representatives that the mediation agreement needed to be legal. Importantly, the ethics charter attached to the 2013 Agreement describes the role and obligations of mediators and specifies in article 11 that:

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<sup>36</sup> The Rectorate is responsible of all public education (from primary school to university) in the academic region and ensures the implementation of the Ministry of Education’s policy in the academic region.

*[the mediator] acts in compliance with the law: he/she immediately reminds the parties that any proposal that does not respect public order or the interests of concerned third parties causes the mediation to be stopped immediately.*

From evidence on file, Vice-President Wegner was sometimes consulted by mediators on behalf of both disputants as to the legality of specific solutions. While Vice-President Wegner worried that his advice might compromise the mediation process, this practice speaks to the concern about legality. Consultation of other public bodies or external experts was often aimed at eliciting advice on the acceptability (including legality) of solutions or about ‘legal’ alternatives. The fact that the pilot was court-led and that key actors in mediation are legal professionals or legally trained (e.g. civil servants) goes some way to explaining this common commitment to legality and the Rule of Law. Furthermore, the legality of mediation agreements can be challenged in the administrative courts. Often the process of certification is used to preempt a legal challenge.

### 3.5.2 The certification of mediations agreements

The administrative court of Grenoble only required to be informed that an agreement had been reached, not of its content. Vice-President Wegner wanted to protect confidentiality and highlight the independence of the mediation process from the court. An agreement’s content was only divulged to the court when disputants asked for certification. The court tended to discourage this: Vice-President Wegner worried that focusing on certification would compromise the search for a creative solution. He also wanted to avoid legitimizing mediation through the judicial process and increasing the court’s workload. Five certifications (11%) were sought during the pilot and all were granted (e.g. the mediation agreement of dispute 1).

### 3.5.3 Compliance

No problem of compliance with a mediation agreement arose during the pilot, a notable contrast from the problems over execution of court judgments mentioned previously.

## *3.6 A relative success*

Set up in Spring 2013, the pilot operated for four years until it was overtaken by the new legislation. While defining ‘success’ in mediation is a minefield, the court settled on the withdrawal of the action. By that definition the pilot might be described as (very) small but successful. Over the four-year period of the pilot, there were 45 mediations (covering 58 disputes)<sup>37</sup>, with 75% of the associated actions being withdrawn. In all but one,<sup>38</sup> a mediation agreement was signed between the disputants. For the remaining 25%, the case simply continued in the court. This success rate may seem an achievement but an average of 11 mediations per year is (very) little in view of the 8000 new cases introduced in the Grenoble court every year. This very low figure is largely the product of the pilot’s set-up: Vice-President Wegner had little spare capacity.

Furthermore, over the same period, public bodies rejected outright approximately 50% of all mediation proposals. This rejection rate is troublesome, particularly since Vice-President Wegner sometimes attempted to talk the public authority into accepting mediation when a private party had already done so. This suggests that further work is needed to shift the mindset of public authorities to accept mediation when proposed rather than pushing for a court judgment.

However, overall the pilot suggested that administrative mediation *can* work and, when an agreement between the disputants is reached, that it is an effective method of dispute resolution including in French administrative context. Importantly, neither the pilot nor the 2016 reform made claims of time or cost savings. In fact, administrative mediation may be quicker than a judgment, but it takes longer than anticipated. Even though, steps were taken to minimise financial costs for the disputants, mediation is more costly than a court action for some disputants. Furthermore, administrative mediation can give rise to worries of inconsistent treatment between those individuals benefitting from a mediation agreement and those who do not. However, the particularity of disputes and of the solutions agreed upon mean that (in)consistency may not be a matter for concern. In reality, these bespoke outcomes were not transferable to other disputes. Inconsistency could become a concern if the basis

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<sup>37</sup> Some mediations tackled together multiples court actions or disputes.

<sup>38</sup> In this case, the claimant just withdrew the court case.

for identification of mediation disputes changed. Furthermore, granting an advantage to a disputant to the exclusion of others in the same situation would constitute a clear breach of the French constitutional principle of equality, a principle firmly protected by all French courts.

Still the full compliance from public authorities where they participate in the mediation is significant.

Critically, the pilot confirmed that administrative mediation needs formal implementation to remove the obstacles to its development, and will be aided by the commitment of a ‘mediation champion’ within the court. This suggests that successful implementation of administrative mediation requires not only legislation but also committed leadership so that mediation grows. Overall, the Grenoble pilot, then, pushed back against assumptions from previous research as well as the history of failure outlined in Part 1 to underpin the claim that it was realistic to move towards implementing mediation on a national basis. In this respect, the 2016 law reform was a momentous development.

#### **4. 2016: A ground-breaking reform**

The 2016 law added a chapter to the CAJ with the aim of regulating administrative mediation; it established also an experiment for compulsory mediation. The new chapter is divided in three sections: the first and general section contains a standard definition of mediation,<sup>39</sup> lists the qualities that a mediator must possess (impartiality, competence and diligence), regulates confidentiality and recognises the possibility for the certification of a mediation agreement. The other two sections regulate separately mediation triggered by the parties outside of any legal action and mediation triggered by a judge (on request or approval of the parties) once an action is introduced in the administrative court. Both sections set down detailed rules that aim to remove previous obstacles to mediation.

##### *4.1 The new law*

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<sup>39</sup> See article 213-1 CAJ.

The new legislation mirrors many choices made by the Grenoble pilot and consequently, removes the previous obstacles to administrative mediation in France. In particular, it suspends the two-month time limit for triggering judicial review, recognised as a major obstacle to mediation. Second, it allows for legal aid to cover mediation costs where mediation is triggered by a judge (compulsory mediation is free). It also allows for pro bono work by mediators. Removing the time and cost barriers, then, enabled parties to opt for mediation in a reasonably low-risk way. Third, the law allows for the certification of mediation agreements, thus strengthening their legal effect where desired by parties. All of these innovations, then, reflect the experience in Grenoble to address systemic barriers to administrative mediation.

In addition to this, Parliament introduced an experiment for compulsory mediation for social welfare and public employment disputes. In essence, these are the most disputatious areas of French public administration, with the possibility that it will create a rich dataset for further study and provide an impetus for the deployment of mediation across the public sector.

#### *4.2 Implementing the new law: Grenoble's influence*

The secondary legislation required to give effect to the new law was adopted on 18 April 2017<sup>40</sup> and the reform came into effect on 1<sup>st</sup> January 2018. In the period between the passage of the new law and its coming into effect, close attention was paid to the results of the Grenoble pilot. The Conseil d'Etat established a National Steering Committee on Administrative Justice and Mediation (NSCAJM), chaired by President Libert, honorary Administrative Court President. The administrative court of Grenoble was well represented on the NSCAJM with its two judges-mediators and later myself being members. This presence allowed for the Grenoble experience to be brought to the Committee, and provided decisive in respect of four issues: choice of mediators, duration of mediation, role of the court, and identification of the mediation disputes.

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<sup>40</sup> Decree n. 2017-566 of 18 April 2017 concerning mediation in the disputes coming under the jurisdiction of the administrative judging.

As outlined in Part 3, the practice in Grenoble was to appoint mediators who are both experienced mediators and experts in the subject-matter of the dispute. This ‘double qualification’ is not standard mediation practice, particularly when practicing facilitative mediation. However, new article R 213-3 CAJ reproduces this double requirement, clearly influenced by its successful deployment in Grenoble. More controversial was the decision to appoint administrative judges as in-house mediators, as was the practice in Grenoble. Concerns were expressed in the NSCAJM about administrative judges’ lack of formal mediation training: some members felt that mediation should be entirely ‘externalised’, while others argued that it would be counter-productive to side-line those judges with knowledge of mediation, as they could play a key role in implementing the reform in their court. In the end, new article R 213-3 CAJ requires all mediators to have mediation training or experience, thus enabling judges to act as in-house mediators where they have the required qualification.

With regard to the issue of duration, the original draft reproduced the provision contained in Grenoble’s 2013 Agreement and imposed a three months time limit renewable once. However, in practice the time limit was frequently extended beyond six months. So learning from the pilot, the final text imposed no time limit but left the duration of mediation to the discretion of the court.<sup>41</sup>

The regulation makes it clear that throughout the mediation process, the overall responsibility for the dispute remains with the court.<sup>42</sup> For instance, according to article R 213-8 CAJ, the court can order interlocutory measures during this period. In addition, the regulation stipulates that the mediator can inform the court of any difficulties encountered during the mediation, allowing the mediator to seek advice or simply to discuss a problem. Again this matches the practice in Grenoble where Vice-President Wegner was always available to discuss difficulties,<sup>43</sup> but mediators acted with complete freedom and independence.

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<sup>41</sup> See art. R 213-8 CAJ.

<sup>42</sup> See art. R 213-5 CAJ.

<sup>43</sup> From evidence on file, this happened albeit exceptionally.



The identification of mediation disputes is critical to the successful deployment of administrative mediation. Still, developing a means of identifying such disputes is anything but straightforward. For this reason, the NSCAJM adopted the list of indicators trialed in Grenoble, as discussed in Part 2 above. The list was included in the national judicial guideline and now guides identification of cases for mediation throughout the country.<sup>44</sup>

Building on the legislative measures and judicial guidance, and drawing upon the experience of the Agreement and groundwork in Grenoble, national and local implementation strategies were developed to maximise the adoption and practice of administrative mediation across the country. The NSCAJM instigated the compilation of a national list of mediators for use in the administrative courts and organised a training programme of sensitisation to mediation aimed largely at administrative judges. In between committee meetings, President Libert toured the country and the administrative courts to present the new legislation, smooth the path of the reform with the relevant Government departments and administrative authorities, set up a network of partners for the compulsory mediation experiment, and meet a wide range of stakeholders to ensure their support. Thus, President Libert adopted a systematic strategy of information and consultation with national stakeholders to ensure the successful implementation and acclimatisation of administrative mediation. In addition, the Conseil d'Etat signed on 13 December 2017, a national framework agreement with the National Bars Council that promoted the use of administrative mediation among legal professionals. Finally, to ensure that mediation became a reality in all of the country's forty-two first instance administrative courts, the Conseil d'Etat encouraged the appointment in each court of mediation champions, mirroring closely the approach of Vice-President Wegner in Grenoble and created an achievable target for mediation cases (1% of the annual caseload of each court for 2019, i.e. a total of 80 for the Grenoble court).

Following on from its pilot, Grenoble revisited its pre-pilot strategy and expanded it, signing Agreements with the Bars of the three remaining *départements* under its jurisdiction in order to be able to recommend mediation whatever the claimant's place

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<sup>44</sup> See *Vademecum de la Médiation* – Conseil d'Etat (Juin 2017).

of residence. Furthermore, the President of the court and the mediation champion organised a series of meetings with the legal departments of several public bodies within the court's jurisdiction to present the reform, signal the court's support and discuss ways of growing mediation together. Consequently, new relationships, working practices and pathways were being forged to strengthen the local readiness for administrative mediation. Inside the court, one of the two judge-mediators was appointed mediation champion following the departure of Vice-President Wegner. New pathways have been set-up to ensure a better identification of mediation disputes and a clerk has been appointed to support the work of the mediation champion. Finally, to ensure that mediation takes its rightful place in the practices of the court, the President is contemplating a new staff performance target focused on mediation. Thus, Grenoble continues to develop its local strategy to maximise the implementation of the new law, building on its local knowledge, relationships and context and ensuring receptiveness inside and outside of the court. Early indications show that the large majority of first instance administrative courts are deploying a similar local strategy.<sup>45</sup>

## **5. Revisiting mediation in a system of administrative justice: early reflections from the French experience**

With the formal implementation of the new legislation now completed, it is time to draw some early conclusions arising from the French experience. Albeit limited in scope, this study of administrative mediation has four main implications for the wider system of administrative justice: first, administrative mediation reflects and is shaped by the specificities of the administrative law setting; second, in practice administrative mediation finds ways of accommodating the conflicting paradigms to which mediation and adjudication belong; third, administrative mediation seems to require the creation of a dedicated (sub)-system of informal administrative justice, thus facilitating the emergence of a plural system of administrative justice.

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<sup>45</sup> See the mediation experiences shared by a wide range of judges, barristers, mediators and civil servants during the 'First Symposium on Administrative Mediation' - Conseil d'Etat – Wednesday 18 December 2019: <https://www.conseil-etat.fr/actualites/actualites/premieres-assises-nationales-de-la-mediation-administrative>

### *5.1 The specificity of administrative mediation*

The French experience helps to understand how mediation is transformed by its contact with administrative law. Indeed, for administrative mediation to be a ‘viable option’ in any system,<sup>46</sup> it is important to understand that the specificity of administrative justice shapes this species of mediation. In other words, administrative mediation needs appropriate adjustments to account for the nature of administrative law and public administration.

#### 5.1.1 Flexible decision-making process

From the survey and observation of the pilot’s mediation disputes, it seems to me that administrative mediation blurs the distinction between remedy and decision-making. While the overall structure (two disputants or more resolving their dispute with the help of an impartial third-party) is definitely ‘remedial’ in nature, administrative mediation tends also towards decision-making. Consequently, the choice of participants is particularly important. For instance, the choice of public authority’s representative will often be key to the mediation success; not only will a line manager or an elected representative have the power to negotiate but they are more likely to have the necessary knowledge and experience for creative problem-solving. In addition, private disputants will normally bring legal representation, which is key in redressing the inherent imbalance of power. Furthermore, the Grenoble pilot revealed the important role played by consultation with other public bodies: either to elicit ideas for viable solutions (in public employment disputes, the centre for local government’s civil service is often consulted to this effect), or because their decision may be hold the key to the resolution process (as happened with the consultation of the Bâtiments de France in respect of repairs to a listed building) or to facilitate compliance with the mediation agreement (e.g. endorsement of financial settlement by the public accountant or finance department).

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<sup>46</sup> Administrative mediation is not the norm in many administrative justice systems and even when it is ‘officially’ supported therein, it does not always thrive. In England and Wales: mediation may be cited in the pre-action protocol for Judicial Review, but it is rarely used.

Finally, in some cases, the participation of ‘interested parties’ beyond the disputants will be necessary in order to solve the dispute at all. In such case, mediation can become a polycentric or participatory decision-making process, certainly better suited to resolve dispute with multiple interests than the judicial process. Thus, the contact with administrative law may transform mediation into a proteiform and informal decision-making process.

This shows that rather than mediation being unsuited to administrative law, it can be structured in useful ways to address the challenges of administrative disputes and to adapt to the specificities of public administration.

### 5.1.2 The mediation agreement

Importantly, the drafting, validity and enforcement of the mediation agreement are also shaped by the public law nature of the dispute. Both the agreement’s specific characteristics and its approval process result from the tensions between confidentiality – a key principle of mediation – and accountability – a key principle of public law.

In Grenoble, more often than not, the mediation agreement was submitted for approval to the local government’s elected assembly. In such circumstances, the drafting of the mediation agreement can be tricky. Practices vary<sup>47</sup> but generally, the need for approval by a political authority determines the succinct nature of the ‘official’ agreement so as to protect a degree of confidentiality. This explains also article L213-2 of the 2016 law: it states that mediation respects the principle of confidentiality but allows an exception when implementation of the agreement requires its existence and/or content to be divulged.

Approval by a political authority was often sought to strengthen the validity of the mediation agreement. As Grenoble’s court (and the national developing practice) discourages the systematic certification of mediation agreements, the formal endorsement by an elected assembly serves to replace the legal validity that such a

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<sup>47</sup> Sometimes two versions of the agreement are drafted: one – succinct – for ‘political’ approval and one for the purpose of the mediation process.

certification would have granted. The move from legal to political accountability and from legal validity to political legitimacy facilitates enforcement and compliance.<sup>48</sup> The question of validity and legitimacy of the mediation agreement is to be explored in the next section, but the shift analysed above is key to defusing the tensions specific to administrative mediation.

## *5.2 Resolving the tensions between the mediation and adjudication paradigms*

I previously postulated that mediation and adjudication belonged to conflicting paradigms with adjudication typically being hierarchical, top down and rules driven and mediation being horizontal, bottom up and problem-solving.<sup>49</sup> While these representations of mediation and adjudication are not original,<sup>50</sup> they are particularly significant in the context of administrative law. Not only do they lead to tensions of the type identified in the previous section but, the competition between paradigms has the potential to disrupt the wider administrative justice system.

When considering the (then) new representation of legal systems as networks as opposed to the more classical and pyramidal representation, Ost and van de Kerchove examined the validity of norms in the new ‘network’ paradigm.<sup>51</sup> They explained that the hierarchical, exclusive and unilateral process of validation in the classical paradigm of a legal system did not match the validation process of the network paradigm. The latter is guided instead by reference to formal validity (i.e. legality), empirical validity (i.e. effectiveness), and meta-validity (i.e. legitimacy), with the validity of each norm being determined by a specific equilibrium between the three criteria and this equilibrium itself being dynamic and subject to change.<sup>52</sup> What the French experience shows is that these validity criteria and their equilibrium play a significant role in administrative mediation.

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<sup>48</sup> This is particularly important in view of the problems of compliance that some court judgments encounter.

<sup>49</sup> See **citation removed for review**.

<sup>50</sup> See for instance, C Menkel-Meadow, ‘Dispute resolution’ in P Cane & H M Kritzer (eds), *the Oxford Handbook of Empirical Legal Research* (OUP 2010) 596.

<sup>51</sup> F Ost and M van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (PU Saint Louis 2002).

<sup>52</sup> F Ost and M van de Kerchove, (n 51) 307.

Throughout the mediation process, the validity criteria of effectiveness and legitimacy are largely dominant; they underpin the search for a solution, with the criterion of legality playing a lesser role. However, once an agreement is reached, the balance between the three validity criteria threatens to change: the need for enforcement of the agreement tends to give dominance to the criterion of legality. A mediation agreement the validity of which arises primarily from its effectiveness and legitimacy loses this validation when scrutinised against the criterion of strict legality for its enforcement.

The equilibrium between the three validity criteria is particularly affected in France by the availability of certification recognised in the new law.<sup>53</sup> To certify an agreement, administrative courts check the content against the principles of legality and public order, thereby shifting the balance between the three validity criteria and bringing the two adjudication and mediation paradigms into conflict. While a validity of norms giving preeminence to the criteria of effectiveness and legitimacy is able to support a creative, consensual and problem-solving solution, the emphasis on formal validity for the certification process reasserts the dominance of legality, thereby threatening all that can be achieved in mediation. The tensions arising from this shift are such that, if not neutralised, mediation may struggle to thrive.

In Grenoble, Vice-President Wegner seemed intuitively aware of these tensions. In practice, once a mediation was agreed to, the dispute would only rarely be the subject of certification and would not normally return to the court and so would not ‘re-integrate’ the adjudication process (unless and until mediation failed). This policy of ‘certification avoidance’ managed the tensions arising from certification, with each dispute resolution mechanism (be it mediation or adjudication) remaining on a parallel course. The Grenoble court mandated notification of the existence of an agreement to close the court case, but as outlined in Part 3 it did not enquire into the agreement’s content. Importantly, the lack of certification had no implications for compliance throughout the pilot.

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<sup>53</sup> See article L213-4 CAJ.

Finally, the approval of mediation agreements by elected representatives completes this process of neutralisation of the tensions between the two paradigms: the shift from legal to political accountability and from legal validity to political legitimacy facilitates compliance, counteracts the absence of certification and avoids a shift in the validity criteria, thereby ensuring that the dispute remains with the mediation paradigm. Thus, the experience in France shows that despite adjudication and mediation being paradigmatically opposed, careful management of the moments of trans-paradigm interaction – including by minimising the formal adjudicatory process once mediation is underway and creating instead internal validation processes within mediation—can enable both to operate in parallel. However, this should not be understood as sanctioning ‘illegal’ agreements, but rather as managing paradigmatic tensions that would otherwise have the power to stifle the problem-solving mediation process upstream.

This experience also tells us that what is needed is a ‘negotiated environment’ within which administrative mediation can operate.

### *5.3 Administrative mediation: the creation of an ‘alternative’ system of administrative justice?*

The French experience suggests that, to thrive, administrative mediation needs to be embedded in a ‘negotiated environment’ with dedicated professionals, new networks of stakeholders, the legitimisation of a distinct ideology, albeit within the institutional structures of administrative law. This in turn has resulted in the emergence of new dispute resolution practices, understandings and cultures (both political and legal). Thus, the introduction of administrative mediation becomes a major enterprise in ‘informal ordering’ that resembles the launch of an ‘alternative’ system of administrative justice.<sup>54</sup> This becomes clear when the constituent parts of this ‘alternative system’ are analysed.

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<sup>54</sup> While administrative justice has two contrasting meanings – see S Halliday & C Scott, ‘Administrative Justice’ in P Cane & H M Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (OUP 2010) –in the present article, administrative justice refers to the various methods of redress against administrative decisions (e.g. courts, ombudsman, complaint procedures, mediation); beside the mechanisms of dispute

### 5.3.1 An Ideology of administrative mediation

In France, administrative mediation rests largely on the assumption that administrative courts are ill-suited to some disputes, and in turn that mediation is well suited to them. As we have seen already, this underpinned both the Grenoble pilot and the national implementation. However, what appears at first to be a rationale for introducing administrative mediation should be understood as an ideology that frames and legitimises the existence of mediation in the administrative justice system. Harrington and Merry<sup>55</sup> demonstrated that systems of mediation are not only ideologically constructed but that they produce ideology in and of themselves. Similarly the Grenoble pilot began the production of a discourse and supportive ideology to explain, legitimise and circumscribe the resort to administrative mediation, an ideology which is both distinct from and fitting with the one underpinning the role of French administrative courts. By focusing on disputes that are not suited to the administrative court system, this ideology provides both a clear delineation between (sub-)systems of administrative justice and substantive legitimation; mediation's very existence is not only sanctioned but required by the existing system of administrative justice. Furthermore, this choice provides a narrow ambit for the use of mediation: the majority of cases in the administrative courts will not be seen as suitable for mediation. Mediation is recognised as well as corralled by this choice of underpinning: adjudication remains unassailably mainstream.

Interestingly, this ideology is completed by the more recent case law of the Conseil d'Etat. Since 2017, the Conseil d'Etat has repeatedly stated that there exists: '(...) a mission of public interest pertaining to the State to develop ADR mechanisms, a corollary to a good administration of justice.'<sup>56</sup> This provides a clear endorsement of administrative mediation by the Supreme Court and pertains to the construction of this ideology: mediation has intrinsic value due to its public interest mission and it is

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resolution, this system encompasses dedicated professionals and stakeholders, an ideology as well as pathways, practices, culture and understandings.

<sup>55</sup> See C Harrington & S Merry, 'Ideological production: the making of community mediation' (1988) 22 *Law & Society Rev.* 709.

<sup>56</sup> See for instance, CE 17 March 2017 n. 403768 and CE 21 October 2019 n. 430062.



placed at the core of the French justice system. It receives the full backing of the state, thereby creating a complex system of legitimacy and ideology.

### 5.3.2 The new professionals and stakeholders of administrative mediation

The Grenoble pilot revealed the key role played by dedicated professionals in the success of mediation. It is not surprising therefore that the introduction of administrative mediation resulted in the emergence of new categories of professionals: mediation champions in the administrative courts, as well as specialist 'administrative mediators' (i.e. persons who are both experienced mediators and experts in the administrative law field in dispute and thus qualified under the new law). Not only is a national list of mediators being established as seen in Part 3, but mediation providers, such as the *Chambre nationale des praticiens de la médiation* have started to offer the services of 'administrative mediators'.<sup>57</sup>

Also, the introduction of mediation has required administrative courts to work with new stakeholders or work differently with established ones. For instance, through the 2013 Agreement Grenoble build a network of stakeholders (old and new) to provide both structure and impetus for the system's acclimatisation to mediation. Since then, the court's local strategy has extended its network(s) by negotiating new agreements and by establishing new contacts (especially with public authorities). As all forty-two administrative courts have been encouraged to follow Grenoble's lead, negotiate their own local agreements, deploy their networks and in some cases even help the emergence of local mediation providers, this phenomenon is spreading through France.

### 5.3.3 Working practices and culture

In Grenoble, administrative mediation has resulted in the creation of new pathways inside the court and changes to the working practices of many stakeholders. As seen

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<sup>57</sup> For instance, on its website, the *Chambre nationale des praticiens de la médiation* lists their administrative mediators separately with their training and area of expertise, see <http://www.cnpm-mediation.org>.

above, the practice by local governments to approve the mediation agreements has created new mechanisms of accountability and has started to change local political culture.

The success of administrative mediation relies also on transforming the very culture of dispute resolution. There are early signs of this in the legal professions. This was somewhat apparent in Grenoble, with several public law barristers reporting an increased interest in solving the dispute (rather than winning the case). In fact, several mediations were triggered at the request of barristers. This also reflects a wider involvement of the French legal professions with mediation as successive legislative reforms have made this form of dispute resolution increasingly mainstream. With more local Bars offering mediation provisions, several have signed an agreement with the local administrative court to become the mediation provider.

#### *5.4 A plural administrative justice system*

This suggests that administrative mediation is emerging as a distinct (sub-) system, operating alongside the administrative courts. In France, administrative mediation is on the way to creating a nation wide informal ordering of dispute resolution and, thus, is introducing a degree of plurality in the administrative justice system. This may mark the beginning of a wider recalibration of administrative justice there.

##### 5.4.1 Administrative mediation as state law pluralism

As mediation has consistently been associated with legal pluralism<sup>58</sup> and informal legal ordering,<sup>59</sup> I believe the Grenoble experience exhibit features of legal pluralism as explained by Gad Barzilai:

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<sup>58</sup> See Harrington & Merry, (n 55) 709.

<sup>59</sup> See D Smith, H Blagg & N Derricourt, 'Mediation in the shadow of the law: the south Yorkshire experience' in R Matthews (ed), *Informal Justice?* (Sage 1988) 123 and C Harrington, 'Informalism as a form of legal ordering' in K Wittington, D Kelemen & G Caldeira (eds), *The Oxford handbook of Law and Politics* (OUP 2008) chap. 21.

‘[Legal pluralism] primarily articulates detachment from legal centralism revolving around state law, criticism of the exclusiveness of state law, decentralization of court-centered judicial studies, exploration of non-state legal orders, unveiling of informal socio-legal practices, and an understanding of law as a multi-centered field that deals with the convergence of a multiplicity of norms, localities, states, global sites and practices’.<sup>60</sup>

The proclaimed aim of the pilot (and of the 2016 reform) was to introduce an alternative mechanism for the resolution of those administrative law disputes that are not well catered for in the courts and to recognise a key role to disputants in developing solutions outside the judicial process; as such these indicate a decentralisation of dispute resolution away from the courts and hierarchical judicial process, a key feature of legal pluralism.

Furthermore, as seen above the Grenoble pilot has generated any number of informal socio-legal practices giving rise to an ordering that did not exist previously. In effect, this initiative triggered a parallel system that has all the hallmarks of an alternative if local system of administrative justice. Furthermore, having informed substantially the implementation of the 2016 reform in an experimental and bottom-up approach, early indications show this informal system spreading through France. Consequently, there is a strong case for recognizing as instances of legal pluralism, the Grenoble pilot and arguably the introduction of administrative mediation throughout France. In fact, this new informal ordering at the heart of the state’s administrative justice system would seem to pertain to state law pluralism, i.e. the recognition of plurality *within* (and not simply alongside) a state’s legal order.

At this stage, it is important to highlight that not only is the literature on legal pluralism deeply conflicted<sup>61</sup> but that some proponents of legal pluralism have

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<sup>60</sup> ‘Beyond relativism: where is legal power in legal pluralism?’ (2008) 9(2) Theoretical Inq. L. 395.

<sup>61</sup> See for instance, B Tamanaha ‘The folly of the social scientific concept of legal pluralism’ (1993) 20 J. L. & Soc’y 192.

rejected the possibility of distinct legal orderings within a state's legal order and of plurality within state law, thereby rejecting the notion of state law pluralism.<sup>62</sup>

However, an analysis deriving from state law pluralism speaks to the growing experience of administrative mediation in France; it is key to understanding the two systems of administrative justice (formal and informal) and their interactions. From this, it may be possible to posit two 'interim' interpretations of these complex dynamics from the perspective of state law pluralism.

The first interpretation sees in administrative mediation an informal (sub)-system of administrative justice first tolerated and then sponsored by the state to expand the capacity and reach of the administrative justice system as a whole. The emergence of a complex and distinct ordering with personnel, pathways, ideology and distinct accountability process goes far beyond an alternative mechanism of dispute resolution. While this portrayal highlights the relative dependence (and fragility) of the informal ordering, it also hints at its possible autonomous entrenchment. With the introduction of administrative mediation in forty-two separate courts, the pluralist potential of the 2016 reform is unleashed further. As networks and practices are likely to diverge from court to court, the emergence of local alternate systems will lead to more plurality.

The second interpretation treats the 2016 reform with suspicion, highlighting the fact that the Grenoble experiment has now been captured, transformed and re-imposed in a top-down manner via state legislation, thus losing its plural and disruptive character.<sup>63</sup> Furthermore, the support and energy deployed by all administrative courts (particularly the Conseil d'Etat) to ensure the success of administrative mediation undermines the claim that it is an enclave of state law pluralism. The same goes for the relation that administrative mediation entertains with case law: the labeling of

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<sup>62</sup> See G Woodman 'Ideological combat and social observation – Recent debate about legal pluralism' (1988) 42 J. Legal Pluralism and Unofficial L. 21 and H. B. A. Sani 'State law and legal pluralism: towards an appraisal' (2020) 52 J. Legal Pluralism and Unofficial L. 82.

<sup>63</sup> See for instance, the critical stance taken by Richard Abel in the introduction of his edited volume, *The politics of informal justice* vol. 1 – the American experience, (Academic Press 1982).

mediation's development as a public interest mission may be interpreted as the beginning of a reclaiming process through law, thereby questioning the pluralist aspirations of this national deployment of administrative mediation.

The future will tell which of these two interpretations is accurate and whether the plurality of the French administrative justice system is reality.

#### 5.4.2 Re-modeling informal administrative justice?

Not only has administrative mediation introduced plurality into the French system of administrative justice, but its unusual characteristics could be instrumental in shaping further reflection on informal administrative justice.

Administrative mediation is commonly (and rightly) categorised as an alternative dispute resolution mechanism alongside ombudsman, arbitration etc. In this context, informal administrative justice has been the subject of several studies, some concentrating on one specific mechanism and others spanning the wider range of ADR.<sup>64</sup> Administrative mediation would certainly benefit from better conceptualization as part of informal administrative justice and from recent studies in the field. For instance, the use of the restorative justice framework may prove pertinent to analysing and conceptualising French administrative mediation and its practice.<sup>65</sup>

In addition, I wish to argue that administrative mediation is unusual in that it straddles the divide between remedies and decision-making that commonly drives the conceptualisation's effort of administrative justice.<sup>66</sup> As already shown above, the Grenoble pilot shows that administrative mediation goes beyond providing redress for a past action or decision, and aims to find a permanent solution to disputes into the

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<sup>64</sup> See Naomi Creutzfeldt *'Ombudsmen and ADR: A comparative study of informal justice in Europe,'* (Palgrave 2018).

<sup>65</sup> See Naomi Creutzfeldt 'A voice for change: Trust relationship between Ombudsmen, individuals and service providers' (2016) 38 J. of Social welfare and family law 460.

<sup>66</sup> See Simon Halliday and Colin Scott (n 54).

future. To this effect, administrative mediation is both a remedial tool and a flexible decision-making process. This dual character is key to understanding French administrative mediation and needs to drive its conceptualisation.

The literature on administrative justice contains several taxonomies identifying the different conceptions of administrative justice that drive types of decision-making and some can be applied appropriately to administrative mediation.<sup>67</sup> For instance, Kagan's study<sup>68</sup> of the role of (mis)trust in the design and operation of decision-making informs a typology where administrative mediation would fit well the ideal-type of 'negotiation/mediation' that combines legal informality with participation by individuals or organisations in decision-making. It is clear that this typology speaks to the French experience. Furthermore, the concept of trust, which is key to his analysis of agencies' decision-making styles places legal creativity at the nexus of strong adherence to rules and emphasis of social values: this would certainly provide a grid of explanation for the search for bespoke/creative solutions within the existing legal framework. Moreover, this work has the added advantage of giving a central role to the concept of trust, a concept that could be particularly pertinent in conceptualising the remedial and decision-making aspect of administrative mediation together. Indeed, it may be that conceptualization of French administrative mediation could play a role in helping us re-think administrative justice beyond the remedy-decision making divide.

## Conclusion

After years of false starts administrative mediation seems to be finally taking root in France with the 2016 reform. The Grenoble pilot that informed its implementation shows that mediation can work in the administrative context and that it can fill a gap in French administrative justice. However, the French experience also indicates that to thrive administrative mediation needs to be supported by its own system of

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<sup>67</sup> See for instance J L Mashaw, *Bureaucratic Justice: managing social security disability claims* (Yale University Press 1983); M Adler, 'A socio-legal approach to administrative justice' (2003) 25 (4) *Law & Policy* 323; S Halliday and C Scott 'A cultural analysis of administrative justice' in *Administrative justice in context* M Adler (ed), (Hart 2010).

<sup>68</sup> R Kagan 'Varieties of bureaucratic justice' in *Administrative law from inside out* N Parillo (ed), (CUP 2017).

administrative justice, thereby leading to a plural administrative justice system in France. Should this distinct (sub-)system of informal administrative justice take root nation-wide, it may be instrumental in re-thinking more widely our modeling of informal administrative justice.