To Achieve Justice or to Respect Traditional Mediation Values?

Testing the Theory of 'Educated Self-Determination' in Addressing This Mediation Dilemma

(A Call for Uniformity and Clarity in the Diverse Field of Mediation)

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Declaration of Authenticity

and

Author's Rights

‘This thesis is the result of the author’s original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.’

Signed

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Date: 28/02/18

"The notion that most people want black-robed judges, well-dressed lawyers and fine panelled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible".

Chief Justice Warren E. Burger

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Dedication

Abu Hurairah (May Allah be pleased with him) reported:

The Messenger of Allah (peace be upon him) said, "When a man dies, his deeds come to an end except for three things: Sadaqah Jariyah (ceaseless charity); knowledge which is beneficial, or a virtuous descendant who prays for him (for the deceased)."[1]

This work is dedicated to God, may it be accepted as the useful knowledge, and to all those who seek knowledge and concerned with enhancing the quality of justice in their communities and internationally.

[1] Riyad as Salihim, *Book 13, Hadith 1383 available at www.sunnah.com, last accessed 28/2/2018*

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My Professors, especially Professor Bryan Clark, for being my role model, always being available for me; sharing your knowledge and wisdom and guiding me through my quest for knowledge. I will always be in your debt; I intend to pay the favour forward and always be available to those seeking knowledge.

The Egyptian Ministry of Justice for allowing me to take sabbatical to pursue this work.

The mother of my child for the support she showed me.

My mother for always keeping me in your prayers; I hope this work makes you proud.

Abstract

This study acknowledges that the field of mediation needs clarity, a sense of unity and an assurance that mediation is capable of delivering justice.

Throughout this thesis, there is an extensive reading of a wide range on international academic articles, texts, procedural rules, practice guidelines and court precedents along with a review of a range of practice across many different jurisdictions and different fields beyond mediation and law such as conflict resolution, sociology, philosophy, history, religion and economics. This research examines the theory of educated self-determination (in both theory and practice) and its ability in bringing uniformity to the field of mediation and aid mediation to deliver justice, all in a deductive research methodology.

The research sets forward an understanding of the meaning of mediation and the meaning of creative justice. Then the research Identifies the possible concerns that both the mediation inner and outer circle teams may raise and attempt to address such concerns.

The research proposes that the theory of educated self-determination has the potential to present a sense of unity to the mediation field and better allow mediation to deliver creative justice to the parties.

Preface

1) **Introduction:**

I have always believed in the importance of justice, therefore decided to research, learn more about and seek to implement justice in the field of law. After obtaining my LLB in Cairo, Egypt; I have worked as a lawyer, public prosecutor, prosecutor manager, judge and currently a chief judge. I have witnessed first-hand the limitations of courts and adjudication in general in delivering the classical justice (based on the law)[2] especially in connection with the agendas set out by 'efficiency' and 'quality' proponents of mediation.[3] In the search for ways to address such limitations I have studied alternative dispute resolution (ADR) at Pepperdine University, USA; Max Plank Institute, Germany and have gained significant insight as a JAMS Weinstein fellow and when acted as a mediator in several jurisdictions including the Los Angeles superior court ADR department. In that experience, I have recognised that mediation has great potential to deliver a unique type of justice, a creative justice (based on parties' references and acceptance)[4]. While acting as a mediator in Glasgow Sheriff Court, UK I was prompted to explore the serious challenges mediation can face in delivering justice and in turn aiding courts in enhancing the quality of justice. I consider the following story was an influential experience which inspired me to conduct this research.

2) **Can't Get No Satisfaction**[5]

The wool scratched my neck as I hugged my coat closer. Steeling myself against the wind which strained to blow me sideways, I skipped over the puddles as I crossed the street towards the Glasgow Sheriff Court thinking miserably, "welcome to another Scottish June".

Catching my breath, I slid into my seat just as the Sheriff entered the room to begin the Small Claim proceedings. As part of my PhD experience at Strathclyde University Law School I served as a mediator at their law school mediation clinic, mediating referred cases as part of the court-clinic protocol of collaboration.

The Sheriff with his thick Scottish accent called forward the first case: a dispute over liability in a car accident. My interest was stirred when a sole man stepped forward. Clearly

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2 Explained in details in chapter two of this work 'Mediation and Justice'

3 Explained in details in Chapter one of this work 'Answering the question, What is mediation?'

4 Explained in Chapter two of this work 'Mediation and Justice'

5 Sherif Elnegahy, Capter 16 Can't Get No Satisfaction. in Professor Lela P Love and Glen Parker (eds), *Stories Mediators Tell – World Edition* (ABA Dispute Resolution Section Publication May 2017) 189

Note: Names have been changed in respect of confidentiality of the process

uncomfortable in his newly bought suit for the occasion, he declared himself to be the self-represented defender[6]. After the clerk had called for the pursuer in the hallways, it became clear that the pursuer was not present.

"According to the law, in the absence of the pursuer at this stage the defender has the right to ask for the dismissal of the case," the Sheriff said. "I assume that you wish to do so?"

I was surprised when the defender replied, "No, Your Honour, I wish to defend my case".

"You understand that you will win the case when it is dismissed," the Sheriff said.

"I understand, Your Honour, but I wish to defend my case and I wish to do so in the presence of the pursuer," the defender replied.

Despite the defender's wishes, the case was dismissed. It was clear that the defender was not satisfied even though the procedural laws had been fairly enforced and the outcome was in his favour.

No case was referred to mediation that day, though I wished I could have mediated the defender's case. The Sheriff, perhaps not appreciating that the defender did not feel he had received justice that evening—a hearing that mediation could well provide with the plaintiff present—wished me better luck next time.

A few days later, I was invited by the clinic to co-mediate a case that had been referred by the court to mediation but couldn't be mediated on the spot and had to be scheduled for a later date.

2.1. The Co-Mediators Get Ready

After several emails with Kevin, my co-mediator, we agreed to meet two hours before the mediation to discuss how we should conduct the mediation. We met in a quiet coffee shop as agreed. Pushing the door open the bell above broke the silence, announcing my late arrival. Having never met Kevin It was a challenge scanning the room looking for him, the waitress looking quizzically at me. My head turned as I heard the bell sound again; Kevin strode confidently across the room, shaking my hand enthusiastically. ''Sorry I'm late, it's a terrible habit,'' he apologised.

Smiling at our commonality we took a seat, Kevin ordered soup to help with the cold he was suffering from as we engaged in small talk and started to get to know each other. Kevin, a Scottish lawyer with over 30 years of experience, recently started to explore the

6 The Scottish terms for claimant and defendant are: pursuer and defender.

mediation world and had a record of five successfully settled cases. It was very assuring to work with him, as I had mediated many cases before in the USA and Egypt but never in Scotland. I needed to be more familiar with the culture, legal system and sometimes the accent.

We pored over the brief case notes we had received from the clinic: Three siblings, Ann, Beth, and Cathy had each raised actions against their disabled brother, Donald, for repayment of sums paid to him (£1500, £1500 and £800) in support to their father's mortgage. "What could have gone so badly wrong that these siblings had to resort to legal action?" I pondered. We both were under the impression that there was a possible power imbalance situation in this case given the fact that the three sisters were uniting against their younger disabled brother (although we were not sure about the type of the disability at the time).

We thought we should explore the underlying issues and attempt to repair relations wherever possible. We agreed to start the mediation in caucus due to the possible power imbalance. That procedure also gave us, the mediators, time to meet with ourselves between caucuses to discuss the case and develop our plan for the next steps.

2.2. The Mediation Venue and Setup

Kevin and I walked to a large law firm in the downtown where the mediation was to take place. The mediation clinic partnered with this law firm, giving the clinic free access to their meeting rooms and facilities for mediations. Upon our arrival, the young lady at the reception welcomed us and showed us the three rooms assigned for mediation. The rooms were bright, each had beverages and snacks, and they were simply perfect for what we had planned: the large room for the joint meetings and our "thinking zone", the other two smaller rooms, for the parties and caucus meetings.

Having decided on where we wanted to seat the parties, I rounded the corner to inform the receptionist to let us know when the parties arrived, and to lead them straight to their individual rooms. The last thing we wanted was a flare-up of emotions jeopardising the mediation. Greeting me with a nervous smile, she motioned at the four people anxiously seated in reception ''your clients are here'' she chimed. My stomach knotted as I glanced to the left, taking in the scene before me: lined up side by side sat four nervous clients looking expectantly at me. They had all dressed casually, except for the woman who was wearing more formal clothes which I could only surmise where borrowed from the way they hung from her slender frame. Keen to avoid a conflict, I quickly moved the parties into their separate rooms and resolved to ensure that I always briefed reception as soon as I arrived where to seat the parties.

2.3. Meeting the Parties

Keen to understand the impact of Donald's disability on the power dynamics, Kevin and I moved to meet with him first. Although he appeared to have some difficulties with walking, he chose not to use a stick and seemed able to get around given enough time. He was a relaxed and gentleman who spoke clearly. He was joined by his brother-in-law, Eric, a quiet but friendly man, who expressed his intention to stay away from the dispute but to provide moral support to Donald. Their calmness and steadiness encouraged us to suggest starting mediation in a joint session, a proposal to which they agreed.

When we stepped into the other room, Ann, the older sister was sitting with crossed arms as I entered the room. Clearly nervous, she soothed her creased skirt as she stood. ''Whatever he said, he's lying,'' came an insistent voice straight away.

Billy, who had been standing near the window, crossed the room towards me and shook my hand. ''I'm Betty's husband, she's sick to the back teeth of this, so I'm here to sort it out for her,'' he proudly announced.

Cathy was notably missing, but they assured us that they had her on the phone and had the authority to make a decision on her behalf. Billy was full of fire, but Ann seemed restrained and unsure.

2.4. The Heated Joint Session

Buoyed by the success of the brief initial encounters we invited all parties to the large room. Each party took a side of the large conference table, facing each other, and Kevin and I settled at the head of the table. Kevin and I confidently introduced ourselves so the parties would know that they were in good hands. Our opening statement covered all the points that we had prepared, clearly explaining our roles and the mediation process, especially since the parties had never been in mediation before.

We invited the parties to introduce themselves and to give us a short description of the situation at hand. We tried to address the clear tension in the air by encouraging the parties to listen and respect one another, taking notes regarding any point that they wanted to comment on so we could address it after the speaker concluded. Nevertheless, both parties started to shout and swear at each other, releasing hostility, hate and anger. Ann said that Donald stuck his tongue out at her and Billy. When Billy threatened to jump across the table and punch Donald, we quickly removed him and Ann from the room. Kevin and I took a minute to strategize and agreed that unless the tone changed dramatically, there would be no more joint sessions in this mediation process.

2.5. The Exploration Phase

While the single joint session did not offer us any useful information about the case besides the obvious tension and broken relations, a number of caucus meetings with both parties, which lasted for more than three hours, provided us with great insights about the case and the parties.

I was intrigued to learn that Donald and his three sisters were not the only siblings; they were in fact only four of eight. The other four had also contributed to mortgage payments, and it seemed that they had sided with Donald. The property was a council house, an accommodation offered by the government to the citizens who are entitled to benefits or public funds with the option to buy the property at very affordable rates with a payment plan.

According to Donald, he lived with his father, and his father bought the council house with the help of a mortgage. When his father ran short of money in 2007, all eight siblings entered into an informal agreement to support their father in paying the mortgage. The three older ones—Ann, Beth, and Cathy—withdrew in 2009 and so, when Donald solely inherited the house, he sold it and split the proceeds among the four remaining siblings, giving them just over £9,500 each.

According to Ann and Bill, Donald wanted to buy his father's council house in 2004 but in order to get the discount had to keep it in his father's name. In 2007 Donald approached them saying he could not afford the mortgage and asking for help. All siblings contributed into the mortgage, but in 2009 the three oldest withdrew from the agreement. When their father died, Donald inherited the whole estate, and when he sold it, he refused to repay the contributions that they had made to the mortgage (£1500, £1500 and Ann £800).

In our thinking zone, Kevin and I identified critical parts of the puzzle that, once sorted by asking the right questions, could hold the key to reveal the underlying issues of this case. However, it was not that easy.

When we asked Ann and Billy why they stopped contributing to the mortgage, we were faced with a long pause as Ann and Billy looked into each other's eyes. Billy said, "what matters now is we just want our money back."

We received the same pause and silence from Donald when I asked, "it is clear that you are not disputing that your three older siblings have contributed to the mortgage. So why didn't you offer them to take their contribution back when you sold the property and divided the proceeds among the four remaining siblings?"

We tried in several ways to work on repairing the relationship between the parties, but we were met with constant resistance to reveal any of the underlying issues. With Ann and Bill's loud declaration that they only care for the money and the mixed and unclear signals from Donald regarding his interests, we were forced to return to our thinking zone to decide on our next moves.

2.6. The Power Imbalance Question

Meeting alone, Kevin and I were under the impression that there was a certain event or set of events behind the damaged relations between the parties, which the parties did not want to talk about—especially Ann and Billy. We thought that we should not poke a wasp nest unless we had a clear reason.

Kevin shared his thoughts regarding the legal aspects of the case, "the three siblings are directing their claim toward Donald, asserting unjust enrichment—a notoriously complex area of law. They are not likely to win such a case. However, if they redirect their claim against their father's estate, then the odds will be in their favour, and they might even end up with more money."[7]

My initial impression regarding power imbalance was correct, but it turned out that Donald was not the weaker party. The three older siblings were not aware of their legal advantage, Donald had the other four siblings by his side, and he appeared calm and in control. Kevin and I decided to address the situation before moving to the negotiation phase.

We met with Ann and Bill and asked if they had considered hiring a lawyer to gain better insights on their legal position. "We can't afford a lawyer as his fee will be more than our claim is worth, Anna replied, "but we are sure about our strong legal position, as we 'Googled' it."

Unwilling to give up, I pushed further: "what about legal aid? Or pro – bono services?"

Starting to get agitated, Bill interrupted, "Why waste my time, the Sheriff already said we had a strong case."

7 It is important to mention the director of Strathclyde mediation clinic Charlie Irvine comment when he learned about this story: "To further complicate the discussion, Kevin's advice is wrong – Legal Rights only attach to movables and this is a claim against the heritable part of the estate. It might lead to an interesting discussion about the problems with evaluative mediation – Kevin was actually wise not to voice his opinion on the law because he lacked perfect knowledge." Such point reflects the debate regarding the mediators' style and its connection to the law. Such debate is covered in this work at section two of the study.

Our only remaining option to address the power balance was to meet with Donald. We needed to ensure that he played fair, given that his siblings did not know that he had the upper hand legally speaking. Keen not to indicate the strength of their potential claim we asked Donald if he had sought representation. “The Sheriff said I had a strong case, so why waste my money on a lawyer?” came his strikingly similar answer.

Kevin and I were sure that the Sheriff would never betray his neutrality by taking sides in a case. We hesitantly decided to move to the negotiation phase where we would see if we could assist the parties in compromising and striking a bargain. The encouraging aspect was for us to know that both parties were equally oblivious to their legal position and both confident enough to negotiate without being fully informed.

2.7. The Negotiation Phase and the Closing

The negotiation phase was conducted via several rounds of the caucus. The first dent we saw in Donald’s confident demeanour came when we asked for an offer. “I don’t have what they’re asking for,” he confided. “I split the money with all my siblings; they took the money too. Why should I be the only one to pay?” he mused.

Taken aback I shifted in my chair; the realisation that Donald might be right sat very uncomfortably with me. Finally, he made an offer, “I can manage £2200 in instalments, or £1850 next week.”

Keen to present Donald’s offer, we approached the siblings with full transparency. Explaining Donald’s point of view, we expected a reaction from Ann and Bill, but were greeted with blank faces, “how are we supposed to split the money?” Bill probed. Donald did not care how they split the money.

After consulting with Cathy on the phone, Bill announced, with a proud grin on his face, “We want the money now. I don’t trust him with instalments; he’ll just weasel out of it. We don’t really want to keep in touch.”

Delivering the good news of the settlement to Donald, he momentarily perked up, “what happens now?” he asked, “do we shake hands?”

Kevin and I glanced at each other nervously, keen not to have a repeat of our earlier joint session.

Ann pursed her lips and looked at her hands resting in her lap when I broached the subject; Bill scoffed “we’re not interested to meet with him ever again; we just want the money.”

Unease built in me, I was glad that our negotiation efforts had not fallen apart with a tense meeting but wondered, "why isn't everyone happy with the outcome?"

2.8. Parties' Feedback to the Mediation Clinic

While Ann and Bill were satisfied with the process and the outcome, Donald raised his lack of satisfaction. Donald mentioned that he was disappointed that he did not have more of an opportunity to clear the air with members of the family, yet he believed the outcome was fair enough and therefore he would honour his agreement.

2.9. Reflections:

First of all, it was very interesting and beneficial to me to witness how the Strathclyde Law School, the Glasgow Sheriff Court and the downtown law firm all get together to support and boost mediation culture in Glasgow, Scotland. I believe the initiative will have a very positive effect, and I hope other countries follow this path.

I have learned so many lessons from my mediation. Perhaps the most important one was that settlement, fairness and satisfaction do not always go together.

In the brief exchange I witnessed inside the small claim courtroom, where the defendant "won" but was not satisfied, fairness was present with the accurate enforcement of the procedural law, but it was clear that the defendant wanted to be heard by the plaintiff even more than having an outcome in his favour.

On the other hand, Ann and Bill were satisfied with the mediation and the outcome. Its fairness is questionable because they all lacked legal knowledge and we, as mediators, couldn't educate them about the merits of their claim. We could only urge them to seek legal counsel. Nevertheless, Ann and Bill were under the impression that they had a strong case and were negotiating with confidence.

Lastly, Donald confirmed that the outcome was fair, and he did honour his agreement, yet he was not satisfied because he did not get the opportunity to address the underlying issues with his siblings. We did try to address the underlying issues and work on repairing the relationship between the parties, but we were not successful.

Mediation fairness goes beyond the accurate application of the law – there is also a procedural side of fairness. Researchers have recognised that "procedural justice"[8] matters profoundly; as disputants' perceptions about the quality of justice delivered depend not only on the outcome but, also, on their evaluation of the fairness of the conflict resolution process itself. Parties

8 Explained in chapter two of this work.

value being heard in a respectful manner and being treated in a dignified way. The "winning" defendant in each of these cases just wanted a chance to speak. I have learned that as a mediator I should give parties enough space to speak, intently listen to their stories, and help them to communicate it to the other side.

Donald was dissatisfied with the outcome of the mediation because it did not address what mattered most to him—fixing his relationship with his siblings. Fairness has many aspects, including the just application of rules, laws and standards, as well as the opportunity to rectify personal wrongs experienced by the parties. Mediation can be a great platform for addressing the latter. To me this means I should always inquire about the parties' expectations regarding fairness to better understand and help them achieve the type of just outcome they seek. In the second case, I should have addressed Donald's need for being understood by, and ultimately reconciling with, his older siblings as much as I addressed the economic dimension of the dispute that mattered the most for Ann and Bill.

Mediation has the capacity to free the parties from outcomes that are only determined by the law and empower them to adopt the standards and develop the relationships that matter most to them. I have learned that I should always start my caucuses by asking the party: what do you wish to achieve in this mediation and why?

Ideally, parties come to mediation with knowledge of their legal rights[9], so they can negotiate with that information and better set their own standards. Without understanding the law, parties arguably lack informed consent to the outcomes they achieve. This is especially true for unrepresented parties. The challenge that I faced with Ann, Bill and Donald regarding their lack of crucial legal knowledge was very troubling. It did not seem sufficient to merely urge them to get legal counsel. Informed decisions are a key element[10] in achieving fairness in mediation.

To answer my own question, fairness is at the heart of satisfaction in mediation, but it is a fairness that is very distinct from what litigation provides. It encompasses being heard, having a process that addresses the important concerns of the parties, and having necessary legal information so that informed choices can be made. **(End of story)**

9 Such predicament is explained in section two of the study.

10 Explained in detail in Chapter three of this work.

3) **Conclusion:**

The predicaments that I have faced in my story; managed to jeopardise my fascination with mediation and its exceptional potentials in resolving disputes in a fair and satisfying manner. In my experience, my hands were tied when dealing with the power imbalance situation; due to conflicting mediation values and the lack of clear professional guidelines. I was torn between respecting many unclear mediation values such as neutrality and the need to meet with what is fair. Evidently, my story presents the timeless mediation ethical debate.[11] Not to mention that I was clueless about my true role as a mediator when I learned that one party is keen on settlement and the other is on fixing the relationship. Indeed, the mediation field is such a rich and diverse field that holds many expectations, objectives, ideologies and styles.[12]

Yet, I refuse to lose my faith in mediation. Therefore, I have set myself in this research journey aiming for some clarity and gaudiness that can aid mediators when dealing with similar challenges. There is a need to propose a central, unified and clear mediation value where all mediators, despite their style and ideology, can orbit around to clarify their true role. Then such value needs to be examined in respect of its potentials, needed tool to truly honour it, to identify and to address the possible critics. This research is to restore the faith in mediation as a concept, provide the mediation field with more clarity and unification and prove that mediation has the ability to deliver justice.

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11 See: James H Stark, 'Preliminary Reflections on the Establishment of a Mediation Clinic' (1996) 2 Clinical Law Rev 457, 503 ("Of all the ethical questions that arise in mediation, none is more central to the mediator's role, or more vigorously contested, than the 'neutrality vs. fairness' debate."). also, David Greatbatch and Robert Dingwell, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' [1989] 23 Law & Soc Rev 613, 615 "[t]he tension between the professed commitment to self-determination and the imposition of an overriding ethical code remains unresolved by the mediation movement." And generally Many mediation critics have argued that mediation systematically harms the powerless and provides second class justice for example see: Martha Fineman, 'Dominant Discourse, Professional Language and Legal Change in Child Custody Decision making' [1988] 101 Harv Law Rev 727, Richard Delgado et al., 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] Wisc L Rev 1359 and Tina Grillo, 'The Mediation Alternative: Process Dangers for Women' [1991] 100 YALE L. J. 1545, 1550

12 This point is explained in more details in Chapter one, answering the question, what is mediation?

Section One

(The Theory)

Introduction Chapter

(section one)

Rational and Importance behind the theory

1) Introduction:

In the search for the core value of mediation, this study seeks to stand as a lighthouse for mediators when it comes to their true role and act as a source of unity in the diverse field of mediation. There is a need to adopt and examine a theory that can help in achieving such goal. To identify such theory; one cannot ignore that many lines of thought in different fields of knowledge are captivated by the idea of self-determination[13].

In respect of organising interactions and transactions between individuals; contract law is formed on the Latin principle of "*Pacta sunt servanda"* meaning that agreements must be kept.[14] The civil law acknowledged that people have the power to act upon their freedom of choice, create obligations upon themselves and form agreements.[15] In this field of knowledge, freedom of choice has been given much appreciation and thought.[16] The civil law made sure that the parties' freedom of choice when forming contracts is true and well protected.[17]

Civil law is not the only field of law that acknowledges people's freedom to decide, in

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[13] Or freewill, freedom of decisions, right to decide or freedom of choice are all terms reflecting the same meaning and used in this study interchangeably.

[14] Black's Law Dictionary (8th ed. 2004)

[15] A contract can be defined as: a **voluntary** arrangement between two or more parties that is enforceable by law as a binding legal agreement. Contract is a branch of the law of obligations in jurisdictions of the civil law tradition. See: Ryan Fergus, *Round Hall nutshells Contract Law* (1st edn, Thomson 2006) 1

[16] For example, the **contract theory** was established by a number of studies that addresses normative and conceptual questions in contract law. For example, see: Patrick Bolton and Mathias Dewatripont, *Contract Theory* (1st edn, MIT Press 2004) and perhaps one of the most important questions asked in contract theory is why contracts are enforced and one prominent answer to this question focuses on the importance of enforcement of promises see: Charles Fried, *Contract as Promise a Theory of Contractual Obligation* (2nd edn, Oxford Uni Press 2015)

[17] The contract theory in the Islamic law provides that freewill is the cornerstone of the construction of contracts, and any element that can negatively jeopardize the freewill such as coercion, error or fraud shall lead such contract to be either void or voidable. For example, see: Samy Alagory, Contract Theory of Sheikh Mustafa al-Zarqa a Comparative Study of Jurisprudence a Master degree thesis in the Arabic language submitted to Al-Azhar University- Gaza 2013 available online at: www.alazhar.edu.ps/Library/aattachedFile.asp?id_no=0046440 نظرية العقود في الشريعة الإسلامية last accessed 22/11/17

connection with organising the relationship between the people and the state or the government; there is a strong line of thought in the constitutional law arena that lends weight to people's right to self-determination. Hobbes, Locke and Rousseau - the founders of the social contract theory[18] argue that man decides to enter into an agreement to better live in harmony and peace and in so doing man pledges to obey an authority and surrenders part or all of his freedom to this higher authority, while this authority protects life, properties and to some extent liberty.[19] The power of the state is a product of the general will of the people, and if the laws imposed by the state are not conformed to the need of the people, then the government and its law may be discarded.[20] Moreover, as set out in the Universal Declaration of Human Rights (UDHR) in the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) international law affirms that people are born free.[21] The declaration pledges that people be entitled to self-determination in the different aspects of life such as marriage[22], travel[23] and religion[24].

Economics is another field of knowledge which places great store in people's self-determination and argues that such a concept holds great benefits to the field of economy. Adam Smith in his book, 'The wealth of nations' argued that by giving everyone freedom to produce and exchange goods as they pleased (free trade) and opening the markets up to domestic and foreign competition, people's natural self-interest would promote greater prosperity than with stringent government regulation. Smith believed humans ultimately

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[18] See: Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268 and John Locke, *Two Treatises of Government* (1689-1690) and Jean-Jacques Rousseau, *On the Social Contract or Principles of Political Law* (1762)

[19] Id

[20] Id specially Jean-Jacques Rousseau.

[21] Art. 1 of the UDHR states: "All human beings are born free…"

[22] Art. 11 (1) of the UDHR states: "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

[23] Art. 13 (1) of the UDHR states: "Everyone has the right to freedom of movement and residence within the borders of each state"

[24] Art. 18 of the UDHR states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom…"

promote public interest through their everyday self-interest and economic choices.[25]

Philosophy is also a field of knowledge in which its writers pay much attention to people's freedom of choice. The writings of the British philosopher John Stuart Mill represent a small fraction of such attention; Stuart Mill offered a rational and philosophic debate on the importance of freedom of individuals in politics[26] and the pursuit of happiness in large as a crucial human principle.[27]

It is important to note that the line of thought that challenged the concept of freewill failed and could not survive; for example, the father of modern criminology, Cesare Lombroso's essentially argued in his theory 'born criminal' in his book criminal man that criminality was inherited and that criminals could be identified by physical attributes such as hawk-like noses and bloodshot eyes.[28] While Lombroso was one of the first to use scientific methods to study crime, and he inspired many others to do the same. Yet, his theory was vulnerable and did not reflect in the modern criminal laws around the world as many criminologists have challenged and abolished his theory.[29]

Recognising that and moving forward, self-determination is a responsibility before it is a privilege. It is well established that in order for a man to exercise his self-determination

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[25] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W. Strahan and T. Cadell, London 1776)

[26] See: John Stuart Mill, *On Liberty*, Harvard Classics: Volume 25 (Collier & Sons Company New York, 1909): "On Liberty is a rational justification of the freedom of the individual in opposition to the claims of the state to impose unlimited control and is thus a defence of the rights of the individual against the state" p. 258

[27] See: John Stuart Mill, *Collected Works of John Stuart Mill,* ed. J.M. Robson (1963-1991 Toronto: University of Toronto Press, London: Routledge and Kegan Paul), 33 vol

[28] Translated by Mary Gibson and Nicole Hahn Rafter, Cesare Lombroso, *Criminal Man* (1st edn, Duke University Press July, 2006)

[29] For example, see: Charles Goring, *The English convict: a statistical study* (London: H.M.S., 1913.) where Goring set himself out to establish whether there were any significant physical or mental abnormalities among the criminal classes that set them apart from ordinary men, as suggested by Cesare Lombroso. Under the sponsorship of the British government, Goring, assisted by other prison medical officers, as well as Karl Pearson and his staff at the Biometrics Laboratory, collected and analysed data bearing upon 96 traits of each of over 3,000 English convicts. He ultimately concluded that "the physical and mental constitution of both criminal and law-abiding persons, of the same age, stature, class, and intelligence, are identical. There is no such thing as an anthropological criminal type."

rights and harvest the fruits of such rights, he first must be fully developed and responsible.[30] This means that the right of self-determination requires being based on a solid foundation. This foundation is education. In philosophy, it has been established that education is essential for man to be capable of practising his rights and duties. Plato in his book, "The Republican" based his vision of the ideal city-state on the importance of education where each class of society would only be fit, strong and competent to carry out their role after having undertaken adequate training and education.[31]

In the field of education, the link between self-determination and education was highlighted in the writings of Rousseau in his book Emile or on education.[32] Rousseau argued that students should not be dictated to choose a certain option, but they should be taught the pros and cons of each choice and then allowed to practice their self-determination.[33] This line of thought has been carried on and developed in modern educational philosophy where self-determination is set as one of the main aims of education.[34] Perhaps that is why most countries have made education free and compulsory to a certain level so people will be in a better position to exercise self-determination.[35]

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[30] Article 29 the UDHR states: (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

[31] See: Edited By G. R. F. Ferrari and Translated by Tom Griffith, *Plato The Republic* (12th, Cambridge, 2009) Plato proposed to create different training programs for the different classes of future artisans, military and philosopher-kings. He believes that mathematics, as an exact science of abstract model, is suitable for the development of the future group of rulers. Knowledge, however, can solely be absorbed through the use of dialectical method for understanding the processes occurring in the peculiar microcosm, called by Plato: 'The Republic'. Only when man go through many years of training by mathematical models and dialectical techniques, not earlier than the age of 50, the ruler philosopher will be readily equipped with enough wisdom to join the government of his country.

[32] Translated by Allan Bloom, Jean-Jacques Rousseau, *Emile or On Education* (New York: Basic Books, 1979)

[33] Id

[34] For example, see: James C Walker, Chapter 10 Self-Determination as an Educational Aim. in Roger Marples (ed), *The Aims of Education* (Routledge 1999) 112

[35] Article 26 of the UDHR states: (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. …

Therefore, one can comprehend that self-determination is a basic right that holds great benefits, yet it needs to be applied properly; it needs to be educated self-determination to better meet its potential.

With this conviction, it is easy to note that mediation falls in line with the ideas above as self-determination is considered a core value of mediation.[36] Few, however, in the mediation field have argued that this value must be associated with enough knowledge about the different aspects of the case and called for mediation informed consent.[37] With that end in mind, this study sets out to examine if embracing educated self-determination can bring the mediation field closer to settling the ongoing dilemma in respect of mediation's ability to settle disputes in a fair manner.

2) Research Methodology:

This research adopts a deductive research methodology.[38] The study will, thus, entail extensive reading of a wide range on international academic and scholarly articles, texts, procedural rules, practice guidelines and court precedents along with a review of a range of practice across many different jurisdictions[39] and different fields beyond mediation and law such as conflict resolution, sociology, philosophy, history, religion and economics. The research is adopting a comparative approach and view mediation as a universal concept with a tendency to regulating mediation in an international uniform manner. The theory 'educated self-determination' in mediation is developed and tested in connection with the different debates surrounding mediation, justice and the law.

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(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. …

[36] Explained in Chapter one of the study

[37] Explained in Chapter Four of the study

[38] "Deductive research methodology is a research process that starts with a theory, hypothesis or concept, usually drawn from the scholarly literature and proceeds to test its applicability or otherwise in a specific context." See: Bill Tayler and others, *Research Methodology: A Guide for Research in Management and Social Sciences* (3rd edn Prentice Hall of India 2008) p.4 also see: A. Bryman, *Social Research Methods* (4th edn, Oxford University Press, 2012) and W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*. (7th Edn, Pearson, 2014)

[39] Mainly but not limited to the different states of America.

3) Main Research Questions:

This research aims to answer one main question; can the theory of educated self-determination enhance the quality of mediation and bring the mediation field closer to settling the debate regarding mediation's ability to deliver justice? Answering this question requires answering several other questions such as: what is mediation? Can mediation deliver justice? How can educated self-determination be engendered within mediation? What are the possible challenges and critiques that scholars from the law and adjudication field ('mediation outer circle team')[40] may raise? What are the possible challenges and critiques scholars from the mediation field ('mediation inner circle team')[41] may raise? How can one address such challenges and critiques?

4) The Research Structure:

This study is conducted with a preface, two sections, recommendations and conclusion. The ***preface*** identifies the main problem in the field of mediation that the study is aiming to address. The preface is a story that points out an unsettled dilemma that often faces mediators: vague mediation values vs. fairness.

Section one of the study is dedicated to establishing the theory of educated self-determination as a possible solution to the mentioned problem. The *Introduction chapter* sets the rationale for the theory. *Chapter one* further explains the theory, its need and importance in respect of bringing clarity and uniformity to the diverse field of mediation. *Chapter two* starts from the assumption that achieving justice is essential for mediation or any dispute resolution methods. Then the theory is examined to test if it can aid the mediator in enhancing the quality of justice offered by mediation.

Section two of this study is dedicated to exploring the practical aspects of applying the theory in practice. The *Introduction chapter* is to identify the possible challenges and critiques that both the outer and inner mediation circle teams may raise, regarding adopting the theory. *Chapter three* seeks to address the mediation outer circle team's objections and better explain how the theory can be applied in practice. *Chapter four* seeks to address the mediation inner circle team's objections and examines the potential for new reforms to the mediation field.

The study concludes with a ***conclusion*** and a set of ***recommendations*** to better identify the study contribution of knowledge.

[40] This team is defined and introduced in Chapter three of this study.

[41] This team is defined and introduced in Chapter three of this study.

Chapter One

Answering The Question: "What Is Mediation?"

Identifying the importance of the theory

1) Introduction:

There is a great importance of definitions in establishing a solid understanding; as those who define the meaning of the words do more than set the meaning, they construct reality.[42]

The unique nature of mediation with its flexibility, informality, integrated interaction between the mediator and the parties along with the absence of a unified definition for mediation creates serious challenges in answering the question "what is mediation?" The answer to such a question is crucial to engendering a better understanding of the concept of mediation, the mediator's role and most importantly how to assess mediation's success. Indeed, some scholars have stressed that defining mediation is critical to discussing the topic of mediation quality intelligently, yet the diversity aspect in mediation presents a serious challenge in such a quest.[43] To better elaborate, we can make reference to a study by Stipanowich conducted to evaluate mediation practice internationally and to understand what, why and how mediators do what they do around the globe based on a survey sent to 153 international professional mediators.[44]

The study reflects that mediation is being practised in very different manners and with a diversity of techniques around the globe, and even within the same country[45], based on the influence

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[42] Voltaire, *dictionnaire philosophique* (1st, Gabriel Grasset, Geneva 1764)

[43] For example, Welsh in Nancy A Welsh, 'All in the Family: Darwin and the Evolution of Mediation' (2001) 7 Disp Resol Mag 20, 24 has examined and described the extraordinary diversity of mediator practices in varied settings and programs by analyzing similarities and differences between practices in five mediation contexts: community, special education, dependency, labor-management, and civil; non-family and concluded that efforts to define and measure quality mediation must recognize and address these variations, especially in light of the extraordinary diversity of disputes in which mediation activity occurs. Also see: Jacob Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' (2006) 7 Cardozo J. Conflict Resol. 289, 302 where in connection with assessing mediation success; Bercovitch asserts that: "we have an intellectual and practical obligation to answer these questions. They are, after all, at the very heart of what we as scholars and practitioners of conflict management do on a daily basis."

[44] The International Academy of Mediators and Straus Institute conducted a *Survey on Mediator Practices and Perceptions* (2014) The Survey was distributed online to 153 respondents, all IAM fellows. Eighty-five per cent, or 130 individuals, participated in the Survey. The respondent pool included individuals who stated they "regularly practised" in Africa; Asia, including the Middle East; Australia and New Zealand; Canada; Europe (both Western and Eastern, with a majority from the United Kingdom); Latin America; and the United States See: T. Stipanowich, 'The International Evolution of Mediation: A Call for Dialogue and Deliberation' (2015) 46 VUWLR 1191, 1195

[45] See: Id Stipanowich where he gives USA as an example where mediation practice seems different from and American state to another.

of many aspects such as culture, legal systems, the involvement of lawyers and other aspects.[46] The study concludes with a call to conduct further research and systematically obtain reliable information to reach a mutual understanding of what is required from mediators and how they can meet with such expectations.[47]

The aim of this PhD study is to react and respond to such a call, starting with this chapter to explore the different challenges behind defining mediation, engage with the scholarly debate, reviewing the existing definitions in statutory statements and court decisions. The chapter moves further to propose a mediation definition that holds the study's theory; by including 'educated parties' self-determination' as a core value in the mediation definition and distinguishing mediation from the other dispute resolution methods by such a value.

2) Challenges behind Defining Mediation

The field of mediation is reflected in the rich and diverse range of scholarship from the different disciplines of law, international relations, political science, mathematics, psychology, and organisational science. [48] As a consequence, and with the absence of a central or international authority, it is hard to get all these fields to agree on a unified mediation definition. Furthermore, with all the knowledge generated within academia often there is a visible gap between mediation theory and practice where academic research does not reach practitioners and vice versa.[49]

The main challenge in defining mediation is the extraordinary diversity and mixture of perceptions that surrounds the term, outcome expectations and ideologies of mediation. To better understand such a challenge, the following aspects can be explored: mediation terminology, mediation history and mediation objectives.

2.1The Terminology of Mediation:

The term mediation is often confused and used interchangeably with *arbitration* and

[46] Id
[47] Id 1243
[48] See Carrie Menkel - Meadow, *Mediation Theory, Policy and Practice* (2nd, Ashgate Dartmouth, 2001) xiv-xviii
[49] See: Honeyman, C, Coben, J and De Palo, G, 'Introduction: negotiation teaching 2.0' (2009) 25 Negotiation Journal 2, 141-146 and United Nations, 'Informal High Level Meeting of the General Assembly on "The Role of Member States in Mediation"' [May 23, 2012, New York, NY] , United Nations, 'Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution' [2011a] United Nations Resolution No 283, adopted by the General Assembly at its 65th session, United Nations, 'Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution",' [2011b] United Nations Resolution No 291, adopted by the General Assembly at its 66th session, ,

conciliation, especially with the increasing use of hybrid processes such as Med-Arb.[50]

The confusion can be due to different cultural understandings of the three processes. In elaboration and starting with Arabic culture; the Quran organises the method by which family disputes can be resolved "If you fear a breach between them (husband and wife), appoint two arbitrators, one from his family, and the other from hers; if they both intended a resolution then Allah will cause their reconciliation. For indeed Allah is all knowing and aware."[51] Scholars differ in interpreting this verse when it comes to the role of the two arbitrators in a marital dispute; some consider it as an arbitration process where the couple has invested the right to settle the dispute in the arbitrators, without the need to refer back to the couple.[52] Others state that it is not an arbitration process despite the use of the word 'arbitrator' (hakam) as the two arbitrators are required only to put their recommendations to the couple where the couple has the power to decide the best course of action to be taken.[53]

With similar thoughts, it seems that in some Asian Jurisdictions the arbitrator is expected to assist the parties to settle the dispute at all stages of the arbitration, using his/her decision-making authority only as a last resort.[54] Carbonneau points out that in Japan '*Arbitration* often takes the form of and becomes *mediation*'.[55] Yang points out that in the Republic of China the same Chinese word, TIAOJIE, is used to refer to mediation and conciliation.[56]

Recognising that and moving forward, culture is not the only cause of such confusion, the language also contributes to the misperceptions. For example; in the English language some legal English dictionaries indicate that *mediation* has long been a complex word in meaning and the distinction between *mediation* and *conciliation* is widely debated among those interested in alternative dispute resolution.[57] Moreover, in the Arabic language, the term 'mediation' in the legal Arabic language is "ALWASATA الوساطة". Such a term is used to refer to mediation as a method of resolving disputes,[58] while it is also used to refer to

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[50] Nadja Alexander, *International and Comparative Mediation Legal Perspectives* (4th, Wolters Kluwer Law & Business, UK 2009) 15

[51] *Quran Surat An-Nisā' 4:35*

[52] The Maliki School. Al-Dawri, *Aqd al-Tahkim* 427

[53] The Shafi'i and Hanafi School. id

[54] H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd, Butterworths, Sydney 2002) 93

[55] T Carbonneau, *The Law and Practice of Arbitration* (1st, Juris Publishing, New York 2004) 51

[56] I Yang, 'Med-arb in Mainland China: A Bold Chinese Invention or a Recipe for Disaster? ' [2008] Session II International Arbitration Conference Proceedings 1, 1-3

[57] Bryan A. Garner, *Black's Law Dictionary* (8th, Thomson West) and Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3rd, Oxford University Press)

[58] See the Cairo regional Center for International Arbitration: mediation Rules at http://www.crcica.org/rules/mediation/2013/crcica_mediation_rules_2013.pdf?AspxAutoDetectCookieSup

brokerage; mixing up the mediator function with the realtor role.[59] To better comprehend the lack of clarity behind the term, a look at the mediation history can offer some explanation.

2.2Mediation's Rich History:

"Mediation is both as old as human interaction and as new as the recent 'reinvention' of this old form has made it, in its modern use in courts, private dispute, public policy formation and governance. Mediation is both a legal process and more than a legal process, used for thousands of years by all sorts of communities, families and formal governmental units."[60]

2.2.1. Mediation Ancient history

Some scholars have suggested that mediation is not a new invention and acknowledge the ubiquity of mediation-like processes throughout ancient history and across civilizations, religions and traditions.[61] Much evidence can be offered to support this observation. The great civilisations of ancient Egypt, India and China developed systems of law and courts without lawyers. Cierpicki writes:[62]

Papyri from Ptolemaic Egypt (305–30 BC) show that it was commonplace for the State to deal with disputes by first directing them to be mediated. The royal administrative officer in charge of receiving complaints would often endorse the petition thus: 'best to mediation; if that is not successful …', followed by the appropriate legal procedure.

Religious references to mediation are found in Islam, where the prophet Mohammed (PBUH) was known to mediate disputes between different tribes and groups and encourage settling disputes through mediation.[63] Islamic judge (Qadi) and the justice system witnessed dispute resolution and is said to have parallels to modern case management and obligatory

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port=1 accessed at 01/01/18 and the Arabic version of the rules uses the term "Alwasata الوساطة" to refer to mediation as a dispute resolution method.

[59] For examples the Egyptian commercial law no. 17 for the year 1999 articles from 192 till 207, the Jordanian law no. 28 for the year 2001, the Moroccan law 15.95 articles from 405 till 421 and the Syrian civil law for the year 1984 all used the term "Alwasata الوساطة" to refer to the brokerage process and organize the role of the Realtor.

[60] Carrie Menkel-Meadow, *Mediation Theory, Policy and Practice* (2nd, Ashgate Dartmouth, 2001) xiv

[61] See: Id, Bryan Clark, *Lawyers and Mediation* (1st edn, Springer, 2010) 1-2, N Alexander, *Global trends in Mediation*, (2nd edn. Kluwer Law International, 2006) Parg Introduction and Alpena an den Rijn and G Fox, 'Nothing New in Mediation?' (2004) 7(1) ADR Bulletin 6

[62] See A Cierpicki, 'The Winnie Whittaker Memorial Lecture 2009: A Brief History of Dispute Resolution Through the Ages' January [2010] Asian Dispute Resolution Review 23, 24

[63] See: http://sunnah.com/search/?q=Conciliation Accessed 22/01/18

mediation.[64] Similar references are found in the Bible. In his first letter to the Corinthians, St Paul urged people to settle matters out of court.[65] The Jewish tradition also has mediation and arbitration roots through its rituals and practices.[66]

In many traditional indigenous societies, which do not have internal formal legal structures, such as those in Australia, New Zealand, Asia and the Pacific, Africa and the Americas, community elders traditionally played and continued to play the roles of mediator and conciliator.[67] This evidence and much more found throughout history in continental Europe and across different jurisdictions proves the rich history of mediation.[68] Such evidence indicates that mediation was the destination for parties seeking to resolve their disputes before the establishment of courts and formal justice. The question is what brought back mediation and why?

2.2.2. Mediation Modern History (Mediation Emerging):

"Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree." [69]

Failure to address the dissatisfaction of the administration of the justice system has resulted in this reality resonating profoundly throughout the years; building momentum and manifesting in new and complex ways. Seventy years after Roscoe Pound's statement the Pound Conference [70] took place as an emerging point for mediation as part of the wider

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[64] H Glenn, *Legal traditions of the world: sustainable diversity in law*, (5th edn, Oxford: Oxford University Press, 2014) 186

[65] 1 Corinthians 6, 1–4. See also Jesus' comments as recorded in Matthew 5, 25–26.

[66] For example, on the Jewish Bitzua (mediation) and P'Sharah (arbitration), see J T Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (San Francisco: Jossey-Bass, 2004) 10. On the conciliatory nature of the Talmudic tradition, see H Glenn, *Legal traditions of the world: sustainable diversity in law*, (5th edn, Oxford: Oxford University Press, 2014) 121

[67] Nadja Alexander, The Mediation Manual: Hong Kong Edition (1st, LexisNexis, 2014) 46-72

[68] For more on the topic and more examples see: *Id and Derek Roebuck*, 'The myth of modern mediation' (2007) 73 Arbitration105 and a European research project http://www.konfliktloesung.eu/ accessed at 22/01/2018

[69] The opening statement Addressed by Roscoe Pound, Annual Meeting of the American Bar Association ABA (Aug. 29, 1906)

[70] Formally known as (the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice) took place April 7-9, 1976 in Minneapolis. The event was a meeting of some 200 judges, legal

modern Alternative Dispute Resolution (ADR) movement. Proposing alternative forms of dispute resolution such as mediation to address dissatisfaction with the justice system can be considered as the broad framework of an agreement for the two main teams behind modern mediation's historical development. The teams are the peacemakers and the legal elite.[71] It is important to note that the reality of mediation is one of a spectrum with the fluidity of thought, influence and action; however, for the purposes of this academic analysis, I will discuss two distinct teams with no overlapping influences or behaviours.

2.2.2.1. The legal Elite:

The legal elites can be credited with some significant developments in the establishment of the modern mediation movement especially the introduction of court-connected mediation programmes. Key players such as Professor Frank Sander and Chief Justice Warren Burger can be seen as pioneers. Their achievements can be witnessed, for example, in the fact that the American bar association (ABA) hosted the Pound Conference and also the introducing of ideas such as the multi-door court system[72] and recommendation of mediation and arbitration experiments. Alliances were soon forged between the ABA, the Department of Justice and other governmental entities moving forward the institutional of mediation. This team is driven by the 'efficiency components'.[73] In elaboration; this team sees mediation as an adjunct to the court system, a remedy for the ills of an increasingly litigious society and a method to aid the crippling courts with their overwhelming caseloads. Particularly by channelling cases of no significant value in either monetary or legal terms outside the court system thus freeing the space, the time and resources for the court to deal with the more significant cases maintaining and protecting the legal field and court capacity. The ideology of such a team with a firm belief in the law and the inherent value of traditional adjudication has served to reflect and reshape mediation's functions, values and expectations

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scholars, and leaders of the ABA who had gathered to examine concerns about the efficiency and fairness of court systems and their administration.

[71] The idea of the two teams draws on the work of Silbey and Sarat at: Susan Silbey and Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' (1988-1989) 66 Denv. U. L. Rev. 437

[72] "The traditional courthouse offers to the public only one "door" for resolving disputes: the litigation process. The multi-door courthouse concept arose out of the realization that litigation is not the best choice for resolving many disputes. In addition to adjudication, parties should be offered a range of alternatives, such as mediation, arbitration (binding or non-binding), case evaluation, summary jury trials, and mini-trials." And for an example of a courthouse multi door program See: Kenneth K. Stauart and Cynthia A. Savage, 'The Multi door courthouse: How it's working' [1997] Colo. Law 2

[73] See Id Silbey and Sarat (1989)

in a manner that does not sound appealing to the peacemaker team.

2.2.2.2. The peacemaker team

This team can be considered pioneers behind grassroots mediation and mediation neighbourhood community programmes. They are driven by the 'quality proponents'[74] with what can be characterised as dissatisfied with and critical of courts and adjudication. Unlike the efficiency proponents, their critique is not centred on the time, cost and poor capacity with dealing with the cases submitted to them, but for the general inadequacy of courts as a vehicle to address the substance of disputes and relationships between disputants. They view mediation as a true alternative to adjudication as it can allow the parties to address other aspects of their dispute such as emotional or social needs rather than a mere focus on the legal aspect of the dispute. The ideology of this team with their community programmes often resisted any link whatsoever with traditional litigation processes and would not accept referrals from the court; often seeking to attract disputants of a collaborative and not adversarial mentality towards conflict resolution. Despite the idealistic vision of the team, history has recorded the failure of such community programmes, and the team started to recognise the need to join forces with the other team; "unfortunately a relatively small number of disputants actually choose to take advantage of the new process. Most disputants continued to turn to the courts for resolution of their disputes. By the mid 1980's many grassroots mediation activists were advocating for the institutionalisation of mediation within the courts because that is where parties and their disputes could be found.'' [75] Other reasons that may have contributed to such a failure: the poor resources and lack of attracting adequate public attention and funding.[76]

In conclusion, in some fields of life, it seems that there are always two teams starting from the same ground aiming to support a cause yet with different perceptions and agendas. It is easy to witness such teams; in our own bodies, we have the heart and the brain or the soul and the body. In international relations, we have the diplomats and the generals. In the economic field we have the Socialists and the Capitalists, and in the literature field, we have the Romantics and the Realists. While the second team holds the key of materialistic visual

[74] Id Silbey and Sarat (1989)

[75] Nancy Welsh, 'The thinking vision of self-determination: the inevitable price of institutionalisation?' [2001] Harv Neg Law Rev 2

[76] In general, see: Engle-Merry S, *Getting justice and getting even: legal consequences among working class Americans* (1st edn, University of Chicago press, Chicago 1990)

achievements, the first team holds the key of embracing and preserving the various beautiful meanings and values of humanity. Having one of these teams dominating the other would lead to unpleasant circumstances and collaboration will always be required for better results in achieving the mutual cause. Mediation can definitely relate to such a concept; Clark writes: ‘’the modern development of mediation is characterised by the meeting of two disparate groups with two largely separate agendas. Evidence suggests that across the globe in a modern context, mediation tends not to develop well without some form of institutionalisation or embedding within traditional legal processes.’’[77]

Presenting the teams[78] behind the mediation development with their different ideologies and agendas can explain why the concept of mediation is associated with a variety of objectives and expectations.

2.3Mediation Objectives:

Understating and setting the objectives of mediation can be meaningful benchmarks for measuring mediation's success. Alexander sets out five objectives: *Service–delivery; Access to justice; Interpersonal relations transformation; Social transformation; Client satisfaction.*[79] While the first two can be very appealing to the legal elites, the remainder may be more appealing to the peacemakers.[80]

Service-Delivery as a mediation objective encapsulates the efficiency proponents' agenda as it refers to the need to reduce the 'cost' of a dispute; saving time, money and resources for both the disputants and the court. "The costs involved in disputing often extend well beyond the costs associated with litigation. They can include organisational resources diverted to dealing with the dispute such as the costs of personnel involved in managing the dispute, opportunity costs, impacts on productivity and turnover, damage caused to long-term business relationships and emotional costs such as loss of morale."[81] It is also worth

[77] B Clark, *Lawyers and Mediation* (1st, Springer, 2012) 5

[78] It is important to note that the legal elites and the peace makers have been evolving and cross pathing turning to four emerging teams explained in more details in chapters three of this work.

[79] In her book: Nadja Alexander, *The Mediation Manual: Hong Kong Edition* (1st, LexisNexis, 2014) 42 she cites: "A number of these objectives are drawn from the work of Breidenbach and Glässer: S Breidenbach und U Glässer, 'Selbstbestimmung und Selbstverantwortung im Spektrum der Mediationsziele' (1999) 4 *KON: SENS—Zeitschrift für Mediation*, 207. On mediation objectives, see also S Goldberg, F Sander, N Rogers and S Cole, *Dispute Resolution: Negotiation, Mediation, Arbitration, and other Processes*, (6th edn, New York: Wolters Kluwer Law & Business, 2012) at 169–167"

[80] It is important to note that, Access to justice may appeal to both – although they may hold different meanings of justice, that is why the meaning of justice is discussed in the following chapter.

[81] Id N. Alexander (2014), On the diverse costs of conflict, see OPP, *Fight, Face or Face it: Celebrating effective management of conflict at work* (1st edn, London: Chartered Institute of Personnel and

mentioning that parties may settle without giving priority to 'the less cost' objective, "the settlement although expensive …made sense …and the university felt that it was the right thing to do".[82] Indicating that some mediation objectives may be founded on one aspect such as the efficiency, yet it can be influenced by quality aspects .

Access to Justice[83] as a mediation objective overlaps with service delivery and both can be seen to be in perfect harmony with the legal elite's mentality as arguably diverting cases away from the court system would support access to formal justice by increasing the courts' capacity and allow them to focus on the more important cases.

Although it is hard to measure mediation's success in respect of reducing costs or increasing access to justice, one measurable criterion in that regard can be settlement rates. Such criteria uncover a certain mediation value which is a resolution. While such a value is undeniably important, it cannot be the dominant value in mediation practice for several reasons. First, it can be considered simply unfair for mediation because the process cannot guarantee to put an end to the dispute compared to adjudication.[84] Meditators have no decision-making powers and cannot promise a settlement as it remains in the hands of the parties to reach a consensual settlement. Thus, setting this up as a goal can lead to disappointment, frustration and disbelief in the process if no settlement is reached. Moreover, settlement targets might lead mediators to adopt styles or techniques that can manipulate or even force parties to settle.[85] In conclusion, the mediation value of resolution shall always be the most appealing value especially in the court-connected context for both the court and the parties, yet it should be acknowledged that it is not the promised objective, it is rather the potential.

Development, 2008) 5–8, and K A Slaikeu and R H Hasson, *Controlling the Costs of Conflict* (1st edn, San Franscisco: Jossey-Bass Publishers, 1998) 14–16

[82] This quote is from MIT University's president after agreeing to pay $6 million in total along with an apology to a student's parents to settle a dispute arising out of the death of their son by alcohol poisoning following an initiation event at a fraternity. See: Folberg & Golann, *Lawyer Negotiation Theory, Practice, and Law* (1st, Aspen, USA 2006) 7 This case is to be better presented in chapter two of this work.

[83] It is important to note that the term 'access to justice' can be contested when used to define this objective; as while it is used here in reflection to formal justice and the improvement of the court's function, the peacemakers will argue that mediation delivers its own form of justice. This issue is discussed further in the mediation and justice chapter of this study, section one chapter two.

[84] Yet, it can be argued that adjudication may fail in putting an end to a dispute when the appeals, delays and dis-satisfactions with the court judgments are considered.

[85] More on this see: James Coben, 'Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception.' (2000) 2 Journal of Alternate Dispute Resolution in Employment and Lela Love & James Coben, 'Trick or Treat: The Ethics of Mediator Manipulation' [2010] Disp. Res. Mag.

The *Interpersonal Relations Transformation*[86] objective refers to mediation practices that aim to empower parties to transform the way they relate to each other through mutual acknowledgement and responsiveness to the other disputants and their constituencies.[87] This objective reflects well with the quality proponents as it welcomes discussing the non-legal aspects of the dispute such as emotions and aims to rebuild broken relationships. When this objective is the centre of mediation, it may be very beneficial for family and commercial disputes where parties have or need to have on-going functional relations. It is noteworthy that this objective may be seen as irrelevant in disputes that do not require continuing relationships, for example in one-off transactions between strangers.[88]

The *Social Transformation* is an extended objective deriving from the previous one. It views disputes as an opportunity to work towards social change by identifying not only the individual but also the social context within which the conflict occurs and which has caused the conflict. Where they are not mutually compatible, the interests of the community are likely to take precedence over individual interests. According to such an objective, mediation can provide a forum for social change by developing and implementing core values for specific communities such as businesses, schools, universities, government departments, neighbourhoods, churches, sporting associations and other communities.[89] These last two objectives can be considered more appealing or may even be the focus of the peacemakers' team.

Finally, the objective of *Client Satisfaction* relies on the ability of mediation to offer a flexible process which is responsive to a client's expectations and diverse personal needs.[90] This question of course centres on what different parties' expectations are when participating in mediation. In a New Zealand survey, 196 lawyers considered that the primary reasons that their clients participated in mediation were a reduction in costs (93.4 per cent), the speedy resolution of disputes (81.1 per cent) and to circumvent the uncertainty of court outcomes (72.4 per cent). These client objectives from the perspective of lawyers match the efficiency proponents' aim for mediation. Conversely, factors such as the preservation of relationships

[86] For more on this school of thoughts see: Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding To Conflict Through Empowerment And Recognition* (1st edn, Jossey-Bass 1994)
[87] Id Nadja Alexander (2014) at 45
[88] D.R. Hensler, 'Suppose it's not true: challenging mediation ideology' (2002)2 Journal of Dispute Resolution 81,82
[89] For more on this promise see: Bush & Folger and Joseph Folger, 'Mediation Research: Studying Transformative Effects' (2001)18 Hofstra Lab & Emp L J 385, 393
[90] Id Nadja Alexander (2014)

(43.9 per cent), the desire for more control over the process and outcome (40.8 per cent) and the desire for more creative solutions (24.5 per cent) can be seen to better matches the quality proponents.[91]

The client's satisfaction elements can go beyond the civil and family perspectives. In elaboration, a study evaluating voluntary victim-offender mediation programs operating in 4 juvenile courts in Oakland, CA, Minneapolis, MN, Albuquerque, NM and Austin, TX. Data were obtained from interviews with 1,153 victims and offenders, as well as court records and other sources. The study examined several topics including mediation outcomes; victim satisfaction and offender perceptions and others. Victim-offender programs resulted in very high levels of satisfaction among both victims (nearly 80%) and offenders (nearly 90%). Victims who participated in mediation were far more likely than other victims to feel that the justice system had treated them fairly. More than 90% of mediation sessions produced a negotiated restitution plan to compensate the victim, and more than 80% of offenders complied with their restitution obligations. Victim-offender mediation helped reduce fear and anxiety among crime victims.[92]

In conclusion, these five objectives represent the various practices of contemporary mediation. When a certain mediation objective(s) dominate the process, it has a direct impact on the mediator's style[93] and techniques and the practice in general. For example, when service-delivery becomes the main focus, it might feature a single sitting, an emphasis on

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[91] K Saville Smith and R Fraser, 'Alternative Dispute Resolution: General Civil Cases' (Ministry of Justice, June 2004) at 27 one more study that support the parties' attraction to resolve their dispute by mediation is based on two complementary data analyses: (1) qualitative analysis of in-depth interviews, and (2) quantitative analysis of survey interviews. The qualitative interviews capture a richer expression of the respondents' opinions, including some of their own analyses of how their views are interrelated. The respondents were a large number of three groups of inside counsel, outside counsel and non-lawyer executives whom they are all influenced by their clients' needs see: John Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 Harv. Negot. L. Rev. 137

[92] See: Mark S. Umbreit and others, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (1st edn, Monsey NY: Criminal Justice Press, 1994)

[93] Mediators are asked to play complicated, diverse roles that may involve-depending on the program, the parties, or the specific case-efforts to "transform," to "facilitate," to "evaluate," or to perform a combination of these (and perhaps other) activities. See: Charles P. Jr, 'Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality, (2004) 2 J Dis Resol 303 The different mediation styles is explored in details in chapter four of this work.

reaching an outcome quickly and a settlement focus rather than a thorough exploration of interests. Further, if lawyers are present, the mediation may take on a legalistic dynamic and require a legally binding agreement in terms of outcome. Conversely, mediation with a predominant objective of interpersonal transformation may involve multiple sessions, deep exploration of underlying feelings and needs, no written outcome and no lawyers.

When enacting mediation laws or establishing mediation programs; the two teams should recognise that the people coming to the mediation table arrive with different expectations and needs. Hence, to avoid disappointments and to assure clarity when it comes to the promise of mediation, the question is which of these objectives, if any, the mediators can confidently promise the parties regarding the mediation outcome. To answer this question; a look at how mediation works is essential.

3) How Mediation Works - Characteristics and structure:

Participating in, shadowing mediation or even watching a number of short videos[94] depicting mediation in action can highlight several key characteristics of the process. So, for example, the parties are in a private room negotiating, speaking their minds, and discussing any or all aspects[95] of the disagreement[96]; while a third party 'mediator' is present to assist them in enhancing the level of communication to effectively and creatively negotiate their differences. It is easy to detect from this description that every mediation can be unique from others even if it is conducted by the same mediator. Perhaps the flexibility of the process, the absence of set procedural rules and the active human participation and interaction during the process are the reasons for the lack of uniformity.

A study[97] that reviewed the mediation literature[98] searching for different mediation

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[94] Many court mediation programs and mediation service providers created short movies on mediation to better introduce it to the public for example see: http://www.courts.ca.gov/3074.htm , http://www.americanbar.org/groups/dispute_resolution/resources/mediation_video_center.html and http://www.mediate.com/articles/ScotlandFamilyVideo.cfm Accessed at 23/01/18

[95] such as Legal, Emotional and Social.

[96] with or without legal representation

[97] Peter T coleman and Others, 'Putting the peaces together: A situated model of mediation' (2015) 26 International Journal of Conflict Management 145-171

[98] Id: The study began with the coding of two prior literature reviews, which focused on studies of mediation published before 2001(Wall J A and Lynn A, 'Mediation: a current review' (1993) 37Journal of Conflict Resolution 160, 194 and (Wall J A and others, 'Mediation: a current review and theory development' (2001) 45 Journal of Conflict Resolution 370-391). For the years 2001- 2012, the study searched the published literature available through Psych Info, Web of Science Social Science Citation Index, ABI Inform, and

characteristics concluded that these could be summarised as followed:

Characteristics of the context: environmental factors, mediation context, visibility of the mediation, time pressure, rules and standards, past outcomes, number of parties, culture.

Characteristics of the conflict: resolution status, conflict intensity, common ground between the disputants and possibilities for mutually acceptable solutions, and type of issues.

Characteristics of disputants: disputant power, power asymmetry, gender, parties' motivations and commitment, relationship hostility, parties' conflict management style.

Parties' perceptions of: mediator credibility, acceptability, trust between mediator and parties, fair conduct, procedural justice, mediator impartiality and bias, perceived mediator's warmth and consideration as well as chemistry with parties.

Characteristics of the mediator: mediator style, training, ideology, skill-base, expertise, experience and rank, as well as the value the mediator places on the parties' attainment of their goals, mediator ties, knowledge and bias towards the parties and the clarity of the mediator's role.

While each and every aspect of these characteristics can be witnessed in the mediation process, in every mediation they respond, assimilate and claim strength and influence interchangeably among themselves; for example the characteristics of the conflict and the disputants might be more dominant in shaping the mediation process than the characteristics of the context and the mediator and vice versa in other mediations thus shaping the mediation process differently and creating the uniqueness of every mediation.

Nevertheless, despite the exceptionality of each mediation process, mediation scholars argue that the mediation process is not spontaneous; it rather follows a systematic structure.[99]

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journals from Lexis Nexus. Of the 133 articles published on mediation during this period, the study concluding its finding on mediation characteristics.

[99] Kovach breaks down the mediation process into 13 stages: 1) Preparation 2) Mediator's opining 3) Parties 'S Opening Statements 4) Gathering Information 5) Identifying the Case and Interests 6) Generating Options 7) Barging And Negotiation 8) The Agreement 9) The Closing, along with four optional stages such as the reality checking. See: K. Kovach, *Mediation: Principles and Practice* (2nd edn, West Group, 2000) 210 and Moor in 12 stage: 1) Initial Contact with The Parties 2) Selecting A Mediation Strategy to Be Adopted. 3) Gathering Background Information and Analysing It. 4) Setting A Plan 5) Building Trust and Collaborations 6) Starting The Session 7) Identifying The Issue(S) And Setting an Agenda 8) Discover The

A common structure can be suggested with a closer analytical examination of how mediation works.[100] It can be concluded that the mediation structure is typically constructed of four main phases[101]: *Opening, Exploration, Negotiation and Closing*. The content of these phases can vary depending on the mediator's style and other elements; Moreover, mediators may carry out and emphasise each of these phases differently. With that in mind, the following paragraphs set out a brief explanation of the goal of each phase and possible ways of achieving such goals.

3.1Opening Phase:

Creating a safe environment or atmosphere coated with positivity and hope is the main goal for the opening phase to invite and allow the parties to actively and effectively participate in the process. How mediators open the mediation session has tremendous significance as it is the parties' first impression of the mediator's competency which reflects on the needed rapport building. Mediators can achieve the goal of this phase by conducting three tasks in a manner that fits their style and the situation. The three tasks or elements that constitute the opening phase can be, welcoming and greeting the parties, establishing trust and explaining and educating the parties about the process.[102]

3.2Exploration Phase:

"It takes two to speak the truth-one to speak and other to hear"[103]

Underline Issues 9) Generating Settlement Options 10) Evaluate The Settlement Options 11) Negotiations 12) Settlement. See: C. Moor, *The Mediation Process: Practical Strategies for resolving conflict* (1st,Jossey-Bass, 1996) 155 moreover Folberg and Taylor in 7 stages 1) Introduction 2) Finding Facts And Separating Issues 3) Finding Or Generating Options and Alternatives 4) Negotiations And Decision Making 5) Clarifying and Drafting The Plan 6) Presentation And Legal Review 7) Application and Enforcement see: J. Folberg & A Taylor, *Mediation A Comprehension Guide to Resolving Conflicts Without Litigations* (1st edn, Jossey-Bass, 1984) 11

[100] Observations based on Id and taking place and reviewing mediation training materials such as: CEDR, *The Mediator handbook* (4th edn,CEDR , 2004) and JAMS Institute, Mediation workshop (Sep 4th 2014- San Francisco) and Straus Institute for Dispute Resolution Pepperdine University School of Law, Mediation The Art of Facilitating Settlement An Interactive Training Program (Aug 4th 2014- Los Anglos). Beside reviewing literature such as Folberg, Golann, Stipanowich and Kloppenberg, 'Chapter 9 Mediation the Big Picture and Chapter 10 A deeper Look into the process' in Wolters Kluwer (eds), *Resolving Disputes Theory, Practice and Law* (2nd, Aspen, 2010), I also draw on personal practical experience here.

[101] There is also an initiation phase called *Convening* that is concerned with establishing parties' willingness to negotiate, bringing them to the mediation table and agreeing to mediate. There is also the *follow up* phase that can come into play after the closing phase if the parties don't settle.

[102] In general, see: the training materials of Straus Institute for Dispute Resolution Pepperdine University School of Law, Mediation the Art of Facilitating Settlement an Interactive Training Program.

[103] Henery David Thoreau quote.

"The wise person does not give the right answers but poses the right questions"[104]

The main purposes of this phase are for the parties to understand each other's perspective and for the mediator to understand the issues and any possible underlying interests. The heart of this phase is communication and building bridges of understanding. The mediator should be equipped with a set of communication tools or skills such as reading body language, the art of paraphrasing, summarizing and active listening. This set of skills will allow the mediator to carry out the fundamental tasks of this phase especially; adopting the right questioning and listening techniques[105] followed by validation techniques that involve the acknowledgment, assurance and valuing of the party's existence, importance, feelings and expressions that would require an intelligent response to emotions[106] and a strategic use of caucusing or private meetings.

The last task or tool that mediators can use in this phase, and also at the closing phase, is being an agent of reality; meaning shifting the parties' mentality and attitude from an adversarial distorted one to a more realistic and cooperative manner by possibly help the parties to re-examine the likelihood of winning the case in an adjudication process and allow then to recognise the different limitations of adjudication to help the parties to move forward. Once communication is established at a workable level of understanding; the parties should be able to generate a proposal which can be transmitted to the other side and the negotiation phase is then underway.

3.3Negotiation Phase:

The goal of this phase is to keep the negotiation going productively while maintaining flexibility and innovation. To explain how the mediator functions in this phase, it is essential to note that broadly speaking negotiation, in general, can be conducted in two fashions: namely, distributive and integrative bargaining. The distributive bargaining approach entails that the parties pull against each other to distribute the "fixed pie" value they have identified between them. As for the integrative bargaining approach, parties tend to go beyond the zero-sum exchange and expand the "pie" by focusing on interests rather than merely positions.[107]

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[104] Claude Levi Stauss quote

[105] More on the topic see: Christopher W. Moore, "*The Mediation Process*" (2003)

[106] More on the topic see: Suzanne Terry, 'Conciliation Responses to The Emotional Content of Disputes ' [1987] Mediation Quarterly 45

[107] Straus Institute for Dispute Resolution Pepperdine University School of Law, Mediation the Art of Facilitating Settlement an Interactive Training Program Handbook section 10. Also more on the concept of

Many different aspects, such as the type of case and parties' wishes can contribute in adopting either distributive or integrative bargaining manners or indeed both throughout the mediation. In distributive bargaining, mediators can help the parties by discouraging offensive opening offers, normalise the negotiation dance or in other words harmonise the parties offers and counter offers to allow a smooth movement from their opening stances to get them closer to each other in a common accepted ground, extract concessions, encourage parties to use signals and help them maintain credibility and save face. In integrative bargaining, mediators can help the parties by encouraging collaboration, exploring party interests, encouraging creativity and deploying a problem-solving mindset.

3.4Closing Phase:

The main goal of this phase is to allow the parties to harvest the fruits of a successful mediation when the process meets its objectives and expectations. Viewing mediation as a dispute resolution method would reflect the expectation that a successful mediation would require a settlement for the dispute. This study recognises that mediators are not arbitrators nor judges; meaning they do not have the power to issue an award or a judgment. Therefore, mediators cannot promise a settlement. The aim of this study is to search for or rather to propose a concrete and deliverable mediation promise.

4) Mediation's Promise:

The question remains thus: what does a successful mediation mean? Does it mean that harmony was restored to the relationship between the parties or that the dispute has settled and is now removed from the court's system? Does it mean that the parties are satisfied and, if so, what specifically are they satisfied about?[108]

When mediators refer to their 'success rate' they usually mean the settlement rate of mediations they have conducted. However, a dispute that does not settle at mediation may be successful in many ways. For example, the parties may have isolated the issues of difference between them and now want to think about their next step, or use a different forum such as arbitration to deal with the identified issues. Conversely, a mediation ending in settlement might be difficult to assess as successful if, for example, the settlement results from bullying

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competitive and cooperative negotiation see: Folberg & Golann, 'Chapter 3 Competitive and Cooperative Negotiation' in (eds), *Lawyer Negotiation Theory, Practice and Law* (1st, Aspen, 2006).

[108] For more on that meaning See Michael Williams, 'Can't I Get No Satisfaction? Thoughts on The Promise of Mediation' (1997) 15 Mediation Quarterly 143

by an aggressive mediator or is contrary to one of the party's best interests.[109] This demonstrates that it is neither fair nor accurate to assess the efficiency proponents' objectives by the settlement rates. On the other hand, the quality proponents' objectives rely on feelings and intangible matters which are very challenging to measure.

Blair Sheppard, one of the scholars to offer a systematic discussion on the notion of mediation success proposed that this evaluation require examining two different aspects: the mediation process and mediation outcome. The process refers to what transpires at the mediation table, and the outcome refers to what has been achieved (or not achieved) as a result of mediation.[110] Indeed parties might believe that they have experienced a successful mediation process, but without any success in the outcome, in the same manner, they might reach a successful outcome through a poorly conducted process. Scholars offer many criteria to be used in measuring the success of the process or the outcome[111], yet it seems to be defining one abstract concept (success) very much in terms of other equally contentious abstract concepts (e.g. fairness, wisdom etc.) without any degree of certainty.[112]

The aim of this chapter is not to discuss the criteria to measure mediation success; it is rather to propose a unifying element which can be viewed as the very essence of both the mediation process and outcome, in a manner that builds or lights the track for those who wish to assess mediation's success. In order to achieve that, there is a need to differentiate between the mediation objectives and the mediation promise. While a doctor cannot promise to heal the sick and a lawyer cannot promise to win a case; they still can promise meeting with the professional standards that can increase the likelihood of achieving what their clients hope for. The same concept can apply for mediators; while they cannot promise meeting any of the objectives mentioned, they should be able to promise a uniform, internationally recognised, professional requirements regarding both the mediation process and the mediation outcome. This can be achieved by a brief look at the different mediation values.

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[109] Id 48

[110] Blair Sheppard, 'Third Party Conflict Intervention: A Procedural Framework' (1984) 6 Res In Org Behav 226

[111] Such as; fairness, efficiency, satisfaction, effectiveness, wisdom and stability see: jessica katz jameson, 'toward a comprehensive model for the assessment of intra organizational conflict: developing the framework' (1999) 10 intl J Of Conflict management 27, 44 and lawrence susskind & jeffrey cruikshank, *Breaking the impasse: consensual approaches to resolving public disputes* (1st edn, Basic Books, 1987)

[112] See: Jacob Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' (2005) 7 Cardozo J. Conflict Resol. 289 at 292

5) Mediation Values:

> *Mediation values can be described as "the theories, principles, world-views and cultural orientations that provide the foundations for the practice of mediation"*[113]

A comparative study by J. Hopt and Steffek[114] confirms the considerable differences in viewpoint and elements of the mediation definitions around the globe. Yet, they managed to classify different mediation values into three levels depending of their importance: *core, essential, additional.*

5.1 The Core Values:

Hopt and Steffek suggest that the mediation definition captures number of core values of mediation.[115] Such as:

1) The voluntary nature of the process where the free will of the parties is such an essential value of mediation that almost all legal systems fundamentally share this view.[116]
2) Parties' self-determination where the parties bear the responsibility of the outcome and resolution with no decision-making power on the part of the mediator.[117]

5.2 The Essential Values:

1) The neutrality of mediators is explicit in numerous definitions[118] whereas those conceptual definitions that do not expressly mention neutrality are implicitly based on the principle as implemented at the level of mediator duties and professional law.[119]

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[113] See: Nadja Alexander, The Mediation Manual: Hong Kong Edition (1st, LexisNexis, 2014) 50

[114] The study investigated the different mediation definitions found in the statutory and judge-made pronouncements ns in the Roman legal system (eg. France, Italy, Spain) and Germanic legal system (Germany, Austria, Switzerland) Nordic (Norway) Anglo-American (USA, England, Ireland, Australia, New Zealand) and others see: Edited By: J. Hopt & Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (1st, Oxford University Press, 2013) 11-17

[115] Id 11 'Mediation is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate(s) communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their disputes.

[116] Id at 12

[117] Id at 12 where cited in support of that different definitions from different jurisdictions; England, Portugal, Canada, China, Germany, Greece, Austria, Australia, New Zealand, Russia, and Art. 3(a) EU Mediation Directive 2008. Also Id 12-13 the study also identified two more core values; the systematic promotion of communications between the parties and a value related to the nature of the dispute where the use of mediation is not confined to the resolution of legal conflicts but may be considered in respect of conflicts of no legal dimension.

[118] Id 13 in support of such a statement the study cited mediation definitions from Austria, England, Hungary, Netherland, USA and the EU Mediation Directive 2008 in Art. 3(b) under the definition of the mediator.

[119] Id 13 and 75where the study cited definitions from Austria, France, Japan and USA California.

2) Mediation confidentiality is as important as neutrality and also expressly mentioned in some definitions[120] or at least secured through confidentiality provisions of substantive and procedural law outside the actual normative definition.[121] The EU mediation directive 2008 also chooses this path by defining mediation in Art 3(a) and regulating confidentiality as a fundamental value of mediation subject to contrary agreement in Art 7.[122]

5.3 Additional Mediation Values:

The study points out additional components or values out of the mediation definitions which are linked to regulatory structures that aim to achieve both *quality* of the process and the outcome. For example, the Austrian mediation definition includes the requirement for mediation to be carried out by '*professional trained*' mediators and according to '*recognised methods*'. [123] Other legal systems have restricted the mediator role to a certain description of his or her activities excluding the proposing of solutions.[124] In other countries, the conventional definition emphasises the *flexibility* of the process. [125] Moreover, there is the defining feature that the ultimate dispute resolution has to be expressed as a *written agreement.*[126] It is important to note that the mediation values are not limited to the above; as Alexander In her book indicates the main, but not all, common mediation values can be; self-determination, voluntariness, transparency, confidentiality, cooperativeness, neutrality, impartiality, non-interventionism, interest-based orientation and resolution.[127]

5.4 The Challenge with Mediation Values:

Alexander mentions "[I]t seems difficult, if not impossible, to identify a core set of values that underpin mediation".[128] Indeed, Hopt and Steffek in their study have also pointed out that many essential values of mediation can be subject to broad consensus; for example: jurisdictions can limit the voluntariness value of mediation where the court may compel the parties to mediation[129], also parties' self-determination and the role of mediation where

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[120] Id 13 and the study cited definitions from Bulgaria, Germany, Portugal and New Zealand.
[121] Id 13 and the study cited England, Ireland, Australia, Canada and USA.
[122] Id 13
[123] Id 14
[124] Id 14 cited Texas Civil Practice & Remedies Code §154.023
[125] Id 14 cited The Legislation Advisory Committee in New Zealand.
[126] Id 14 Cited Hungary
[127] Nadja Alexander, The Mediation Manual: Hong Kong Edition (1st, LexisNexis, 2014) 50
[128] Id Nadja Alexamder 52
[129] See: Edited By: J. Hopt & Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (1st, Oxford University Press, 2013) 12 where cite Florida system as an example.

differences emerge regarding whether the mediator is entitled to propose solutions.[130] With the same line of thought, other writers such as Mayer[131] and Astor[132] have also recognised that many values often fail to stand strong against any attempt to better comprehend in respect of aiding mediation; therefore they challenged the assumptions associated with values such as voluntariness, confidentiality, cooperativeness, neutrality, noninterventionism, interest-based orientation and resolution. Alexander provides a vivid example using the value of confidentiality to stress that many values cannot be said to apply universally and, in certain circumstances, can be culturally inappropriate.[133]

This vividly indicates that there is a need to re-visit the validity and meaning of these different mediation values.[134] Moreover, it is clear that the mediation field has a real need for a unified mediation value which; further reflects the importance of this study with its proposal to consider the educated parties' self-determination as the mediation promise, core value and essential element in mediation definition. Before moving forward with such a proposal, a brief exploration to the different mediation definitions is required.

6) *Observation on existing Mediation Definitions:*

All the challenges that have been mentioned did not stop different*: service providers, academics and the international community* from generating their own mediation definitions. The following is an analytical view of such mediation definitions.

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[130] Id : J. Hopt & Steffek 12 where cite Netherland, Canada and Norway as examples.

[131] B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (1st Edn, Jossey-Bass, 2004)

[132] H Astor, 'Rethinking Neutrality: A Theory to Inform Practice Part I' [2000] ADRJ 73, H Astor, 'Rethinking Neutrality: A Theory to Inform Practice Part II' [2000] ADRJ 145, H Astor, 'Rethinking Neutrality Again' (2003) 14 ADRJ 125

[133] Id Nadja Alexander 50-51 Alexander uses the story of a Samoan mediator "Tariu who completed his mediation training with a well-respected conflict resolution training organisation in a western country and returned to Samoa enthused and motivated to support the introduction of mediation to his Pacific homeland. His colleagues at the court asked him whether they could apply mediation to a criminal matter. He told them no: the scope of his training made it clear to him that mediation only applied to civil cases. They asked him if they could suggest solutions to the parties. He replied firmly in the negative. Then they asked him if the court could appoint chiefs from the disputants' villages as mediators because the chiefs would already be familiar with the conflict and they would know the parties. The newly-minted mediator told them that this would compromise neutrality and it was probably not a good thing to do. Finally, they asked him about conducting some of the mediations in the local village square rather than in the court so that everyone could see and understand what was happening. After all, this was consistent with customary practice. Tariu shook his head. He explained the idea of confidentiality and that it was forbidden for outsiders to access the mediation. As his colleagues walked silently back to their work desks, Tariu wondered about how this new mediation would work in his country. One year later, he told us that the while the overseas training he received was of excellent quality, it was not sufficient and that he has had to adapt the model to local needs and cultural norms. He now conducts his own mediator training in Samoa based on a revised set of mediation values and principles."

[134] Mediation neutrality and confidentiality are visited and examined in chapter five of this study.

Mediation service providers can be private mediation centres, Independent mediators and even court-connected mediation/ADR programs. These different mediation providers developed several mediation definitions.

> However, "[m]ost of these definitions are 20 to 60 words strung in segmented, sometimes complex, sentences. Many - though not all - service providers tend to see the world more through their own private lenses than from the vantage point of their customers. They wind up describing what they do, rather than properly defining mediation itself. Consequently, they unwittingly limit what mediation is, or could be, by the narrow zone within which they operate."[135]

Perhaps the reason behind that is the trend with the existing mediation definitions where it reflects and focuses on one or two mediation characteristics and ignores others such as the process, mediator role, the parties, the outcome and others.[136] The Californian evidence code presents a strong example of this as it has had to define mediation in two dimensions, by first describing the process followed by the mediator's role within it,[137] then a court decision subsequently focused on another dimension which is the parties' participation.[138] With the same line of thought, several definitions have taken the same approach to describing some of the mediation characteristics to define mediation,[139] while others tend to focus more on the mediator role.[140]

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[135] Michael Leathes, 'Stop Shoveling Smoke! Give Users a Classic Definition of Mediation' [September 2011] 1, 2

[136] For the mediation characteristic; see the above discussion on how mediation works.

[137] California Evidence Code 1998 s SECTION 1115-1128(1115)(A&B):

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for mediation.

[138] The California state supreme court has described California Evidence Code's 1998 s SECTION 1115-1128 framework as extensive but the use and effectiveness of mediation depends on the candour of the participants. As the court has noted, the purpose of the statute is to promote "a candid and informal exchange regarding events in the past. See: *Fair v. Bakhtiari* [2006] 4th 40 Cal 189, 194-196 (California state supreme court)

[139] For example, The Bench Handbook Judge Guide to ADR by Judicial Council of California, Administrative Office of the Courts 2008 did not confirm a definition for mediation; instead provided a detailed description of the mediator role, the process and roles of parties and attorneys under the section IV. MEDIATION A. DISCRIPTION. Available at: (http://www.metalaw.me/resource/ADR.pdf) Accessed at 23/10/2018

[140] A court connected mediation program describes mediation as "a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their

It is fair to conclude that the various reviewed mediation definitions are rather a description of the mediation process according to the drafters' individual perception of the process or how one hoped the process should be rather than a definition that can be internationally accepted. This is particularly vivid with the mediation definitions developed by mediation service providers. As such, mediation definitions tend to view mediation with the influence of different mediation styles, where they describe mediation according to one or more styles and exclude other styles depending on what such mediation service provider offers and on their mediators' training, background and believes. For example, the American court committee of Maryland comments: "Evaluative Mediation is not defined here because we believe it is a misnomer. In a survey asking Maryland mediators how they define their practice, no mediator responded that they define their practice with the term Evaluative." The committee concluded that evaluative mediation is not mediation, it is a different process such as a Settlement Conference process.[141] On the other hand, JAMS mediation centre defines mediation as a directive/evaluative process.[142]

This further confirms the confusion in the mediation field regarding the mediator role, mediation value and mediation promise.

Against this backdrop, many *scholars* have attempted to offer a mediation definition based on a scientific and academic approach. One attempt viewed mediation as a chain reaction that holds the interaction of many variables. [143] While this attempt, like other

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opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy." See: United State District Court Central District of CA General Order NO 11-10 in the Matter of ADR Program 4.2 Description of mediation. Available at (http://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-11-10.pdf) accessed 23/01/2018 Also the Austrian mediation law defines mediation as an activity […], where a […] mediator […] promotes the communication […] and the Italian mediation law define mediation in a similar fashion see: Edited By: J. Hopt & Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (1st, Oxford University Press, 2013) 15

[141] See: The Maryland Program for Mediator Excellence's Definitions Task Group and approved by the Mediator Excellence Council on May 19, 2010. Available at: http://www.courts.state.md.us/macro/pdfs/mediationframeworkdescriptions.pdf last accessed: 28/01/18

[142] See: JAMS website defining mediation and answering the question what is mediation: "…This allows each side to explain and enlarge upon their position and mediation goals in confidence. It also gives the mediator an opportunity to ask questions which may well serve to create doubt in an advocate's mind over the validity of a particular position." Available at: https://www.jamsadr.com/mediation-defined/ last accessed 28/01/18

[143] "The present article provides an alternative framework for evaluating mediated relationships. From this perspective. a mediated process is a chain reaction, beginning with an independent variable that affects a mediator that in turn affects an outcome. The definition of mediation offered here, presented for stage

academic attempts, provides a definition that can capture all the possible different mediation styles and objectives yet, it does not constitute a reliable, practical and unified mediation definition. With all the several academic attempts and proposals for a unified mediation definition,[143] the question is: did the international community managed to address the need for a uniformed mediation definition?

Perhaps the most significant project from the *international community* to address this predicament to bring a sense of consistency to the mediation field; is the ongoing project of the United Nations Commission on International Trade Law (UNCITRAL); to establish an International convention on the settlement of commercial disputes: International Commercial Conciliation. According to such project: " 'Conciliation' means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the conciliator') lacking the authority to impose a solution upon the parties to the dispute."[144]

Several observations can be highlighted; first, the strategy that has been used in addressing the diversity of beliefs associated with mediation values; is to avoid it, as the draft states: "…a process, regardless of the expression used and irrespective of the basis upon which the process is carried out…". Second, the use of the term conciliation and conciliator requires a concrete understanding in connection to the meaning of conciliation and whether mediation is different from conciliation.[145] Last and most important is the observation that this definition may leave the debate alive. Yet, it can indicate the importance and validity of the research theory of 'educated self-determination' as the draft states that mediation allows an opportunity for parties to "reach an amicable settlement of their dispute with the assistance

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sequences, states three conditions for establishing mediation: (a) the independent variable affects the probability of the sequence no mediator to mediator to outcome; (b) the independent variable affects the probability of a transition into the mediator stage; (c) the mediator affects the probability of a transition into the outcome stage at every level of the independent variable." See: Linda M. Collins, John J. Graham & Brian P. Flaherty, 'An Alternative Framework for Defining Mediation' (1998) 33 Multivariate Behavioural Research 295-312

[144] See: United Nations Commission on International Trade Law (UNCITRAL) Working Group II (Dispute Settlement) Sixty-seventh session Vienna, 2-6 October 2017 project on: An International convention on Settlement of commercial disputes International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation. The definition is under Article 2.4

Available online: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html last visited 28/01/18

[145] This issue is tackled later in this chapter.

of a third person… lacking the authority to impose a solution upon the parties to the dispute". This affirms the recognition of parties' self-determination by stressing that the third party lacks authority to impose a solution. As for the assistance role of the third party, this study proposes that the mediator's main responsibility is to educate the parties so they can better practice their self-determination as it is explained across this study.

7) *The Theory of Mediation Educated Self-Determination*

Besides all the rationale provided in the introduction chapter of this study, many other lines of thought from scholarly findings support the notion of parties' educated self-determination as a core value and at the heart of the promise of mediation.

For example, Krause argues that party self-determination is a key component of a high-quality mediation.[146] Bernard and Grath state "Party self-determination is considered the fundamental principle of mediation".[147] Nolan-Haley confirms that party self-determination is widely accepted as the intrinsic value of mediation.[148]

As for the meaning of party self-determination and what does it entail, the American model standards of conduct for mediators[149] define it by: "Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes."[150] This makes it clear that "If self-determination is divorced from informed decision-making. It cannot claim to constitute authentic self-determination."[151]

With this initial understanding, further explanation and examination to be followed across the study, this work sets forward the theory of educated self-determination as the

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[146] Alan Krause, 'Striking Accord: Composing a High Quality and Meaningful Mediation' (2011) 33(1) U La Verne L Rev 147, 148

[147] Phyllis Bernard & Bryant Garth, *Dispute Resolution Ethics: A Comprehensive Guide* (1st Edn, American Bar Association, 2002) 73

[148] Jacqueline Nolan-Haley, Self-Determination in International Mediation: Some Preliminary' Reflections (2006) 7 Cardozo J. Conflict Resol. 277, 278

[149] The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

[150] See: The Model Standards of Conduct for Mediators Standard I. Self-Determination (A)

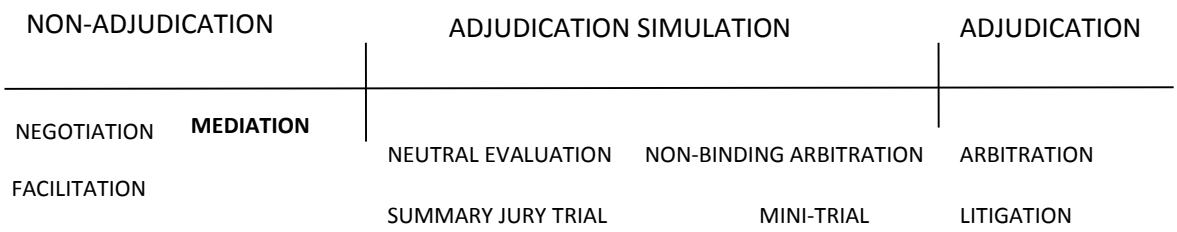
[151] See: Isabelle R Gunning, "know justice, know peace: further reflections on justice, equality and impartiality in settlement oriented and transformative mediations*" (2004)5* Cardozo J Conflict Resol. 87, 93

mediation core value and promise - a uniform and unique aspect of the mediation process that differentiates mediation from other dispute resolution methods.

8) Distinguishing Mediation from the other Dispute Resolution Methods:

The first step in distinguishing mediation from other dispute resolution methods in the light of the theory of educated self-determination is to understand the location of mediation on the dispute resolution spectrum as follows.

Dispute Resolution Spectrum



More parties control over the process and the outcome and more interactive with the process.

Flexible and informal

All aspects of the dispute can be discussed. (More Personal Communications)

Settlement is by a consensual agreement.

Less parties control over the process and outcome and less interactive with the process.

Formal procedures

Legal and right based (Less Personal Communications)

Binding decision (award, Judgment)

[Figure 1]

The above figure explains that the different dispute resolution methods can be classified under three categories, namely: Adjudication, Adjudication Simulation and non-Adjudication methods.[152]

Adjudication: is the legal process by which an arbiter or judge reviews evidence and argumentation, including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.[153] With this understanding methods such as Litigation and Binding Arbitration are classified under

[152] This spectrum under such classification is based on personal reflection and understanding of the different dispute resolution methods.

[153] See: *"Glossary for Administrative Hearings" Washington State Office of Administrative Hearings.*

adjudication.

Adjudication Simulation: Neutral Evaluation[154], Non-Binding Arbitration[155], Mini-Trial[156] and Summary Jury Trial[157] are all methods that depend on the 'reality check' concept. These methods simulate the adjudication option yet with a safety net; where they allow the parties to present the legal aspects of their case and gives them the chance to weigh their position and foresee the possible outcome if the case proceeds to trial or arbitration. The goal is that by the end of any of these processes the parties may become more sensible and realistic toward their dispute and grow a tendency to settle through negotiation or mediation.

Non-Adjudicative: Negotiation, facilitation and Mediation differ from adjudication in

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[154] Neutral Evaluation: Is a process that lets each side present written and oral summaries of its case to a neutral person who is often an attorney with expertise in the subject matter of the case, called an evaluator. The evaluator reads the parties' written statements, reviews evidence and may hear witness testimony. In Neutral Evaluation lawyers and their clients get to hear independent feedback on the strengths and weaknesses of their case. This helps the parties have a more realistic nonbinding assessment of the potential outcome of their case if it goes to trial. Definition can be found at County of San Mateo Court web Site accessed in 23/01/2018: https://sanmateocourt.org/court_divisions/adr/civil/neutral_evaluation.php#what

[155] Non-Binding Judicial Arbitration: In arbitration, a neutral (the arbitrator) reviews evidence, hears arguments, and makes a decision (award) to resolve the dispute. Arbitration normally intended to be more informal and speedier and less expensive than a law-suit. When the case is referred by the court to Arbitration it can be termed "judicial arbitration," and it is not binding, unless the parties agree to be bound. A party who does not like the award may file a request for trial with the court within a specified time. However, if that party does not do better in the trial than in arbitration, he or she may have to pay a penalty. Be careful here, you may be talking about a very specific arbitration scheme in one jurisdiction. See: You Don't Have To Sue, Here Are Some Other Ways to Resolve a Civil Dispute, Presented by the Judicial Council of California and the State Bar of California. March 1998 available at: http://www.courts.ca.gov/documents/adr.pdf last accessed 23/01/18

[156] Mini-trial: "The mini-trial is a flexible, nonbinding ADR process used primarily out of court. A few federal judges have developed their own versions of the mini-trial, which is generally reserved for large cases. In a typical court-based mini-trial, each side presents a shortened version of its case to party representatives who have settlement authority—for example, the senior executives of corporate parties. The hearing is informal, with no witnesses and with relaxed rules of evidence and procedure. A judge or non-judicial neutral may preside over the one-day or two-day hearing. Following the hearing, the client representatives meet, with or without the neutral presider, to negotiate a settlement." See: Guide to Judicial Management of Cases in ADR, By Robert J. Niemic Donna Stienstra Randall E. Ravitz, Federal Judicial Centre 2001 P.146 avilable at: https://www.fjc.gov/sites/default/files/2012/ADRGuide.pdf last accsess 23/01/18

[157]Summary Jury Trial: "The summary jury trial is a nonbinding ADR process designed to promote settlement in trial-ready cases. A judge presides over the trial, where attorneys for each party present the case to a jury, generally without calling witnesses but relying instead on submission of exhibits. After this abbreviated trial, the jury deliberates and then delivers an advisory verdict. After receiving the jury's advisory verdict, the parties may use it as a basis for subsequent settlement negotiations or proceed to trial. A summary jury trial is typically used after discovery is complete. Depending on the structure of the process, it can involve both facilitated negotiations, which can occur throughout the planning, hearing, deliberation, and post-verdict phases, and outcome prediction, that is, an advisory verdict. Part or all of the case may be submitted to the jury. The jurors are chosen from the court's regular venire; some judges tell the jurors at the outset that their role is advisory, but others wait until a verdict has been given." See: Id, P.145

that they are consensual, informal and can go beyond the legal aspect of the dispute. Most importantly with the non-adjudication methods the parties are the decision makers; meaning they remain in control over the outcome of their dispute.

Establishing that mediation falls under the non-adjudication methods does not fully clear the confusion between mediation and the other dispute resolution methods and to better distinguish mediation from the other dispute resolution methods there is a need to examine mediation in comparison within the main dispute resolution methods, especially the other non-adjudication methods and also arbitration.

8.1 Mediation and non-adjudication methods (the Mexican food metaphor)

One way to understand the similarities between mediation and the other non-adjudicatory methods is to propose a metaphor: non-adjudicatory methods are like Mexican food.[158] Cheese, flour tortilla, tomato salsa and guacamole are the core components of burritos, tacos, quesadillas and nachos. While these popular Mexican dishes share the same ingredients they are also distinctly different; much like mediation, negotiation and facilitation share the same key features and foundations but are simply "assembled" differently. This metaphor may explain why mediation can be easily confused with other non-adjudication methods.

With the same line of thought, Murnighan argues that mediation shares a common feature with the other forms of dispute resolution methods. All the dispute resolution methods are a form of intervention.[159] He suggests several aspects can differentiate mediation from other dispute resolution methods such as; the structure of the mediation process and the level of intervention or powers of the third party.[160] One can argue, that Murnighan's

[158] The thought has been developed by a conversation on the topic with the mediator Edward Bantle.

[159] See: J. Keith Murnighan, The Structure of Mediation and Intervention: Comments on Carnevale's Strategic Choice Model, [1986] Negotiation Journal 351 where Murnighan based his study on the work of Carnevale see: Carnevale, "Strategic Choice in Mediation." (1986) 2 Negotiation Journal 41-56 Murnighan confirms that: "mediation is one form of intervention; the definition of intervention is also important. Webster's defines intervention as "any interference that may affect the interests of others" while to mediate is "to interpose between parties as the equal friend of each, especially to effect a reconciliation." Id Keith Murnighan.

[160] "The structure of mediation differentiates it from the more general issues associated with intervention. Mediation's structure, or defining characteristics, rests on three elements: (1) two or more parties having difficulty agreeing without assistance; (2) an outside mediator being chosen rather than choosing to become involved; and (3) no final decision-making or sanctioning power for the mediator. As the third party's power increases, their actions can be conceptualized as intervention; if their power is limited, their actions can be conceptualized as mediation. Clearly, the consequences of intervention and mediation will differ significantly for the conflicting parties." See: Id Keith Murnighan

differentiation remains general and leaves the debate alive; therefore this study proposes educated self-determination as the concrete benchmark that differentiates mediation from other dispute resolution.

8.1.1 Mediation and Negotiation:

Negotiation is the art of communication and persuasion. Negotiation can be defined as "a process of communication used to get something we want when another person has control over whether or how we can get it."[161] Mediation and Negotiation are very similar to a great extent in the sense that negotiation is the heart of mediation. Indeed mediation can be described as an "assisted negotiation".[162]

In drawing a line to differentiate mediation from negotiation three points can be raised. First, in negotiation parties negotiate independently without the help of a third party interference but in mediation parties negotiate with the assistance of a neutral third party (Mediator). Secondly, the phases of the mediation process are more structured than negotiation as explained earlier in this chapter. Lastly and most importantly mediation is often claimed to "add value" to unassisted negotiations by helping parties overcome cognitive, psychological, and strategic barriers to resolution that they cannot readily overcome themselves.[163] This study proposes that the value of educated self-determination is the true value to an unassisted negotiation that mediation offers.

8.1.2 Mediation and facilitation:

There are two types of the facilitation process: open space and appreciative inquiry facilitation. Open space is a method of facilitating meetings, seminars or large meeting. The purpose of open space is to invite people to discuss their ideas in areas of mutual interest. This method can be useful for dealing with complex issues and decisions among groups with high levels of diversity and potential conflicts. In case of preventing potential conflict, such a method can be successful when leaders or management are willing to share power.[164]

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[161] Folberg & Golann, 'Chapter one Negotiation and Conflict' in (eds), *Lawyer Negotiation Theory, Practice and Law* (1st, Aspen, USA 2006).

[162] See: IV. Mediation Rule 2.6 in the Bench Handbook, Judges Guide to ADR issued by Administrative Office of the Courts as part of the Judicial Council of California available at: http://www.metalaw.me/resource/ADR.pdf last accessed 29/01/18

[163] See generally Robert Baruch Bush, 'What Do We Need a Mediator For? Mediation's "Value-Added" for Negotiators' (1996) 12 Ohio St J On Disp Resol 1

[164] For more on the process of open space facilitation see: http://www.openspaceworld.org/files/tmnfiles/2pageos.htm Last access 23/01/18

In the appreciative inquiry the facilitator goes beyond providing a practical or rather creative communication environment to asking positive questions with a view to moving forward and exploring new potentials and opportunities.[165] While facilitation seems to be a lighter process than the mediation process, facilitation seems to be used to prevent a conflict or when the conflict has not escalated to a serious level, ADR service providers acknowledge that mediation and facilitation are two different processes. For example the federal mediation and conciliation service offers mediation and facilitation as two distinct services.[166]

In the light of this study's theory, the 'education' part of the informed consent as it will be explained in the second section of this study; is what distinguishes mediation from facilitation. Meaning; both mediation and facilitation aim to enhance communication, honour parties' self-determination but only mediation holds the responsibility that parties practice their self-determination with adequate knowledge and information.

8.1.3 Mediation and Conciliation:

If mediation was a colour, then conciliation can be one of its darker shades.[167]

The terms of Mediation and conciliation are generally used interchangeably.[168] Some have started the quest to explore the differences between the two terms, yet concluded that both terms lack clear and uniform definitions.[169] Others describe conciliation as a more directive and interventionist process than mediation where the neutral's focus is on the legal merits of the dispute and the possible outcome and can even go as far as suggesting terms of settlement.[170] Many support this notion and argue that the technique of a mediator proposal is

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[165] For more on appreciative inquiry see: Edwin E Olson and Glenda H Eoyang, *Facilitating Organizational Change-Lessons from Complexity Science* (1st edn, Josses-Bass/Pfeiffer, 2001) and Jane M Watkins and Bernard J Mohr, *Appreciative Inquiry-Change at the Speed of Imagination* (1st edn, Jossey-Bass/Pfeiffer 2001) .

[166] See: https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/facilitation/ last access 23/01/2018

[167] This is the recommendation of this study.

[168] See: Sally A Harpole, "The Combination of Conciliation with Arbitration in the People's Republic of China" (2007) 24 J Int'l Arb 623; and Carlos de Vera, "Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China" (2004) 18 Colum J Asian L 149, 152

[169] See: Elina Zlatanska and Folake Fawehinmi, 'Mediation and Conciliation: In Pursuit of Clarity' (2016) 82 ARBITRATION: The International Journal of Arbitration, Mediation and Dispute Management 146-152

and Alessandra Sgubini et al., "Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective" available at: https://www.mediate.com/articles/sgubiniA2.cfm last accessed 29/01/18

[170] Nadja Alexander, *International and Comparative Mediation Legal Perspectives* (4th, Wolters Kluwer Law & Business, UK 2009) 16

a common practice of conciliation.[171] Indeed, with this understanding conciliation can be seen to be very similar to the evaluative mediation style. [172]

One way to end this confusion is to allow the term mediation to be used in a broader sense to absorb conciliation. In support of this proposal the term "conciliation" is relatively fading away in use.[173]

8.1.4 Mediation and Settlement Conference

The judicial branch of California courts explains the process of settlement conference by: "The parties and their attorneys meet with a judge or a neutral person called a "settlement officer" to discuss possible settlement of their dispute. The judge or settlement officer does not make a decision in the case but assists the parties in evaluating the strengths and weaknesses of the case and in negotiating a settlement. Settlement conferences are appropriate in any case where settlement is an option."[174] With this understanding; a simple way to explain the settlement conference process is that; the last is mediation but the mediator is often a judge or a third party with a strong legal background, and this third party is not shy to express his/her opinion and evaluate the case.[175]

The same argument used to compare mediation to conciliation can be used here; where the term mediation to be used in a broader sense to absorb settlement conference. It is important to note that the ongoing debate regarding the mediator style and the resistance

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[171] There is some historical support for defining conciliation as a process in which the third party would prepare and propose an agreement that he or she viewed as representing a fair settlement. See: Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (5th ed, Oxford University Press, New York, 2009) at 5

[172] According to Riskin "A principal strategy of the evaluative-narrow approach is to help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever other process they will use if they do not reach a resolution in mediation. But the evaluative-narrow mediator stresses her own education at least as much as that of the parties. Before the mediation starts, the evaluative-narrow mediator will study relevant documents, such as pleadings, depositions, reports, and mediation briefs." See Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 7 Harv. Negot. L. Rev. 7, 26 also see chapter four of this work for a detailed discussion regarding the mediator style.

[173] The National Family Conciliation Council changed its name in 1993 to National Family Mediation and The International Chamber of Commerce ICC used to offer conciliation but in 2001 replaced the 1988 Rules of Conciliation with the ICC ADR Rules see: Henery Brown and Arthur Marriott, 'Chapter 8 Mediation General Principles' in (eds), *ADR Principles and Practice* (3rd, Sweet & Maxwell, UK 2011).

[174] See: the official website of the CA courts: http://www.courts.ca.gov/3074.htm last accessed 29/01/18

[175] In support of this statement, In the description of settlement conference under the role of neutral article 2.41 states (…Neutrals commonly use techniques similar to those in mediation…) see: : VII Settlement Conference Rule 2.41 in the Bench Handbook, Judges Guide to ADR issued by Administrative Office of the Courts as part of the Judicial Council of California available at: http://www.metalaw.me/resource/ADR.pdf last accessed 29/01/18

towards the evaluative style, contributes highly to the confusion.[176]

Mediation and Arbitration:

[m]ediation 'involves helping people to decide for themselves'; arbitration (and adjudication), on the other hand, 'involves helping people by deciding for them'[177]

These two processes share similar features such as the help of a third party to garner a solution and confidentiality of process. The clear distinction between mediation and arbitration lies in self-determination; wherein arbitration the parties gives up their self-determination to the arbitrator when it comes to the outcome. In arbitration[178] the parties have no control over the outcome and the arbitrators settle the dispute by a binding decision (award) which typically enjoys international recognition and support especially in international commercial disputes.[179]

9) Conclusion

In the simplest of words mediation is an assisted negotiation. This chapter reflects on the rationale stated in the introduction chapter and sets out that the true added value offered by mediation to the unassisted negotiation; is educated self-determination. Such value is being proposed as a possible solution to bring a sense of consistency and clarity to the diverse field of mediation. The potentials of educated self-determination are to be discovered in the following chapter.

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[176] The different mediators' style is explored in chapter four of this work.

[177] Meyer, A S, 'Functions of the mediator in collective bargaining' (1960) 13 Industrial and Labour Relations Review 164.

[178] For more information regarding Arbitration especially international commercial arbitration see Margaret L. Moses, 'Introduction to International Commercial Arbitration' in (eds), *The Principles and Practice of International Commercial Arbitration* (1st, Cambridge, USA 2008).

[179] For example, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) 1958 Article III state that Contracting State Shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There Shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. See: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf Accessed at 23/01/18

Chapter Two

Mediation and Justice[180]

Testing The Theory in Connection to Mediation Delivering Justice

1. Introduction:

This study starts from the assumption that justice and/or presenting a sense of fairness to the disputing parties is a cornerstone and main goal for any dispute resolution method. This assumption is being strengthened by briefly exploring the idea and the need for justice. This exploration is covering a number of perspectives, including historical, philosophical, and religious perspectives. After reaching an understanding of the idea of justice, the chapter discusses two main means of delivering justice: formal justice—including an analysis of its strength and limitations—and creative justice. The chapter proceeds to demonstrate the relationship between mediation and justice and mediation's ability to deliver several justice outcomes, which are procedural justice, distributive justice, and restorative justice, all in connection to testing the educated self-determination and examining its potentials.

2. The Idea of Justice

> *The need for justice grows out of the conflict of human interests. That is to say, if there were no conflict of interests among mankind we should never have invented the word justice, nor conceived the idea for which it stands*.[181]

"It is not fair" is the statement that reflects a feeling which often leads to conflict, whether it is as small as a young boy shouting it out to his older brother who got a much bigger piece of the cake, or as big and complicated as a businessman complaining that his partner did not comply with his duties in a million dollar transaction.[182] Such bitter feelings of injustice occur when the harmony that governs a situation or relationship is being threatened by conflicting interests. One can logically propose that replacing such negative feeling of injustice with a positive feeling or sense of justice can be an effective approach to deal with conflicts and to better restore balance and bring harmony back to its place.

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[180] This Chapter is published under the title can mediation deliver justice? See: Elnegahy S, 'Can Mediation Deliver Justice.' (2017) 18(3) Cardozo J Conflict Resol 759 available at: http://cardozojcr.com/wp-content/uploads/2017/05/CAC305_crop.pdf last access 31/01/18

[181] THOMAS NIXON CARVER, *ESSAYS IN SOCIAL JUSTICE* (HARVARD UNI PRESS, 1915) 3

[182] Morton Deutsch & Janice M. Steil, 'Awakening the Sense of Injustice' (1988) 2 SOC. JUST. RES. 3; Morton Deutsch, *Justice and Conflict, in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (2011).

As important as justice can be, it is a challenging quest to search for a reliable, steady, and clear definition of the concept. In the search for a definition, many dictionaries define justice with other similarly hard to define concepts such as fairness or righteousness, thereby creating an endless circle.[183] Many scholars are influenced by the Aristotelian school of thought and urge that the best way to understand justice is by examining the absence of justice, leading to many studies defining different types of injustice and consequently types of justice.[184] Yet, this leaves us without a concrete definition of the core concept itself. This article is not claiming to settle this debate; rather, it proposes an acceptable ground regarding the idea of justice as a first step towards answering the question "can mediation deliver justice?" by briefly examining the notion of justice in ancient history, philosophy, and religion.

2.1 The Ancient Egyptians

The ancient Egyptians used to adorn their temples walls with Ma'at the goddess of Justice—a beautiful lady with an ostrich feather on her head—where she is often representing other supreme values such as ethics, truth, and most importantly, balance.[185]

Ma'at The God of Justice

[Figure 2]

Ma'at, as a principle, was formed to meet the complex needs of the emergent Egyptian

[183] *See, e.g., Justice*, CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/dictionary/british/justice (last visited 31/01/18); *Justice*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/justice (last visited 31/01/18).

[184] *See, e.g.*, Janice Steil et al., 'A Study of the Meanings of Frustration and Injustice' (1978) 4 PERSONALITY & SOC. PSYCHOL. BULL. 393, 398; Morton Deutsch & Janice M. Steil, 'Awakening the Sense of Injustice' (1988) 2 SOC. JUST. RES. 3; Morton Deutsch, *Justice and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (2nd Edn, Jossey Bass, 2011).

[185] SIEGFRIED MORENZ, EGYPTIAN RELIGION 273 (ANN E. KEEP trans. 1973); *see also* JOHN H. TAYLOR, *JOURNEY THROUGH THE AFTERLIFE, ANCIENT EGYPTIAN BOOK OF THE DEAD* (1st Edn, Harvard Uni Press,2010) 209

state that embraced diverse people with conflicting interests. The ancient Egyptians held a strong conviction that Ma'at, or justice, had the power to maintain the "cosmic harmony," which if disturbed could have negative consequences for the individual as well as the state.[186] Therefore, the pharaoh or the ruler would describe himself as the "lord of Ma'at" who decreed with his mouth the Ma'at he conceived in his heart.[187] For the individual, Ma'at played an important role in faith and belief regarding his journey to the afterlife. The hearts of the dead were said to be weighed against the single "Feather of Ma'at" as the most significant court and last stage of their journeys to the afterlife. Hearts were left in Egyptian mummies while their other organs were removed, as the heart was seen as the part of the Egyptian soul where all bad deeds rest. From the ritual of the weight of the heart, explained on the papyrus from the Book of the Dead,[188] it can be understood that the ritual involves placing the heart of the deceased on one side of the scale and the Ma'at feather on the other side. Only when the heart was found to be lighter than or equal in weight to the feather of Ma'at had the deceased led a virtuous life and would go on to Aaru, or heaven. (As shown in Figure 3).

The Weight of the Heart Ritual

[Figure 3]

Several observations can be made here: since the dawn of civilization, humanity

[186] *See* Mahmoud Mandawary, بحث كامل عن المعبودة ماعت(الصدق والعدل أساس المُلك), https://www.civgrds.com/god-maat.html (last visited 31/01/2018).

[187] NORMAN COHN, *COSMOS, CHAOS AND THE WORLD TO COME: THE ANCIENT ROOTS OF APOCALYPTIC FAITH* (2nd Edn, Yale Uni Press, 1999) 9

[188] ID JOHN TAYLOR, at 209.

recognised the importance of justice as the cornerstone for any viable balanced society.

Ma'at—the Goddess of Justice in ancient Egypt—has also been used as a symbol of other supreme values such as truth and balance[189], which does not mean that the meaning of justice is a mix of several essential values, but rather teaches us that the concept of justice is actually the guardian or assurance that many vital values are in place and protected.

Lastly, from absorbing the meanings behind the "weight of the heart," it is fair to conclude that the ancient Egyptians started the line of thought that suggests that a man's conscientious power and connection to his faith and beliefs are the best drives for justice. In this paradigm, the heart, innate nature, and morality are the best indicators for the values that justice must protect. Further, the balance within a man's inner self and his self-discipline are the best ways to maintain such values, which in result would lead to a just society.[190]

2..2 Greek Philosophy

Greek philosophy took a very similar approach, where Plato formed his ideas from the works of his teacher Socrates, arguing that real justice is not to be found in external actions, but in a man's inward self[191]. Accordingly, justice shall be achieved if a man manages to balance and control three elements that make up his inward self. The three elements are reason, spirit, and irrational appetitive impulses.[192] The rational reflects man's mind and all it can entail with logic and reason. The spirited indicates the man's heart, with all the associated feelings, especially courage and bravery. The appetitive represents the man's stomach, with all the irrational and animalistic desires. Keeping all three in tune, man is ready for action of any kind in a just manner, whether personal, financial, or political. Plato extended the concept of balancing the three elements to society, where the ruling class is rational, soldiers are spirited, and the working class are appetitive. To maintain a balanced and just society, every individual must understand and respect his role and carry his duties in a just manner.[193]

Aristotle wrote that justice could be defined using two concepts: proportionality and rectification:[194]

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[189] Id SIEGFRIED MORENZ, EGYPTIAN RELIGION

[190] These observations or understandings are based on personal logical analyses to the presented data.

[191] *See* PLATO, *THE REPUBLIC* (Tom Griffith trans., 12th Edn, Cambridge, 2009)

[192] *See id.*; William J. Byron, S.J., 'Ideas and Images of Justice' (1980) 26 LOY. L. REV. 439, 442–43

[193] Id

[194] ARISTOTLE, *NICHOMACHEAN ETHICS* (W. Ross ed., 1956) 209–15 Aristotle started the line of thought of introducing retribution and creating a system that involves punishment as a way of bringing balance and

> The concept of "*proportionality*" entails that the unjust is what violates the proportion. Hence, one team becomes too great, the other too small, as indeed happens in practice; for the man who acts unjustly has too much, and the man who is unjustly treated, too little, of what is good. In the case of evil, the reverse is true; for the lesser evil is reckoned a good in comparison with the greater evil, since the lesser evil is rather to be chosen than the greater and what is worthy of choice is good, and what is worthier of choice is greater good.

The remaining concept of justice is "*the rectification*," which arises in connection with transactions both voluntary and involuntary—for it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery, the law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong, and the other is being wronged, and if one inflicted injury and the other has received it.[195]

Such a view urges that justice require us to find the right balance between rights and duties by establishing a system that can exact a remedy when such balance is jeopardized.[196] This approach placed the foundation for establishing the concept of "formal justice," or "justice based on the law," and emphasises the importance of the law. Perhaps this school of thought explains why the Greeks personified justice as the goddess Themis—her image is usually used to adorn courts all around the world—holding the scale in one hand representing proportionality, and the sword on the other hand representing rectification, with a blindfold representing equality.[197]

2.3 In Religion

I have always found that mercy bears richer fruits than strict justice[198].

One can argue that the concepts of proportionality and rectification are clearly embodied in religions' philosophies of justice. Furthermore it can also be observed that the

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achieving justice. Indeed, the idea of setting standards for the fair distribution of resources along with appointing man's conscience as the source and the guardian of justice; where the good conscience has the ability to urge the man to discipline himself, recognize right from wrong and identifies and embraces all the essential values needed for a just behaviour; is rather powerful, yet too idealistic. Mans' conscience can become corrupted or silenced, which requires a certain kind of force to redirect man to the right path.

[195] *Id.*

[196] Joseph L. Daly, 'Justice and Judges' [1988] BYU L. REV. 363, 365–66, 365 n.10 (1988) (citing Joseph L. Daly, *Thinking About Justice, in* ENHANCING CONSTRUCTIONAL STUDIES 3–5 (1987)).

[197] Id Daly, 'Justice and Judges' at 365–66.

[198] Quote from Abraham Lincoln's speech in Washington D.C circa 1865.

concept of mercy has been invited to be part of the justice equation with the evolution of religions and societies throughout time.

Looking at the Abrahamic religions, it can be argued that they started with adopting the concepts of proportionality and rectification in a clear and strict manner when it perhaps seemed that people were in a desperate need for order and deterrent placing the foundation of "retributive justice" as the Torah states: "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."[199]

Yet, after establishing such goals, one could argue that society became very materialistic and lacked flexibility and compassion and there was a need to soften such societies. By adopting the concepts of mercy, forgiveness, and love, such societies introduce a much deeper layer of justice by placing forgiveness as part of the "restorative justice." That is why the Bible states that: If someone slaps you on one cheek, turn to the other also. If someone takes your coat, do not withhold your shit from them.[200]

As society continued to evolve, it was the time to blend the three concepts and perceive justice as the balance between proportionality, rectification, and mercy. As the glorious Quran states:

> And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed—then it is those who are the wrongdoers.[201]

Additional observations can be offered. First, each religious school of thought affirmed Aristotle's concepts of proportionality and rectification. Yet, they suggest that applying these concepts without integrating a different aspects of humanity—such as mercy, forgiveness, and empathy—can turn justice into revenge, and fail to protect the values needed to restore harmony and balance. Second, one's likelihood to choose forgiveness over punishment seems to be linked to a sense of detachment from materialism, and the transient nature of this worldly life. The reward of the next life or responding to one's natural sense of morality is worth more to a person than the fleeting satisfaction of retribution in this life. This thought will be discussed in greater detail under retributive justice later in this article. Finally, and most importantly, the evolution of the idea of

[199] *Exodus* 21:24–25 (King James Version).
[200] *Luke* 6:29 (New International Version).
[201] *Quran, Al Maeeda* 5:45 (Saheeh Version).

justice in religion affirms the importance of participation, people's ability to make choices, and their references as an essential part of the justice equation. Here, people have the power to decide on the values that matter and can better achieve the balance, especially when choosing between deterrence and forgiveness, in the manner that fits in the party's sense of justice according to the situation. In other words; the philosophy of religion confirms the importance of parties' self-determination and its close relation with justice.

2.4 Conclusion on the Idea of Justice:

People are naturally social beings that have to deal with many conflicting interests when dealing with one another[202]. Many have written on the meaning of justice,[203] yet it seems there is no concrete definition of justice.

The image or the symbol of the scale has always been used to represent justice.[204] Perhaps the reason for this imagery is that the concept of justice has always been orbiting around the idea of balance. Such a notion can be found in the examination of ancient history, philosophy, and religion, albeit, each has taken slightly different approaches. Nonetheless, they all perceive justice through the lens of balance, and all these different views agree that the main objective of justice is to restore and maintain a balance between parties, leading to the establishment of balance in society's fabric.

It can also be proposed that the concept of justice is more than the constitution of a number of supreme, timeless, immutable, and universal values that are built in our innate nature.[205] Rather, justice is the protection and assurance that such values have been honoured. This line of thought is in compliance with the ideas of natural law, which "manifests our constant striving for objective and universal values. . . ."[206] It is hard to name and define all of these values, and it is even more

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[202] *See* Aristotle's concept that "Man is a political animal." Aristotle Id, at 209–15.

[203] *See, e.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* (1st Edn, Harvard Uni Press, 1999); *see also* AMARTYA SEN, *THE IDEA OF JUSTICE* (1st Edn, Harvard Uni Press, 2009); HANS KELSEN, WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE (1st Edn, Uni of California Press, 1957)

[204] For example: The image of the scale is present in ancite Egyptain history as presented in this chapter, see figure three and also the Greek goddess Themis holds a scale as mentioned in this chapter under justice in philosophy.

[205] An experiment by Frans de Waal on Moral behaviour in animals shows that even monkeys can feel injustice and react to unequal pay (12:30 min.). Frans de Waal, *Moral Behaviour in Animals*, TED, http://www.ted.com/talks/frans_de_waal_do_animals_have_morals#t-754498 (last visited 31/01/18).

[206] "From early on, the Greek notion of natural law … involved both the idea of natural rules universally binding men . . . and the idea of man as a naturally social being who could fulfil his potential in society. Cicero and the Stoics further developed the [ideas of natural law] so that man could live a just life by ascertaining the universal laws of nature through reason. In the Middle Ages, the scholastics stressed the transcendent version of natural law, only to be followed by humanist concepts of virtue in the Renaissance." Joe W. Pitts II, 'Judges in an Unjust Society: The Case of South Africa' (1986) 15 DENV. J. INT'L L. & POL'Y 49, 54 n.21, 69

challenging to prioritise certain values over others. Therefore, justice shall always be a very subjective matter determined by a variety of values.

Therefore, this paper proposes that justice is "*the art of restoring and maintaining balance between the conflicts of human interests by embracing, applying and protecting the needed standards and values.*"[207]

3) Who decides which standards and values should govern justice?

The question remains: who sets such standards and decides on the values that matter and need protection in connection with restoring and maintaining the balance? In answering such a question, scholars revealed two means of delivering justice: justice based on the law—formal justice—and justice based on the parties' perceptions and acceptability—creative justice.

3.1 Formal Justice—Justice Based on the Law

The strictest following of law can lead to the greatest injustice.[208]

When the policymaker decrees laws, she decides for the people who value matter the most for society, the priority and importance of each value, and how the values can be protected. In this manner, the policymaker sets the law as the standard of justice, creating justice based on the law. Many scholars have used different terms when explaining justice based on the law.[209] In this work, Menkel-Meadow's term "*formal justice*"[210] is the term used to refer to justice based on the law.

Some firmly believe that formal justice is the accepted definition of justice where

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[207] The study recognises its limitation; dealing with the topic of justice more properly requires much length and deeper analysis. Yet, there is a need to establish a platform or at least set of assumptions to build and react upon; to better move forward with this chapter. Therefore this is not a definition of justice, this is only an understanding to be used and move forward with the chapter.

[208] *MARCUS TULLIUS CICERO, DE OFFICIIS (ABOUTDUTIES) 10, 33.*

[209] Menkel-Meadow calls it "***Formal Justice***." Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal,' in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 420 (2013); *see also* Michael J. E. Palmer, *Formalisation of Alternative Dispute Resolution Processes: Socio-Legal Thoughts, in* FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION (Joachim Zekoll et al. eds., 2014) (viewing formal justice as the values that are protected by the involvement of the state and its authoritative institutions); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation,* 9 CLINICAL L. REV. 157, 160 (2002–03) (calling the institution "***justice from above***," where justice comes "from the application by a judge, jury or arbitrator of properly created standards or rules to 'facts'"); Linda Singer, *Interest-Based Types of Justice—Video*, MEDIATE.COM (Jan. 2011), http://www.mediate.com/articles/singerdvd10.cfm last accessed 31/01/2018 (explaining "***rights based justice***" enforced by courts)

[210] Id Menkel-Meadow

justice must be in alliance with the terms of the legal merits of a given case,[211] as "what justice requires . . . is what the law requires."[212] Arguably, justice through the law shall always be the best fit to implement Aristotle's proportionality and rectification concepts.[213] It can protect several important aspects related to public interests, such as the public declaration of acceptable and unifying norms and values in the society, validation of the rule of law,[214] the power to restore order in society through public accountability, and deterrence by enforcing the courts' judgments. This is especially important when protecting the weak against the strong and achieving equal treatment and equalising the power of the disputing parties.[215] Moreover, formal justice presents another important dimension of justice, which is consistency.[216]

With that in mind, others believe that justice must be perceived in a much broader sense and cannot be limited within any particular action of the lawmaker. They assert that "law is only politics,"[217] and the lawmaker often fails to capture and protect immutable timeless values needed for justice. Daly, for example, in his search for justice, identified two schools of thought: "The Traditional Western View of Justice" and "The Critical Legal Studies View of Justice." These schools of thought maintain that the law is political, where those in power make the law are people whose missions are often vulnerable to several factors, such as self-aggrandisement and political agendas, and who are influenced by social values, such as the economy and society's wealth. These factors and values do not reflect or capture the timeless values needed for justice.[218] To address such limitations, the traditionalist philosopher may propose that the answer is in the hand of the judges. They proposed that the judges, as the one applying the law, have the power to use their discretion to overrule laws that they deem unfair or economically or socially biased. They argue that the judges should apply a system based on societal and communal values rather than on the economic and the

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[211] *See, e.g.*, Robert W. Gordon, 'The Radical Conservatism of the Practice of Justice' (1999) 51 STAN. L. REV. 919; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1st Edn, Harverd Uni Press,1998)

[212] Robin West, 'The Zealous Advocacy of Justice in a Less than Ideal Legal World' (1999) 51 STAN. L. REV. 973, 976

[213] Id Daly, at 365, *citing to* ARISTOTLE 209-15 (W. Ross ed. 1956)

[214] David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 GEO. L.J. 2619

[215] Judith Resnik, 'Courts: In and Out of Sight, Site and Cite' (2008) 53 VILL. L. REV. 771

[216] *See* Michael Giudice, 'Asymmetrical Attitudes and Participatory Justice (2006) 4 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 18

[217] Steven J. Burton, 'Reaffirming Legal Reasoning: The Challenge from the Left' (1986) 36 J. LEGAL EDUC. 358, 359

[218] Id Daly at 365–69.

social influence of lawmakers, as reflected through their writing of laws.[219] This line of thought is very unsettling and has troubled some thinkers. Dworkin, who has written extensively on the link between the law and moral principles, confirms that while there are laws that are in fact "unjust," he rejects the idea that an unjust law is not a law.[220] Moreover, many confirm that judges have no discretion in any strong sense; judges' settle cases based strongly on doctrine.[221]

Moreover, Giudice developed his research[222] on the work of Rosenbaum,[223] identifying a gap between the public and legal officials when it comes to the experience and expectations arising out of the law. Where Rosenbaum writes:

> The law and its practitioners simply wish to streamline the system in search of the bottom line, to move cases along, to create a process that allows rules to develop and precedents to evolve, and, most important of all, to achieve the correct legal result. Legal, and not moral, outcomes occupy the legal mind. But the public cares little about the efficiency of court administrations and the evolution of legal rules. People look to the law to provide remedies for their grievances and relief from their hurts, to receive moral lessons about life, to better themselves and their communities. What most people don't realize is that judges and lawyers are motivated by entirely different agendas and mindsets.[224]

Giudice focused on such gaps and identified important limitations of formal justice given the law's function and characteristics.[225] One of the limitations identified is *generalisation not particularisation*. This is the idea that "[i]t is not feasible for a modern legal system to offer tailor-made guidance and instruction to each individual or for every particular occasion."[226] Instead, the law develops general standards applicable across groups and individuals in society. Judges, lawyers, and other officials, upon applying such general standards set by the law, classify or subsume fact-specific situations and disputes under

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[219] *Id*.
[220] *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1st Edn, Harvard Uni Press, 1977)
[221] *See* Alvin B. Rubin, Does Law Matter? A Judge's Response to the Critical Legal Studies Movement (1987)37 J. LEGAL EDUC. 307
[222] *See* Id Giudice
[223] *See* THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* (1st Edn, HarperCollins, 2004)
[224] *Id*. at 5.
[225] Id Giudice
[226] *See* H.L.A. HART, *THE CONCEPT OF LAW* (2d edn, Oxford Uni Press, 1994) 21–22

general categories. This leads to generalisations and often requires only a minimal understanding of the circumstances of a particular dispute. The cost of recognition of the particular nature of the wrong done in a particular case is creating the harm of stripping away multifaceted and diverse emotional elements from actual disputes, especially because emotional responses and reactions to events typically have no place in the legal assessment of cases; only the legally relevant and established facts of the dispute are of any importance.[227]

Another limitation is referred to as the *range of remedies*:

> The familiar conventional legal remedies available are quite narrow and include mainly monetary damages to winning parties in civil cases, and fines or physical limits on the liberty of citizens convicted of criminal wrongdoing . . . . whether the range of remedies is more or less narrow, the remedies granted in cases are determined by existing law. Officials, themselves, are bound to make decisions according to what the law provides.[228]

The circumstances that give rise to disputes are multifaceted and diverse. Individuals might demand remedies that best address their dispute, but are not available in their range of legal remedies. "Unconventional remedies identified by Rosenbaum include the opportunity for individuals to give public apologies and for individuals or groups to tell their story to truth and reconciliation commissions."[229] With the same line of thought, Bryan Clark noted "[a] pluralistic notion of justice recognises that justice is not the monopoly of the law and legal remedies but rather may be found in a whole range of social norms and considerations" and that the courts, with the application of legal norms to relevant facts, may often fail to deliver justice on the parties' terms[230]. Studies and surveys reveal that plaintiffs may wish to sue for a whole range of extra-judicial needs such as an apology.[231]

In conclusion, formal justice has great importance, yet comes with serious limitations. In addressing such limitations, scholars recognize the need to give parties the opportunity to embrace and set the standards and values that matter the most for them and to agree on an outcome with

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[227] Id Giudice at 17–20.
[228] *Id*. at 21.
[229] *Id*.
[230] BRYAN CLARK, *LAWYERS AND MEDIATION* (1st Edn, Springer, 2012) 139, 151
[231] *See, e.g.*, SCOTTISH CONSUMER COUNCIL, CONSENSUS WITHOUT COURT: ENCOURAGING MEDIATION IN NON-FAMILY CIVIL DISPUTES IN SCOTLAND 23 (1997)

much wider and more creative remedies in the search for the balance and achieving justice on their own terms. With this understanding and foundation, the chapter proceeds to test the theory of educated self-determination as the corner stone of creative justice.

3.2 Creative Justice - Justice Based on the Parties' Perceptions and Acceptability

When parties are invited to act creatively in crafting an outcome that presents their own sense of justice, they get the opportunity to use the standards that better meets their references, and are not limited to standards that have been adopted by the legislature or articulated by the courts. They create another form of justice arising from perceived limitations of formal justice. Scholars recognise that parties' mutual agreement over the value of fairness is a valid form of justice and have used many terms to refer to it.[232] In this work, this form of justice will be termed "*creative justice*." This chapter emphasizes that the theory of educated self-determination is the cornerstone of creative justice. Moreover, the chapter is to explore the potentials of such theory by understanding how creative justice can better aid the parties when dealing with disputes. To achieve that, the chapter starts with presenting a

[232] Jonathan M. Hyman and Lela P. Love called it "**justice-from-below**" where "[t]he rules, standards, principles and beliefs that guide the resolution of the dispute . . . are those held by the parties. The guiding norms . . . may be legal, moral, religious or practical . . . parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts. Consequently, justice in [such manner] comes from below, from the parties." see: Id Hyman & Love, at 160–61, 162. Menkel-Meadow called it "***Informal Justice***" or "*Semi-Informal Justice*" when it is regulated or linked to the courts. See: Id Menkel-Meadow *See also "**[i]nterest-based justice***," which is based on the interests of the parties, where the standards and the outcome are not imposed by an authority figure, but agreed by the parties as Linda Singer suggests. Singer, *supra* note 23. *And see* Jacqueline M. Nolan-Haley, 'Court Mediation and the Search for Justice Through Law' (1996) 74 WASH. U. L.Q. 47, 63 n.78, *referencing* P.S. Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law (1980) 65 IOWA L. REV. 1249, 1259 (lamenting the modern trend away from the deterrent function and toward the dispute settlement function of law, there is an assumption that "[j]ustice can only be done by the individualized, ad hoc approach, by examining the facts of the particular case in great detail and determining what appears to be fair, having regard to what has happened;". characterizing this trend as the move from principles to pragmatism.) Moreover, the concept of individualized justice has been the subject of much discussion in connection with the settlement of mass tort cases for example see: Carrie Menkel-Meadow, 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road' (1995) 80 CORNELL L. REV. 1159, 1203–05 Michael Giudice, in connection with the law commission report in Canada, called it "***participatory justice***," where it committed to the belief that participation from parties to a dispute is an essential part of any dispute resolution, as it requires that those involved have a greater say in how disputes are resolved. Understanding harm in terms of its actual impact and consequences requires input and consideration from those affected. Likewise, a flexible approach to justice recognizes the importance of tailoring solutions to meet the needs of those affected, which again requires their participation. Finally, the parties to relationships must be given full opportunity to discuss resolution if relationships are to be reconstructed. Giudice, *supra* note 30, at 28. *See also* the term "***Private Justice***" Judith L. Maute, 'Mediator Accountability: Responding to Fairness Concerns' (1990) J. DISP. RESOL. 347, 354, 368-69.

study and a case.

Jeffrey Rubin, a student of Morton Deutsch, highlights that any dispute constitutes of different dimensions; as he presented the concept of the triangle of conflict and settlement where a successful and satisfactory outcome must address the three sides of the triangle. The three sides, or the three "E's," are economic, emotional and environmental. The *emotional* refers to the internal pushes and pulls created by the conflict that affects how we feel about ourselves in relation to others. The *environmental* is the setting and social considerations, including how others will view what is going on and how the resolution will appear to third parties. This can be simply referred to as "saving face." The *economic* side is basically the substantive legal rights set by the law.[233] To better explain such triangle and presents an example of creative justice; the following case can be presented. In August 1997, Scott Krueger arrived to start his freshman year at MIT University. Five weeks later, he passed away in an accident involving alcohol poisoning following an initiation event at a fraternity. Almost two years later, Krueger's parents sent MIT a demand letter stating their intent to sue. The letter alleged that MIT had caused their son's death by failing to address what they claimed were two longstanding campus problems: a housing arrangement that they said steered new students to seek rooms in fraternities, and what their lawyer called a culture of alcohol abuse at fraternities. On the other side, MIT lawyers argued that they were in a strong legal position and that an appellate court would rule that a college is not legally responsible for an adult student's voluntary drinking. MIT officials felt, however, that a narrowly drawn legal response would not be in keeping with the university's values. This was especially so when they recognised that their policies and practices, including those governing student use of alcohol, could have been better. MIT responded with a personal letter from Charles M. Vest, MIT's President, inviting Krueger's parent to negotiate a settlement. In the negotiation, the Kruegers vented their anger to President Vest. "How could you do this?" they shouted at Vest, "You people killed our son!" they also challenged Vest on a point that bothered them terribly: Why, they asked him, had he come to their son's funeral, but not sought them out personally to extend his condolences? Vest responded that he was following advice that it would be better not to approach them in the light of their anger at the institution. That advice was wrong, he said, and he regretted following it. Vest went on to apologise for the

[233] *See* MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1st Edn,1973); Jeffrey Z. Rubin, 'Some Wise and Mistaken Assumptions About Conflict and Negotiation' (1989) 45 J. SOC. ISSUES 195

university's role in what he described as a "terrible, terrible tragedy." "We failed you," he said, and then asked, "what can we do to make it right?" Mrs Krueger cried out again at Vest, but at that point, her husband turned to her and said, "the man apologised. What more is there to say." Their counsel, Leo Boyle, later said that he felt that, "there's a moment . . . where the back of the case is broken. You can feel it. And that was the moment this day."

In the end, the parties reached a settlement agreement. MIT paid the Kruegers $4.75 million to settle their claims and contributed an additional $1.25 million to a scholarship fund that the family would administer. Most importantly, President Vest offered the Kruegers a personal, unconditional apology on behalf of MIT. At the conclusion of the process, Vest and Mrs. Krueger hugged each other[234]. For MIT, the settlement, although expensive, made sense—it minimised the harm that contested litigation would have caused to the institution, and the university felt that it was the right thing to do.[235]

The three E's, in this case, can be identified as economic: the legal liability issue and the compensation issue; emotional: the Kruegers' grief; and environmental: MIT's reputation. In this example, justice based on the law would have only focused on the legal matters, thus ignoring or even harming essential needs of the parties. For the Kruegers, there was an urge to address their noneconomic values, such as the need to "obtain admissions of fault, acknowledgements of harm, retribution for defendant conduct, prevention of reoccurrences, answers, and apologies . . . ."[236] For MIT's officials, their essential need was to maintain their good reputation and public image. Both parties recognised that seeking justice based on the law and going to court would not just fail to address the parties' needs, but might cause a tremendous emotional toll for the Kruegers and damage MIT's public image. Consequently, the parties' needs were addressed by creative crafting a process similar to mediation, and a resolution that embraces the values and standards that matters for restoring the balance of justice.

Justice is the art of restoring and maintaining a balance between humans in their interactions and conflicts of interests, which requires protecting as well as embracing certain values and standards. When the policymaker decides such values, it constitutes formal justice, and when the parties are the ones who decide on the values by practising their self-determination, then creative justice is formed. The most important conclusion to be made

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[234] *See* FOLBERG & GOLANN, *LAWYER NEGOTIATION THEORY, PRACTICE, AND LAW* (1st ed., Aspen, 2006) 7

[235] *Id.*

[236] *See* TAMARA RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES* (1st Edn, Cambridge, 2009) 34

here is "justice is not the monopoly of the law and legal remedies but rather may be found in a whole range of social norms and considerations,"[237] where honouring parties' self-determination and granting them the option and the privilege of deciding on the standards and values that better address their sense of justice, can be essential in the quest of seeking justice and the enhancement of its delivery.

It is immediately obvious that formal justice works best when adjudication methods are used, and conversely, creative justice works best when non-adjudication methods such as mediation are applied. However, both forms of justice are not limited to a certain method, i.e., the court can deliver, or at least support delivering creative justice. For example, the Egyptian law states that "[t]he litigants may request to the judge at any stage of the litigation to recognise what they had agreed upon regarding the settlement of their disputes and their agreement shall enjoy extra-judicial enforcement powers and bring the claim proceedings to an end."[238] On the other hand, mediation can deliver formal justice to some extent when the process involves lawyers, the mediator adopts an evaluative approach, and the focus is on the economic, legal matters. In this case, mediation has the potential for producing an outcome similar to adjudication.[239]

Courts around the world are adorned with Lady Justice, or Iustitia, the Roman goddess of justice, and judges in many legal systems are called justice; these aspects highlight that adjudication methods, especially litigation, carry the burden and the responsibility of delivering justice. The question that arises here is: does mediation share the same responsibility as litigation, where delivering justice is the main concern and principle duty when functioning to resolve disputes?

4) Mediation and Justice

By standing on solid ground regarding the idea of justice, and the two means of delivering justice, formal and creative justice, we have moved a step forward in answering our initial question: can mediation deliver justice? In order to take a further step, there is a need

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[237] Id CLARK, at 151.

[238] A rough translation of the Article 103 of the Egyptian civil and commercial procedural law:
"للخصوم أن يطلبوا إلي المحكمة أية حالة تكون عليها الدعوى إثبات ما اتفقوا عليه في محضر الجلسة ويوقع منهم أو من وكلائهم فإذا كانوا قد كتبوا ما اتفقوا عليه الحق الاتفاق المكتوب بمحضر الجلسة وأثبت محتواه فيه. ويكون لمحضر الجلسة في الحالتين قوة السند التنفيذي وتعطي صورته وفقا للقواعد المقررة لإعطاء صور الأحكام."

[239] Some scholars recognize this fact and even are in favor of such a conclusion. Judith Maute, for example, argued that "[t]he benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome." Id Maute, at 368.

to study the relationship between mediation and justice, in other words there is a need to answer the question: does mediation have the responsibility of assuring justice? Answering this question is essential because some in the mediation field may argue that justice is not part of the game. Indeed, "[t]here is little dispute that fairness is the fundamental goal of any dispute resolution process including mediation."[240] Perhaps the main reason used to justify such a point of view is the fact that the mediator has no decision-making power. Adding to mediators' neutrality prevents them from imposing or even considering their sense of justice to the mediated outcomes, where they give weight in respect of the outcomes to only the acceptability of the parties.[241] In other words, some scholars have argued that mediators are not accountable for the outcome because the parties control it, as the principle of parties' self-determination governs mediation.[242] Moreover, mediators might argue that justice is not part of the game because they simply do not understand what the word justice means in general, or in mediation in particular. Similarly, Pollack remarks that she considers justice to be in the eye of the beholder, rather than a uniform set of beliefs held by each party.[243]

Shapira, in his research, examined the relationship between mediation and justice in both mediation codes of conducts and mediation literature.[244] He provides significant evidence from numerous codes of conduct in which the word "fairness"[245] is often used, thereby indicating the importance and the connection between mediation and justice.[246] Yet, he noted that it is without a straight line or without consistency when it comes to the meaning

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[240] Jacqueline M. Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 NOTRE DAME L. REV. 775, 787 n.57 "Fairness is a predominant concern in the mediation community. Few commentators would disagree that it is the normative standard governing mediation." *Id*. at 775–78, 778 n.12.

[241] Stulberg recognized this in his research where he commented on the work of Hyman & Love, and challenged such an approach where he argued that there must be a system to assure justice or fairness even with parties' acceptance, as he named situations where parties might accept an unfair outcome. *See* Joseph B. Stulberg, 'Mediation and Justice: What Standards Govern?' (2005) 6 CARDOZO J. CONFLICT RESOL. 213; Id Hyman & Love.

[242] *See* Omer Shapira, 'Conceptions and Perceptions of Fairness in Mediation' (2012) 54 S. TEX. L. REV. 281, 290, n.75 (citing Joseph B. Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind' (1981) 6 VT. L. REV. 85, 88–91).

[243] Phyllis Pollack, Seeking "Justice," MEDIATE.COM: PGP MEDIATION BLOG (June, 2015), http://www.mediate.com/articles/PollackPbl20150606.cfm last accessed 31/01/2018 ("Plaintiffs file lawsuits seeking 'justice'. Defendants respond, stating they are seeking 'justice' as well. Both come to mediation, seeking 'justice.' When I am told this, that each side wants 'justice,' I am not sure how to respond because I do not know exactly what that word means.") (explaining the importance of starting this chapter by dealing with the idea of justice and its two forms).

[244] Id Shapira, at 283–90

[245] *Id*. at 286. Shapira mentioned in his research: "I use the *terms fairness and justice* interchangeably." *Id*. (emphasis added).

[246] *Id*. at 283 n.2.

of justice in mediation.[247] Moreover, he concluded from reviewing the mediation literature that the issue of justice has received much attention in mediation literature,[248] where scholars often distinguish between justice in relation to the process and justice in relation to the outcome.[249] He also points to the work of scholars such as Susskind, Maute, and Gibson, who have argued that mediators are accountable for the quality and fairness of the mediation outcome.[250] With the same line of thought, Peachey in his research, "What People Want from

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[247] *Id*. at 284–85 (Stating:

> The following review of selected codes of conduct aims to illustrate the numerous and bewildering meanings of fairness in the codes and the difficulty of finding a unifying rationale for these meanings. Fairness according to the codes of conduct is connected to the mediator's competence to conduct the mediation (*E.g.*, GEORGIA STANDARDS § V, at 32.) and the duty to 'exercise diligence in scheduling the mediation.' Fairness requires the mediator to remain impartial, (*E.g.*, OREGON STANDARDS, *supra* note 2, § III, at 3.) to avoid conflicts of interests, (*E.g.*, NEW YORK STANDARDS, *supra* note 2, § II.B, at 5.) and to avoid unfair influence that results in a party entering a settlement agreement. (*E.g.*, *Alabama* MEDIATOR CODE OF ETHICS § 4(b)) Fairness is connected to the quality of the process (*See* FED.INTERAGENCY ADR WORKING GRP. STEERING COMM., A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS § VI, at 9–11 (2006)) and its integrity. (*See* GEORGIA STANDARDS, *supra* note 3, § IV, at 3032; REVISED STANDARDS OF PROF'L CONDUCT FOR MEDIATORS § V.E, at 5 (N.C. Dispute Resolution Common 2011).) Fairness requires that parties have an opportunity to participate, (JAMS, MEDIATORS ETHICS GUIDELINES § V, at 2 (2013),) that their participation is meaningful, (*E.g.*, FAMILY MEDIATION Canada., MEMBERS CODE OF PROF'L CONDUCT art. 9.3, at 2 (2013),) and that they have an opportunity to speak, be heard, and articulate their needs, interests, and concerns. Fairness demands that parties make voluntary, un-coerced decisions (*E.g.*, CAL. R. CT. 3.857(b),) without undue influence (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.1,) on the basis of knowledge (*See, e.g.*, GEORGIA STANDARDS, § IV.A Recommendation, at 31.) or informed consent (*E.g.*, MCI PROF'L STANDARDS OF PRACTICE FOR MEDIATORS § III.E (Mediation Council of Illinois (2009),) and have an opportunity to consider the implications of their decision. (FAMILY MEDIATION CANADA CODE, art. *9.5*; GEORGIA STANDARDS, § IV.A Recommendation; ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 1.3). In a fair mediation, the parties may terminate the mediation at any time. (*E.g.*, GEORGIA STANDARDS § V.) The fairness of mediation is preserved when participation is not to gain an unfair advantage (*E.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION § XI.A.6 (Association of Family & Conciliation Courts 2000)), when manipulative or intimidating negotiating tactics are not used, (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.4,) and when the parties avoid nondisclosure or fraud. (*E.g.*, N.C. STANDARDS, § V.E; VIRGINIA STANDARDS, § K.4). Fairness is violated when the agreement is grossly (*E.g.*, N.C. STANDARDS§ V.E) or fundamentally unfair, illegal, or impossible to execute, (*E.g.*, GEORGIA STANDARDS, § IV.A) and when the parties do not understand the agreement and its implications on themselves (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.6, and; GEORGIA STANDARDS, § IV.A Recommendation) and on nonparticipants (third parties). (*E.g.*, GEORGIA STANDARDS, § IV.A Recommendation)).

[248] Id Shapira, at 286–90.

[249] *Id*. at 286 n.33 (Citing Joan Dworkin & William London, 'What Is a Fair Agreement?*'* (1989)7 MEDIATION Q. 3, 5 ("There are two broad categories of fairness: procedural and substantive. Procedural fairness relates to the question of whether the *process* of reaching an agreement was fair. Substantive fairness relates to the issue of whether the *content* of the agreement or the *outcome* of the mediation is fair.") (Emphasis added); Joseph B. Stulberg, 'Fairness and Mediation' (1998) 13 OHIO ST. J. ON DISP. RESOL. 909, 911–12; Nancy A. Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001)79 WASH. U. L. Q. 787, 817).

[250] *Id*. at 288 n.63, 290 (Citing Kevin Gibson, 'Mediator Attitudes Toward Outcomes: A Philosophical View' (1999) 17 MEDIATION Q. 197, 207–09 (arguing that mediators sometimes have a duty to question the mediated agreement); *see* Id Maute, at 358 ("[T]he mediator is accountable for the quality of private justice . . .")); Lawrence Susskind, 'Environmental Mediation and the Accountability Problem' (1981) 6 VT. L.

Mediation,"[251] affirms:

> The rising interest in mediation in the past decade has often been expressed as part of the elusive search for justice. Mediation has been presented as making justice accessible … or providing a low-cost and expeditious forum for achieving it … Some mediation services are even called neighbourhood *justice* centers or community *justice* centers.[252]

Indeed, the two teams behind the modern development and emergence of mediation—legal elites and peacemakers—shared the same foundation and expectations of mediation: that mediation can enhance the quality of justice.[253]

Delivering justice should always be the fundamental concern of any dispute resolution process; after all, restoring and maintaining the disturbed balance is the main purpose of resolving disputes. This is the core of the established understanding of justice, thus mediation, as a method of resolving disputes, must uphold delivering justice as the main concern of its function especially that many pieces of evidence have been provided in that regard. The question that remains is: how can mediation deliver justice?

5) Mediation Delivering Justice

The two means of delivering justice, formal justice, and creative justice can fall under the category of what is the value system that governs the means of delivering justice? That is, whether justice is governed by the values stated in the law or the values according to parties' perceptions and acceptability.

There is another important category that should be offered here to answer better the question: how can mediation deliver justice? The category is the expected outcomes from

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REV. 1, 14–18 (arguing that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties)).

[251] Dean E. Peachey, 'What People Want from Mediation', in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (Edn, Jossy Bass, 1989) 300

[252] *Id*. at 301.

[253] The idea of the two teams draws on the work of Silbey and Sarat: Susan Silbey & Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' (1988–89) 66 DENV. U. L. REV. 437 (explaining that the two teams had different approaches though as the legal elites looked at mediation from the lances of efficiency and mediation ability to improve justice offered by the court by help clearing the docket by settling the less significant cases outside the court system. On the other hand, the peacemakers' views mediation with the quality proponent mind sit expecting mediation to provide better justice throughout creative justice). Discussed before in chapter one of this work.

delivering justice. Referring to Peachey's work, three main outcomes can be explained: procedural justice, distributive justice, and restorative justice.[254] The following sections explain each outcome and examine mediation's ability to deliver each one.

5.1 Procedural Justice and Mediation

> *Giving people an opportunity to speak about what happened to them, and to confront those who are responsible for their hurt, is an indispensable part of what it means to do justice, and to administer a legal system that is just.*[255]

Referring to the story of the Scottish Sheriff and the unsatisfied winner mentioned earlier in this PhD "Can't Get No Satisfaction,"[256] can be an excellent introduction to the meaning of procedural justice. In this story, the defendant was not satisfied even though the procedural laws have been fairly enforced and the outcome was in his favour.

This story indicates that procedural justice[257] is more than just providing uniformity and transparency through legal proceedings. "*Procedural justice* refers to the individual's perception of the fairness of the rules or procedures that regulate a process or give rise to a decision," or simply, the right application of the right rules that govern the process.[258] Such understanding leads to the question: what are the people's perceptions or expectations regarding fair procedures?

In answering this question, researchers have recognised that procedural justice matters profoundly as disputants' perceptions on the quality of justice, delivered by a process by which conflicts are resolved, and decisions are made, relies heavily on their evaluation of the fairness of the procedures of the process. Once the disputants conclude that they have been treated in a procedurally fair manner, they tend to view the outcome as substantively fair and

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[254] Id Peachey, at 301–04.

[255] *See* Id ROSENBAUM, at 58–59.

[256] Sherif Elnegahy, Capter 16 Can't Get No Satisfaction. in Professor Lela P Love and Glen Parker (eds), *Stories Mediators Tell – World Edition* (ABA Dispute Resolution Section Publication May 2017) 189 mentioned in the Preface of this PhD.

[257] The term or sense of procedural justice is usually connected to due process in the U.S. legal system, fundamental justice in the Canadian legal system, procedural fairness in the Australian legal system, and natural justice in other common law jurisdictions. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1st Edn, Yale Uni Press,1990) 3–7 (explaining how the term "procedural justice" has been defined).

[258] Id Peachey, at 301 (citing William Austin & Joyce M. Tobiasen, *Legal Justice and the Psychology of Conflict Resolution*, *in* THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES 227 (1984)); Morton Deutsch, 'Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?' (1975) 31 J. SOC. ISSUES 137; Gerald S. Leventhal, *Fairness in Social Relationships*, *in* CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 211 (1976).

are more likely to comply with it, even when the outcome is unfavourable to them.[259] Nancy Welsh demonstrated three principal characteristics that enhance perceptions of procedural justice: (1) Opportunity for voice: that the disputants had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation. (2) Being heard: disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence. (3) Treatment: disputants' judgment about procedural justice is affected by the perception that the third party treated them in a dignified and respectful manner and that the procedure itself was dignified.[260] The question remains: can mediation provide procedural justice?

Some have argued that there is evidence that parties often prefer a decision to be made by an authoritative third party because it is perceived as better concerning procedural fairness than a process in which parties retain decision control.[261] On the other hand, scholars in the field of mediation assess such evidence as "equivocal."[262] As Nancy Welsh reveals, "the literature [actually] suggests that disputants are less concerned about receiving formal due process during their experiences with the courts than they are about being treated in a manner that is consistent with their everyday expectations regarding social relation and norms."[263] Thus, procedural justice norms need to be embedded in all types of dispute resolution,[264] whether in processes where the decision rests with the parties themselves or in processes where the decisional control is handed to a third party. Any method or process will only be deemed procedurally fair when the core elements of voice, being heard, and dignity are present.[265] With such an understanding, "mediation has the potential to score highly in terms

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[259] *See* Robert J. MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness'(2005) 1 ANN. REV. L. SOC. SCI. 171, 178; E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (Edn, Springer,1988); Ellis M. Johnston, 'Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens' (2001) 89 GEO. L.J. 2593, 2619; *see also* TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (1st Edn, Russell Sage Foundation, 2002) (noting that most initial research in the area of procedural justice has focused on the criminal justice field); Id TYLER, at 3–7; MICHAEL ADLER, *ADMINISTRATIVE JUSTICE IN CONTEXT* (1st ed., Hart Publishing, 2009) (noting the recent shift in focus towards civil disputes).

[260] Id Welsh, at 820–25.

[261] Id MacCoun, at 175.

[262] Id CLARK, at 154.

[263] Id Welsh, at 826.

[264] Nancy A. Welsh, 'Disputants' Decision Control In Court-Connected Mediation: A Hollow Promise Without Procedural Justice' [2002] J. DISP. RESOL. 179

[265] ID CLARK at 154–55.

of procedural justice."[266] Indeed, mediation can provide the parties with a better and safer space to speak their minds and hearts and be heard. Thus, mediation fulfils the elements of the voice and being heard better than adjudication where the parties tend to hide behind their lawyers and let them do all the talking. The treatment element is easily addressed when the mediator maintains his neutrality.

Two points can be raised for the mediators to consider in delivering procedural justice when it comes to the use of caucuses. First, mediators should be careful about the amount of time they spend in caucuses and should try to spend relatively equal time with each party. If this is not possible, they should at least explain why they had to spend more time with the other party. Second, parties might reveal facts or evidence to the mediator in caucuses under the protection of confidentiality. If that occurs, mediators should not implement any evaluation approaches or offer a mediator proposal without having the permission to reveal such information to the other party. This gives the revealing party the chance to comment on the information learned before any evaluation or mediator proposals take place[267].

Mediation has the capacity to deliver and capture the core three elements of procedural justice—voice, listening, and dignified treatment—as long as the mediator successfully carries out his main responsibility of enhancing communication channels between the parties, and carefully applying caucusing as part of the mediation process.

5.2 Distributive Justice and Mediation:

> On a semi-primitive island where the population relies on fishing as the main source of food, one fisherman used to throw away all of the big fishes he caught back into the ocean and keep the small ones. When he had been asked the reason for doing this he replied "the single cooking pan that I own is relatively small and only small fishes can fit in it." [268]

Peachey explains the concept of distributive justice as justice that can be applied to conflicts related to resource allocation.[269] He provides examples for resources to be allocated, such as wage disputes, sharing household income and international fishing treaties.[270] The question here is: what are the criteria that constitute the basis of distributive justice? The

[266] *Id*. at 154.
[267] These two points have been developed throughout my own practice as a mediator.
[268] Hypothetical story
[269] Id Peachey, at 301.
[270] *Id.* at 301–02.

answer is equality, equity, and need[271]. Distributive justice based on *equality* is where all parties receive an equal share of goods.[272] Distributive justice based on *equity*, on the other hand, is influenced to a greater extent by the principle of proportionality, where each person's outcome is proportional to his or her inputs.[273] Another proportional approach defines justice as a distribution based primarily on *need* with little regard for other factors.[274]

Delivering distributive justice with the application of the criteria of need can be very satisfying, as it will reflect the parties' sense of justice by addressing his or her needs. Nonetheless, it can be very challenging for adjudication methods to apply the need criterion when delivering distributive justice; perhaps this emphasises the limitation of formal justice. In elaboration, one can only imagine that it would be almost impossible for a modern legal system to offer tailor-made guidance and instruction to each individual or for every particular occasion. Instead, the law develops general standards that are applicable across groups and individuals in the society. Therefore, the equality and equity criteria comply better with the generalist nature of the law, whereas the criteria of need struggle to cope with this generalisation concept: that justice is based on the law on which it relies.

Indeed, neutrals in the adjudication process are bound to make decisions according to what the law provides. To support this; it is easy to witness that the law provides predetermined, clear, and strict standards based on equality or equity or both, which must be applied with no discretionary power or any further interpretation from the neutral side at certain cases, such as the inheritance disputes.[275] Even when the law gives the judge space to apply his or her discretion in some disputes, such as those concerned with damages and

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[271] Id Peachey

[272] Id Peachey, (citing Edward E. Sampson, *On Justice as Equality*, 31 J. OF SOC. ISSUES 45 (1975)).

[273] Id Peachey, (citing ELAINE WALSTER ET AL., EQUITY: THEORY AND RESEARCH (1978)).

[274] *Id*.; *see also* Id Deutsch

[275] For example: many Arab countries apply Sharia Law to family matters and one of the main bases of the inheritance provisions providing the shares of each deserver is the following verse from Quran:

> Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children—you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise. 4 Sura 411, (An-Nesã' or The Women) (Sahih Translation.).

Also, See e.g., Succession Act 1964, § 2(1)(a) (U.K.) (stating that legal rights reserve a proportion of a person's heritable estate to their spouse and children without giving the person liberty to remove these rights through writing a will).

compensation[276], judges tend to apply the equality or equity criteria or both rather than the need criterion Perhaps the reason is that judges in litigation can barely understand or capture the need criteria, as parties tend to be overshadowed by their lawyers. Additionally, only the legally relevant and established facts of the dispute are of any importance, as compared to multifaceted and diverse emotional elements of the disputes.[277] Even if the judge managed to go beyond the legal boundaries of the dispute and understand more about the parties' needs with respect to the fair distribution of resources, the limited range of remedies offered by the law would still be a great challenge for the judge to apply the need criteria.

Against such a backdrop, mediation can offer a space for the parties to practice their self-determination and tailor their outcome according to the need criterion, with much broader and more creative remedies as compared to adjudication. In other words, mediation can more easily address the generalisations and limited remedies that hold back adjudication, preventing it from delivering the need criteria. Delivering distributive justice through the need criteria can be very satisfying for the parties as it best addresses exactly what they might need.

In the exploration phase of the mediation process, parties can learn about the different criteria of distributive justice—equality, equity, and need. Then, they can adopt the negotiation style that fits better with the criterion that can address their senses of justice, as long as they are well informed about the other criteria.[278] Several writers have pointed out

[276] An example can be given from the Egyptian Civil Code, articles 168,169, and170. "Whoever causes damage in order to avoid a bigger damage threatening him or another, shall not be liable except to the extent seen by the judge as adequate," Civil Code, art. 168;"Whenever there are several persons who are responsible for the tortuous act, they shall be jointly liable in damages; the liability shall be equally shared between them, unless the judge determines their respective proportions of payable damages." Civil Code, art. 169;
The judge evaluates the extent of damages related to the prejudice suffered by the injured party, according to the rules prescribed by article 221 and 222, he shall take associated circumstances into his consideration, if, at the time of the ruling, it has not been possible for him to make a final determination of the extent of damages, he shall be entitled to allow the injured to demand, within a given period to review the evaluation of the extent of damages. Civil Code, art 170.

[277] Id Giudice at 17–20.

[278] In one case, a mechanic who lost both of his hands while repairing a combine harvester claimed that a manufacturing flaw of the interior of the machine caused the accident. When the case went to mediation, the representatives of the company that manufactured the combine harvester played hardball in the negotiation phase, leading to a final offer that was perceived to be unjust by the mediator. Many precedents suggested that the claimant could get more money if the case went to court, leaving the claimant better off with the equality criteria. Furthermore, the amount would in no way compensate for the fact that the man could no longer make a living for the rest of his life, reflecting the equity criteria. To the mediator's dismay, the claimant accepted the offer. In caucus, the claimant mentioned that he had been diagnosed with terminal cancer and that all he wanted in life was to leave enough money for his two children. Therefore, the settlement amount was fit for this purpose and perceived as fair by the party who did not wish to spend the remainder of his life fighting a lawsuit. Thus, the criteria of need were the desired criteria for the claimant. This case was shared by mediator Bruce A. Edwards in a conversation about his

that the need criterion is a common expression of fairness in established social relations, particularly among friends, relatives, and family members.[279] Indeed, mediation can score highly in the distributive justice arena by appreciating the need criterion and by helping the parties to reflect the need in their outcomes. This can be vividly noticeable in family[280] and business disputes. In one study,[281] dedicated to answering the question of why business lawyers and executives believe in mediation, the research concluded that mediation allowed parties in business disputes to better address their needs by saving time and money,[282] preserving business relations,[283] and gaining closure.[284]

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point of view regarding justice in mediation. He shared with me that he concluded that as long as the party is well informed about all of his options and perceives the outcome as just according to his references and accepts it, that is all that matters. Interview by Sherif Elnegahy with Bruce A. Edwards.

[279] Id Peachey, at 302 (citing Melvin J. Lerner, 'The Justice Motive: Some Hypotheses as to its Origins and Forms' (1977) 45 J. PERSONALITY 1 and John H. Berg & Margaret S. Clark, *Differences in Social Exchange Between Intimate and Other Relationships: Gradually Evolving or Quickly Apparent?*, *in* FRIENDSHIP AND SOCIAL INTERACTION (Valerian J. Derlega & Barbara A. Winstead eds., (1996).

[280] For example, a study tested 71 couples who were randomly assigned to mediate or litigate their child custody dispute and determined that one of the main factors in determining the parties' satisfaction and view of fairness of the process is the decisional control by the parties and the criteria of need. *See* Katherine M. Kitzmann & Robert E. Emery, 'Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution' (1993) 17 L. & HUM. BEHAV. 553 Another study summarizes a selected group of family mediation studies published over the past twenty years. The study focuses on four custody mediation programs in the public sector, two studies of public and private sector comprehensive divorce mediation, and three court-connected programs for mediation of child protection or dependency disputes. This study examines several issues, but most importantly determining mediation success. The criteria used to determine the success of the mediation process have included settlement rates, satisfaction of participants, efficiencies in time and cost, and, to a lesser extent, evidence of changes in relationships and durability of settlement. Most of these criteria are closely connected to the application of the criteria needed in distributive justice. *See* Joan B. Kelly, 'A Decade of Divorce Mediation Research: Some Answers and Questions' (1996) 34 FAM. & CONCILIATION CTS. REV. 373

[281] For supporting evidence, see, for example, a study based on a methodology that consisted of two complementary data analyses: (1) qualitative analysis of in-depth interviews, and (2) quantitative analysis of survey interviews. The qualitative interviews capture a richer expression of the respondents' opinions, including some of their own analyses of how their views are interrelated. The respondents were a large number consisting of three groups: inside counsel, outside counsel, and non-lawyer executives who are influenced by their clients' needs. *See* John Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 HARV. NEGOT. L. REV. 137

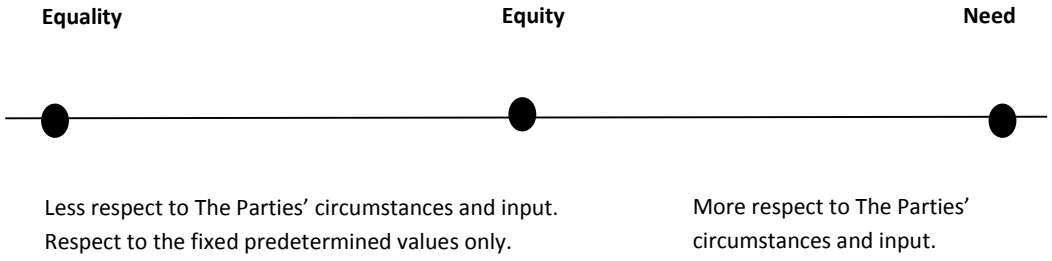
[282] As a typical testimonial of general counsel of a major manufacturing firm states, "ADR is far less expensive than litigation in resolving disputes, and that's ultimately what litigation is all about. I think you can get to the heart of the matter a lot quicker and again with a lot less expense." *Id*. at 177. "[T]he differences in relative evaluations is a reflection of executives' greater distaste for litigation than greater absolute satisfaction with ADR." *Id*. at 178. "Another [executive] described how ADR provides relief from the frustrations of delay, expense, and uncertainty of adjudication." *Id*. at 185.

[283] "The respondents in this study generally believe that mediation is sensitive to business needs and helps preserve business relationships." *Id*. at 186. These findings are consistent with a survey of 606 inside counsel of Fortune 1000 companies, which found that more than 80% of them believed that mediation saves time and money. *See* David B. Lipsky & Ronald L. Seeber, 'In Search of Control: The Corporate Embrace of ADR' (1998) 1 U. PA. J. LAB. & EMP. L. 133, 139

[284] An additional study is consistent with these findings and emphasizes that the need for closure complements the need of preserving relationships in business disputes. One inside counsel who was interviewed during

Disputes that might be orbiting around the allocation of resources, such as civil cases, would require distributive justice to bring back the balance between the disputing parties by the application of a fair distribution of such resources. Distributive justice is governed by three criteria—equality, equity and need—placed somewhere on what can be called the distributive justice criteria spectrum.

The Distributive Justice Criteria Spectrum



[Figure 4]

A distributive justice criteria spectrum starts with the equality criterion, where the distribution is based on pre-determined fixed values with almost no regard to the parties' circumstances and inputs. On the opposite end of the spectrum lies the need criterion, with much respect for the parties' inputs and circumstances, and where the distribution is based on a flexible set of values that address the wide range of parties' aims and needs. Mediation, with its ability to empower parties and enhance communication between them, would allow the parties to put the three criteria of distributive justice on the negotiation table for consideration. Mediation can appreciate and capture the need criterion, which can present a deeper, more satisfying, sense of justice; which in return can overcome adjudication's limitations of generalisations, limited remedies, and reliance on only the equality criterion.

5.3 Restorative Element of Justice and Mediation

Restorative justice is a term developed by Peachey with a much broader sense as he

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the study stated, "most disputes are resolved immediately in the interest of the relationship." Craig A. McEwen, 'Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation' (1998) 14 OHIO ST. J. ON DISP. RESOL. 1, 14

acknowledges that although the term[285] is typically used in relation to crime, its concepts are also directly relevant to the harms suffered in the course of everyday life and routine conflict where the issue is not classified as a crime.[286] The idea for the right to restorative justice has also been recognised and developed by the international community in relation to peace and conflict resolution fields. In this circumstance, it is called reparation.[287] Reparation can be defined as "The action of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged."[288] Under international law, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[289]

To maintain the broader discussion in this article, and to avoid being committed to a certain term and all its associated particular and technical meanings, this article will discuss the restorative element in justice. The meaning of the restorative element of justice is not only to respond to conflicts of interest, but also to respond to the grievances, pain, and negative psychological experiences caused by a party who unilaterally acted outside of established rules or norms leading to damaging or even stealing resources.[290] Indeed, some disputes require more than simple financial compensation and a fair distribution of the disputed resources in order to address the needed corrective aspect and desired emotional relief concerning restoring balance back to the situation. It is worth referring back to the triangle of conflict and settlement mentioned earlier in this article,[291] to emphasise the fact that there are other dimensions linked to conflicts and settlements that go beyond the legal matters. This proves the importance of addressing the emotional aspects of a dispute and

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[285] *See* Edited by Heinz Messmer and Hans-Uwe Otto, *Restorative Justice on Trial Pitfalls and Potentials of Victim-Offender Mediation International Research Perspectives,* (1st Edn, Springer, 1992)

[286] *See Id* Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire, in* RESTORATIVE JUSTICE ON TRIAL, at 551

[287] *See, e.g.*, The UN General Assembly Resolution 60/147 (Dec. 16, 2005).

[288] See *Reparation*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/reparation (last accessed 14/02/2018)

[289] *See* Factory at Chorzow (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No.17, at 47 (Sept. 13); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep., 14, ¶ 113 (June 27); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 14 (Apr. 9); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 184 (Apr. 11); Interpretation of Peace Treaties With Bulgaria, Hungary and Romania (second phase), Advisory Opinion, 1950 I.C.J. Rep. 221 (July 18); "Every internationally wrongful act of a State entails the international responsibility of that State." *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GAOR Int'l L. Comm'n, 56th Sess. U.N. Doc., A/CN.4/L.602/Rev.1, 26 (2001)

[290] *See Id* Peachey, at 302–03

[291] *See Id* MORTON DEUTSCH *at note 47*

shows that justice should be concerned with addressing emotional needs as well as legal needs.

Peachey argues that restorative justice's main goal is to remedy wrongs and restore balance by adopting four significant approaches to be applied either exclusively or combined. The four approaches are retribution, restitution, compensation and forgiveness.

5.3.1 Retribution:

> The injured party requires that the person responsible for creating the injustice suffer in a way that is commensurate with the way the victim has suffered. Retribution can be either limited ("an eye for and eye") or unlimited ("death for insult"). The crucial element is that justice has been served when the perpetrator has been punished. Retribution need not be administered by the actual victim. Indeed, retribution is very often carried out by a powerful third party, such as a parent, teacher or the state.[292]

As explained before, under the idea of justice in this section, retribution is a well-recognised form of justice in philosophy—Aristotelian concepts of proportionality and rectification[293]—and in religion[294]—Judaism and Islam—as it can play an important role in societies by achieving deterrence and correction. Yet, it can be argued that seeking or applying retribution without the use of wisdom and the mercy that underpins retribution can turn it into an ugly form of revenge.

5.3.2 Restitution:

> Another way to 'make things right' is to replace or renew whatever has been damaged. The smashed fender is taken to the body shop and repaired, with the offending driver paying the bill. The damaged fence is rebuilt, or the injured person receives payment for lost wages resulting from a fight. Whereas retribution is frequently executed by the third party, restitution is more likely to directly involve the second party (the victim or recipient of the injustice). The victim receives some material good or service to repair or replace that which was damaged, while with retribution the satisfaction realized by the

[292] *See Id* Peachey, at 304
[293] *See* the idea of justice discussion earlier in this chapter
[294] See the idea of justice discussion earlier in this chapter

victim is primarily psychological or emotional.[295]

5.3.3 Compensation:

Like restitution, compensation focuses on the needs of the victim. However, it may not always be possible to restore that which was lost or damaged. Grandma's broken china cannot be replaced, nor can a severed arm or a dead relative. In such a situation, it is still possible, nevertheless, for the perpetrator to attempt to address directly the needs of the victim through some form of compensation, such as money, material aid, or performing a service for victim. For example, people frequently claim financial compensation for "pain and suffering." Compensation is also frequently administered by third parties such as insurance companies or criminal injuries compensation programs.[296]

5.3.4 Forgiveness:

A fourth way to restore justice is through forgiveness. Although rarely discussed in the social sciences literature, this approach nevertheless is important, particularly in established relationships. Justice is restored when the debt is cancelled, usually following admission of wrongdoing or demonstration of remorse. However, forgiveness can also be a unilateral act that is not contingent on any particular response by the culprit. [297]

Indeed, one can view forgiveness as a much deeper level of justice, as explained in religion's philosophy of justice. Scholars affirm that forgiveness is often misunderstood as something that happens in an immediate, all or nothing manner [298]. On the contrary, forgiveness is a process that often takes place over a considerable period of time.[299] This process can be related to further actions on the part of the offender, or it can be driven by events and needs in the healing process of the victim. Finally, forgiveness is not something that the injured party does for the benefit of the defendant. Real forgiveness is the process wherein the claimant lets go of the rage and pain of the injustice so that he or she can resume living, freed from the

[295] *See Id* Peachey, at 304–05
[296] *See id*. at 305
[297] *See id*.
[298] *See* LEWIS B. SMEDES, *FORGIVE & FORGET: HEALING THE HURTS WE DON'T DESERVE*, (1st edn, HarperOne, 1984).
[299] *See Id*.

power of the hurt and all the negativity associated with the conflict.[300]

> Retribution, restitution, compensation and forgiveness are distinct ways to restore justice, but they are not mutually exclusive. For example, someone who has been injured in a car accident may desire restitution for lost wages as well as a retributive sanction in the hope that it would deter the offending driver from future drinking and driving.[301]

It seems that the broader concept of restorative justice developed by Peachey is built upon the concept of the triangle of conflict as developed by Deutsch and Rubin.[302] That is, Peachey appreciates the importance of addressing the economic aspect side by side with the non-economic—emotional and external—aspects of the dispute to truly restore the balance of justice and leave the parties satisfied. Peachey sought to provide a much broader scope of justice by providing more tools that go beyond the economic dimension of the triangle of conflict and thus was able to address the non-economic aspects of a dispute. It is also noticeable that the compensation and the restitution approaches of restorative justice address the economic aspect of the dispute, and that these two approaches together can constitute distributive justice. Peachey added the retribution and forgiveness approaches to allow restorative justice to address the emotional and external dimensions of the dispute that distributive justice alone could not resolve.

The question that arises is what are the elements that determine which approach(es) of restorative justice are more appropriate in any given context? A study that involved interviewing victims with regards to restorative justice[303] indicated that the three main elements that can be very influential in the disputant's orientation towards the different approaches of restorative justice are: relationship between the disputing parties, reason for

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[300] *See Id.*

[301] See: Id Peachey, at 305

[302] *See Id* Deutsch, *See also Id* Rubin.

[303] The data for this study were drawn from 140 interviews conducted in the victims' homes or another location of their choosing. The interviews generally occurred two to six weeks after the victimization. The interviewees had been subjected to offenses drawn from three general categories: breaking and entering into residential premises (20%), domestic and neighbourhood assaults or harassment (54%), and assorted serious offenses involving weapons, serious bodily injury, etc. (26%). *See* STEVEN D. BROWN & DEAN PEACHEY, MINISTRY OF THE SOLIC. GEN. OF CAN., EVALUATION OF THE VICTIM SERVICES PROGRAM IN THE REGION OF WATERLOO, ONTARIO (1984)

behaviour and nature of offence.[304]

5.3.5 Relationship Between the Disputing Parties

The type of relationship between the parties can be significant in shaping the parties' orientation toward one approach of justice over another. Scholars affirm that interpersonal relations can be the key for deterring the use of distributive justice,[305] while in turn relationships can hold the same importance in the arena of restorative justice.[306] While relationships can fall into one of three categories: strangers, casual relationships, and close relationships[307], it is hard to predict the effect of each type of relationship on parties' perception of justice. One can expect that intimate relationships may generate a tendency toward seeking forgiveness. However, close relationships can also yield some of the most intense and violent conflicts,[308] leading to a demand for retribution. The same can be true with casual relations or interactions with strangers, and the preferred form of justice can vary considerably[309]. Peachey offers the following observations to predict the effect of relationships in connection to the appropriate approach of restorative justice:

> In violations between strangers, compensation will be preferred. In intimate relationships, the victims will often experience a strong ambivalence between forgiveness and retribution. The strongest desire for retribution will result when victims have [a] casual relationship with the offender. In such situations, the victim sees the offense as having been targeted specifically at himself or herself rather than at an anonymous stranger. Yet there is not a close enough emotional bond to produce a strong concern for the offender's welfare. Also among these victims, their relationship to the offender was a significant factor in determining justice orientations. When the offender was a stranger, the victims tended to focus upon what would best restore the loss, such as some type of compensation. When, however, the offense violated a prior

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[304] *See Id* Peachey, at 309–15 (offering these three elements by generating multiple hypotheses supported by findings from his studies)

[305] *See* Melvin J. Lerner, 'The Justice Motive: Some Hypotheses as to Its Origins and Forms' (1977) 45 J. OF PERSONALITY 1; *see also* Melvin J. Lerner & Linda A. Whitehead, *Procedural Justice Viewed in the Context of Justice Motive Theory*, *in* JUSTICE AND SOCIAL INTERACTION (1st Edn, Gerold Mikula, 1980).

[306] *See Id* Peachey, at 310

[307] *See id.*

[308] GWYNN NETTLER, *CRIMINAL CAREERS VOLUME 2, "KILLING ONE ANOTHER"* (1ST EDN, CINCINNATI ANDERSON PUBLISHING,1982)

[309] *See* Id Peachey, at 310

> relationship between the two individuals, the victims tended toward retribution. But when it was an intimate relationship, a significant number of victims moved toward forgiveness and alternated between retribution and forgiveness.[310]

It seems that forgiveness can be an appealing approach when there is a desire to preserve the relationship, especially when the love or attachment to the other party is more significant than the harm done. Also, if both the relationship and the harm are not significant, forgiveness or compensation might be the desired approach. On the other hand, retribution can be sought when the harm is more significant than the relationship, or when an element of the relationship has been translated in a negative manner, such as through betrayal or personalised harm. All of this reflects the close link between the strength of the relationship and the other two elements. In order to put the element of relationship into an accurate perspective, there is a need to investigate the effect of the other two linked elements by explaining and understanding the reason for behaviour and nature of the offence.

5.3.6 Reason for Behaviour

An additional element linked to the relationship element, which will also likely affect justice orientation, is the psychological meaning that one party imputes the other's behaviour or simply the motives behind such behaviour.[311] Understanding the motives for other's behaviour can reveal the *intentionality* and possibility of repeating *the behaviour*[312]. As for the intentionality of the behaviour, the party might ask: did the person intend the injury or damage, or was it caused by accident or negligence? Further, if the injury or damage was intended, was it an act of deliberate malice toward me or did I just happen to be the victim of the offence? A desire for retribution would likely be stronger when the offence is personalised. In other words, when the victim perceives the offenders as trying to harm him or her in particular, then retribution can be the desired approach.[313]

The other critical perception is the likelihood of the behaviour being repeated. Victims who attribute the offender's behaviour to external or temporary stresses and pressures or momentary weakness on the part of an otherwise upstanding citizen would indicate that the

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[310] *See Id Restitution*, at 554.
[311] *See* Id Peachey, at 311
[312] *See id.*
[313] *See id.*

offender is not likely to continue to engage in such behaviour. When such a conclusion is reached, the victim can prefer compensation or even forgiveness when the offender demonstrates remorse. On the other hand, when the others' behaviour is perceived to originate from an enduring trait, this can lead to the conclusion that such behaviours can be repeated. Typically, in such a scenario, there is a much desire for retribution to address several needs such as protection, deterrence and reasserting society's values.[314]

It is important to note that these findings assume that victims will be able to come up with a reasonable and logical attribution regarding the two perceptions of the *intentionality of the behaviour* and the *possibility of repeating such behaviour*, which requires gathering enough knowledge and developing a solid understanding, which in turn all require a decent level of communication between the parties. When there is lack of communication and such understanding cannot be acquired to answer why the event happened, or why the perpetrator acted as he or she did, then the only possibility that the victim may see for restoring justice is through retribution[315]. Lerner's justice motive theory offers more insights into that meaning. As he suggests, with a lack of knowledge and understanding regarding the motives behind the behaviour, the victim will resort to retribution, as he might believe that 'at least the perpetrator will suffer as I have suffered.' The victim may even dehumanise the perpetrator, thereby justifying a harsher treatment and retribution.[316]

5.3.7 Nature of Offence

Another obviously connected aspect to consider is the type of harm that has been suffered. Injustice can refer to the damage or injury that is seen to be unwarranted or illegitimate to oneself or one's resources.[317] Several empirical investigations suggest that:

> [d]amage to symbolic resources like status, esteem, or reputation (or highly symbolic goods such as mementos and heirlooms) will be more likely to lead to demands for retribution than for restitution or compensation. On the other

[314] *Id*. at 313 (offering such findings based on a survey study followed by a laboratory investigation).
[315] *See id.*
[316] *See Id* Lerner; *see also Id* Lerner & Whitehead.
[317] It is important to note here that this section is absorbing restorative justice within a broader sense to capture its application to civil cases and not limiting it to the criminal cases. In particular, the definition of harm or offence can go beyond the physical injury and property damage that is the focus of criminal laws. For example, Vidmar describes violations of one's perceived rights or failure to honour contractual or implied obligations as an event that also gives rise to a sense of injustice. *See* Neil Vidmar & Dale T. Miller, 'Social Psychological Processes Underlying Attitudes Towards Legal Punishment' (1980) 14 L. & SOC'Y REV. 565

> hand, damage to concrete resources will result in an orientation toward restitution or compensation. Within any given type of resource, the greater the value or quantity of the resource that is damaged, the more likely it is that retribution will be seen as the appropriate form of justice.[318]

When asked what would be the fairest thing to happen, the subject of the investigation frequently mentioned rehabilitating the offender. Such frequent use raised questions of whether rehabilitation should be an additional approach to restorative justice.[319]

Restorative justice is concerned with restoring the disturbed balance between parties by addressing the different economic and non-economic elements (emotional and external) of the harm caused to the party. There are four approaches to restore the balance—retributive, restitution, compensation, and forgiveness. These approaches can be explained very simply as retribution, if I suffered, they have to suffer too; restitution and compensation, if they broke it, they have to replace it, fix it, or compensate me; and lastly forgiveness, I will let it go and forgive. One might believe that people tend to prefer retribution to restore the balance, but in fact, it can be the opposite, especially given that taking a quick review of research efforts in various countries indicate that people are not as geared towards retribution as conventional wisdom might hold [320].

Researchers suggest that both victims and the general public desire a broader range of approaches to justice than the legal system typically offers with respect to retribution. For example, victims in the United Kingdom have been reported to often favour reparation over retribution[321], as have victims in New Zealand,[322] as well as several areas in the United States,[323] specifically including Minnesota.[324] There is growing evidence that retribution is

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[318] *See Id Restitution*, at 554.

[319] *See* ROBERT B. COATES & JOHN GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM-OFFENDER RECONCILIATION PROGRAMS (1985); *see also* Id Peachey, at 315 (citing E. Cohn & V. C. Rabinowitz, *Restitution: The Egalitarian Sentence*, Paper presented at the Annual Meeting of the Int'l Pol. Psyc. Soc. (June 1980)).

[320] Martin Wright, *What the Public Wants*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY (1st Edn, Martin Wright & Burt Galaway, 1989).

[321] *See Id.*

[322] See: Id Burt Galaway, *The New Zealand Experience Implementing the Reparation Sentence*, *in* RESTORATIVE JUSTICE ON TRIAL.

[323] See: Id Robert B. Coates & John Gehm, *An Empirical Assessment*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY, *supra* note 136.

[324] See: Id Imho Bae, *A Survey on Public Acceptance of Restitution as an Alternative to Incarceration for Property Offenders in Hennepin County, Minnesota, U.S.A.*, *in* RESTORATIVE JUSTICE ON TRIAL.

only one of the routes people choose for seeking justice in the aftermath of an injury.[325] Studies suggest that there are three elements—the relationship, the reason of the offence, and the nature of the offence—that can be very influential on the parties' orientations towards a certain approach to restoring the balance. Building on the last two points, one can only hope that people are good and peaceful by nature, and the three elements can in fact be ways for the wronged party to validate and reciprocate that the other party is a good person despite the harm they caused and which in turn does not deserve a harsh treatment. By gathering enough knowledge and understanding the other party's explanation, the wronged party can achieve such a conclusion. This can help the party to move from the retribution position to the other approaches more naturally. Even when parties fail to gather the needed information and explanation in connection with the three elements, or the input suggests that the other party evil or bad and retribution is the only appropriate approach, there is an additional element which can appear to shift the perspective away from retribution. This fourth element can represent a positive, interactive role that the other party can present to prove that he or she is, in fact, a good person, or at least they can shift back towards their good nature. This conclusion is drawn from several studies that report that victims often seek to rehabilitate the offender.[326] These findings have led scholars to link rehabilitation to the forgiveness approach as a necessary step for the party to witness contingent changes by the offender for the victim to resort to compensation or forgiveness instead of retribution.[327] To apply this on a larger scale beyond criminal cases, the fourth element that can be added is a positive interactive role for the defendant to play and to prove that he is a good person after all, and such harm is not to be repeated. There needs to be an acknowledgement of the pain and suffering that the claimant has to deal with and offering possible, creative solutions to ease such suffering can be very influential for the parties to restore peace and move away from the retribution orientation toward the other approaches. The positive interactive role can be as simple as an act of sincere apology,[328] or it can be a creative remedy addressing the emotional

[325] *See Id Restitution*, at 551.

[326] For example, in a study evaluating a victim-offender reconciliation program, when victims were asked to rank their priorities with respect to a fair outcome, the respondents ranked 'help the offender' as their secondary goal, with 'recover restitution for loss' as their primary goal. *See Id* Coates. A similar study found that 23% of victims preferred rehabilitation to retribution. *See* Id Brown. Preferring rehabilitation can be additional proof that people are not eager for retribution and are in fact are good and peaceful by nature.

[327] *See Id* Peachey, at 315.

[328] See: id John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons*, *in* RESTORATIVE JUSTICE ON TRIAL, (drawing upon Haley's observations of Japan, where letters of apology from offenders

aspects such as establishing a scholarship in the MIT case.[329]

5.4 Can Mediation Deliver Elements of Restorative Justice?

The question now is: can mediation deliver the restorative element in justice with its four approaches of retribution, restitution, compensation, and forgiveness?

It has been established how mediation can score highly in delivering restitution, compensation, and forgiveness through the means of creative justice and enhancing the level of communication. The true challenge that faces mediation in delivering restorative justice is the retribution approach. The crucial obstacle that can hold mediation back from meeting with the retribution approach is that retribution entails pain of one type or another, and suffering is rarely undertaken voluntarily. Mediated settlements are based on parties' participation and acceptability rather than an imposed decision, which explains why retributive sanction provisions are rarely established in settlement agreements.[330] Yet, there are two possibilities where mediation can deliver retributive justice: creative retribution and transformation from the retribution orientation, explained below.

5.4.1 Mediation Delivering Creative Retribution

Mediation possesses the potential to deliver a creative, unique version of retribution, which causes less violence and preserves lives. To elaborate, a case study of the revenge killing in Upper Egyptian villages can be offered.

5.4.1.1 The Conflict Analysis of Revenge Killing in Upper Egyptian Villages

Using a hybrid of the conflict analysis tools,[331] along with recent anthropological studies,[332] and international studies on the topic,[333] several elements can be presented about

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to their victims are frequently followed by letters from the victims to the police asking that criminal proceedings be dismissed).

[329] The MIT case presented in this chapter is under the titled: *Creative Justice (Justice based on the parties' perceptions and acceptability)*.

[330] Other general obstacles that can face mediation are based on the voluntary and parties' self-determination characteristic of mediation, which can present other sets of obstacles such as the parties' reluctance to face someone with whom they are in conflict, especially when much pain, suffering, and emotion is involved. Moreover, parties might desire revenge or want their position to be vindicated by an authoritative third party. Lastly, disputes that expect retribution in the outcome can be claimed by the state to deal with it exclusively without allowing the parties to tackle them as a matter of public policy, such as many criminal cases.

[331] *See* SIMON FISHER ET AL., *WORKING WITH CONFLICT: SKILLS AND STRATEGIES FOR ACTION* (1st Edn, Zed Books,2000).

[332] *See* فتحي عبدالسميع في كتابه "القربان البديل .. المصالحات الثأرية في صعيد مصر الدار المصرية اللبنانية . Translated roughly the citation is: FATHEY ABD ELSAMEAH, *THE ALTERNATIVE SACRIFICE; CONCILIATIONS FOR REVENGE KILLING IN UPPER EGYPT* (1st Edn, Egy. Labn. Publisher, 2015).

the conflict.

5.4.1.2 General Information About the Conflict

The studies were located in rural villages in Upper Egypt, where the population is highly influenced by the clans' culture, which is very family-oriented[334]. In murder cases where the murderer belongs to one family and the victim to another family, the family of the victim refuses to accept any condolences until justice is served.[335] To them, justice can only be served by killing the murderer.[336] It is a matter of honour that a member of the victim's[337] family, usually the victim's son[338], should take such vengeance. This begins a vicious cycle of attack and counter-attack in the name of vengeance and family honour[339].

5.4.1.3 Important Elements

There are several reasons that can be identified as to why the revenge takes place, begetting a vicious cycle. The reasons start with the culture of the clans and the strong sense of family, where one's family is a fundamental element of one's identity. Justice to these families only translates to retribution, or, in other words, an eye for an eye; who committed the murder must be killed. Seeking justice through the law and court system is considered a sign of weakness, which would dishonour the family. The reasons behind this mentality are that the legal system is very slow and, most importantly, the death penalty is only applied in very rare, legally complex situations. Lastly, it is related to the family honour and status, meaning there is a need for such family to establish deterrents, otherwise they can be seen as a weak family that can be taken advantage.

5.4.1.4 The Khauwda Ritual

There is only one possibility to stop such a cycle of violence; the Khauwda ritual[340]. The ritual is effectively a power mediation process ending with a symbolic death for the

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[333] Immigration & Refugee Board of Canada, *Al-Tar Vendetta Feuds; Underlying Philosophy and Principles; Areas or Groups that Participate in it; How Egyptian Law Addresses it; Reaction of Authorities to Violence Committed in this Tradition*, EUR. COUNTRY OF ORIGIN INFO. NETWORK (Mar. 2, 2004), https://www.ecoi.net/en/document/1077628.html last access 18/02/18

[334] See: Id FATHEY ABD ELSAMEAH. فتحي عبدالسميع في كتابه "القربان البديل .. المصالحات الثأرية في صعيد مصر الدار المصرية اللبنانية

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

killer, and leading to the victim's family forgiving such person[341].

5.4.1.5 Explaining the Mediation Process and the Khauwda Ritual

The most important element of this type of mediation is the mediator himself, usually called the "Agaweed." The Agaweed must enjoy a significant status among all the families of the village[342]. Such status can be translated to power, wealth, age, wisdom belonging to the most powerful and influential family and not to mention skills and charisma. According to this culture, the success of the Khauwda ritual depends on the mediator's power and authority.

The *convening phase* of the mediation starts with the Agaweed interfering and calling for the initiation of the Khauwda ritual. With this call and with the influence of the Agaweed's status and authority, the vengeance is postponed, and the killer is given a promise of safety. This part of the mediation is crucial because the victim's family usually spends a long time resisting mediating. Readily accepting the mediation is culturally taboo and seen as a disrespectful to the victim.

The *exploration phase* is usually conducted in a number of caucuses with the killer and with the victim's family. On some conflicting points of the dispute, the mediator is usually asked to conduct an investigation so both parties can be clear on all points.

The *negotiation phase* is when the parties start to negotiate about the obligations and rights of each party, the date, time, and location of the Khauwda celebration, and the person performing the ritual—usually the killer themselves or the most significant member of the killers family.

The *concluding phase* is the Khauwda celebration or ritual itself. The ritual starts with a large space that is equipped to host as many people as possible from all around the village and surrounding villages to witness the ritual. The victim's family usually sends an invitation, similar to a wedding invitation, to as many people as possible as shown in figure five.[343]

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[341] *Id.*

[342] *Id.*

[343] See: Book Review: by May Hisham هشام مى, 6 مراسم لم تعرضها في الأفلام إنهاء رحلة الثأر بصعيد :مصر تقديم كل ليس الكفن اليوم المصرى ,شيء

Part of The Khauwda Celebration or Ritual

[Figure 5][344]

The "top table" of the event hosts the Agaweed, a government official, such as the mayor of the village, the chief of police of the district, a man of religion, such as the imam of the local mosque, and a representative from the victim's family. One of the most important roles of the Agaweed at this stage is to inform the table of the people in attendance who have the potential to resist the process. Together they ensure the smooth running of the ritual.

The killer arrives, passing through the large crowd toward the family. In a culture where status and appearance are everything, he berates himself by appearing barefoot and with his head uncovered to show his humility and shame. He dresses in all black and carries his funeral shroud in his outstretched hands, presenting it to the family of his victim as seen in figure six.

[344] *Id.*

Part of The Khauwda Celebration or Ritual

[Figure 6][345]

In some cases, the Agaweed leads the killer through the crowd by a rope around his neck and presents the rope to the victim's family, announcing that the killer is at their mercy. The Agaweed speaks about the importance of forgiveness before allowing the killer space to apologise and show remorse. The family of the victim, on accepting the Khauwda, say, "for the sake of God, the sake of the Prophet, the sake of the mediator and for those in attendance you are forgiven." Upon hearing these words, the crowd rejoices and celebrates as seen in figure seven.

Part of The Khauwda Celebration or Ritual

[Figure 7][346]

[345] *Id.*
[346] *Id.*

Complimentary rituals to the Khauwda can include asking the killer to change to white clothes and cover his head and feet as the victim's family begins to accept condolences on the death of their loved one. Some families bury the shroud of the killer, while others keep it as a witness to the legacy of their dead family member and proof that they sought vengeance for their death. Depending on the strength of the mediator and the intensity of emotions during the Khauwda ritual, the killer may be banished from the village for a period of time, or, conversely, can be welcomed into the victim's family as an honorary member, offered protection, housing, or marriage.

In conclusion, in some cases, it is very hard to shift the parties from the retribution orientation, yet mediation can offer a less violent manner of retribution, which satisfies the injured party. In this case study, the culture revealed that people would rather die than perform the Khauwda ritual due to its unbearable humiliation. With such an understanding, it seems that the killer has actually undergone a symbolic death, which somehow addresses the victim's family's need for retribution without shedding blood. This example may be an extreme case,[347] yet it shows the possibility for mediation to provide creative solutions that can satisfy the parties and meet their needs for retribution.

5.4.2 Mediation Shifting the Party Retribution Orientation

Scholars and policymakers recognise that there are benefits associated with bringing the parties to mediation, even in cases which typically call for retribution, such criminal cases.[348] The mediation process can be very beneficial in several manners even when it can

[347] Many **other examples** can be used in this respect, including the story **from of Rwanda's** Gacaca courts as a local initiative to restore justice, reconciliation, and peace after the Rwandan genocide of 1994. Here, where a community court hears suspects, and if the last suspect confesses about his crime, seeks asked for forgiveness, and sought reconciliation with the community, the Gacaca court can send him home with no penalty. *See Background Information on the Justice and Reconciliation Process in Rwanda*, U.N., http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (last visited 18/02/18). One such story is told in the documentary In the Tall Grass, directed by Coll Metcalf. *See* IN THE TALL GRASS (Internews Networks 2005) (telling the story of a woman who accused a man of killing her grandchildren. The Gacaca court hears from a witness who claims to have seen the accused bury the children and orders him to dig. Upon finding the bones, the woman asks the accused to wash them and bury them correctly. Because the accused still did not confess, he was sent to official courts. After his sentencing, the Gacaca court returns to the woman to reveal the accused's sentence. She refuses to listen, claiming justice was done when he washed the bones and buried them. She was convinced he had felt her pain as he did so and this was more than enough for her. This represents another example that retribution can take more creative forms than killing or jailing the perpetrator.).

[348] For example, mediation has been used in the criminal setting since the 1970s, and today there are over 300 programs in the U.S. *See* Mark S. Umbreit et al., 'Victim-Offender Mediation: Three Decades of Practice and Research' (2004) 22 CONFLICT RESOL. Q. 279, 279–81

be assumed that the outcome will not meet with retributive justice. One manner where mediation can be beneficial is when the mediator helps the parties to explore their orientation, needs, and expectations in order for them to better determine if a retributive approach is really what is needed for them to restore the balance. Indeed, people can be very confused as to what would really bring balance and harmony back to their lives when in dispute. Their true orientation might be misguided,[349] or they might appear to seek a certain orientation such as restitution or compensation but are actually seeking another orientation such as retribution,[350] or they simply might be torn between many different orientations.[351] If it has been concluded that retribution is what is needed, then one can suggest that the mediator can appropriately refer them to the court or other forms that can rule on the legitimacy of the retributive claim. However, if it has been concluded that restitution or compensation is the required approach, then the mediator can help them by delivering distributive justice by allowing the parties to negotiate the allocation of resources using any of the equality, equity, and need criteria.

The second place where mediation can be beneficial is in the restorative justice arena, which requires recognizing that the four elements—relationship between the parties, reason of the offence, the nature of the offence, and the positive role for the claimant to play—influence the parties' orientation toward restorative justice's different approaches—retribution, restitution, compensation, and forgiveness. Mediation is communication, which allows for the gathering and sharing of information to come to a solid understanding and find answers

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[349] *See* William L. F. Felstiner, et al., 'The Emergence and Transformation of Dispute: Naming Blaming Claiming' (1981) 15 L. & SOC'Y REV. 631 (explaining that disputes are transformed into legal cases through a process of naming, blaming, and claiming, where lawyers counsel their clients about the available remedies in the legal system and redirect their orientation to fit into the legal system's remedies).

[350] Id COATES & GEHM, (identifying that parties often spoke of the restitution as if it were a punishment).

[351] To elaborate, a study was conducted on Canadian medical negligence mediation where 131 in-depth interviews were conducted with plaintiffs, defendants, lawyers for both sides, and mediators. The study concluded that the claimant had a wide range of aims when pursuing legal action for the search of relief and balance. When asked to prioritize their aims for the outcome, claimants responded as follows: admitting fault (59%); preventing this happening again (59%); finding answers and explanations (53%); retribution for conduct (41%); apology (41%); monetary compensation as a secondary goal (35%); acknowledging harm (35%); punishment (24%); monetary compensation as a primary goal (18%), and; monetary compensation as the sole aim (6%). *See* Tamara Relis, It's Not About the Money: A Theory on Misconceptions of Plaintiff's Litigation Aims' (2007) 68 U. PITT. L. REV. 701, 723. 'It is worth mentioning that the study suggested that lawyers could not quite capture the claimants' aims and needs as physicians' lawyers saw very little besides financial demands when they asked about their views on the claimants' litigation aims. The study shows: money alone (90%); answers (10%); admit fault (0%); never again (0%); apology (0%), and; retribution for conduct (0%). *Id.* at 714. Correspondingly, the study also suggests that the hospital lawyers and the claimants' lawyers tend to have a slightly better understanding of the claimants' aims and needs, though neither where able to fully capture the diverse needs of the claimant as the majority of lawyers saw the primary goal as money. These findings can affirm the wide range of orientations that parties can bring with them to the dispute, and more importantly, the misunderstanding of each other's orientation.

and explanations for the aforementioned questions. With that being established, mediation can be very useful for the parties to enhance the communication level between them. Once the communication level has been enhanced, relationship importance can be recognized, reasons for behaviour can be revealed, and the defendant can carry on a positive role by showing remorse, demonstrating that such behaviour to not be repeated, etc. all of which may lead the parties to accept compensation, restitution or even forgiveness rather than retributive sanctions. Lastly, mediators can engage in public education aimed at fostering a broader understanding of restorative justice and reducing society's reliance upon retribution. [352]

6) Conclusion

In the quest of testing the theory of educated self-determination in respect to the mediation field, this chapter aims to explore the possible benefits or potentials behind adopting such theory. To do so, there was a need to establish number of foundations and assumptions; namely: an understanding of the meaning of justice, the importance of justice in relation to parties' satisfaction when settling their disputes, the limitations of formal justice and the relation between mediation and justice.

It has been argued that in order for mediation to claim a place as an effective dispute resolution method, mediation -as any dispute resolution method- must be concern with both the fairness of the process and the outcome. With such conviction, the concept of creative justice has been presented where the parties' self-determination is the core of creative justice.

Evidence have been presented to support that by honouring parties' self-determination; mediation can be the champion of creative justice and can restore the balance and harmony between the disputing parties. With such an orientation mediation can meet the core aspects of procedural justice: voice, being heard, and dignified treatment. Moreover, mediation can deliver distributive justice by allowing the parties to negotiate the allocation of resources using any other criteria such as equality, equity, and most importantly need. Lastly, mediation can be very valuable as it meets the elements of restorative justice—restitution, compensation, and forgiveness.

As for the element of retribution: first, it is important to note that despite this topic is more in alliance with the peace and conflict resolution filed than the law and dispute resolution field. Yet, it was essential to briefly touch upon the topic to better meet with the

[352] *Id* Peachey, at 307–08.

broad conceptual orientation of this research and to better provide a complete overview on the topic of mediation and justice with the focus on testing the study's theory and highlights its different potentials. Second, it has been argued that mediation can deliver a unique untraditional version of retribution that is less violent or at least assists the parties in discovering their true orientation and shift it away from retribution.

In the end, the chapter suggests that honouring and adopting the study's examined theory would provide may benefit and aid mediation in claiming a place as an effective dispute resolution method capable of delivering "creative" justice. With that being established, it is important to note that society, culture, policymakers, and courts continue to treat the law as the definitive source of normative despite all of its limitations. Until this mindset evolves and we start to recognise and appreciate creative justice as a parallel normative order that can be as beneficial to the society as it is to individuals. It is vital for mediation to allow the parties to develop "creative" settlements as long as they remain within the orbital sphere of formal justice. Thus, creative justice delivered by mediation must not contradict with the standards of the law. This thought is what reflects the need to have self-determination associated with the educational aspect. To better explain this and to answer how the theory of 'educated' self-determination can stand against all the possible criticism, section two of this PhD is dedicated for that purpose.

Section Two

(The Practice)

Introduction Chapter (Section Two)

Mediation and Law

Identifying the Practical Challenges in Adopting the Theory

1) Introduction:

In section one of this study, the theory of educated self-determination was presented conceptually to identify the rationale, meaning, the need and benefits of such theory. Section two of this study seeks to demonstrate the different practical challenges when applying such theory and how such challenges can be addressed.

This introductory chapter seeks to identify the possible criticisms that can be raised against the theory of educated self-determination as the core of the concept of creative justice. To achieve that; four teams (mediation evangelists, or the 'mediation inner circle team'; adjudication romantics, or the 'mediation outer circle team'; mediation realists and adjudication realists) are introduced.

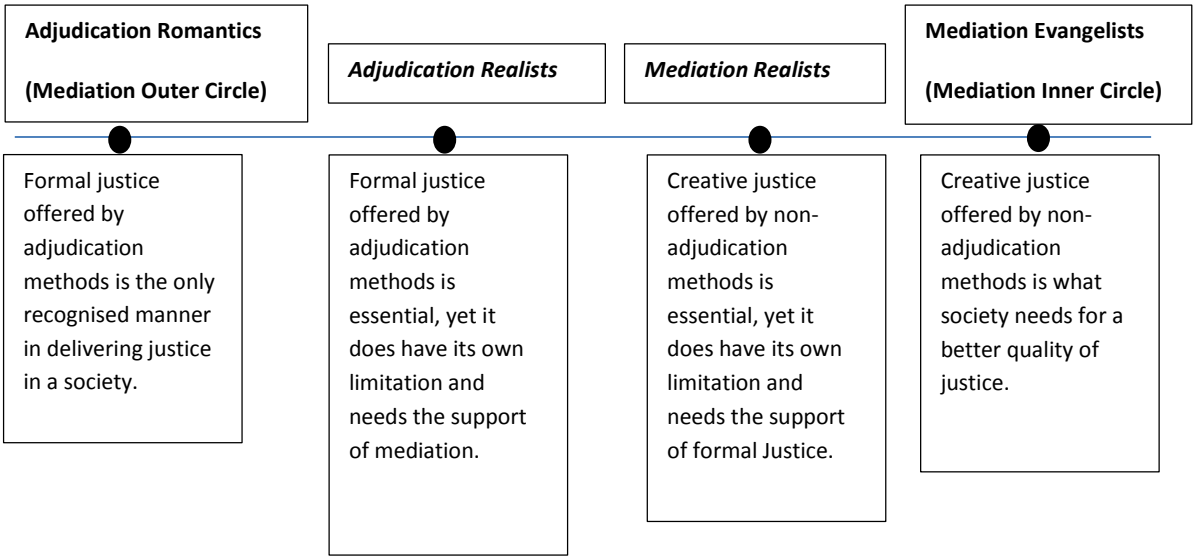
Introducing the teams:

The re-emergence of mediation in the post Pound conference era and the introduction of Frank Sander's concept of the multi-door court system led mediation to the centre of the traditional formal civil justice through court-connected mediation programs.[353] While a fillip for the growth of mediation, such an infusion was provoking enough to unleash a strong wave of criticism towards mediation. The criticisms centred largely around justice concerns and the role of the law in formal civil justice. In other words, the introduction of mediation to the courts and the unique form of justice (creative justice) provided by mediation when honouring parties' self-determination, was provocative enough to start a heated scholarly debate over the appropriateness and effectiveness of both forms of justice explained in chapter two (formal justice and creative justice).

In this chapter, this debate shall be discussed through the eyes of the four identified teams: an inner circle mediation team (mediation evangelists); an outer circle mediation team (adjudication romantics); and two teams presenting possible common ground, mediation realists and adjudication realists.

[353] See chapter one of this work.

Mediation Inner, Outer and in Between Teams



[Figure 8]

It is important to note that these four teams are used for purely academic purposes and to articulate the debate; in reality the teams are much more fluid with many mediation writers and commentators identifying with elements of both realism and romanticism on both sides of the argument.

2) Meeting the two extremes - inner and outer mediation circle teams:

Professor Dame Hazel Genn in her writings has presented mediation through the eyes of the two teams which lie at the end of the spectrum, the 'adjudication romantics' and the 'mediation evangelists'.[354]

2.1 Mediation Evangelists:

Genn refers to the work of Menkel-Meadow[355] and the work of Bush and Folger[356] to present this team. Through the lens of the mediation evangelists, the Ideology of mediation is of peace-seeking, with a focus on the interests and needs of the parties and addressing any

[354] See: Hazel Genn, *Judging civil justice* (1st Edn, Cambridge University Press, 2009) 82-85

[355] See: C Menkel-meadow, *Mediation: Theory, Policy and Practice* (1st Edn, Ashgate, 2001) Introduction, p. xvii and C Menkel-meadow, 'Whose dispute is it anyway? A philosophical and democratic defence of settlement (in some cases)' (1995) 83 Georgetown Law Journal 2663-96 and C Menkel-meadow, 'The trouble with the adversary system in a postmodern, multicultural world' (1996) 38 William and Mary law Review 5-44, 5

[356] RA Baruch and JP Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (2nd Edn, San Francisco: Jossey Bass, 2005)

conflict between these different needs and interests by a creative and collaborative problem-solving approach that can preserve and even transform and strengthen the relationship between the parties. This team is presented as anti-adjudication and anti-litigation. Judicial determination and legal rights have no value to this team as adjudication characteristics (such as adversarialism, the focus on authority decision-making and legal rights) contradict mediation characteristics (its collaborative nature, party empowerment basis and focus on parties' needs and interests).

This team can be seen as the ambassador of the pure facilitative module of mediation.[357] Carrying out mediation with the facilitative approach as the only recognised manner of conducting the mediation process, or in other words, adopting a 'lawless' form of mediation, has exposed mediation to several criticisms. Perhaps the main plank of these criticisms is that when mediation focuses only on the different needs and interests of the parties, it turns into a process that is not fundamentally concerned with the assertion of vested legal rights which in turn can raise serious concerns regarding the fairness of the mediated outcomes. Genn amplifying this concern asks "[a]re mediators concerned about substantive justice? Absolutely not … Mediation is about searching for a solution to a problem. There is no reference to the hypothesised outcome at trial. The mediator does not make a judgement about the quality of the settlement."[358]

Such justice concerns arising from the mediation evangelists' views have two dimensions: first, that mediation produces settlements without reviewing certain rights implemented in the law and secondly, that it produces mediated settlements which violate rights and values stated in the law. Starting with the first dimension Nolan-Haley in her research[359] presented the following case study:

"The claimant purchased a one-year membership from a fitness club, paid an initiation fee of $312.00, and agreed to pay monthly charges of $75.00. After using the club facilities for two months, he tried to cancel his membership because he believed that he had been misled about available equipment and facilities. The club refused to cancel the claimant's membership

[357] The different mediation styles are explored in the coming chapter.

[358] See: Hazel Genn, *Judging civil justice: the 2008 Hamlyn lectures.* (1st Edn, Cambridge University Press, 2010) 116-117

[359] See: Jacqueline M. Nolan-Haley, 'Court Mediation And The Search For Justice Through Law' (1996) 74 Wash. U. L. Q. 47, 66 in which she investigated the standard of justice offered by the court connected mediation programs and the importance of the law through studying two cases that had been mediated at the New York City small claims court and interviewed the mediator afterwards in relation to of how much the law was involved.

because the claimant failed to cancel within the time prescribed in his contract. The claimant then attempted to sell his membership but was prevented from doing so when the club offered the potential buyer a lower price. (The club denied this accusation.) The claimant was charged monthly fees of $75.00 to his credit card for nine months, during only two of which he actually used the club. He sued in small claims court to recover the $312.00 initiation fee. In court, the club was represented by its corporate counsel. The claimant appeared professional during the mediation session; the claimant sought to recover the monthly charges that had been charged to his credit card despite the fact that his initial complaint was simply to recover the initiation fee. The case was settled in mediation with the defendant agreeing to credit $200.00 to the claimant's credit card and terminate the contract."[360]

When the mediator was interviewed about her reflection she stated that: "I concentrated on what the parties wanted. It became clear that the inexperienced claimant (who was only suing for the initiation fee) wanted out of the contract and that the club wanted to get this guy off their back."… "The only ethical issue which arose was how to deal with the inequity of legal knowledge of the parties"… "I think I did okay because I have found that when I have an attorney and a pro se party, I keep impartiality if I treat them both as if they are parties, irrespective of their professional status. In this particular case, this was easy to do because the attorney for the defendant was understanding and amiable. All in all, I think that both parties left satisfied, especially the claimant."[361]

The mediator, in this case, did not look into the law, yet she was happy with the outcome because it met the parties' needs and both were satisfied. Nolan-Haley reviewed the law applicable in this case[362] and concluded that had the claimant proved his case in court it could be expected that as a minimum that he would have been awarded the full initiation fee and may have been awarded treble his claim in damages.[363]

The question that thus arises is: if the claimant was aware of this piece of information

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[360] Id Jacqueline M. Nolan-Haley at 67

[361] Id Jacqueline M. Nolan-Haley at 68

[362] See Id Jacqueline M. Nolan-Haley at 70-71 were she cites: The Health Club Services Law created a private right of action to recover damages caused by a health club's failure to provide promised services. N.Y. GEN. Bus. LAW § 628 (1984). of the statute was discussed in Faer v. Vertical Fitness & Racquet Club, Ltd., 462 N.Y.S.2d 784 (N.Y. Civ. Ct. 1983), modified, 486 N.Y.S.2d 594 (N.Y. App. Term 1984), the only reported case under the statute: [T]he purpose of this article is to safeguard the public and the ethical health club industry against deception and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of health club services by prohibiting or restricting false or misleading advertising, erroneous contract terms, harmful financial practices, and other unfair, deceptive and discriminatory practices which have been conducted by some health club operators.

[363] Id Jacqueline M. Nolan-Haley at 70-71

and was more aware of his legal rights according to the law would he have settled for the $200 and still be satisfied with the outcome?

Stulberg[364] affirms that any mediated agreement terms accepted without "full knowledge" of the possible alternatives can taint the fairness of those outcomes especially when the settlement agreement presents a lower value than the value stated in the law.[365] Several points can be raised in response to such a concern: if the outcome perfectly addresses the party's need would it really matter whether that party knew the other possible outcomes stated by the law through adjudication methods, especially with all the uncertainty, cost and time that can be associated with such an outcome? More importantly, what is the cost of obtaining the full knowledge of the entire possible alternative regarding the outcome? In the gym case, the claimant settled at $200, and it is argued that he could have ended with triple his original claim ($312) in damages if he had successfully proven his case in front of the court. The question is how much the claimant would have to pay, for example, in lawyers' fees to obtain such knowledge and how much may he be required to pay a lawyer if he decided to proceed to litigation? Even if he eventually won the case, it can be questioned whether he would end up with as much as net $200 after paying all the bills[366]? Obtaining "full knowledge" of all possible outcomes is important, yet it comes with serious financial burdens and potential delays which could be considered disproportionate especially with small claims cases.

Stulberg adds a more troubling concern regarding the second dimension of the justice concern in mediation by asking what should occur "if disputants agree to an outcome that is acceptable to them but contrary to the requirements of the public law system"?[367] He uses the

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[364] Joseph B Stulberg, 'Mediation And Justice: What Standards Govern?' (2004-2005) 6 Cardozo J Conflict Resolution

[365] Id Joseph B Stulberg at 225-226

[366] It is worth noting that under several legal systems such as USA each party in litigation per their own litigation expenses whether they win or lose their case, while other legal systems such as the UK follows a 'loser pays' system where the losing party may have to even cover the winning party's litigation expenses.

[367] See: Id Joseph B Stulberg at 223 where he also adds another example: "a Somalian father and mother living in the U.S. agreed in mediation with a U.S. doctor to perform a clitoridectomy and infibulation on the parents' fourteen year old daughter, not for reasons of health or because they are religiously prescribed **...** but rather, because the surgeries are 'thought to be crucial to the definition of a beautiful feminine body, the marriageability of daughters, the balance of sexual desire between the sexes, or the sense of value and identity that comes from following the traditions of their group." He uses this example to represent fairness concerns in mediation with the connection of mediation settlements preaching cultural values embraced by the larger community. See: Id Joseph B Stulberg at 226-227 It is important to note that such a concern is only vivid when the preaching of the cultural values are embedded in the public law of the jurisdiction where mediation took place, even the example he used considered illegal but he asked to presume that the legal status of the practice in the jurisdiction was ambiguous to distinguish between the two concerns

following hypothetical example for elaboration: "In a mediation session involving a case of employment termination, A agrees to settle the case by rehiring B, his terminated employee, but only on the condition that B agrees to be paid in cash and otherwise work "off the books." B agrees."[368] Stulberg explains that this agreement is able to hold because of the abuse of confidentiality and privilege in mediation as the parties will face legal complications if the terms of the agreement become public. For example; the employer will face a tax liability for failure to pay social security tax and worker compensation tax, etc. The employee presumably would not have declared these payments as income and, thus, would face income tax liabilities. [369]

Creative justice as explained in chapter two is based on parties executing their self-determination powers and freeing themselves from the values and standards stated in the law and adopt the values and standards in their settlement which suits them better which in turn can arguably present a superior and more satisfying form of justice compared to the one offered by the law.[370] With that in mind, the second dimension of the justice concern raises the question: is parties' self-determination powers are absolute or should it have limitations?

To answer such a question, one of Shapira's concepts of fairness in mediation is to be presented. In his research, Shapira presented that one of the conceptions of fairness is the expectation to "play by the rules of the game" were breaking any such rule would lead to an unfair outcome. This is so because such rules are aspects of fairness. Such an understanding of fairness has been drawn from the work of the philosophers Bernard Gert and Brad Hooker.[371] This understanding of justice applies to formal justice, or justice based on the law and Shapira extended the application of this to mediation by stating that "mediation is also a game with rules"[372] and the source of the mediation rules can be mediation codes, mediation literature and most importantly the parties themselves as according to the concept of justice based on parties' perceptions and acceptability; the parties are free to choose the rules and standards to be applied to their case. With that being presented, some scholars stress the point

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mediation settlement preaching the law and mediation settlement preaching cultural values- you need to clarify the meaning of the last part of this sentence . See: Id Joseph B Stulberg at 227 citation no 37

[368] See: Id Joseph B Stulberg at 223-224

[369] See: Id Joseph B Stulberg at 223-224

[370] See Chapter two of this work

[371] See: Bernard Gert, *Morality: Its Nature And Justification* (rev. ed. 2005) 196 and Brad Hooker, *Fairness, in* 8 ETHICAL THEORY & MORAL PRAC. (2005) 329, 329

[372] Id Omer Shapira at 291

that mediations occur in a social context.[373] "Thus, the rules of mediation are part of a larger system of social rules that regulates all aspects of social life and takes care of general social interests that go beyond the private interests of the players in a particular game."[374] With the same line of thought other scholars argue that on the basis of fairness considerations, mediators should consider the impact of the parties' decisions on third parties. To elaborate, the settlement of a dispute must consider others whom may be affecting by such settlement, even if they are not in a direct connection to the dispute. For example, in a family dispute between couples; the interests of the children should be considered, or in a business dispute the partners of a firm should not agree on provisions which can negatively affect the staff of such a firm. Such an understanding must apply to society at large in deciding whether and how to intervene in the process and consider the settlement and any possible effect to the larger society.[375] In other words, these writers see external social norms as applicable to mediation and therefore consider violations of those external norms to be unfair. In turn, such a wide conception of fairness in mediation points to the limitations on parties' freedom of choice or self-determination. In this conception of fairness, creative justice is not without limitations, and parties within mediation are not free to make any decision they wish to make.[376] Parties in mediation can reflect justice based on their references and acceptance in their mediated settlement where that settlement takes the form of a contract. To address the presented concern; mediation settlements must respect and comply with the surrounding laws in general and contract laws in particular in the jurisdiction where the mediation took place and the jurisdiction where such settlement is meant to be enforced at.[377]

In conclusion, mediation evangelists form one of two extreme teams who stand at one end of the importance of the law in dispute resolution where their lack of interest in the law and their strong discouragement of adversarial methods of resolving disputes has led them to be called anti-adjudication and anti-litigation.[378] This team believes that through mediation

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[373] See: Judith L. Maute, 'Mediator Accountability: Responding to Fairness Concerns*'* [1990] J. DISP. RESOL. 347, *354*

[374] Id Omer Shapira at 293

[375] see: Dworkin & William London, 'What Is a Fair Agreement?' (1989) 7 MEDIATION *Q.* 3, 12 ("There must be a regard for client self-determination, but at the same time, an ecological perspective acknowledges the boundaries of self-assertion and therefore interdependence with the larger system.") and also see: Kevin Gibson, 'Mediator Attitudes Toward Outcomes: A Philosophical View*'* (1999)*17* MEDIATION Q. 197, at 203-04.

[376] Id Omer Shapira at 294

[377] Mediation settlement compliance with contract laws is being dealt with in the following chapter under informed consent in mediation; the outcome consent section.

[378] See: Hazel Genn, *Judging civil justice* (1st Edn, Cambridge University Press, 2009) 82-85

parties can be empowered, their needs and interests can be better recognised which all can create a transformative effect on the parties' relations with each other and by and large echo to the greater society. Mediation through the lens of the mediation evangelists is an ideal or rather dreamy image, yet it can leave mediation exposed to several criticisms and raises justice concerns in connection with not giving enough attention to the law and legal rights. It is important to note here that these criticisms and concerns reflect the importance that self-determination must be educated. The theory of educated self-determination can be a key way of addressing the 'justice' concerns in mediation raised here.[379]

With a complete opposite ideology, the other team places extreme attention on the law and resistance to the very concept of mediation as follows.

2.2. Adjudication Romantics:

The 'adjudication romantics'[380] is a team who pays great attention to adjudication as a critical social practice that resolves disputes, defines and refines the law which in turn protects important public values. Thus, recourse to litigation involves an affirmation of community and willingness to subject oneself to the community's standards.[381] The team go beyond the assertion of the importance of adjudication and the law to attack the very concept of mediation and settlement as they view mediation as a threat to formal justice, earning themselves the title of anti-settlement and anti-mediation.[382] The ideology of adjudication romantics has been explained in the following way: "court judgements are presented as the gold standard against which other forms of dispute resolution are weighed: arbitration measures up reasonably well given its similarities to litigation … mediation, however, is portrayed as a kind of rogue process: unregulated, private, informal and, potentially,

[379] Chapter three and four of this work is dedicated to further discuss and test the theory of educated self-determination in a more practical level.

[380] Many scholars have used such term; Carrie Menkel-Meadow used and perhaps coined it in: Carrie Menkel-Meadow, 'Ethics and the Settlement of Mass Torts: When the Rules Meet the Road' (1995) 80 CORNELL L. REV. 1159, 1173 It is also used by Waldman in Ellen Waldman, 'The Concept of Justice in Mediation: A Psychobiography' (2004) 6 Cardozo Journal of Conflict Resolution 247–271 moreover Hazel Genn used it in reference of the work of (as she cites): "Judith Resnik, Marc Galanter and David Luban are prominent and compelling examples. See also D.R. Hensler, 'Suppose it's not true: challenging mediation ideology', [2002] Journal of Dispute Resolution 81" see: Hazel Genn, *Judging civil justice* (1st Edn, Cambridge University Press, 2009) 84

[381] See: Id Hazel Genn at 85

[382] See: O. Fiss, 'Against settlement' [1983–84] Yale Law Journal 93 and R.M. Ackerman, 'Vanishing trial, vanishing community? The potential effect of the vanishing trial on America's social capital', (2006) 7 Journal of Dispute Resolution 165, 181

unfair".[383] In the view of this team, formal justice delivered by adjudication methods is the only accepted form of justice. With this vision, adjudication romantics aim their arrows towards mediation with three criticisms; one where they challenge mediation's ability to deliver justice along with other two concerns in connection with the claimed negative effect mediation can cause to formal justice in general and to litigation in particular: namely, *'loss of law'* and *'vanishing trial'* concerns.

With regards to the adjudication romantics' first justice concern; their difficulties may be alleviated to some extent when mediation settlement manages to simulate adjudication outcomes.[384] Moreover, the idea of settlement can be tolerated by this team when the negotiation prior to the settlement was a "lawyer-negotiation" based on the legal merits of the case.[385] In addressing such aspects a reference to the previous chapter can be made here where a case has been built in support of the notion that "justice is not the monopoly of the law and legal remedies but rather may beicai found in a whole range of social norms and considerations"[386] and that mediation indeed can deliver the different forms of justice; procedural, distributive and restorative justice by the application of justice based on parties' perceptions and acceptability.[387]

In the aftermath of the Pound conference[388] the adjudication romantics started to swim against the tide of promoting mediation and the whole notion of the multi-door court concept;[389] as they viewed the promotion of mediation and the settlement-based alternatives

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[383] See: Charlie Irvine, 'Mind the Gap: Mediation and Justice' [July 2014] Mediate.com <http://www.mediate.com//articles/IrvineC5.cfm> last accessed 25/02/18 where he cite the following where it can consider as an affirmation and additional examples of the adjudicate/on romantics team: "Owen M Fiss, 'Against Settlement' *93 Yale Law Journal (1984) 1073-1090;* Laura Nader 'Disputing Without the Force of Law' *88 Yale Law Journal* (1979) *998-1021;* Deborah R Hensler, 'Suppose It Isn't True? Challenging Mediation Ideology.' *Journal of Dispute Resolution, Vol.2, (2002) 81-99*; Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure.* London: Ministry of Justice Research Series 1/07 (2007)"

[384] These can be achieved when mediators adopt an evaluative approach and the focus is on the economic legal matters; producing a mediated outcome similar to the adjudication outcomes. Some scholars recognise such fact and even are in favour of such conclusion, Judith Maute, for example, argued that "[t]he benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome" see: Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns' [1990] J DISP RESOL 368

[385] See: Robert H Mnookin and Robert Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' *(1978-1979) 88 Yale Law Journal 950-997*

[386] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under Justice in Mediation Page: 151

[387] See: Chapter two of this work.

[388] See: Chapter one of this work under the title mediation emerging.

[389] The best example can be the classic work of Owen Fiss in 1984 see: Id O. Fiss, 'Against settlement' at 1073–92 and the work of Ackerman see: Id R.M. Ackerman, 'Vanishing trial, …at 165–181, 166."

to the court as a true threat to all the positive functions litigation can provide to the public. Their argument suggests that diversion from formal dispute resolution processes to mediation will entail a reduction in trials and resultant judicial precedent; which in turn it is alleged will affect the development of the law through judicial precedent. This ' loss of law' is especially felt in common law or 'mixed' systems[390] which follow judicial precedent as a source of law. Beyond a reduction of judicial precedent, there are other arguable negative results from diminishing trials by channelling cases outside the court system through private settlements such as reduction in the public function of trials in common law systems[391], the public promulgation of acceptable norms of a society and validation of the role of law[392], and the public demonstration of democratic practice in which individuals' power is equalised.[393] Moreover, on a more practical level fewer trials may lead to the loss of key judicial and lawyering skills in dealing with civil cases, as well of similar experiences in connection with civil litigation practices.[394]

It is clear now that the adjudication romantics built their 'loss of law' and 'vanishing trial' concerns on two assumptions; first, that mediation is presented as an alternative to adjudication and that increased mediation use will lead to less adjudication. The second assumption is that mediation is the main cause of diverting cases outside the court system reducing valuable judicial precedents needed for the development of the law. Bryan Clark sets out several arguments[395] to challenge such assumptions behind the adjudication romantics' concerns.

He starts by asking the question: 'mediation an alternative to what?'[396] As an attempt to defuse the tension between adjudication romantics and mediation and by building an argument that mediation is not meant to be the replacement of litigation, he suggests that mediation is in practice an alternative to settlements that occur in the shadow of on-going

[390] Such as Scotland.

[391] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). At 161

[392] See: Luban D 'Settlements and the erosion of the public realm' (1994–1995) 89 Georgetown Law J 2619–2662

[393] See: Resnik J, 'Courts: in and out of sight, site and cite' (2008) 53 Villanova Law Rev:771, 806

[394] See: Yeazell S, 'Misunderstood consequences of modern civil processes' [1994] Wisconsin Law Rev 631,678 and "McMunigal K, 'The costs of settlement: the impact of scarcity of adjudicating on litigating lawyers' [1990] UCLA Law Rev 833 and Glasser C, 'Civil procedure and the lawyers the adversary system and the decline of the morality principle' (1993) 56 Modern Law Rev 307, 324

[395] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010).

[396] Id Bryan Clark under the title mediation: an alternative to what? 150

litigation. Moreover, he also argues that mediation can offer a better sense of procedural justice[397], a more structured process and potentially better quality settlements. He states "In many contexts in which court-connected mediation takes place, a mediated settlement (if the case does resolve) takes place instead of a non-mediated settlement, rather than a judicial decision. This is so because in the general civil court context, absent mediation, cases often settle extra-judicially in any case."[398]

With the same line of argument and in response to the 'vanishing trial' related concern, Clark argues that the promotion of mediation not necessarily lead to a reduction of trials and offers several strands of evidence in support of such an argument. He starts by presenting the work of Herbert Kritzer[399] a comparative analysis of the phenomenon of vanishing trials in England, Wales, Canada and the USA where he noted that while in some cases increasing resources to mediation may be a contributory factor, equally the process can also be seen rather as a beneficiary of a climate in which trials have become rarer and settlements have become the general norm;[400] as it has been noted that fewer than 5% of filed cases get to trial, mediations only 5th on the list of reasons for the vanishing trial; most cases get disposed of by or settled after summary judgement.[401] In England and Wales the significant drops in the rates of civil trials took place before the Civil Procedure Rules that sought to encourage settlement practices within the justice system were introduced in 1998; prior to any significant development in the use of mediation which signals that there are other factors behind the phenomena of vanishing trials.[402] For the USA it has been suggested that a key driver in the reduction in civil trials is not the promotion of mediation but rather that litigants themselves have become wary of the costs, time and risks involved with litigation

[397] See: Id Bryan Clark and Chapter two of this work under mediation and procedural justice.
[398] Id
[399] See: Kritzer H, Disappearing trials? A comparative perspective' (2004) 1 J Empirical Legal Stud 735,754
[400] Id
[401] See: Id Galanter M, The vanishing trial 483–484, 545
[402] See: Id Bryan Clark under the title Mediation and the Vanishing Trial p. 162 where he cites "Kritzer H (2004) Disappearing trials? A comparative perspective. J Empirical Legal Stud 1:735–754 . For trials in the Queens Bench Division of the High Court there is a precipitous drop from the 1988 peak of 3,189 to a mere 600 in 1998. In my own jurisdiction, cases initiated and heard in the Scottish Court of Session and Sheriff Courts have also taken a significant dip in recent times, despite the fact that concurrent civil mediation activity has been steady rather than prolific—for statistics, see http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendCivil Accessed 1 November 2011. For more recent English statistics of diminishing civil case loads see Genn H (2010) Judging civil justice: the 2008 Hamlyn lectures. Cambridge University Press, Cambridge (2010), pp. 33–36."

which has led them to contract out of the public formal system. [403] Clark sets out several other arguments as a foundation in support of the notion that "A general point can hence be made that at least in respect of disputes at the higher end of civil justice spectrum, mediation will often take in place in respect of cases, which absent mediation, would have settled extra-judicially in any instance." [404]

In response to the 'loss of the law' concern; Clark points out that "In certain instances, it can be argued that too much precedent can be counterproductive in that it can create further uncertainty in the law, thus increasing the risks inherent in litigation and dissuading would-be litigants from engaging with the process."[405]

While addressing the adjudication romantics' concerns towards the promotion of mediation and its infusion to the civil justice system it is important to note that the referral system adopted by court-connected mediation programmes or adopted by policymakers, in general, can be a crucial aspect and require much attention.[406]

In conclusion, mediation evangelists and adjudication romantics come from the opposite, distanced positions where it seems that it is quite challenging to get them standing in common ground. The two new teams that have emerged to bridge the gulf are mediation realists, and adjudication realists.

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[403] See generally, Smalkin FN and Smalkin FNC, 'The market for justice, the litigation explosion and the Verdict Bubble: A Closer Look at Vanishing Trials' [2005] University of Maryland School of Law, Legal Research Paper No. 2005–60

[404] See: Id Bryan Clark under the title Mediation and the Vanishing Trial p. 162 where he cites: "… in most jurisdictions globally at least outside of minor civil cases involving individuals, out of court settlement is the norm. In this sense research into mediation in English construction cases found parties involved in mediation viewing that if they had not mediated they would have settled anyway in 78% of cases. It was suggested that 19% of cases would otherwise have preceded to trial- Gould N et al (2010) Mediating construction disputes: an evaluation of existing practice. Centre for Construction Law, Kings College, London p.52" Moreover, classic American studies of judicial settlement conferences found that their use did not generally lead to a reduction in trial rates. See Id Bryan Clark where he cites: "Rosenberg M (1964) The pre-trial conference and effective justice. Columbia University Press, New York, Church T et al (1978) Justice delayed: the pace of litigation in urban trial courts. The National Center for State Courts, Williamsburg, Hensler DR (2003) Our courts, ourselves: how the alternative dispute resolution movement is reshaping our legal system. Penn State Law Rev 108:165–197 p.176" Similarly, pre-trial, mandatory arbitration schemes in the USA, did not generally reduce trial rates. See: Id Bryan Clark where he cites: "Hensler DR (2003) Our courts, ourselves: how the alternative dispute resolution movement is reshaping our legal system. Penn State Law Rev 108:165–197"

[405] See Id See: Id Bryan Clark under the title Mediation and the Vanishing Trial p. 163 where he cites: "Smalkin FN, Smalkin FNC (2005) The market for justice, the litigation explosion and the 'Verdict Bubble: A Closer Look at Vanishing Trials. University of Maryland School of Law, Legal Research Paper No. 2005–60. para 42 and Menkel-Meadow C (1995) Whose dispute is it anyway? A philosophical and democratic defence of settlement (in some cases). Georgetown Law J 83:2663–2696 p. 2668"

[406] This study identifies in the recommendation section, that the topic of referral under court connected mediation require further research in conception to the study's theory.

3) Meeting the realists:

3.1 Mediation realists:

The work of Bryan Clark[407] and Charlie Irvine[408] can be presented here as the team which presents a more realistic view of mediation and in turn respond to the criticisms of mediation mentioned under the mediation evangelist team.

Mediation realists assert that there are several forms of mediation and mediation evangelists do not, in fact, represent the wide and diverse practices of mediation; but rather are only ambassadors of the truly facilitative[409] or norm-generating[410] species of mediation. The criticisms that have been levelled in connection with the purely facilitative model are off the mark with regard to other forms of mediation. As mediation has become infused with the formal civil justice system and also as a result of market demands especially in legally complex and high in value disputes, the practice norms in mediation have often become more evaluative, with a greater role therein of the law and justice based on the law. [411] As Macfarlane has noted in the Canadian court-connected environment, "the law does and should play a significant role within the mediation process as one of a matrix of factors relevant to settlement." [412] Moreover, Menkel-Meadow has noted that "[mediation's]practice often turns to [a] kind of case evaluation. . . especially in complex legal disputes where the parties seek a third-party neutral 'advisory opinion' in the context of their dyadic negotiations. Parties. . . often seek guidance from a 'neutral' who combines the mediator's process skills with some knowledge or wisdom, either about case law and precedents or about custom, trade practices and industry insider knowledge."[413]

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[407] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under the title Mediation and 'Justice' At 148-150

[408] See: Charlie Irvine,' Mediation and Social Norms: A Response to Dame Hazel Genn' (April 1, 2009) 39 Family Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686197> accessed 25/02/18 and Charlie Irvine, 'Business As Usual? Mediation and the Justice System ' [May 2013] Available at **http://www.mediate.com//articles/IrvineC4.cfm** accessed 25/02/18

[409] Broad Facilitative mediators are those who tend to focus on the non-legal aspect of the dispute; See: Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' *(1997) 1 Harvard Negotiation Law Review 7*

[410] Norm-generating mediation, in which the parties themselves are responsible for generating the norms upon which the settlement is based. See: Ellen Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' *(1997) 48 Hastings Law Journal 703*, 745

[411] See: Id : Bryan Clark at 149

[412] See: Macfarlane J, *The new lawyer: How settlement is transforming the practice of law* (1st Edn, UBS Press,2008), Toronto Chap. 6

[413] See: Menkel-Meadow C (2001) Introduction. In: Menkel-Meadow C (ed) *Mediation: theory, policy and practice*. Ashgate/Dartmouth, Aldershot at p. xxvi see also: Subrin S, 'A traditionalist looks at mediation: it's here to stay and much better than I thought' (2002/2003) 3 Nevada Law J 196, 218 and 219

With the same line of argument, Clark notes; "the prominent role of legal norms in the mediated settlement may be even acuter in lawyer dominated, a court-connected mediation which, experience suggests, tends to be more evaluative in nature and solutions crafted therein more reflective of adjudicative norms than mediation in other contexts. This may especially be the case with judicial mediation but equally has become commonplace in court-connected mediation generally…lending a further, formal justice flavour to the process."[414]

The mediation realists affirm that mediation is diverse and highly adaptable. Thus, the criticisms that have been levelled are with regard to the facilitative model of mediation where legal rights are not the centre of attention in the process, or even where parties are being encouraged to disregard the law and focus on the non-legal aspects of the dispute with a broad facilitative approach. The fear here is that many mediators have started to adopt more evaluative approaches and concentrate more on the law and legal rights.[415] Perhaps this occurred as a new movement to respond to market demands and to overcome such criticisms, or simply the cause of this may be that the process has become subsumed within dominant formal justice culture and/or by the influence of lawyers[416]. Mediation realists conclude with an observation and a concern. First, mediation cannot be viewed as an equal to adjudication even with the formal justice flavour that coats the process when evaluative approaches are adopted. Such an observation is to assure that mediation is not in competition with adjudication nor anti-adjudication as the mediation evangelists assert. Secondly, mediation realists raise the concern of getting mediation too close and have become much concerned about the law and the workings of lawyers as a true threat to the mediation process where this can damage and become contrary to the ethos of the mediation process. To better explain this concern the second case study of Nolan-Haley in her research is instructive:[417]

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[414] See: Id Bryan Clark at 149

[415] More on such concern see: Kimberlee K. Kovach & Lela P. Love, 'Evaluative Mediation is an Oxymoron' (1996) 14 Alternatives To The High Cost Of Litig 31 and James J. Alfini, 'Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?' (1991) 19 FLA. ST. U. L. REV. 47, 66-71

[416] For example, JAMS isone of the leading mediation centres in the USA and internationally reported in their corporate fact sheet that they handle and average of 13,000 mediation cases per year. It is important to note that JAMS is recognised for following a highly evaluative approach, JAMS mediators are largely former Judges or at least lawyers with years of experience. For their corporate fact sheet, see: http://www.jamsadr.com/files/Uploads/Documents/Corporate-Fact-Sheet.pdf Accessed 25/02/18 which can be a strong indicator that the evaluative mediation approach is dominating the market.

[417] See: Jacqueline M. Nolan-Haley, 'Court Mediation And The Search For Justice Through Law' (1996) 74 Wash. U. L. Q. 47, 66 she was investigating the standard of justice offered by the court connected mediation programs and the importance of the law through studying two cases that have been mediated at the New York City small claims court and interviewed the mediator afterwards in the aspect of how much the law was involved.

"The claimant's purse, containing $600.00 in cash and valuables, was stolen from her chair while she attended a play at a local community centre. The claimant sued the centre for $600.00 in damages. During the mediation session, the claimant argued that she had expected safety and that there should have been better security. The defendant denied liability, claiming that the centre was a public place and that while he felt sympathetic to the claimant, the potential for crushing liability made it impossible for him to ensure that the property of everyone who entered the place would be safe. The defendant also presented evidence of signs that disclaimed liability for stolen or lost property. The claimant stated that she did not see any signs. The case did not settle in mediation, and it was returned to the trial calendar."[418] When the mediator was interviewed about her reflection she stated that she saw no way in settling the case as when she caucused with the defendant and asked him if he is willing to make an offer, the defendant replied no because he had no liability, and the mediator's own interpretation of the law led her to believe that the claimant had no case as in criminal cases only the criminal who committed the behaviour is the subject of any possible compensation claim. She built such an understanding on the precedent on the victims of 1993 bombing at the World Trade Center that held that they could not successfully sue the New York Port Authority because of intervening criminal activity.[419]

Many lessons can be learned[420] but the most important lesson is the one arising from the mediator's exclusive focus on the legal merits of the case. Adopting a highly evaluative approach with a sole focus on the legal aspect of the case[421] will block the mediator's vision of other values that can be the foundation of creative justice. In elaboration, the mediator, in this case, should have invested more time and effort in the communication or exploration phase examining the noneconomic and non-legal aspects of the case. It may have, for example, been worth exploring the claimant's motives behind suing; perhaps these were more than just recovering the money, such as the need for recognition and showing sympathy toward the claimant's negative experience and if this were the case a sincere apology perhaps would have gone a long way. Maybe the claimant has some sort of attachment to the centre

[418] Id Jacqueline M. Nolan-Haley at 71

[419] Id Jacqueline M. Nolan-Haley at 71, 73 Nolan-Haley mentioned that this analogy is imperfect since there are many differences that a judge might find between suing a local entity such as the Port Authority, and suing a private community center.

[420] Id Jacqueline M. Nolan-Haley where Haley notes: "Regarding the mediator style and the possible bias by taking the defendant side and the control mind-set that lacks flexibility out of the statement "no way in settling the case" "

[421] Where Riskin call it the evaluative narrow mediator style see: Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996)1 Harv. Negot. L. Rev. 7 7, 26

where she or her family and friends would go frequently and the real motive behind suing is to prevent these kind of incidents in the future and a promise from the defendant of taking some measures in extra security would address such motive. On the other hand it was also worth exploring any possible settlement drives to the defendant by reflecting to him the benefits of settling the case privately even if he has a strong case. The mediator should have emphasised that even if he won the case the centre's reputation and business could be very vulnerable when the public and especially the center patrons acknowledge that their property can get stolen without any recourse from the center. Moreover, if paying this amount from the centre's budget is an issue to the defendant, the mediator could have assisted him by exploring his insurance policy if any or even the possibility of offering some sort of discount or free tickets to the claimant. [422]

The concern now is clear. When the law dominates mediation's attention it may hold mediation back from meeting its potential in achieving creative justice discussed in chapter two or even in providing the parties with a process were they can better communicate and build a better understanding of each other's positions. To address such concerns there is a need to assure that an 'informed decision' in mediation with respect to the different forms of mediation practice takes place in a manner that preserves the spirit of the mediation process.[423] With this end we can move to present the fourth team - 'adjudication realists'.

3. 2 The adjudication realists:

> *By integrating a system of alternative methods of dispute resolution into our existing legal framework, we can prepare our system for the plunge into the twenty-first century without sacrificing the achievements of our great legal heritage.*[424]
>
> *_Judge Thomas D. Lambro*

In general the legal elites, with the influence of the peacemakers[425] form the foundation of the adjudication realists team. They share with the adjudication romantics admiration and appreciation of the importance of adjudication especially litigation. However,

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[422] Id Jacqueline M. Nolan-Haley

[423] Such topic is being discussed in details in the following chapter.

[424] Lambros, 'The Alternatives Movement: Rekindling America's Creative Spirit' (1985) 1 OHIO ST. J. DIS. RES. 3

[425] See: Chapter one of this thesis under the title the legal elites and the title peacemakers. where the idea of such teams have been draws on the work of Silbey and Sarat at: Susan Silbey and Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' (1988-1989) 66 Denv. U. L. Rev. 437 ,

the adjudication realists recognised that the civil courts had become overwhelmed by crippling delays and costs to the point that the system was in crisis. They gathered at the Pound conference[426] to address the increasing litigious behaviour fuelled by aggressive and adversarial litigation culture where they suggested promoting a more harmonious way of resolving disputes to save the system from itself. This led to the 'institutionalisation of mediation'[427] and the spread of court-connected mediation programs around the globe[428]. Indeed, embracing mediation into the court system can create a win-win situation for both mediation and the courts system. Mediation can benefit[429] from the increase of public awareness, enriched party knowledge of mediation and growing sophistication among lawyers and judges about the process. Large-scale initialisation of mediation through the implementation of court-connected mediation programmes has contributed enormously in the modern development of mediation. Evidence on a global scale suggests that mediation tends to develop better with some sort of Institutionalisation or emerging within traditional legal processes[430] as mediation programs that sit separately from formal civil justice typically struggle to gain users compared to mediation programs connected to the courts.[431] Indeed "In a most basic sense courts can help expedite the growth of mediation because the courtroom is where the cases can be found."[432]

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[426] See: Chapter one of this thesis under the title Mediation Emerging.

[427] The term "Institutionalisation of Mediation" can be referred to the process of making mediation part of a community's formal, public system of resolving disputes and integrating mediation into the court system. The use of the term in this thesis refers exclusively to public institutionalisation in the form of court-annexed mediation as it is recognized that institutionalization occurs through private channels also, such as when a private dispute resolution centre has survived long enough and functioned effectively enough to have become an institution within a community. See: Bruce Monroe, 'Institutionalization of Alternative Dispute Resolution by the State of California' (1987) 14 Pepp. L. Rev. 945 more on Institutionalisation of Mediation see: Roberts. S., 'Alternative dispute resolution and civil justice: an unresolved relationship' (1993) 56 Modern Law Review 452, 470.

[428] For an overview on the different implementation of the court connected mediation programs around the globe see: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under the title The 'How' of Institutionalisation At 140 and in more details see: Nadja Alexander, *Global Trends in Mediation* (Second Edition edn, Kluwer Law International, 2006)

[429] It is important to note that it is probably not the concern of 'adjudication realists'. Their interest is surely about improving the courts – any benefit to mediation is a by-product.

[430] Yet, this has been disputed by some writers – see in particular Bush. R.A.B., 'Staying in orbit, or breaking free: the relationship of mediation to the courts over four decades' (2008) 84 North Dakota Law Review 705, 768

[431] N Welsh, 'The thinning vision of self-determination: the inevitable price of institutionalization?' (2001) 6 Harvard Negotiation Law Review 20

[432] Bryan Clark speech titled "Can courts enhance the use of mediation?" At the 3rdAsia Mediation Association Conference, Hong Kong 2014

On the other hand, the court system can benefit profoundly from such collaboration as there is evidence that courts can use their resources more efficiently and increase the public's trust, confidence and satisfaction in the entire civil justice system.[433] Against the argument of adjudication romantics that more mediation will lead to a 'loss of the law'; Clark states "[p]romoting mediation … may lead to earlier settlements than those in litigated cases which are settled by general (non-mediated) means. Hence a culling of cases from the court's docket at an earlier stage and thus a freeing up of the system to handle those cases, in which an adjudicated decision is genuinely sought, may occur. The resultant increased speed and economy of the civil justice system may lead to more—not fewer—trials taking place as litigants are drawn back into the system."[434]

In principle, such collaboration sounds promising and highly rewarding for both mediation and courts yet, in practice if such collaboration was enforced poorly in a court-connected mediation program lacking the right motives and not delivered in the right manner, the benefits may be superseded by the drawbacks which could be used as ammunition for attacking the concept of court-connected ADR/mediation programs and even mediation itself.[435] Most court-connected mediation program across the globe have in fact oriented largely from a selfish courts/policymaker's motives fuelled by the aims of 'efficiency proponents' rather than the 'quality proponents' associated with the appreciation of mediation and its potentials.[436]

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[433] Louise Phipps Senft & Cynthia A. Savage, 'ADR in the Courts: Progress, Problems, and Possibilities' [2003] Penn State Law Review 327, 328

[434] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under the title Mediation and the Vanishing Trial At 162

[435] See: Nancy A. Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System' (2004) 5 CARDOZO J. CONFLICT RESOL. 117, 135-40 *See generally* Edward Brunet, 'Questioning the Quality of Alternative Dispute Resolution*'* (1987) 62 TUL. L.REV. 1 (comparing ADR and civil litigation from many perspectives, some captured under the concept of "quality of justice," and challenging some of the claims made for ADR by its early proponents); Kim Dayton, 'The Myth of Alternative Dispute Resolution in Federal Courts*'* (1991) 76 IOWA L. REv. 889 (Arguing that court connected ADR has not expedited dispositions or reduced backlogs and does not yield other claimed benefits)

[436] Clark provide several evidence in support of such observation see : Bryan Clark Id at 140-141: "For example, civil justice reviews across the common law world in countries such as England and Wales, and Hong Kong have promoted the use of mediation at least in part as to alleviate significant costs and delays inherent in their civil court systems…Civil law countries have also looked to mediation as a remedy for struggling court systems: witness, for example, the recent reforms to Italian civil justice with mediation held up as an antidote to the exorbitant delays of the system…Similarly in the Netherlands the final report of the Platform ADR project of the Ministry of Justice promoted mediation as way to curb overly litigious behaviour on the part of the citizens and help alleviate court loads… In a like fashion, mediation was rendered mandatory for most litigants in Buenos Aires… not least to eradicate crippling case loads. Court-connected developments hence often have aims which are tied closely to the economic wellbeing of the formal justice system…"

To better present this concern, Judge Brazil offers a classification for the court-connected mediation programs to fall under; naming the first category 'selfish courts'.[437] The primary motive of these courts is reducing their docket pressure which is why it can be marked as institutional selfishness even if the core of such a motive is to allow judges and administrative staffs to deliver higher quality services to the cases that remain. This group of courts believe that "public funds could be saved through the funnelling of litigants, particularly those involved in what can unfairly be termed 'garbage' cases,[438] to mediation and other informal dispute resolution processes."[439] Judge Brazil set out a number of criticisms of this group starting with the risk of falling to deliver the right message to litigants as they "will infer that the judges in these courts have certain favoured classes of cases or litigants for whom they are trying to reserve their time, and that the primary purpose of ADR in these courts is to get rid of all the other kinds of cases. Stated baldly, ADR programs whose purpose is to reduce docket pressures risk sending the following message from the court: "Litigants and lawyers, you are bothering us, taking up our time and depleting our resources. We have more important things to do, so please leave. Go somewhere else to solve your problem." Public institutions should think twice before sending this kind of message to their constituents."[440]

Moreover, this group of courts has less chance to enhance how it defines itself or broaden its sense of mission and the role and character of their institution. Most significantly, in evaluating ADR/mediation programs, these courts may emphasise settlement rates and value its mediation program by how many cases it managed to divert out of the court system. This approach can inflict pressures on mediators and on program administrators to settle cases and settle them quickly. Such pressure is able to threaten the quality and integrity of the program and the mediation process itself. When mediators are occupied by the idea that their value to the court is measured by their ability to settle, this can distort the way mediators conduct mediation and might lead them to cut process corners, to cut ethical corners, and to put pressure on litigants to accept terms that the litigants really do not think are fair,

[437] Judge Wayne D. Brazil, 'The Centre of the Centre for Alternative Dispute Resolution' (2006)6 Pepp. Disp. Resol. L.J. 313, 314

[438] Cases which do not involve significant monetary or legal issues.

[439] Bryan Clark speech titled "Can courts enhance the use of mediation?" At the 3rdAsia Mediation Association Conference, Hong Kong 2014 p.p. 2

[440] Judge Wayne D. Brazil, 'The Center of the Center for Alternative Dispute Resolution' (2006) 6 Pepperdine Dispute Resolution Law Journal 313, 315

jeopardising parties' self-determination - the very foundation of mediation.[441]

Judge Brazil argues that these courts can push people to believe that the court's goal is to get rid of them and is likely to seed inside them feelings of resentment, disrespect and alienation from their public judicial institution. Most importantly such problematic motives can fuel the most disturbing criticism towards mediation of which it is alleged that mediation disadvantages the less powerful party especially when the court-connected mediation program is compulsory.[442]

It is clear now that adopting 'selfish' motives for the use of mediation by judges and policy-makers is not an 'easy fix' for the deep wounds of civil justice systems such as access problems, excessive party and state costs, and extensive delays. Instead, it can be argued that they should focus on prioritising the people and investing in enhancing the quality of justice as this is the main service provided by the court. This lack of focus may be the explanation behind the adjudication romantic's vicious assaults towards mediation who cast mediation as the villain rather than the hero.

There is a need to adopt the right motive in embracing mediation within the formal court system in order to harvest the fruits of a win-win collaboration between courts and mediation. It is suggested that thoughtfully designed and carefully administered court ADR/mediation programs can produce evidence of keeping several expected mutual benefits for both mediation and courts such as enhancing feelings of party gratitude and satisfaction and reducing cost and delays.[443] Therefore, Judge Brazil stresses courts should fall under a second parallel category with a very different picture and vision. "These courts founded ADR programs for very different reasons, and that had a very different orientation. Instead of looking primarily inward, toward themselves, courts in this tradition look primarily outward, toward the people. The preoccupation in these courts is not with institutional self-protection but with serving the people."[444]

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[441] Id

[442] This study recognises its limitation and recommends further research in the topic of court connected mediation.

[443] Craig A. McEwen, 'Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation' (1998) 14 OHIO ST. J. ON DISP. RESOL. 1, 24-27

[444] Id 316 Judge Brazil where he uses the developments of court sponsored ADR programs in Hawaii and in the Northern District of California as best to represent such group from his experience: *See* Wayne D. Brazil, 'A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values' [1990]The University of Chicago Legal Forum 303 (detailing the early history of what has become the Multi-Option ADR program in the Northern District of California.).

When the main purpose behind placing mediation inside the court's systems is to enhance the quality of justice[445] offered by the courts and in return in society in large the collaboration between the courts and mediation can be fruitful. This mission brings to the surface the old debate of quality vs efficiency proponent.[446] Such goals can be achieved by considering a thoughtful design and implantation of the court-connected mediation programs which acknowledge and supporting meditation's abilities in delivering creative justice.[447] Thus courts can have the two forms of justice available for litigants: formal and creative justice.

4) Conclusion:

Meeting and understanding the vision of mediation evangelists and adjudication romantics (mediation inner and outer circle teams), along with both the adjudication realists and mediation realists' efforts to bridge the gap and link the two circles between the two extreme teams in an attempt to create a common ground of understanding have clarified the several criticisms and attacking arrows towards mediation, creative justice and parties' self-determination. The main foundation of these criticisms lies in the relationship between mediation and the law. When mediation is in a great distance from the law, several justice concerns can be raised. When mediation is in great proximity to the law, serious concerns can be levelled in connection with negatively affecting the very core values of mediation.

In the search for balance, the theory of educated self-determination is being tested practically in the following chapters.

Chapter three is dedicated to addressing the concerns of mediation outer circle team; the important role of the 'educated' part of the theory is highlighted and examined in respect of, the assurance that the parties are practising their self-determination powers and are

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[445] See the following work of scholars whom stressing on having the enhancement of justice as the main purpose or promise of court connected mediation programs: Wayne D.Brazil, 'Court ADR 25 Years After Pound: Have We Found a Better Way?' (2002) 18 OHIO ST. J.ON Disp. RESOL. 104-06 (discussing surveys of perceived fairness); Jacqueline M. Nolan-Haley, 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 CARDOZO J. CONFLICT RESOL. 57, 64-65; Nancy A. Welsh, 'Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value' (2004) 19 OHIO ST. J. ON Disp. RESOL. 573, 581-82 (discussing "procedural justice"). And Judge Wayne D. Brazil, 'Should Court-Sponsored ADR Survive?' (2006) 21 Ohio State Journal On Dispute Resolution241, 248 ("fair results," in this context, meaning the results that would be produced by error-free application of the pertinent legal principles to the real historical facts)

[446] See: Chapter one of this work

[447] It is mentioned in this works conclusion that there is a need for further research on the topic of court connected mediation with respect of implementing the research theory.

creating their creative settlements within the sphere of the law. Indeed, there is a need for the mediated settlement agreements to remain within the orbit of the law especially when seeking enforcemen. The UNCITRAL project on an international convention on settlement of commercial disputes for international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation recognised that and stated in the draft the following:

Article 4 — Grounds for refusing to grant relief

"1. (c) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State …"[448]

All of that indicates the importance of examining the theory of educated self-determination in respect of finding the balance between creative justice and the law.

Chapter four is dedicated to addressing the concerns of mediation inner circle team. The application of the educated self-determination theory can be troubling for such team as they may view the educated part of the theory comes in contradiction with core mediation values. Such mediation values are to be evaluated in connection with the study's theory.

[448] See: UNCITRAL *Sixty-seventh session Vienna, 2-6 October 2017* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html last access 26/02/18

Chapter Three

The Concept of Mediation Informed Consent

(Addressing the concerns of the mediation outer circle team)

1) Introduction:

The mediation outer circle team main concern or question is; can mediation deal with power imbalance and aid the weaker party?[449] This chapter is to address such question by first explaining the new phenomena of self-represented parties as a possible main cause of power imbalance. Then the chapter takes a deeper analysis of the meaning and sources of 'power' for the parties in dispute. Lastly, the chapter review the concept of mediation informed consent as a possible tool to apply the theory of educated self-determination and test its potentials in addressing the mediation outer circle concern.

The phenomena of self-represented parties:

There are a variety of reasons which can be offered as to why people are self-represented depending on the culture and the legal system.[450] Regardless, of these reasons, it is clear from available data around the globe that self-presenting litigants continue to make up a significant proportion of litigants and becoming an alerting phenomenon. For example in the USA studies show that as many as 80 % of parties in family disputes and as many as 90 % of tenants in landlord- tenants disputes are self-represented.[451] In the UK, statistics suggests that there is a sharp rise in the number of people representing themselves in UK courts.[452]

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[449] See the previous introduction chapter.

[450] Some parties may not be able to afford to pay a lawyer. Legal aid cuts and increasing litigation and lawyers' fees have contributed to that. Some may feel they do not need a lawyer. For example, in uncontroversial matters such as an uncontested divorce the value of the dispute is seen to be disproportionate to the lawyer's fees. Some may be disenchanted with the legal profession and hold the view that involving a lawyer will only make the dispute more acrimonious whereas they could resolve it themselves in an amicable fashion see: Duncan Webb, 'The right not to have a lawyer' (2007) 16 (3) Journal of Judicial Administration 165, 172

[451] Engler in his research reviewed reports that indicate that nationwide there are at least one party who is self-represented in 80 % of the family law cases. See: Russell Engler , 'And Justice for All' (1999) 67 Fordham L Rev 1987, 2048 and other studies reflect up to 90% in tenant landlord disputes see: Russell Engler, 'Out of Sight ' (1997) 85 Cal Law Rev 79, 107 and Paul D. Healey , 'In search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron' (1998) 90 Law Libr J 129, 132

[452] See: Report by Justice Sir Stanley Burnton 'Delivering Justice in an Age of Austerity' available at http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf accessed at 26/02/18 where cited at p.11:

"See for example, House of Commons Justice Committee, Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (March 2015), chapter 6, available online at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf. Accessed 26/02/18 See also Ministry of Justice, Family Court Statistics Quarterly: July to September 2014 (December 2014), p.13, figure 7 (showing a halving of the number of cases with both parties represented and a corresponding rise in the number of cases with neither party represented), available online:

Similarly in Australia, statistics of family and even high courts revealed that up to 68 % of litigants were self-represented.[453]

Self-represented parties are troublesome for the court for many reasons. In elaboration scholars and judges explain the concern by pointing out that court systems are adversarial in nature where the court or the judge has a substantially passive role (especially in the common law systems) and relies on the parties to be the active end to present all relevant evidence and argument according to a set of procedural rules and regulations for the court to make its decision. Self-represented parties, by and large, do not have the expertise to assist the court that a lawyer would. Alongside several procedural barriers that can face self-represented parties in presenting their case, in the adversarial system; this lack of assistance from parties hinders the court in discharging its function.[454] Not to mention that when a dispute involves one party who is self-represented and another who is represented by a legal practitioner, this appears to create an un-level 'playing field' which all, in turn, raises fairness concerns of the formal legal process provided by the court.[455]

The dangerous phenomenon of self-represented parties is not an exclusive concern to the formal court systems. It has echoed to reach mediation's shores with the dramatic rush of self-represented parties to mediation in connection with the parties' increased desire to seek alternative dispute resolution and most importantly with court orders that parties who seek judicial resolution must first seek mandatory mediation.'[456] This, in turn, left mediation

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388811/family-court-statistics-quarterly-july-to-september-2014.pdf last access 26/02/2018

[453] In the 2011-2012 financial year, 27 % of finalised cases in the Family Court involved at least one self-represented litigant. In 2007-2008, the figure was the same. See: (Family Court of Australia, Annual Report 2011-2012, 62.) In the High Court, 41 % of special leave applications in the 2011-2012 financial year was filed by self-represented litigants. See: (High Court of Australia, Annual Report 201-2012, 1 5.) In 2007-2008, that figure was 67 % . See: (High Court of Australia, Annual Report 2007-2008, 18.)

[454] See: Richard Stewart, 'The self-represented litigant: A challenge to justice' [2011] 20(3) Journal of Judicial Administration 146, 155 with the same line of thoughts Justice Robert Nicholson states: "independent of, and not governed by the duties owed to a court by a legal practitioner upon which the operation of the court system is so highly dependent. Those duties are duties of disclosure to the court, of avoidance of abuse of the court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously." See: Hon Justice Robert Nicholson, 'Australian experience with self-represented litigants' (2003) 77(12) The Australian Law Journal 820, 821.

[455] See: Id Richard Stewart where he states: "It might be said that the "playing field" of litigation is never truly level, even when both parties are represented, because of the varying skills and abilities between solicitors and counsel. However, the field is more markedly uneven in cases where a lay- person is on one side and a qualified practitioner is on the other."

[456] See: JacquelineM Nolan-haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' [1999] 74() NOTRE DAME L Rev 775 Where she cites: "See STEPHEN B. GOLDBERG ET AL., Dispute Resolution: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-11 (2d ed. 1992), for an historical account of the alternative dispute resolution movement and the place of mediation in that movement. Mediation's increased appeal is due to a variety of reasons including

exposed to the criticism that the process is unable to deal with self-represented parties in particular and power imbalance in general, casting a very heavy cloud of fairness concern over mediation or in other words raises the question of the quality of justice offered by mediation which in turn affected mediation development. As Clark notes: "The argument that mediation is unable to handle and in fact may exacerbate power imbalances between participants has dogged development of the process in recent decades."[457] Indeed, Some Scholars argue that mediation "works best when equals are bargaining with one another"[458] and mediation may not be an ideal method and even "ineffective in cases of severe power imbalances between the parties."[459] On such grounds, the adjudication romantics[460] and other scholars have aimed their arrows towards mediation and launched a rather provocative claim that mediation is a perfect instrument for stronger parties to impose their will upon weaker disputants. They target the very essence of mediation and its values as a serious threat to fairness when mediation has to deal with a case of power imbalance, blaming mediation informality,[461] and mediator neutrality.[462]

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decreased costs, high satisfaction, and compliance rates. *See, e.g.,* Barbara McAdoo & Nancy Welsh, 'Does ADR Really Have a Place on the Lawyer's Philosophical map?' (1997) 18 HAMLINEJ. Pun. L. & POL'Y 376 (stating that attorneys value mediation because of the perception that it encourages early settlement and therefore reduces costs of litigation). There are, however, inconsistent reports of reduced costs. *See, e.g.,* James S. *Kakalm* ET AL., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under THE Civil Justice Reform Act 20 (1996) … (stating that mediation programs studies did not necessarily solve cost and delay problems). There are consistent reports that parties experience high levels of satisfaction with the mediation process. *See, e.g.,* Chris Guthrie &James Levin, 'A Party Satisfaction Perspective on a Comprehensive Mediation Statute' (1998) 13 OHIO ST.J. ON Disp. RxsoL. 885 *and* sources cited therein; Robert A. Baruch Bush, 'What Do We Need a Mediator For? Mediation's "Value-Added" for Negotiators*'* (1996) 12 OHIO ST.J. ON Disp. RESOL. 1 (citing the value of participation as the reason for high satisfaction rates)."

[457] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under Power Imbalance in Mediation Page: 156 where he cites: "Rueben R (2000) Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice. UCLA Law Rev 47:949–1104, Grillo T (1991) The mediation alternative: process dangers for women. Yale Law J 100:1545–1610 and Auerbach J (1983) Justice without law, resolving disputes without lawyers. OUP, New York"

[458] Lynn Mather, 'The Importance and Political Implications of Dispute Definitions' [1984] 146 () In A Study of Barriers to the Use of Alternative Methods of Dispute Resolution, Vermont Law School at 93 cited in Jordi Agustí-panareda, 'Power Imbalances In Mediation: Questioning Some Common Assumptions' (2003) 59(24) Dispute Resolution Journal 1

[459] MI Levine, 'Power Imbalances in Dispute Resolution' [1984] 146() In A Study of Barriers to the Use of Alternative Methods of Dispute Resolution, Vermont Law School at 154 cited in: Jordi Agustí-panareda, 'Power Imbalances In Mediation: Questioning Some Common Assumptions' (2003) 59(24) Dispute Resolution Journal 1

[460] See: section two, Introduction Chapter

[461] Several scholars criticise the very concept of informality in mediation and argue that it can "denies the weak party the right to a system of checks and balances" see: L.A. Pinzón, 'The Production of Power and Knowledge in Mediation'(1996) 14 Med. Q. 5 and also see: Richard L Abel, The Contradictions of Informal Justice. in Rlabel (ed), *The Politics of Informal Justice: The American Experience* (Academic Press 1982) 297, 298 and with the same line of thoughts; Michael Coyle presents that "without the

It has been asserted that mediation shares the responsibility of delivering justice with other dispute resolution methods.[463] The presented claim that mediation may disadvantage the weaker party does cast serious fairness concerns**. There are one of two ways to deal with such concern**: one way, is to ask the mediation outer circle team the following question: Is it fair to hold the new field of mediation accountable and expect mediation to be able to deal with self-represented parties and the power imbalance challenge in large, while the old and will structured adjudication system is still struggling with such challenge? Another way is for the mediation filed to accept the challenge and demonstrate the ability of adequately addressing the challenge of dealing with self-represented parties and the power imbalance issue. With this last way, mediation can prove itself as an effective dispute resolution method and can deliver a superior form of justice compared to adjudication or formal justice. This study is adopting this challenging quest.

2) Power Imbalance in Mediation:

> *"Power imbalances may take a number of forms, both tangible and intangible, including in terms of parties' confidence, intelligence, eloquence, access to legal resources and financial wealth."*[464]

The first step needed in the path of proposing a solution to the issue of power imbalance in mediation is to understand what exactly power imbalance in mediation means? Mediation is a process of an assisted negotiation[465] and power in negotiation can be defined as "the ability to convince the opposing party to give her what she wants even when doing so is incompatible with the opponent's interest."[466] In other words power in a negotiation is how

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information available under court discovery processes, and without access to a third-party neutral with power to enforce the law without regard to rank or wealth, disputants who lack resources or strong alternatives to negotiation are vulnerable to being ignored or exploited by those with greater resources." See: Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond To The Challenge?' (1998) 36 Osgoode Hall L J 647 and Michael Coyle also notes "The question of how well the court system, as presently structured, meets the goal of providing justice without regard to disparities in resources or social status is a debate …" see: Id 647

[462] It have been said that the neutrality of the mediator gives the mediator "an excuse to avoid applying pressure on the stronger party" see: L.A. Pinzón, "The Production of Power and Knowledge in Mediation," (1996) 14 Med. Q. 5

[463] See: Chapter Two of this work

[464] See: Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under Power Imbalance in Mediation Page: 156

[465] See: Chapter one of this work

[466] See: Russell Korobkin, *Negotiation: Theory and Strategy* (2nd edn, Aspen, 2009) 129. It is important to note that such a definition can better fit distributive or competitive bargaining approaches rather than cooperative integrative bargaining as the focus on interests instead of positions and the notion of expanding

each side can use its power to move the negotiation in the direction it desires and get what it wants from the other side.[467] 'Power' is such a significant factor in negotiation and in turn in the mediation process where mediators must understand how power dynamics may affect the mediation process.[468] All mediators, regardless of their philosophy or style, should seriously considering placing balancing power at the heart of their practice as it can form an ethical responsibility linked to the duty of conducting a quality process and preserving party's self-determination.

The first step in achieving this is by recognising the main source of such 'power'. The party's 'power' in negotiation or the ability to direct the negotiation and influence its outcome may arise from a number of sources.[469] It can be argued, for example, that the party's financial resources are a source of power in a negotiation where the disparities in such resources between the parties can influence the settlement in three ways. [470] First, the poorer party may be less able to afford competent legal advice which in turn would affect him or her to collect and analyse the needed information (such as legal rights and prediction of the outcome in the litigation) to conduct a healthy or balanced negotiation.

Second, the poorer party may be in need of the damages he or she seeks immediately and thus become induced to settle even if the settlement is to be considerably less than what the party might get if he or she waited for judgment.[471] Third, the poorer party might be

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the pie in the latter model means that the opponent doesn't have to act against their interest. For more detail on the two negotiation approaches See: see: Folberg & Golann, 'Chapter 3 Competitive and Cooperative Negotiation' in (eds), *Lawyer Negotiation Theory, Practice and Law* (1st, Aspen, 2006). And Generally see: Bruce Patton, Roger Fisher, and William Ury, *Getting to Yes* (Penguin Group 1981)

[467] See: Folberg, Golann, Stipanowich and Kloppenberg , *Resolving Disputes: Theory, Practice and Law* (2nd edn, Aspen, 2010) 137

[468] Generally, see: B Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16(75) Mediation Q

[469] Bernard Mayer, for example, has identified ten sources from which a party might derive negotiation power. These include decision-making authority, expertise regarding the issues under negotiation, access to resources, the ability to influence decision-making procedures, negotiation skills of the party or their representative, the ability to inflict discomfort on the other party, and the "inertial" power of a party that wishes to continue the status quo. See: B Mayer, 'The Dynamics of Power in Mediation and Negotiation' [1987] 16(75) Mediation Q at 78 also Michael Coyle states regarding of the sources of power in negotiation "and a number of factors relating to the status and relationship of the parties, and unrelated to issues of principle, law, or notions of fairness may influence the outcome of a negotiation." See: Michael Coyle, 'Defending The Weak and Fighting Unfairness: Can Mediators Respond to The Challenge?' [1998] 36() Osgoode Hall L J 649 also Roger Fisher identifies six elements of negotiating power: skill and knowledge, a good relationship, a good alternative to negotiating; an elegant solution; legitimacy; and commitment see: Roger Fisher, 'Negotiating Power: Getting and Using Influence' (1983) 27 Am Behavioral Sci 149

[470] See: Folberg, Golann, Stipanowich and Kloppenberg, *Resolving Disputes: Theory, Practice and Law* (2nd edn, Aspen, 2010) 454

[471] It is important to note here that honouring the party's needs is one dimension of delivering justice see: Chapter two of this work. Yet, responding to the party's need without educating him or her about the

forced to settle because he or she doesn't have enough financial resources to finance the litigation. However, scholars have pointed out that financial resources may prove to be a source of vulnerability in certain contexts.[472] Indeed, a seemingly rich party may sometimes be subject to financial or reputation related pressures that make him or her as anxious to settle as indigent plaintiffs.[473] If the party's financial resource is not a main or only accurate indicator of power in negotiation; as many scholars have argued[474] then the question remains; what is the main source of power in negotiation and mediation? Such sources of power include personal power (personality traits, negotiation skills and cognitive abilities) and relationship power (institutional hierarchies 'employment disputes' and societal hierarchies 'gender, race, age') cannot claim to be the source of power in mediation against scholarly debate.[475] Moreover, the same argument used with the financial resources power can be used here; where in certain contexts the personal and relationships powers may be a source of vulnerability. For example, in sexual harassment claim, the defendant may enjoy personal power (personality traits) and relationship power (institutional hierarchy), yet the defendant

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waiver of their legal rights to allow the party to make a sound judgment after weighing the risks and benefits of his alternatives is what consider a sign of power imbalance.

[472] See: Bruce Patton, Roger Fisher, and William Ury, *Getting to Yes* (Penguin Group, 1981) at 106-08

[473] See: Folberg, Golann, Stipanowich and Kloppenberg , *Resolving Disputes: Theory, Practice and Law* (2nd edn, Aspen, 2010) 454 at 454-455

[474] For example, Jeffrey Rubin and William Zartman state: "using power as resources, is not an accurate indicator either of the power of the parties going into negotiations or their perception of their power relationship." See: Jeffrey rubin & william zartman, 'Asymmetrical Negotiations: Some Survey Results That May Surprise' (1995) 11 Negotiation J 362 Similarly, Morton Deutsch has questioned whether power measured by the parties' resources should have a necessary relation with the outcome of a negotiation process see: Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (1st Edn, Yale Univ Press, 1973)

[475] For example, the claim those women often are subject of disempowerment in mediation when compared to males in family disputes can be connected to the personal and/or relationships powers. Such a claim has been challenged. While some scholars support the claim for ex. See: Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond To The Challenge?' (1998) 36 Osgoode Hall L J 647 Where he cites: "A.M. Davis & R.A. Salem, 'Dealing With Power Imbalances in the Mediation of Interpersonal Disputes' (1984) 6 Mediation Q. and D. Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9 Mediation Q. 227 at 232 and Bryan Clark, 'Chapter 5 The Fusion of Mediation, Lawyers and Legal Systems' in (eds), *Lawyers and Mediation* (1st, Springer, 2010). Under Power Imbalance in Mediation Page: 157 where he cites: "Grillo T (1991) The mediation alternative: process dangers for women. Yale Law J 100:1545–1610, LaFree G, Rack C (1996) The effect of participants' ethnicity and gender on monetary outcomes in mediated and adjudicated civil cases. Law Soc Rev 30:767–797, Bryan P, 'Killing us softly: divorce mediation and the politics of power' (1999) 40 Buffalo Law Rev 441,523 and Bohmer C and Ray ML, 'Effects of different dispute resolution methods on women and children after divorce' (1994) 28 Family Law Q 223, 245" other scholars reject it and provide contrary evidence see: Id Bryan Clark where he cites:

"Kelly J (2004) Family mediation research: is there empirical support for the field? Conflict Resolut Q 22(1–2):3–35, Proksch P (1998) Kooperative Vermittlung in streitigen Familiensachen. Kohlhammer, Stuttgart Reed L (2007) The civil court and the future of dispute resolution. Paper presented to the Scottish Institute of Arbitrators and Tilley S (2007) ADR professional: recognising gender differences in all issues mediation. Family Law 37:353–356"

can fall under embarrassment, personal or institutional reputation threats of which create enough pressure to leave the defendant as anxious to settle as indigent plaintiffs.

In the search for the main source of power in mediation, Nolan-Haley suggests that power imbalance in mediation can impede the consensual underpinnings of the mediation process and in turn the outcome of mediation where she links that to three impediments: coercion, incapacity and ignorance.[476] When examining these three elements, it is clear that they all present different dimensions of the absence of knowledge. Coercion is caused by the lack of knowledge about the voluntariness and consensual nature of the mediation process and not knowing that the parties share the control over the outcome of mediation while enjoying the liberty to walk away and seek/return to litigation.[477] Incapacity accrues when the needed knowledge and skills for presenting and arguing the different aspect of the case is missing from the party's abilities. Lastly, ignorance is the clear most generic dimension of the lack of knowledge in mediation in the relation to the process[478] and/or the outcome.[479] Thus, it can be

[476] See: Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making' (1999) 74 NOTRE DAME L Rev 778

[477] Stulberg in his work responding to the concept of justice from below set by L. Love, points out that in order for mediation to deliver justice from below the decision making must be free from any signs of coercion. He provides this hypothetical example: "For example, assume that a divorcing couple participating in a mediation session is negotiating the division of property. The husband, whose income has been the primary revenue source for the family, proposes that he keeps the home and automobile, thereby leaving the wife with their two infant children without a home or any means of private transportation. The wife agrees to the proposal for fear that, if she protests, the husband will physically assault her when the mediation session ends. Her statement, "I agree to the proposed settlement terms," carries the surface picture of there being an agreement about the settlement terms; hence, it would be a presumptively "just" outcome. But we reject that conclusion because we believe that a component of a fair process is that individual participants shape their future relationship in a way that reflects, in the most fundamental sense, "his" or "her" commitment; if we are concerned that a person agreed to an outcome because she feared physical harm, then we legitimately question whether the commitment is hers." See: Joseph B Stulberg, 'Mediation and Justice: What Standards Govern? (2004-2005) 6 Cardozo J Conflict Resol 213, 222

[478] For example Nolan-Haley and Colatrella Jr assert that parties must be educated about the mediation process and the mediator style to set their expectation about the mediation process before consenting to participate therein see: Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making' (1999)74 NOTRE DAME L Rev 778 and Michael T. Colatrella Jr., 'Informed Consent In Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honouring The Mediator's Ethical Duties' (2013-2014) 15 Cardozo J Conflict Resol 705

[479] Mediated settlement can entail a degree of concession which in turn leads to a waiver of rights and will include commitments which in turn create legal obligations. Scholars assert that mutually accepted outcomes based on ignorance of such legal rights and obligations taint the fairness of those outcomes. For example, Nolan-Haley in her case study of the gym case (mentioned in Chapter three of this work) argues that the settlement wasn't fair because the claimant settled without being aware that his legal right might entail him for more value when tried with litigation see: Jacqueline M. Nolan-Haley, 'Court Mediation and The Search for Justice Through Law' (1996) 74 Wash. U. L. Q. 47. Similarly, Stulberg presents a hypothetical situation of a wife accepting a settlement in a family case without being aware that it is less than the minimum financial support stated in by the law which casts a serious fairness concern see: Id Joseph B Stulberg at 225. See also Elster who presents a similar type of ignorance and refers to it as 'sour grapes' "It is the phenomenon of someone who, by virtue of his or her life experiences, background or

proposed here that one of the main sources of power in negotiation and mediation is 'knowledge'. Educating the ignorant or the weak party in mediation with the needed information to equip him or her with the required knowledge can bring balance back to mediation and can be the core goal in addressing power imbalance in mediation. Such understanding is the essence of the principle of informed consent in mediation. Before proceeding with examining the principle of informed consent in mediation several notes need to be set in conclusion.

Self-represented parties and the parties who are presented with incompetent representation can form the great majority of 'the weak party' in both litigation and mediation as they lack the needed knowledge and information to effectively present or negotiate their case; creating the challenge of power imbalance[480]. Dealing with the challenge of self-represented parties in particular and power imbalance, in general, should be a mutual responsibility between the formal justice system and mediation. As Clark says "Given gaps in access to formal justice and attendant recourse to legal remedies, with mediation used to bridge the divide, a lack of alternative options for recourse may in fact reflect reality for disempowered individuals"[481]. With reference to the huge power gulfs that subsist in society indeed, mediation can only contribute to addressing the challenges but can't be the magical solution. Mediation cannot go too far without formal justice adopting necessary reforms to empower the weak party.[482] This chapter is to focus on the mediation share of the responsibility in addressing power imbalance by presenting the principle of informed consent in mediation as a way to adopt the theory of educated self-determination in practice.

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intellectual imagination, does not envision the possibility of alternate and improved conditions. For example, Babcock and Laschever claim that it does not occur to women in the workforce to ask for a raise for certain types of job changes or to ask for the same size raise that a male would seek." See: Id Joseph B Stulberg at 226 where he cites "Jon Elster, Sour Grapes: Studies in The Subversion of Rationality (1983)."

[480] It is worth mentioning that in practice in some cases self-represented parties are also ignorant to their weaknesses, which can become a source of power in the mediation. For example; the lack of knowledge of a weak position can embolden a party to negotiate firmly, comfortable that they have a "strong" position.

[481] Clark also mentions: "Auerbach noted, "without legal power, the imbalance between aggrieved individuals and corporations and government agencies cannot be redressed" See: Id Bryan Clark at 156 where he cites: "Auerbach (1983), p. 145. Auerbach J (1983) Justice without law, resolving disputes without lawyers. OUP, New York"

[482] Many courts have recognised that and carried several initiatives to tackle the challenge of self-represented litigants. For example in the Australian courts it have been said that there are three things that can be done in relation to self-representation in litigation: one is to **get them lawyers** (such as legal aids), the second is to **make them lawyers** (ex: offering a legal information sessions at the court registry)and the third is to **change the system** (ex: allowing the parties to talk to the judge); see: SELF-REPRESENTED LITIGANTS: TACKLING THE CHALLENGE By Deputy Chief Justice Faulks Family Court of Australia available at http://www.familylawexpress.com.au/family-law-factsheets/representing-yourself/self-representation-guide/self-represented-litigants-tackling-the-challenge/ accessed at 26/02/18 Other courts decided to support mediation dealing with the challenge; for example California courts sought the assistance of expertise to develop courses and to train mediators on how to deal with self-presented parties see: http://www.courts.ca.gov/21515.htm accessed at 26/02/18

3) The Principal of Informed Consent in Mediation:

3.1 Background:

"Informed consent" in general is a legal term which describes the circumstances under which a person knowingly and voluntarily agrees to a course of action recommended by a professional, like a physician or lawyer.[483] Scholars, with Nolan Haley, assert that the absence of truly educated parties in mediation may result in harmful results and raises several fairness concerns. Thus there is a need to apply informed consent in mediation.[484] Yet, Cooley and Love says "anyone who dares to explore the field of informed consent in alternative dispute resolution quickly comes to appreciate the quagmire of differing expert viewpoints; of conflicting or silent codes of conduct, statutes, and rules; of divergent definitions of processes; and of the complexity of the topic generally."[485] Indeed, informed consent in mediation is surrounded by debates regarding what informed consent in mediation entails, the mediator duty towards outcome consent and mediator style which each to be discussed in the following.

3.2 The principle of informed consent in mediation

Mediation is different from litigation as mediation is governed by the principle of consent where parties must agree to both participate in the process and to its outcome[486]. With such conviction, Nolan Haley asserts that there are two levels of consent in mediation, participation consent and outcome consent. The two consents must be associated with adequate disclosure to have the parties educated about the mediation process and the outcome

[483] See: MichaelT Colatrella Jr., 'Informed Consent In Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring The Mediator's Ethical Duties' (2013-2014) 15 Cardozo J Conflict Resol 706 where he cites: Douglas Andrew Grimm, 'Informed Consent For All! No Exceptions' (2007) 37 N.M. L. REV. 39,41

[484] See: Id MichaelT Colatrella Jr. at706 where he cites: "Ellen Waldman, Mediation Ethics 113-54 (2011) (addressing the "tension between the disputants' autonomy and substantive fairness"); Engler, Russell Engler, *Revising the Role of the Court-Connected Mediator to Achieve Fairness for Unrepresented Litigants, 11* NE-ACR Newsletter 1 (2005). at 1 (advocating that the mediator make *pro se* parties aware of rights waived by settlement); Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary,* (2005) 21 OHIO ST. J. ON Disp. RESOL. 45 (advocating that a mediator must warn parties of the risks and benefits of evaluation); Id Nolan-Haley, at 775 (advocating for a robust duty of informed consent for mediators); Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR, [2001] FED. JUDICIAL CTR. 24"

[485] John W. Cooley and Lela P love 'Midstream Mediator Evaluations and Informed Consent' (2007-2008) 14 Disp Resol Mag 11

[486] In litigation generally one party is involved against their desire and outcomes rendered by courts are imposed by the judge

allowing the parties to make an informed consent regarding the process and the outcome. [487] In proposing and developing the principle of informed consent in mediation Nolan-Haley establishes two foundations. First, the principle of informed consent complements essential mediation values especially parties' self-determination. Second, informed consent is a legal requirement in several fields, and the mediation field should follow this lead and assign informed consent as a requirement for the mediation profession. Both foundations are to be explored in the following along with the two levels of informed consent:

The first foundation: informed consent complements core mediation values:

Parties' self-determination is recognised to be a core value in mediation by scholars[488], mediation laws[489], court mediation rules[490] and mediation standards[491]. Parties' self-determination in mediation reflects the conviction that individuals act out of free will and are at liberty to make arrangements to resolve their own disputes; where parties bear the responsibility of the outcome and resolution with no decision-making power on the part of the mediator.[492] In other words, it assumes parties' ability to negotiate freely and thus invokes the notion of voluntariness in mediation.[493] Nolan-Haley asserts that parties' self-determination in mediation is slightly different from the general notion of autonomy or self-determination

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[487] See: Id Nolan-Haley at 777-782

[488] For example see: Nadja Alexander, The Mediation Manual: Hong Kong Edition (1st, LexisNexis, 2014) , Robert A Baruch Bush and Joseph P Folger, *The Promise Of Mediation: Responding To Conflict Through Empowerment And Recognition* (1st Edn, Wiley, 1994) and David a hoffman, 'Ten Principles of Mediation Ethics' (2000) 18 Alternatives reprinted in Mediation: Approaches and Insights (Juris Publishing, 2003) 147

[489] A study of which investigated the different mediation statutory and court rules in the Roman legal system (eg. France, Italy, Spain) and Germanic legal system (Germany, Austria, Switzerland) Nordic (Norway) Anglo-American (USA, England, Ireland, Australia, New Zealand) and others, concluded that parties' self-determination is a core value of mediation see: Edited By: J. Hopt & Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (1st, Oxford University Press, 2013) 11-17

[490] For ex. See: 2015 California Rules of Court: Rule 3.853. Voluntary participation and self-determination: A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. Available at: http://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_853 access in 26/02/18

[491] For example, In the United States, The ABA Model Standards of conduct which is considered to be the first mediator ethical code of national significance, was issued in 1994 and was revised and updated in 2005, by a joint committee of the American Arbitration Association, the American Bar Association Section of Dispute Resolution and the Association of Conflict Resolution. In these standards, parties' self-determination is presented as the fundamental principle of mediation. Available at: http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf Accessed at 26/02/18

[492] Id : J. Hopt & Steffek, at 12 where cited in support of that different mediation definitions from different jurisdictions; England, Portugal, Canada, China, Germany, Greece, Austria, Australia, New Zealand, Russia, and Art. 3(a) EU Mediation Directive 2008.

[493] See: Id Nadja Alexander at Chapter two Mediation—Objectives, Values and Historical Perspectives p. 60 where she also notes: "The identification of self-determination as a core value of mediation may be questioned in light of the trend towards increasing levels of 'incentive' to participate in mediation" such note is to be discussed in another chapter of this work.

because self-determination in mediation is grounded on relational and communal values.[494] In elaboration, self-determination in mediation goes beyond individual autonomy as it is tied with the other party's self-determination. Thus, it requires connection with other human beings to establish communication and collaboration. Such communication and collaboration are what allows the parties to execute their self-determination powers in mediation. Also, as mentioned above, self-determination in mediation on the key way that distinguishes mediation from adjudication where the decision-making powers lie in the hands of the parties. This point is linked to the conviction that self-determination in mediation is what allows the parties to achieve 'justice based on parties' references and acceptability'[495]. With such privilege and responsibility, Nolan-Haley asserts that the absence of adequate knowledge would leave such communication and collaboration unbalanced and would ultimately undermine the core value of self-determination and leave the parties with unfair results. [496] Thus, Nolan-Haley states "When parties understand what they are doing in the mediation process and what they are not doing when they understand what their agreements mean and what legal entitlements they may have waived in making such agreements, then they may be said to have truly exercised self-determination."[497]

Many scholars confirm such a conviction.[498] Noone and Ojelabi assert that the concept of party autonomy requires informed decisions, including being informed of the law and their legal rights; as such knowledge will enable the party to negotiate a fair settlement.[499] Similarly, Stulberg and Maute affirm that the veracity and tolerability of any legal system are founded upon each citizen being knowledgeable of their legal rights and, therefore, a party must possess the relevant legal information when seeking to resolve their dispute in a mediation forum. If the disputants do not appreciate their legal positions, including the likely outcome of litigation, they are unable to make informed decisions and negotiate a settlement

[494] Id Nolan-Haley at 790
[495] Explained in chapter two of this work
[496] Id Nolan-Haley
[497] Id Nolan-Haley at 813
[498] For example, Coben at his work cites the following statement from Id Nolan-Haley: "…for if the self is unknowing, just what is it determining?" see: J. Coben, 'Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values beyond Self Determination and Neutrality' (2004) 5 Cardozo Journal of Conflict Resolution 65, 80
[499] See: M. Noone and L. Ojelabi, 'Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014)45(1) Washington University Journal of Law & Policy 145- 19

which is objectively fair.[500]

Parties' self-determination is not the only core value of mediation which informed consent can complement. Informed consent can be a cornerstone in establishing and delivering other mediation values and mediator's ethical obligations such as delivering quality process[501] and promoting fairness in mediation[502]. Providing quality process and promoting fairness in mediation entails preserving human dignity with the enhancement of the parties' perception of procedural fairness in their participation in the mediation process. Informed consent will keep the parties educated about the process; enhancing their participation and their sense of procedural justice. Moreover, having the parties informed about the outcome along with the process would all contribute to their satisfaction of the process and the outcome which can translate to better compliance and the voluntary enforcement of the outcome; achieving efficiency.[503] This argument is in perfect alliance to the importance of the theory of educated self-determination and proves that the concept of mediation informed consent can be the ideal tool to apply the theory in practice.

Second foundation: informed consent is a legal requirement in several fields and the mediation field should be inspired:

Informed consent is an ethical, moral, and legal concept that is embedded in the legal culture which requires individuals who give consent to be competent, informed about the particular intervention, and consent voluntarily. [504] For example; informed consent governs the relationship between physicians and patients, and, to a lesser degree, between lawyers and clients and should be a governing principle in mediation as well.[505]

In the Physician-Patient Relationship, the tort doctrine of informed consent requires that physicians disclose "relevant medical information" to patients and then obtain their consent before administering treatment.[506] The principle of informed consent in the lawyer-

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[500] See: J. Stulberg, 'Mediation and Justice: What Standards Govern?' (2005) 6 Cardozo Journal of Conflict Resolution 213-245 at 239 and J. Maute, 'Mediator Accountability: Responding to Fairness Concerns' [1990] 2 (4) Journal of Dispute Resolution 347-369 at 362

[501] For ex see: The ABA Modern Standards of conduct: Standard VI. Quality Of The Process

[502] See: Chapter two of this work under the title mediation and justice with number of evidences out of numerous contexts in which the prove that assuring fairness is one of the mediation values.

[503] See: Id Nolan-Haley at 791 – 93 and Id Michael T. Colatrella Jr. at 713 – 15

[504] See: Id Nolan-Haley at 781 where she cites "Paul S. Appelbaum Et Al., Informed Consent: Legal Theory and Clinical Practice 35-65 (1987)."

[505] Id

[506] For a discussion of the evolution of the American tort doctrine from a requirement of "Simple" To "Informed" Consent, See: Id Nolan-Haley at 782 where she cites "Paul S. Appelbaum Et Al., Informed Consent: Legal Theory and Clinical Practice 35-65 (1987) At 35-62; Ruth R. Faden & Tom L. Beauchamp, A History and Theory Of Informed Consent 120 (1986). At 125-43. The Phrase "Informed Consent" Was First Articulated

client relationship is a similar principle to that in medicine. Clients should be educated about their choices and participate in decision-making.[507] In the United States Model Rule 1.4 mandates that lawyers "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[508]

With that end, mediation field should be inspired from the other fields and start recognising informed consent as an essential requirement of the mediation profession; especially that informed consent can complement the core values of mediation and address fairness concerns.

Several institutions have already recognised informed consent as an essential aspect of the mediation process and state it in their mediation rules. For example, The Virginia Supreme Court Rules in connection of Informed Consent states: "The rule focuses on the informed consent of the prospective mediation clients to the particular approach, style and subject matter expertise of the lawyer-mediator. This begins with a consultation about the nature of the mediation process, the limitations on evaluation, the lawyer-mediators approach, style, and subject-matter expertise and the parties' expectations regarding the mediation process. If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and self-determination."[509] Another example the Supreme Judicial Court of Massachusetts mention informed consent in their Uniform Rules on Dispute Resolution as the following: "The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and

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In *Salgo V. Leland Stanford Jr. University Board Of Trustees,* 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957) (Discussing Physicians' Duty To Give "Full Disclosure Of Facts Necessary To An Informed Consent")." also see Id MichaelT Colatrella Jr., at 719 -730 where he provides a summary of the evolution of the informed consent in the medical practice ending with the modern understanding of what it means to obtain informed consent in medical practice:

"(1) A description of the recommended treatment or procedure; (2) [a] description of the risks and benefits of the recommended procedure, with special emphasis on risks of death or serious bodily disability; (3) [a] description of the alternatives, including other treatments or procedures, together with the risks and benefits of these alternatives; (4) [t]he likely results of no treatment; (5) [t]he probability of success, and what the physician means by success; (6) [t]he major problems anticipated in recuperation, and the time period during which the patient will not be able to resume his or her normal activities; and (7) [a]ny other information generally provided to patients in this situation by other qualified physicians." And Cites "George J. Annas, The Rights Of Patients 8 (3d Ed. 2004)."

[507] See: Id Nolan-Haley at 784 where she cites: "David A. Binder Et Al., Lawyers As Counsellors: A Client-Cantered Approach (1990)."

[508] See: Model Code of Professional Responsibility Rule 1.4 (1997).

[509] See: the professional guidelines of conducts Rule 2.11 note 3 (2005). Available at http://www.vsb.org/pro-guidelines/index.php/rules/conselor-and-third-party-neutral/rule2-11/ Last accessed at 26/02/18

voluntarily consents to any agreement reached in the process."[510]

In arriving at a clearer understanding of the mediator's role regarding informed consent, it is essential to explain at the outset that the mediation scholarship distinguishes between two layers of informed consent: "participation" consent and "outcome" consent.[511]

3.3 Mediation Participation Consent:

To examine participation consent; three questions will be used: what, why, how. Starting with:

3.3.1 What participation consent entails?

Nolan-Haley identifies it by stating the following: "Meaningful consent must be voluntary and should be given with an understanding of its attendant consequences. Consent to participate in the mediation process, what I will call "participation consent," has several dimensions. It involves a conscious, knowledgeable decision to enter into the mediation process and to continue participating in mediation through good faith negotiations. This is more than a matter of signing a form agreeing to mediate. It involves an on-going commitment to honour the integrity of the mediation process ...."[512]

3.3.2 Why participation consent is important?

The term mediation does not describe a single unified, fixed process. Mediation can be conducted in a variety of ways, incorporating several strategies that the mediator can adopt. This leaves mediation vulnerable to the possibility of being confused with other alternative dispute resolution processes. To elaborate, a mediation that ends with a mediator proposal can easily be confused with a non-binding arbitration process. Similarly a highly evaluative mediation focussing on the law can be confused with the early neutral evaluation ENE

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[510] See: Supreme Judicial Court of Massachusetts Rule. 1:18, number 9(c) (2003). Available at http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc118.html last accessed at 26/02/18, one more example is found in the draft of the Association for Conflict Resolution's Proposed Policy Statement on "The Authorized Practice of Mediation," where informed consent in mediation is defines as: "Respect for the nature of the parties' voluntary participation in a mediation calls for that participation to be grounded in informed consent. In other words, parties have the right to 'understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.' This is a continuing right. The parties decide when and under what conditions they will reach an agreement or terminate mediation" See: The ACR draft in August 28, 2004 at rule at 6. B

[511] See: Id Nolan-Helay, Id MichaelT Colatrella Jr. and Lela P Love and John W Cooley, 'The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary' (2005-2006) 21 Ohio St J on Disp Resol 45

[512] Id Nolan-Haley at 819 – 820 (footnotes omitted)

process. Moreover, if the one who conducts the aforementioned mediation is an authoritative figure, such as a judge, shifting the focus to the law and settlement, the process can become more associated with a settlement conference process. Also with a mediator that adopts a transformative approach where the focus is on the relationship between the parties or a broad facilitative mediation where the focus is on parties' underlying interests and feelings, it can be seen more like a therapeutic session.[513] Therefore with the variety of mediation styles, there is a need to educate the parties about the type of mediation process they are about to engage in, to clear any confusion, so they would effectively set their expectations, understand the mediator's role and most importantly recognise their power, duties and privileges over the process and the outcome and fully appreciate the voluntariness of the process to prevent any coercion in the mediation settlements.

3.3.3 How can participation consent be accomplished?

The answer to such a question is essential given that each mediation style can present a number of advantages and disadvantages that parties should be aware of before participating in the mediation process. That can be achieved by the mediator and/or the service provider in several manners. The following are possible ways that can be proposed in delivering the two levels of the participation consent 'the disclosure' and 'the consent':

The first level is participation disclosure which requires educating and equipping the parties with enough knowledge regarding the mediation process[514] and about the different mediation styles and the advantages and disadvantages of each style. This can be achieved by:

1) Requiring the mediator, in the convening phase of the mediation process, to orally explain the style(s) that she will be adopting in this mediation; highlighting the advantages and the disadvantages of her style. This would allow the parties to stand on

[513] Nolan-Haley cites: "In explaining the mediation process, mediator must describe the difference between mediation and other forms of conflict resolution including therapy and counselling" see: Id Nolan-Haley at 801 (footnotes omitted)

[514] As an example of an adequate disclosure regarding the mediation process Nolan-Haley cites: "The CENTER FOR DISPUTE SETTLEMENT, INSTITUTE OFJUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION, Rule 3.2(b) (1992) list ten items of process information which courts should provide to parties and their attorneys: *Information on process:* (1) the nature and purpose of mediation; (2) confidentiality of process and records; (3) role of the parties and/or attorneys in mediation; (4) role of the mediator, including lack of authority to impose a solution; (5) voluntary acceptance of any resolution or agreement; (6) the advantages and disadvantages of participating in determining solutions; (7) enforcement of agreements; (8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented; (9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court; (10) the advantages and disadvantages of a lack of formal record" see: Id Nolan-Haley at 800 (footnotes omitted)

a solid foundation regarding the mediation style by asking the mediator questions and asking for any needed clarification which in turn allows them to comfortably consent to participate in such mediation.[515]

2) Another possible way is to get the service provider to develop and provide prospective parties with educational materials such as visual educational clips or brochures that explain the different mediation styles and the advantages and disadvantages of each style. [516] Then the service provider can highlight the styles of each available mediator in their mediation panel for the parties to select the mediator that can perform using the style of which suits them best. [517]

Once the participation disclosure is achieved, the mediator or the service provider can proceed to secure participation consent by the issue of a questionnaire/agreement to the parties to fill in, prior the initiation of the mediation process and appointing the mediator, which can identify their wishes or expectations regarding the mediation style(s) that they wish to participate in. In elaboration, such a questionnaire may include 'yes or no' questions for the parties to answer in connection with the mediator's role and the client's role.[518]

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[515] With the same line of thought see: Alan Gross, "Transparent Mediation: Giving Away our Strategies" available at (*Mediate.com*) <http://www.mediate.com/pdf/transparentmediationgivingawayourstrategies.pdf > last accessed 26/02/18

[516] This idea is drawn from existing initiatives in US courts where they provide the parties with educational materials explaining the mediation process. For example CA courts provide short clips explaining mediation and the other ADR methods available at: http://www.courts.ca.gov/3074.htm accessed at 26/02/18 and FL courts provide detailed information for the parties on how to prepare for mediation available at: http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml accessed at 26/02/18 The Chapter proposes to simply include information on the different mediation styles in such materials. It is only fair to point that some mediation service providers do present information on the meaning of the different mediation styles in their websites. For example, JAMS website does explain the difference between the evaluative and facilitative mediation. Available at: http://www.jamsadr.com/adr-spectrum/#FACILITATIVE-MEDIATION accessed 26/02/18. Yet what the chapter **proposes is to include the advantages and disadvantages of each style as well.**

[517] Most of mediator panels include names, contacts, experiences and hourly rates of the mediators. For example see the mediation panel list of Superior Court of California, County of Sacramento available at: https://www.saccourt.ca.gov/civil/docs/mediation-panel-list.pdf Accessed at 26/02/18**. This chapter propose to include the mediator preferred style(s) to such lists.**

[518] The Idea is drawn from the work of John R Williams mediator at Santa Clara County and his questionnaire to parties on requested services of meditator in personal injury litigation where added to the training materials of Straus Institute for Dispute Resolution Pepperdine University School of Law, Mediation The Art of Facilitating Settlement An Interactive Training Program (Aug 4th 2014 Los Anglos). Page 7 : 15 and the work of Margaret l Shaw where she present the "continuum of behaviours" in examining the level or the degree of how evaluative the evaluative mediators can be. See: Margaret l Shaw, 'Style Schmyle! What's Evaluation Got To Do With It' [Spring 2005] Disp RESOL MAG 19 also the work of Harold Abramson and his sample agreement to mediate see: Lela P. Love & John W. Cooley, 'The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary' (2005) 21 OHIO ST. J. ON Disp. RESOL. 45, 69 where cites: "Harold Abramson, Mediation Representation: Advocating In A Problem-Solving Process Appendix G (2004)." Lastly the work of Imperati highlighting the "decision points" where the mediator might usefully direct parties to consider important elements of the mediation process see: Samuel J.

When examining the parties' answers, the mediation service provider can appoint an appropriate mediator to better suit the clients' wishes, or the mediator can adopt the desired mediation style to honour the parties' participation consent.

There is a practical challenge which participation consent may invoke. If the parties could not agree on a certain style and/or a mediator, this would, in turn, jeopardise the initiation of the mediation process. In response to such a practical challenge, mediation is a process of which counts on the parties' collaboration, thus agreeing on the mediator and her style can be a warm-up and would allow the parties to start the mediation with a precedent of a small successful collaboration. If the parties could not agree on a style and the mediator or the service provider could not convince them to accept certain style, then it can be viewed as a strong indicator that they are simply not ready for mediation and referring them to another dispute resolution method can save lots of time and energy.

To fully appreciate the importance of the participation consent; the different mediation styles should be presented before moving to examining the outcome consent.

3.4 Mediator Styles

Two children tentatively put one foot in front of the other as they struggle to gain their balance in their new skates, nerves swooping down suddenly and breathtakingly, the ice cold air hitting their faces as they approach the opposite sides of the ice; the children recoil and turn to their parents; ''I've never done this before, I'm scared I'll fall'' one parent soothes ''don't worry, I know you can do it! I believe in you!'' while the other pushes the child toward the ice and encourages "you're in good hands, I'm here to guide you." Buoyed with their newly found confidence the children step out onto the ice, gliding at first then wobbling for a few steps and coming down with a loud thud as their bodies hit the ice. A coo comes reassuringly from the side-lines ''good try; you're doing great! You'll get the hang of it in no time!''. Eagle eyed, the other parent glides onto the ice without hesitation and scoops up the child ''I'll take you under my wing, follow my lead'' As the children move slowly around the ice they become conscious that their skating looks different from the others speeding past with ease ''Am I doing it right?'' the children query as they pass their parents. Nodding serenely like a

Imperati, 'Alternative Dispute Resolution Symposium Issue: Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation' (1997) 33 WILLAMElTE L REv 743

Dove the reply comes ''If it feels right, it's definitely right'' while on the other side comes a shrill reply of ''Look around, are you doing what everyone else is doing?'' Despite the different parenting styles at the end of the day, the two children learned to fly over the ice.

Mediators' styles, models and approaches are all terms used to describe mediator conduct during mediation. Many scholars have categorised mediator styles using a variety of concepts, phrases and descriptive words.[519] After presenting the most popular terms used in explaining different mediator styles including: evaluative, facilitative and transformative, the chapter proposes that the entire range of mediator styles can be carried out by two breeds of mediators '*Dove mediators'* and '*Eagle mediators'*.

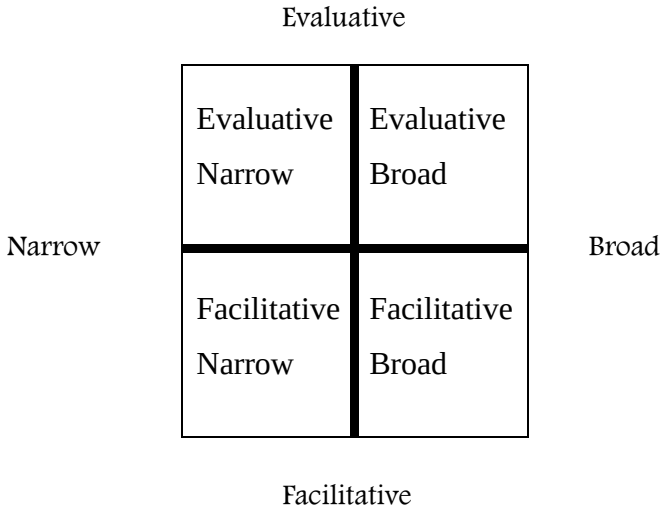
3.4.1 Riskin Grid, the Classic and the New Terms:

Riskin's influential work emphasises that mediators not be all alike and in explaining such a view he developed and presented his initial grid as shown below: [520]

[519] See: Id Nolan-Haley where she says: "a number of mediation models and styles have been identified in the theoretical and empirical literature" and she cites: "Robert A. Bush & Joseph P. Folger, The Promise Of Mediation: Responding To Conflict Through Empowerment And Recognition (1994) (Describing Transformative Mediation); Deborah Kolb, When Talk Works: Profiles Of Mediators (1994) (Describing Range Of Mediator Practices); John Paul Lederach, Preparing For Peace: Conflict Transformation Across Cultures (1995) (Describing Prescriptive And Elective Mediation Training Models); James Alfini, *Trashing Bashing And Hashing It Out: Is This The End Of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); Jeanne M. Brett Et Al., *Mediator Style and Mediation Effectiveness*, 2 NEGOTIATIONJ. 277 (1986) (Describing Shuttle Diplomacy And Deal-Making); Freshman, *Supra* Note 107 (Community Enhancing Model); Kenneth Kressel Et Al., *The Settlement-Orientation Vs. The Problem-Solving Style In Custody Mediation*, 50 J. Soc. ISSUES 67 (1994); Joel Kurtzberg & Jamie Henikoff, *Freeing The Parties From The Law: Designing An Interest And Rights Focused Model Of Landlord/Tenant Mediation*, 1997J. Disp. RESOL. 53 (Interest-Based And Rights-Based Model); Riskin, *Supra* Note 188; Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 J.L. & POL'Y 7 (1986) (Describing Bargaining And A Therapeutic Style Of Mediation); Ellen A. Waldman, *The Challenge Of Certification: How To Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. Rev. 723 (1996) (Describing Norm-Generating, Norm-Educating And Norm-Advocating Models); Waldman, *Social Norms*, *Supra* Note 106. *See Generally* Carrie Menkel-Meadow, *The Many Ways Of Mediation: The Transformation Of Traditions, Ideologies, Paradigms, And Practices*, 11 NEGOTIATION J. 217 (1995)."

[520] See: LeonardL Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 (7) HARV NEGOT L REv 17

Riskin Classic Grid



[Figure 8]

Riskin's grid is based on two continuums. The horizontal continuum presents how the dispute at hand can be defined. At one end is the narrow definition as the focus is on the economic dimension[521] of the conflict where the negotiation tends to follow a 'position based' or 'distributive bargaining' approach[522]. The other end of the horizontal continuum is the broad definition as the focus is on the non-economic dimension of the dispute (emotional and external) where the negotiation tends to adopt an interest-based or integrative bargaining approach. The vertical continuum is related to the mediator activities or her individual style; with an evaluative style at one end and facilitative style at the other.[523]

Over time Riskin recognised inherent problems with his scholarship in connection with creating confusion and misunderstanding of what he wanted to deliver. Therefore, he proposed changing the words "evaluative" and "facilitative" to "directive" and "elective".[524] Riskin's updated research focuses on mediator influences as well as influences by participants.

[521] The three dimensions (economic, emotional and external) have been explained in chapter two of this work under the title triangle of conflict and settlement.
[522] The two bargaining manners distributive and integrative bargaining has been explained in chapter one of this work under the title negotiation phase.
[523] See: Id Riskin,…: A Grid for the Perplexed 17
[524] See: Leonard L. Riskin, 'Decision-making in Mediation: The New Old Grid and the New New Grid System' (2003-2004) 79 NOTRE DAME L REV 1

Furthermore, he believes that "directive" is more descriptive than "evaluative" because the former is more general and abstract, and therefore, may cover a wider range of mediator activities. [525]

The chapter notes that the directive and indirective styles are different from the evaluative and facilitative styles, in elaboration an evaluative mediator might follow a directive or an indirective style in delivering their evaluative mediation. With that being said, for purposes of this chapter, however, references will continue to be made to evaluative and facilitative styles since these terms are widely adopted and used throughout the mediation field and to avoid confusion in this chapter.

3.4.2 Facilitative mediator style

Facilitative mediators do not provide opinions regarding the dispute nor suggest options in connection of the settlement; instead, they rather assist the parties in evaluating their disputes and generate settlement options for themselves through enhancing the communication levels using questioning and other techniques.[526] The facilitative mediator is viewed as a third party facilitator where she seeks to emphasise the parties own problem-solving, creativity and personal evaluation,[527] with such style the mediator encourages parties' (the principles)attendance facilitates communication, tries to uncover parties' underlying needs and interests and helps educate the parties by assisting them to understand the others' needs and interests by creating a comfortable form of communication in which the parties can develop their own creative solutions to a problem.[528] Mediators who adopt the facilitative style, In comparison to the evaluative style, are often referred to as "'soft,' 'touchy-feely,' 'therapeutic,' 'potted plant,' or 'new age-y' ".[529]

3.4.3 Evaluative mediator style

The evaluative mediator will assist the parties with their disputes by assessing strengths and weaknesses of the merits of their arguments.[530] Scholars assert that the evaluative mediators adopt intrusive techniques. Indeed some evaluative mediators may go as

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[525] Id

[526] See: LAURENCE J. Boulle and others, *MEDIATION- SKILLS AND TECHNIQUES* (1st edn, LexisNexis, 2008) at 12-13

[527] John Lande, 'Toward More Sophisticated Mediation Theory' [2000] J Disp RESOL 321, 322

[528] See: Id Riskin,…: A Grid for the Perplexed at 29 – 30, 32 – 34 and Id Lande.

[529] See: John Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 FLA ST U L REV 839, 850

[530] See: Dwight Golann & Marjorie Corman Aaron, 'Using Evaluation in Mediation' (1997) 52Disp RESOL J 26, 27

far as to advocate for a particular settlement proposal.[531] Some use "less intrusive techniques" by recommending a "range of fair outcomes." Under such manner, the evaluative mediator predicts how she thinks a fair and reasonable person might settle.[532] Other evaluative mediators prefer a much gentler approach by posing questions in a way to educate the parties and have them soften towards settling; by offering a 'reality check'.[533]

Scholars refer to evaluative mediators as more directive in their approach, naming them by such terms as: "'muscle mediators,' 'Rambo mediators,' [and] 'Attila the mediator(s).'"[534]

Before moving to exploring other mediator styles two points need to be illustrated. One point is regarding the separation line between the facilitative and the evaluative style. The other point is in connection with the debate on the appropriateness of the evaluative style.

First, in distinguishing between facilitative and evaluative styles, there is no clear line that separates both of them. In fact, the boundary between the classic facilitative and the classic evaluative can be a large grey area.

Riskin and others acknowledge that many dynamics may affect a mediator's style, including personal beliefs, timing, participant influences, and the subject matter of the mediation.[535] This, in turn, might inspire the mediators to move from adopting one style to another even in a single setting. In elaboration, Riskin states that a mediator may be more evaluative in an employment case and more facilitative in a neighbourhood dispute. A mediator may begin a mediation using facilitative techniques, and at the end of a long day, urge the participants toward settlement using evaluative techniques.[536] The grey area between the two styles is created when the mediators started to combine the two styles in a single sitting.

It is important to note here that shifting from a facilitative to evaluative style can be a valid or even a require skill that mediators should enjoy in certain circumstances, as long as the mediator was transparent and has obtained parties' participation consent. Therefore, the questionnaire/agreement proposed in this chapter allows the parties to instruct the mediator to when she can make such a shift from facilitative to evaluative. The troubling bit here is

[531] See: Id Riskin, Grid for the Perplexed at 27

[532] See: Maureen E. laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14 NOTRE DAME JL ETHICS & PUB POL'y 479, 493

[533] See: Id Maureen E. laflin at 493 – 94 and Margaret l Shaw, 'Style Schmyle! What's Evaluation Got to Do with It' [Spring 2005] Disp RESOL MAG

[534] See: Id John Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' at 850

[535] See: Alan scott rau et al, *Processes of Dispute Resolution* (3rd edn, 2002) 375-431 and Id Riskin, Decision-making in Mediation, at 34-41

[536] See: Id Riskin, Decision-making in Mediation, at 34-35

when an evaluative mediator disguises and presents herself as a facilitative mediator. In other words, when the facilitative mediators shift to evaluative without even recognising it and without informing the parties. This might occur when a mediator declares herself as a facilitative to comply with the parties' participation consent and yet uses one of the evaluative style tools especially the 'reality checking' questioning technique. This can create ambiguity regarding the mediator role or style; undermine the parties' participation consent and raises concerns regarding the grey area between the facilitative and evaluative styles.

To elaborate on this concern an example differentiating between facilitative and evaluative mediators can be used. Colatrella Jr provides the following example: "Facilitative mediators when helping a plaintiff in an employment discrimination suit look more realistically at damage break down the damage request into it constituent categories and discuss the evidence he has for each, such as back pay, front pay, and pain and suffering. Asking a plaintiff to support each component of damage request with facts, even without evaluating those facts, frequently reveals weakness and gaps in the plaintiff's demands, making them more flexible in the settlement figure. The evaluative mediator, on the other hand, is more directive in his approach to resolving the dispute. He or she will express an opinion as to the likely outcome or value of a legal claim or defence were it to be adjudicated. If a plaintiff makes a damage request that the mediator finds unsupportable, an evaluative mediator will explain why it is unsupportable and unlikely to be obtained in adjudication."[537]

When examining such an example, one can argue that it does present two evaluative mediators with a softer approach in the first. As the first mediator in this example can be viewed as slightly engaging in evaluative style; giving the fact that she did use 'reality-checking' questions, focused on the strengths and the weakness of the plaintiff legal case and aimed for the settlement, even though the mediator didn't express an opinion; her questions have an undeniable evaluative component.

With the same line of thought, Love and Cooley recognise that there is a fine line between the evaluative style and the facilitative style when the latter attempt to use 'reality -checking' questions to help the parties to make their own evaluation. [538] They assert that a facilitative mediator "may properly facilitate the parties' conversation about applicable law,

[537] See: Michael T. Colatrella Jr., 'Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honouring The Mediator's Ethical Duties' (2013-2014) 15 Cardozo J Conflict Resol 746, 747

[538] See: Lela P. Love & John W. Cooley, 'The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary' (2005) 21 OHIO ST. J. ON Disp. RESOL. 57

their discussion about the strengths and weaknesses of their respective cases, and their discussion of alternatives and options. In pursuit of those goals, the mediator may ask: *Have you considered the point Lawyer A made concerning his belief that you do not have standing to bring this claim?, Could you explain to me why you think this is discrimination as opposed to just poor management?, Imagine that you lost your appeal, can you explain why that might have happened?, Have you considered getting legal advice about the claim for punitive damages?, Have you considered the signal you will send by rejecting this offer? If these negotiations break down, tell me again about your litigation option."* [539]

Yet they acknowledge that such questions have an evaluative component and it can be quite challenging for the mediator not to cross into the evaluative style especially given that her tone, body-language, and gestures can turn an otherwise reality-checking question into an evaluation or expression of opinion.[540]

To conclude, the principle of informed consent points towards mediators being aware of their style and disclosing it clearly to the parties. If mediators find themselves shifting to a different style or stepping into the grey area between the facilitative and the evaluative style; they should disclose the possibility of adopting a different style to better honour parties' participation consent and the theory of educated self-determination in large.

The second point that needs to be addressed here is the popular "evaluative versus facilitative" debate. Scholars have spilt rivers of ink debating the appropriateness of the evaluative style.[541] The fact that evaluative mediators can offer professional information, express opinions, predict likely court outcomes, propose solutions and might even pressure the parties to accept a particular resolution[542] was provocative enough for the passionate mediation team[543] to argue that evaluative style activities are inconsistent with the role of a mediator as it can weaken mediation by undermining mediation values such as parties' self-

[539] Love and Cooley have developed such stand and examples with connection of The Association For Conflict Resolution ACR proposed report/draft 2004 of The Authorized Practice Of Mediation see: Id Love and Cooley at 57

[540] Id

[541] For example, See: John Feerick et al, 'Standards of Professional Conduct in Alternative Dispute Resolution' [1995] J Disp ResoL. 95, 106-08 ;E. Patrick McDermott & Ruth Obar, 'What's Going On in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit'(2004) 9 HARV NEGOT L REV 75; James H Stark 'The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals from an Evaluative Lawyer Mediator'(1997) 38 S. TEX L REv 769, 784-92; Kenneth M Roberts, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' [2000] Journal of Dispute Resolution

[542] See: Id Riskin, … A Grid for Perplexed

[543] See: Chapter three of this work

determination and the mediator's neutrality.[544]

The space available in this chapter would not allow a full engagement in this debate, yet the following observation can be presented. Despite the debate, it is easy to witness that the evaluative style continues to hold a steady footing in mediation practice. Perhaps the parties of legally complex and high stakes dispute have created a strong demand for the evaluative style in the market place. Equally, the involvement of the lawyers in the mediation field and spread of the court-connected mediation programs have contributed to the evaluative style surviving and indeed thriving despite the heated debate.[545]

Such observation prevented the drafters of the ABA model standards to exclude the evaluative style from the mediation practice; instead, they acknowledge it; as the standards state:

> "A mediator may provide information that the mediator is qualified by training or experience to provide".[546] More importantly, Lela Love, a scholar that can be considered from the passionate mediation team and one who used to stand firmly against the evaluative style,[547] has also recognised such observation and started to negotiate her resentment and reluctantly accepting the evaluative style. However she sets two conditions for such acceptance:[548] First, the mediator should be competent and acquire proper knowledge and experience regarding the aspect of the dispute of which she can offer evaluation or advice.[549] Second, the mediator should secure parties' participation consent after warning the parties with all the disadvantages of the evaluative style.[550]

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[544] For example, see: LELA P. Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1996-1997) 24 FLA ST U L REV 937 and Kovach, Kimberlee K. and Love, Lela P., 'Evaluative Mediation' is an Oxymoron (March 1996). 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (March 1996). Also Robert Benjamin, 'What is Mediation Anyway? Ethical Issues, Policy Issues and the Future of the Profession' [1996] NIDR News 915 (where argues that mediation should stand as a distinct and clear-cut alternative to the evaluative and frequently highly-adversarial adjudicatory processes and that mediators should not evaluate.)

[545] For example, see: Jeffreyh Goldfien and Jenniferk Robbennolt, 'What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles' (2006-2007) 22 Ohio St J on Disp Resol 277 and Joseph B Stulberg and Sharon B Press, 'Variations on a theme by Sander: Does a Mediation have a Philosophical Map?' (2016) 31 Ohio State Journal on Dispute Resolution 101 also; Lande John, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 FLA. ST. U. L. REV. 839

[546] See: ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS STANDARD VI. QUALITY OF THE PROCESS 5

[547] See: Id Love, The Top Ten Reasons Why Mediators Should Not Evaluate 1997 and Id Kimberlee K. and Love 'Evaluative Mediation' is an Oxymoron 1996

[548] See: Id Love and Cooley 2005 at 66 - 72

[549] See: Id Love and Cooley 2005

[550] See: Id Love and Cooley 2005 at 66, 76 where she provides the following as an example of a proper warning of the evaluative style: "*You have asked me to give an opinion on the likely court outcome of this matter,*

In conclusion, both facilitative and evaluative style offers their own benefits along with potential risks and limitation as so any other dispute resolution processes. Perhaps this is why mediators tend to combine styles as an attempt to maximise benefits and avoid risks. The facilitative style priorities the value of having the parties arriving at their own solution to their mutual problem.[551] Yet, fully empowering the parties and respecting their own sense of fairness (even if their sense of fairness is not embodied in public norms) [552] can be associated with possible disadvantages. Economically speaking such style can take much more time comparing to the evaluative one which in turn can result in spending more time and money. More importantly, the solution reached in a facilitative mediation might not be optimal;[553] Parties may simply not choose the best solution because of their inexperience or lack of knowledge. The lack of knowledge can be crucial as the mediator will be restraining herself from expressing an opinion regarding the quality of the outcome and shall not share legal information; such risk is manifested with the unrepresented or poorly presented parties.[554] It is important to note that scholars who are pro facilitative style do not disagree that parties should have relevant information. Their claim, however, is that mediators should not be the one who provides this information.[555]

On the other hand, an evaluative mediator will not be shy in expressing her opinion and providing the parties with advice and at least one perspective of the likely adjudicated

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and I am willing to do that if you both agree to my providing that service. However, you should understand that at least one of you may not like my opinion and may feel I am no longer impartial. And, it may be that I will be inclined toward the evaluation I provide. If that happens, I may be unable to assist you further or may be less effective as a mediator. Also, particularly if you think my opinion is wrong, you may be disadvantaged by it in subsequent negotiations. While I will do my best to give you a thoughtful opinion, you should understand I might be wrong-different lawyers come to different conclusions-and my analysis will be based on information that is different from what a judge, arbitrator or jury would hear. My opinion will be based on more limited evidence than the evidence available in adjudication, since you have not completed discovery. Also, since I have learned information in caucus and from confidential submissions that you have not heard or seen and hence cannot rebut, you must rely on me to separate that out from information I hear in joint session. In any case, it is very speculative to predict what a particular judge might do. I advise you to listen to your own counsel (or to get legal counsel) to inform you and protect your legal rights.

Also, to the degree we focus on legal rights and the likely court outcome, it may distract you from looking for more creative solutions that might serve your interests better. Are you sure you want me to give an evaluation?"

[551] Douglasn Frenkel and Jamesh Stark, *The Practice of Mediation* (1st Edn, Aspen Publishers, 2008) 73, 74

[552] Id Frenkel and Stark at at 74 and Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (1st Edn, Jossey-Bass 2011) 145

[553] Id Frenkel and Stark at 73, 74

[554] See: Dwight Golann and Marjorie Corman Aaron, 'Using Evaluation in Mediation' (1997) 52 Disp RESOL J 26, 27 and generally section two introduction chapter of this work

[555] See: Id Nolan-Haley at 799 (footnotes omitted)

outcome.[556] This can have the parties better educated and consequently more powerful in the negotiation with their mediation counterpart which in turn can be translated into a fairer settlement.[557] However, there are many potential downsides to using evaluative techniques. The evaluative style can steer the negotiation in a certain direction(s) limiting parties' imagination and creativity. Not to mention that the mediator might be wrong in her evaluation.[558] The more serious downsides are; the mediator may jeopardise his neutrality because his evaluation favoured one side over another, thereby alienating one party.[559] Finally, the evaluation may undermine party self-determination when influencing them to make a decision that might be best under the law, but not best for the party overall. [560]

In connection to the last two concerns a question can be posed; when the parties have been well informed about the possible downsides of the evaluative style before consenting for such mediation would not that make the parties' self-determination and mediator's neutrality debate somewhat sterile? Moreover, the discussion raised earlier under the first foundation for informed consent can be used here where the argument is without adequate knowledge parties cannot truly apply their self-determination powers. However, a closer look at mediation neutrality is required to address the concern of jeopardising mediator neutrality which is discussed in chapter four.

3.4.4 Transformative mediator style:

Bush and Folger revolutionised the principle of transformative mediation style.[561] While most mediation styles focus on the problem-solving outcome, the transformative style mediator offers a different approach. The transformative mediator helps the parties focus on their relationship through shifting the communication channels away from a problem-solving outcome and toward a more open communication style.[562] Then parties can achieve "moral growth" by emphasizing individual "empowerment and recognition".[563] Bush and Folger define "empowerment" as "the restoration to individuals of a sense of their own value and

[556] See: Id Dwight Golann and Marjorie Corman Aaron
[557] See: Id Michael T. Colatrella Jr. at 747
[558] See: Id Love and Cooley 2005 at 58 and Id Love The Top Ten Reasons Why Mediators Should Not Evaluate
[559] See: Id Love and Cooley 2005 at 58 and Id Love The Top Ten Reasons Why Mediators Should Not Evaluate
[560] See: Id Love and Cooley 2005 at 58
[561] See: Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment And Recognition* (1st edn, Jossey-Bass, 1994)
[562] See: Id Bush and Folger at 82, 83
[563] See: Id Bush and Folger and Joseph p Folger, 'Mediation Research: Studying Transformative Effects' (2001)18HOFSTRA LAB & EMP L J 385, 393

strength and their own capacity to handle life's problems."[564]"Recognition" is "the evocation in individuals of acknowledgement and empathy for the situation and problems of others."[565]

To elaborate, the transformative style focus on parties' interaction, shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness; by person's ability to empathize and begin to understand the other party's perspectives and points of view (the recognition dimension).[566] With the transformative style, the parties may grow, develop, and change their own perspectives to become better human beings.[567] Eventually, transformative mediation can transform the character of the individual disputants as well as society in general.[568] Although transformative mediation does not emphasize problem-solving, parties may settle an underlying dispute as part of their relational transformation. [569]

3.4.5 Mediator Styles Depending on the Influence of Social Norms:

Ellen Waldman asserts that mediation can be classified into "three separate models".[570] Each model is formed in connection of the influence level of social norms[571] upon the mediator role.

The first model is the "norm-generating" which is seen as the classic form of mediation; the mediator helps the parties manage their conflict and establish their own norms and creating solutions based on their personal needs rather than social norms.[572] Under the norm-generating model the mediator does not feel morally responsible for the outcomes they preside over; As mediator gets busy managing process and interaction, "she does not restrain deliberations by referencing concerns extrinsic to the parties"[573] The norms by which choices

[564] See: Id Bush and Folger at 2
[565] See: Id Bush and Folger
[566] See: Id Folger at 393 and Bush and Folger at 96
[567] See: Id Bush and Folger at 2-12.
[568] See: Id Bush and Folger at 20
[569] See: Id Bush and Folger 11, 12
[570] See: Ellen A. Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' (1997) 48 Hastings Law Journal 703-769
[571] Irvine shares the following in explaining what are social norms? "They are: 'The rules that a group uses for appropriate and inappropriate values, beliefs, attitudes and behaviours'…This definition embraces the law but is by no means limited to it. Early twentieth century judges used 'the man on the Clapham omnibus', as a kind of normative standard but social norms applicable in disputes might include 'reasonableness' and 'the way children ought to be brought up'. They could also include simple ideas like turn-taking, not interrupting and, of course, fairness." See: Irvine Charlie, 'Mediation and Social Norms: A Response to Dame Hazel Genn' (2009) 39 Family Law 351
[572] See: Id Waldman at 713-18
[573] See: Id Waldman at 718

are evaluated must come from the parties themselves. This model is particularly suitable where legal norms do not apply or are unclear, or where mediation's primary goal is improving the relationship.[574]

The second model is "norm-educating" [575] with this model the mediator goes a step farther by referring to "relevant social and legal norms".[576] "Contrary to the norm-generating model, where discussion of societal standards is thought to impede autonomy and distract parties from their true needs, this model's consideration of social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible"[577] with this model parties maintain autonomy by deciding whether or not their final resolution conforms to the social or legal norms.

The final model identified by Waldman is the "norm-advocating" model.[578] In such model "the mediator not only educated the parties about the relevant legal and ethical norms but also insisted on their incorporation into the agreement. In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values."[579]

3.4.6 Styles Dictated by Commercial Needs:

The commercial nature of the mediator's role may influence her conduct and choice of style; especially in respect to whom she considers being her client.[580] For example; if a mediator considers the lawyers to be her clients, she may assert an evaluative style that she thinks the lawyers desire, in hopes of securing future business with them.[581] Indeed, the mediator may attempt to appease clients to obtain future referrals rather than focus on the process.[582]

Bush addresses commercialism by examining the mediator's ability to sell her services and

[574] See: Id Irvine
[575] See: Id Waldman at 731, 32
[576] See: Id Waldman at 730
[577] See: Id Waldman at 732
[578] See: Id Waldman at 742
[579] See: Id Waldman, at 745
[580] See: Susan Nauss Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2007-2008) 42 USF L Rev 577 at 595
[581] See: Id Susan Nauss Exon
[582] See: Id Sussan Nauss Exon where she cite: "During the 2004 Annual Conference of the Association for Conflict Resolution, a comment was made in one session that the mediator would do whatever was necessary for the money."

address the client needs when the last is searching for a mediator.[583] Bush emphasises mediator goals and describes mediators as "***settlers, fixers, protectors, reconcilers, and empoweror s***."[584]

The ***settlor***'s mission is to settle as many mediations and as quickly as possible. [585] With this line of thinking it can be argued that a mediator will be directive in her approach and may even cross the line to coerce the parties, knowing the primary purpose is to settle the dispute. The ***fixer*** mediator emphasises problem-solving through solutions. Her goal is to relieve the parties of their problem while finding a solution that is best for everyone.[586] One can imagine that this style is in alliance with the norm-educating approach and require a high level of creativity and knowledge.

The remaining types of mediators are "variants of the general 'fixer' species."[587] ***Protectors*** strive to aid the weaker party. They attempt to ensure that no one is hurt or taken advantage of through the mediation process. Sometimes protectors go so far as to ensure that the final outcome is fair and start to assist the weaker party at the expense of disadvantaging the other party.[588] The neutrality of such mediator is seriously questioned.

The final mediator types give more attention to preserving their neutrality. The ***reconcilers*** help the parties concentrate on understanding each other and focuses on the quality of the mediation rather than attempting a final settlement. Reconcilers are sometimes referred to as "therapeutic" or "sensitive."[589]

Lastly, some mediators are ***empoweror s*** because their goal is to embrace party's self-determination. Empoweror mediators may generate options but remain detached from them so that the parties may settle voluntarily. Some refer to this type of mediator as a fixer who does not take a directive approach.[590]

3.4.7 The Influence of the Courts' Involvement on mediator's Style:

Inviting mediation to bask inside the formal court system with the establishment of the court-connected mediation programs around the globe has certainly contributed significantly

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[583] See: John Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' [1997] 24 FLA ST U L REV at 851 citing: "Robert A. Baruch Bush, Ethical Dilemmas in Mediation 17-18 (1989) (unpublished manuscript)"
[584] See: Id
[585] See: Id at 852
[586] See: Id
[587] See: Id
[588] See: Id
[589] See: Id at 853
[590] See: Id at 853

in influencing or rather directing the mediator's style, especially when the orientation of court-connected mediation program is considered to fall under the 'selfish courts' motives; where the court is obsessed by the 'efficiency proponents' rather than the 'quality proponents' associated with the appreciation of mediation and its potentials.[591]

The court influence has created a mediation style of which can be called the ***"Michigan Mediation"***[592] style. Such style is moving mediation from the centre of the non-adjudication method to a great approximate to the boundaries of the adjudication methods. In other words, mediation under this style can resemble arbitration to a great extent. To elaborate, the history behind the name of such style is to be presented. According to the initial Michigan court's Alternative Dispute Resolution Rules in connection of mediation; the court selects three evaluators from a panel of attorneys. After reviewing written briefs and hearing some argument from counsel, the panel produces an "award."[593] Although the award is not binding, the rejecting party will be sanctioned if it fails to obtain a better result at trial.[594] In the year 2000, the Michigan Supreme Court revised its court Rules regarding Alternative Dispute Resolution primarily to change the terminology.[595] The Michigan Court Rule 2.403 amended to have the term "mediation" to be changed to "case evaluation".[596]

Although the Michigan court recognised that their initial rules are off foot regarding mediation and they are in fact more in alliance with other dispute resolution methods, yet other variations of the traditional "Michigan Mediation" continue to exist. Florida has a statute that regulates Campus Master Plans and Campus Development Agreements.[597] It requires that parties mediate disputes that arise while implementing executed campus development agreements.[598] Pursuant to this mandate, each party selects a mediator, and the two mediators, in turn, select a neutral third mediator. The panel of three mediators issues a recommendation to resolve the dispute.[599] In the ADR department at the Egyptian family courts, a mediation panel is formed of enough number of members (usually three), and at least one of them is a legal expert, to mediate the family disputes as a mandatory requirement to

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[591] For more detailed discussion about the institutionalisation of mediation and the concept of the 'selfish courts' see: section two introduction chapter under the title The Adjudication Realist team

[592] See: Laurence D Connor, 'How to Combine Facilitation with Evaluation' (1996) 14 ALTERNATIVES TO HIGH COST LITIG 15 (explaining the "Michigan Mediation" procedure).

[593] See: Id Connor and Id Susan Nauss Exon at 597

[594] See: Id Connor and Id Susan Nauss Exon

[595] *See Michigan Court Rules* MICH. CT. R. 2.403 cmt.; *also id*

[596] See: Id

[597] See: Florida State court rules number: § 240.155 (1998).

[598] See: Id

[599] See: Id

file a family claim.[600] Many other courts only allow former judges and highly experience lawyers to join their mediators' rosters as part of the court-connected mediation programs. [601] Adding to that, some courts set a very short time as a limit for the mediation process to be concluded;[602] which might force mediators to offer mediator proposal to cope with the time limit pressure.

The "Michigan Mediation" style can be referred to the mediation of which is conducted in a great similarity of arbitration; the mediators selection (as a panel) and/or focusing on the legal matters of the dispute as the mediators come from a strong legal background and/or concluding the mediation process with a mediator proposal (non-binding award). The 'selfish court's' motives with its focus on the efficiency proponents - even if it will affect the quality proponent- along with the market demand in a certain type of cases, have influence lots of mediators to adopt the "Michigan mediation" style.[603]

In conclusion, there are several variations which can guide mediators in conducting the mediation process in a certain manner; written definitions and standards, mediator's own personality, background and values, the perceived parties' needs and most importantly the desire and the responsibility of helping the parties when in conflict. All the different mediator's styles explained above, and more[604] can fall under two main categories in connection of parenting styles, the mother or a feminine approach and the father or a muscular approach. In other words, mediators can be one of two pieces of bread; dove mediators and eagle mediators. The dove mediators are in alliance with the facilitative, fixer, reconciler, empoweror and norm-generating styles. The dove mediators are like a parent who

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[600] See: Article number 5 of law number 10 for the year 2004 organising the Egyptian family courts.

[601] For example, see: Central California Federal court mediation rules:
MEDIATOR QUALIFICATIONS AND SELECTION, 3.1 Qualifications:
"A person may serve as a member of the Mediation Panel if:
(a) the person has been a United States Appellate, District, Magistrate or Bankruptcy Judge, or a California Judicial Officer; or
(b) the person is currently a member in good standing of the Bar of the United States District Court, Central District of California, with at least 10 years legal practice experience"

[602] For example see State of Illinois Circuit Court of Cook County mediation rules

[603] For example attorney Laurence D. Connor confirms that he is adopting the "Michigan Mediation" style but try to add a facilitative twist as; "First he evaluates the mediation in a similar manner to the "Michigan Mediation," although he does not disclose his recommended award. Then he begins the second phase of the mediation using a facilitative style. During the facilitative phase, Connor uses both joint sessions and private caucuses and relies extensively on party involvement. If the parties cannot settle the matter, Connor terminates the mediation and discloses his award, including the reasons for it." See: Id Laurence D Connor

[604] There are many other style names and classification for example a scholar names mediators as "Trickster," "Magician," and "Prime Negotiator" based on the mediator's personality treats see: Robert D Benjamin, Managing the Natural Energy of Conflict: Mediators, Tricksters and the Constructive Uses of Deception. in Daniel Bowling and David Hoffman (eds), *Bringing Peace Into The Room: How The Personal Qualities Of A Mediator Impact The Process Of Conflict Resolution* (2003) 79, 80

enjoys enough patient, determination and belief that her children should be able to learn how to fly by themselves and with enough encouragement and with the lightest of interference they will fly when they are ready. The eagle mediators are in alliance with the evaluative, directive, settler, protector, norm-advocating and Michigan mediation styles. The eagle mediator is a devoted parent who believes that all the knowledge and experience that she accumulated through the years must be present and used by his children when learning how to fly especially that they are in his eyes are young, confused, scared and don't know any better. There are undeniable advantages, limitations and effects associated with each style that mediators might use, even though existing empirical research cannot provide a specific demonstration of the exact effect of the different mediation styles.[605] The clear remaining aspect is that both dove and eagle mediators when adopting any of the different mediation styles are in fact aiming to aid the parties like a concerned parent. While in real life children cannot choose their parents or their parenting style, in mediation parties have the power to agree on the mediator and her style with the application of mediation participation consent. The mediation participation consent educates, empower and allow the parties to better execute their self-determination powers and seek the assistance of the mediator breed, dove or eagle, of which comply better with their references and expectation.

3.5 Mediation Outcome Consent:

As explained before, Informed consent in mediation consists of participation consent and outcome consent. While the mediator's duty regarding the participation consent can be

[605] Susan Nauss Exon says and cites the following: "One research project measured the extent to which evaluative and facilitative mediators' styles affected party satisfaction and the amount of money obtained by a mediated settlement. That research project was limited to a study of evaluative versus facilitative mediator styles in the context of the Equal Employment Opportunity Commission's ("EEOC") mediation program. The authors' study focused on 645 employment law cases that were mediated at the EEOC from March 1 to July 31, 2000. The study compared the results of mediations conducted by evaluative and facilitative mediators and found, among other findings, that the participants were most satisfied with a facilitated mediation and obtained more monetary relief in an evaluative mediation in which the claimant was represented by counsel. See: E Patrick Mcdermott and Ruth Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' [2004] 9 HARV NEGOT L Rev 75 at 75, 90 and 95-105 Another more generic study focused on four neutrals who worked on one simulated dispute. The study illustrated that mediators employ various styles within a single mediation and that the final outcome of the mediation may be due in part to a mediator's style combined with the disputants' personalities and approaches. See: Dwight Golann, 'Variations in Mediation: How-and Why-Legal Mediators Change Styles in the Course of a Case' [2000] J DISP RESOL A third study concluded that a mediator's style in community mediations did not affect the final outcome. Lela P. Love &James B. Boskey, 'Should Mediators Evaluate? A Debate Between Lela P. Love and James B. Boskey' (1997) 1 CARDOZO .ONLINE J. CONFLICT RESOL. 1, 41, 96"
see: Id Susan Nauss Exon at 600, 601

manageable, logical and comprehensible, yet the debate occurs with the mediator's duty in respect of the outcome consent. Holding the mediator responsible for assuring that the parties' have acquired all the needed information along with the legal information regarding their outcome before consenting and comet to such settlement have created a scholarly debate. The meaning of mediation outcome consent, the debate over the level of the mediator responsibility regarding assuring parties with outcome consent and the main reason behind such debate is discussed in the following:

3.5.1 The Meaning and the Importance of Mediation Outcome Consent:

*Nolan-Haley Identifies the outcome consent in mediation by stating: "*Consent to the outcome reached in mediation, what I will call "outcome consent," involves a separate decision to accept the agreement that is reached with an understanding of its content, its consequences, and what options are being waived by such consent. This requires sufficient factual and substantive information. In this sense then, disclosure and consent are linked concepts and, without sufficient disclosures, "outcome consent" is suspect."[606]

When parties settle their dispute in mediation, it can involve a degree of concessions and waive some of their legal rights. Informed consent in mediation requires that parties have sufficient and/or specific knowledge and understanding of the rights they are waving.[607] Indeed, Parties when agree to settle their dispute in mediate they aim for all the qualities the mediation process can offer; such as informality, flexibility and speed; in return, they waive their right to resort to litigating with all the associated legal rights of which litigation can offer; such as due process. The first level of informed consent; participation consent should be able to educate the parties with the advantages and limitation of the mediation process in comparison of the other dispute resolution methods available to them before waving their right to litigate and agree to settle in mediation. When parties proceeds and do agree on certain provisions in their settlement of which may better address the "need" criteria, which in turn can include the waiving of other legal entitlement based on the "equality" or "equity" criteria embedded in the law.[608] The parties should be aware of their legal rights stated in the law before waiving it for other more appealing or more practical standards according to the

[606] Id Nolan-Haley at 819 – 820 (footnotes omitted)
[607] In general see Id Nolan-Haley
[608] For a discussion on the criteria of the distributive justice in both mediation and formal justice see: chapter two of this work under the title distributive justice.

justice based on parties' references and acceptance.[609] Moreover, the settlement agreement shall create new legal positions, duties and rights. The parties should be familiar with the legal circumstances created by such settlement agreement. The second level of informed consent in mediation; the outcome consent is to educate the parties with enough information, including the legal information, about the different dimensions of their settlement agreement.

There is a general agreement between scholars that the first level of informed consent; participation consent should be placed in the heart of the mediator responsibility. Yet, the debate is orbiting around the mediator responsibility in assuring the second level of informed consent in mediation: the outcome consent.[610] The following is to present the two sides and explore mediator neutrality, mediation and the practice of law as the main reasons behind such debate.

3.6 Mediators should be held accountable for both participation and outcome consent:

Nolan-Haley asserts that the mediator duty to assure the parties with both levels of mediation informed consent, including the outcome consent; arise out of fiduciary relationship established between the mediator and the disputing parties. Such relationship entails that the mediator should honour the trust of which the parties invested in her and maintain the integrity of the mediation process. The guiding principle for the mediator to achieve that is to assure the parties a fair process and a fair outcome. In turn, this might urge the mediator to adopt evaluative approaches and provide legal information.[611]

To emphasise the importance of outcome consent and the level of disclosure mediators should provide Nolan-Haley presents a sliding scale model of informed consent disclosures. According to such scale, three elements must be considered, the location of mediation, voluntariness of the parties' participation and their representational status. The ideal situation is when the parties are well represented; voluntarily choose to mediate, and the mediation is being conducted away from under the roof of the court. In this situation, the parties are powerful enough thus; the level of the mediator disclosure regarding the outcome consent is governed by the contractual approach. The parties in such situation dictate the level of

[609] See: Chapter two of this work

[610] See: Id Nolan-Haley where she asserts that mediators should assure the two levels of informed consent. Yet, see: Id Michael T. Colatrella Jr. while he agrees that mediators should assure participation consent to the parties he argues that mediators shouldn't be responsible for the outcome consent.

[611] See: Id Nolan-Haley at 825 – 840

disclosure and interference the mediator can provide in respect of the outcome consent. On the other hand, parties can be most vulnerable and in a desperate need for the highest level of outcome disclosure when they are self-represented, have been ordered to mediate, and the mediation is conducted at the court.[612]

There must be a special caution exercised when mediation occurs in court. When parties seek the court in resolving their dispute they are expecting the judge to guard the fairness of the dispute resolution process and presumably they expect that the judge shall resolve their dispute based on the legal norms. It is the mediator who assumes this responsibility and expectations when parties are referred to mediation.[613] There is a great need to offer enough information about the mediation process and the voluntariness of the mediation settlement to set the parties expectations better when diverted from litigation to mediation and prevent coercion in mediation settlements especially when they are mandated to mediate. While the participation disclosure is able to cover that, the outcome disclosure is essential to achieving a fair outcome especially when the parties are self-represented. Nolan-Haley asserts that

> "unrepresented parties are entitled to receive information about their legal entitlements when a court requires them to participate in mediation. This does not mean that they should know with certainty how a court would rule. Rather, they should have an understanding of the range of possible outcomes and laws that may affect those outcomes…At the same time, however, the claimant should understand that an agreement reached in mediation might be more beneficial to her than a court ruling based on law. I do not advocate that court mediation sessions replicate the adversarial model or that mediation outcomes approximate what is available in court. I do argue, however, that when courts require unrepresented parties to mediate, that their mediation outcomes be informed by law. This is not to suggest that, once informed of their legal entitlements, parties will automatically seek legal remedies in the mediation process. Other non-legal values may matter more. But if the principle of informed consent means anything in court mediation, it means that parties should be able to decide for themselves what values do matter. They should know what legal entitlements they are waiving in the name of

[612] Id Nolan-Haley at 827
[613] Id Nolan-Haley at 830

autonomy and self-determination. By understanding both their legal and non-legal interests, they can make trade-offs among these interests that are at least reasonably educated."[614]

In respect of having the mediator providing the parties with outcome consent; it seems that Nolan-Haley believes that only eagle mediators are up for the task as she proposes four highly evaluative mediation modules: paternalistic[615], instrumentalist[616], informative[617], and deliberative[618] as a guiding manner for mediators to assure outcome consent to the parties.

In conclusion, Nolan-Haley leads the line of thoughts of which mediators are responsible for assuring the parties informed consent with its two levels, participation and outcome consent. Mediators are bound by the fiduciary relationship with the disputant parties which in turn require reassuring a fair process and a fair outcome. Fairness in mediation dictates that parties should be equipped with enough information about the mediation process and the different dimensions, including the legal, of their mediation settlement. Not to mention that the promise of parties' self-determination is empty without informed consent. In the occasion of self-represented parties engaging in court mandatory mediation, an assuring informed consent is needed the most. In addition, having the mediator adopting an evaluative

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[614] Id Nolan-Haley at 836 – 837 (footnotes omitted)

[615] "The *paternalistic* or "dictated autonomy" model, the mediator acts primarily as the parties' surrogate in assessing what outcome might be best. The parties' decision-making is supported by the mediator's presentation of selected information as well as by the mediator's explicit opinion of what should be done. Autonomy is exercised not only by the parties' agreement to mediate, but by their concurrence in the mediator's determination of what is best." See: Id Nolan-Haley at 815

[616] "In the *instrumentalist* or "limited autonomy" model, the parties' objective is simply to reach settlement. Their decision-making is strongly influenced by the mediator's presentation of selected information to each party to close the deal. The mediator highlights risks over any other kind of information-'You never know how the judge will rule.' The presumption is that taking the offer would signal that the case would be over. Autonomy is primarily exercised by the parties' agreement to mediate because the mediator exercises subtle influence to close the deal to reach agreement." See: Id

[617] "In the *informative* or "assisted autonomy" model, the mediator acts as an information conduit, providing parties with information that is relevant to their needs and interests. Receiving this technical expertise gives parties the means to exercise control. The mediator also assists parties in exploring individual values and in selecting outcome options that realize those values. The parties make the ultimate decision about what values matter and what outcome should be pursued. Decision-making is influenced by the factual and substantive information given by the mediator, and autonomy is maximized through the parties' use of information to control ultimate decision-making."see: Id

[618] "Finally, in the *deliberative* or "reflective autonomy" model, the mediator provides parties with the same factual and legal information described in the *informative* model but also helps the parties understand, articulate, and finally, choose the values that should govern their ultimate choices. Disputing parties are encouraged not simply to examine personal preferences, but to consider-through consultative processes, deliberation, and dialogue-alternative choices, their worthiness, and their implications for settlement. Decision-making is influenced by activist mediator behaviour in helping parties expand appreciation of values and then choose the values that are important in resolving their disputes. The mediator engages in moral deliberation and helps the parties prioritize preferences. Coercion is avoided. Autonomy is expressed in self-understanding and moral self-development. Disputing parties come to know more clearly who they are and how the various outcome options affect their knowledge of self and their identity." See: Id at 816

mediation approach and providing legal information is required to achieve fairness especially in that later occasion. Nolan-Haley confirms that permitting mediators to give legal information would trigger serious debates. Yet she concludes that fairness is what matters at the end of the day and reforms and modifications should take place to allow, lawyer and non-lawyer, mediators to provide legal information to the parties to promotes greater fairness in mediation.

With this line of thoughts, this research recognises that it will be very troubling for the mediation inner circle team raises much concern related to the very core of the mediation practice namely; jeopardising mediator's neutrality and bringing the mediation too close to the law. Chapter four of this work is to address the mediation inner circle team's concerns.

3.6.1 Mediators should only be held accountable for participation consent:

Michael Colatrella confirms that the duty of participation consent should be imposed upon mediators because it is inconsistent with the mediator's ethical duties of enhancing the quality of the mediation process.[619] Yet, he sets a serious argument that outcome consents should not be imposed as a duty on mediators and stress that Nolan-Haley's call of amending mediation rules and standards to allow mediators to assure outcome consent must be rejected.[620]

Michael Colatrella starts his argument by challenging one of the foundations Nolan-Haley sets in support of her stand which is the fiduciary relationship between the mediator and the parties of which she claims. He recognises that other scholars are supporting Nolan-Haley's view as one scholar has argued that courts should impose fiduciary status on mediators because of the confidence and trust that parties typically place in the mediator.[621] Yet, Colatrella asserts that mediators are not fiduciaries. Fiduciary can be explained as "acts on the client's behalf and in service of the client's welfare in the relevant domain." as a general definition, a "fiduciary is a person entrusted with power **. . .** to be used for the benefit of another and legally held to the highest standard of conduct."[622] With such understanding the

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[619] See: Id Michael T. Colatrella Jr at 744

[620] Id

[621] See: Id Michael T. Colatrella Jr at 739 where he says and cites: according to Arthur Chaykin; the mediator has a "powerful political position between the two parties [and] . . . because the "mediator actively seeks to gain the trust of the parties of the parties in order to maximize effectiveness." See Arthur A. Chaykin, 'Mediator Liability: A New Role of Fiduciary Duties' (1984) 53 U. CIN. L. REv 731, 744-45

[622] See: Id Michael T. Colatrella Jr. at 739 where he cites "Steven Joffe & Robert D. Truog, *Consent to Medical Care: The Importance of the Fiduciary Context, in* THE ETHICS OF CONSENT 353 (1st edn, Franklin G. Miller and Alan Wertheimer,2010)."

role of a mediator is inconsistent with the role of a traditional fiduciary; perhaps that is why no court has responded to the call of deeming mediators as fiduciaries. "… [m]ediators are not fiduciaries at all because by the very nature of their role they cannot have individualised loyalty, as might a doctor or a lawyer. A mediator's loyalty is to all of the parties to a dispute, not just one party. Mediators serve the parties by serving the process."[623] With the same convection, Jhon Lederach observed that "[a]dvocacy chooses to stand by one side for justice's sake. Mediation chooses to stand in connection to all sides for justice's sake."[624]As a supporter of all sides in mediation, the mediator cannot provide legal counsel to one side to the detriment of another side, however noble the motivation.[625] Colatrella concludes the fiduciary argument by saying "if traditional fiduciary obligations applied to mediators, and mediators were bound to obtain participants' informed outcome consent, they could be "damned" by one client for not informing him of his legal rights before accepting a settlement and be damned by the other client if he did because he breached his obligation of impartiality."[626]

With that end, Colatrella points out; requiring mediators to assure the parties with informed outcome consent shall oblige the mediators to provide legal advice which in turn create ethical and practical concerns namely breaching mediators' core value of neutrality and preventing non-lawyer mediators and facilitative mediators from practising mediation.[627] Yet, in acknowledgement of the importance of the outcome consent in addressing fairness concerns in mediation especially with the self-represented parties Colatrella presents several tools available to the facilitative mediators and other tools to the evaluative mediators of which can provide the parties with substantial assistance in respect of making better decisions regarding their outcome and understanding the consequences of a particular settlement without having the mediator obligated to assure outcome consent.

According to Colatrella facilitative mediators can assist the parties achieving outcome

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[623] See: Id Michael T. Colatrella Jr at 739 (footnotes omitted)

[624] See: Id Michael T. Colatrella Jr where he cites "John Paul Lederach, Preparing for Peace: Conflict Transformation across Cultures 14 *(1995).*"

[625] See: Id, Moreover Michael Moffitt says that in establishing a claim that a mediator is a fiduciary, a "[p]rospective plaintiff would need to overcome the structural difficulty of asserting that the mediator owes simultaneous fiduciary obligations to parties with opposing interests in the same matter at hand…Fiduciary obligations, cannot be structured responsibly in a way that would damn the mediator no matter what she did, yet holding a fiduciary obligation simultaneously to opposing parties risks exactly that." See: Id Michael T. Colatrella Jr at 740 where he cites "Michael Moffitt, 'Suing Mediators' (2003) 83 B.U. L. Rev. 147, 168"

[626] See: Id Michael T. Colatrella Jr at 740

[627] See: Id Michael T. Colatrella Jr at 741

consent by using the tools of enhancing communication or information gathering, help the parties to assess such information, ensure that the parties understand the terms of their settlement through the promotion of the understanding of the law.

By using questioning and encouraging the parties to share information the facilitative mediator shall enhance communication which in turn increases the gathering of different types of information; factual information, legal information and information regarding the parties' future alternatives.[628] Then by focusing on the elements of the procedural justice especially 'the voice' and' 'being heard' and using reality checking questions the facilitative mediator can help the parties assess the meaning and the value of the information they have acquired in an objective manner[629] to overcome the possible "cognitive dissonance"[630] Lastly, the facilitative mediator can assist the parties to achieve, without guaranties, outcome consent by spending enough time with the self-represented party and uses different explanatory language to make sure that such party understand the rights they may have waived by agreeing to a settlement and what the settlement terms entail.[631] To achieve that the facilitative mediator must promote a better understanding of the relevant law without providing legal information by pointing the parties to acquire such knowledge from available, credible and low or no cost public resources. [632]

As for the evaluative mediators; Colatrella acknowledges that evaluative mediators do provide legal information, opinions and can assist the parties in fashioning enforceable and durable mediated terms by helping the parties to understand their rights and responsibilities under the mediated agreement whether or not they are represented by counsel. Thus;

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[628] See: Id Michael T. Colatrella Jr at 754-758

[629] See: Id Michael T. Colatrella Jr at 759-761

[630] Colatrella mentions that "People tend to overemphasize the importance of facts (and law, too) that support the view of the world they wish to maintain and minimize or ignore the facts and law that undermine that preferred view." And cites "John S. Hammond, Ralph L. Keeney & Howard Raiffa, Smart Choices 194-95 (1999)."See: Id Michael T. Colatrella Jr at 759 He associate such "well documented phenomenon" with a psychological term called Cognitive dissonance which is defined: "is a state of tension that occurs whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent." Where he cites "Carol Taveris & Elliot Aaronson, Mistakes Were Made, But Not By Me 13 (2007); Joel Cooper, Cognitive Dissonance, Fifty Years Of Classic Theory 6-7 (2007)." See: Id Michael T. Colatrella Jr at 759

[631] See: Id Michael T. Colatrella Jr at 761-764

[632] See: Id where Colatrella provide the following as examples: "Many courts have created … law clerks, attorneys, assistants, or offices to assist unrepresented litigants. There is also a proliferation of information-sheets, pamphlets, websites and even kiosks designated for assisting *pro se* litigants with common litigation in small claims, landlord-tenant and family matters where a high percentage of litigants are *pro se. such as 'Self-Help,* Superior Court Of California-County Of Orange.*'* Private organizations and academic institutions are also providing free legal data bases and legal information that are lay user friendly; Such as Cornell University Law School's program of publishing legal resources and materials for people to better understand the law at no charge)."

evaluative mediators can help the parties in achieving outcome consent. Yet, Colatrella advice evaluative mediators with the following: never provide legal advice. When providing their legal information, evaluative mediators must do that even-handedly to maintain neutrality. Lastly, evaluative mediation should be used appropriately, cautiously and sparingly because of any potential risks that evaluative mediation possesses to procedural and outcome fairness.[633]

3.6.2 Reflections on the different views of the two teams regarding outcome consent:

In examining the different views presented by Nolan-Haley and Michael T. Colatrella; one can start by pointing out the common grounds where both teams stand; as it can be easy to notice that both agree on the following: Informed consent is constituted of participation consent and outcome consent. Informed consent is essential in addressing fairness concerns in mediation especially with the case of self-represented parties who are uneducated about the relevant laws. Mediators should be held accountable if failed to assure the parties with participation consents. The outcome consent raises two main concerns; the mediators' neutrality and the question of is mediation a practice of law. However, the disagreement between the two teams is regarding the mediator responsibility in respect of assuring outcome consent to the parties. Nolan-Haley argues that fairness must be the superior value in mediation and mediators' main goal; thus proposes that mediators' must be held accountable in assuring outcome consent to the parties. To achieve that she acknowledges that reforms regarding neutrality and regarding the question is mediation a practice of law should take place to allow mediators are educating the parties about the different dimension of their outcome even if the mediator has to provide legal advice. On the other hand, Michael T. Colatrella debates that mediators must not hold accountable in connection of assuring outcome consent and mediators must not provide legal advice. Colatrella asserts that neutrality is as important as fairness and both values should be maintained not sacrificed at the expense of the other. In finding the balance and maintaining both fairness and neutrality in mediation; Colatrella proposes several tools of which mediators can use in assisting, without granting, the parties to achieve outcome consent.

With a closer look at the Colatrella proposal, several observations can be the

[633] See: Id Michael T. Colatrella Jr at 764-770

emphasis. First, his proposal does not provide a reliable solution to overcome the challenge of the fairness concern regarding the self-represented parties in mediation as he says when concluding the tools facilitative mediators can use in promoting an understanding of the law "…these certainly are not equivalent substitutes for full legal representation…"[634] Second, in laying down his proposal some of the tools mentioned can be argued that they violate neutrality to some extent, especially the tool mentioned of having the facilitative mediator spend more time with the self-represented party to assure that such party understands the settlement agreement before consent; he acknowledges such shortcoming and defended it by saying "This is not acting impartially because the message, intent and effect are the same, to make certain that both parties understand and agree to the terms of the settlement to which they have explicitly agreed. This kind of consent benefits both parties."[635] The question here is: isn't the same argument can be used in defending mediators when providing legal advice to educate the weaker party for the sake of achieving efficiency and removing any ambiguity to ensure smooth enforcement and acceptance for the mediated settlements which in turn benefits all parties? Moreover, Colatrella noted that evaluative mediators when providing legal information should do so even handily to avoid jeopardising neutrality, which again the same can be used in defending mediators who provide legal advice that they can maintain their neutrality if they deliver their legal advice to both parties even-handedly. Lastly, he noted the importance of promoting a better understanding of the law and even facilitative non-lawyer mediators must at least acquire a general understanding of the relevant laws to be effective.[636]

4) Conclusion:

Enlightening the parties of a dispute of their legal rights is considered in some countries, following the civil legal system, an essential right within the formal legal

[634] See: : Id Michael T. Colatrella Jr at 764

[635] See: Id Michael T. Colatrella Jr at 761

[636] As Colatrella says "mediators must have a general sense of the relevant law in the dispute over which they preside. A mediator must have both mediation process knowledge and a minimal degree of substantive knowledge about the dispute. Substantive knowledge may be legal knowledge if the law is relevant, like in the case of proving illegal employment discrimination. Substantive knowledge might also be industry knowledge, such as understanding industry practices in commercial construction projects in a dispute over the contractor deviating from the construction plans. To be effective, a mediator might need both legal and industry knowledge." See: Id Michael T. Colatrella Jr at 762 where he cites "Joseph B. Stulberg, *Must a Mediator be Neutral? You Better Believe It!,* 95 MARO. L. REV. 829, 830 (2012)"

systems.[637] With the same line of thoughts, this study presented the concept of mediation informed consent as a possible tool to apply the theory of educated self-determination in practice. To fully adopt and apply such theory in a manner that can address the mediation outer circle justice concerns and to prove that mediation can deal with power imbalance and in fact an effective dispute resolution method; there is a need to follow Nolan-Haley's proposal of holding the mediator accountable for both the informed participation and outcome consent. Following such proposal would lead to raising many concerns from the mediation inner circle with respect to mediation core values namely, jeopardising mediation neutrality, confidentiality and bringing mediation too close to the law. These valid concerns are to be addressed in the following chapter.

[637] For example, the Egyptian legal system recognises that "enlightening" the parties of their legal rights is one of the courts essential responsibilities. See: Art. 4 of the law 1 for the year 2000 of the family court " يكون للمحكمة - فى اطار تهيئة الدعوى للحكم - تبصرة الخصوم فى مواجهتهم بما يتطلبه حسن سير الدعوى ،"

Chapter Four

Untraditional View to The Traditional Mediation Values and perception

(Addressing the mediation inner circle team)

1) Introduction:

It has been established that parties' self-determination is considered to be the core value of mediation.[638] The study has also highlighted that without adequate knowledge parties cannot practice or enjoy such value.[639] In testing the theory of educated self-determination, it has been suggested that holding the mediator accountable for both the participation and outcome informed consent can address justice concerns of mediation outer circle team.[640] With such understanding and proposal, the mediation inner circle team may object and claim that such proposal shall jeopardise other core values of mediation (neutrality and confidentiality) and brings mediation too close to the law.

This study advocates that the main reason behind the objection and concerns of the mediation inner circle team is the lack of clarity and unity when it comes to the true role of the mediator. This understanding can be supported by viewing the ongoing debate on evaluative against facilitative mediator style presented in the previous chapter.[641] One way to address that is to search for the true meaning of neutrality as a core mediation value and attempt to answer the question is mediation a practice of law? This is vividly important in connection with holding the mediator accountable for the mediation outcome informed consent. Furthermore, there is a need to review confidentiality as a mediation value, as confidentiality can stand as an obstacle against any reforms and improvement attempts in the field of mediation. Indeed, a strict confidentiality provision shall make the mediator immune against the parties complaints or the service provider review.

With such understanding and moving forward, a brief look on the topic of regulating mediation is essential as it is linked to honouring, understanding and setting the scope of any mediation value.

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[638] In general, see section one; especially the introduction chapter and chapter one of this work.
[639] Id
[640] See: Chapter three of this work.
[641] Moreover, on the notion that the mediation field lacks clarity and unity see chapter one of this work.

2) Regulating mediation:

There is a debate over the degree to which mediation should be regulated. Hopt and Steffek have identified two main models of regulating mediation adopted by the examined countries in their study extensive and restrained regulation. [642]

Starting with *the extensive regulation module*, "arguments raised in favour of a high regulatory density are consumer protection, the need for state promotion of mediation, legal certainty and the necessity to draw a line between mediation and professional legal services."[643] With such conviction, some countries tend towards an extensive and comprehensive, regulation of mediation. A clear example of this regulatory approach is given by Austrian law.[644] "In Austria, mediation of civil matters is intensively regulated by the Civil Law Mediation Act (*Zivilrechts-Mediations-Gesetz*). This is supplemented by the Civil Law Mediator Training Regulations (*Zivilrechts-Mediations-Ausbildungsverordnung*), which set out training requirements in the binding form and relatively extensive detail. Cross-border mediations in Europe are regulated in a separate law, the EU Mediation Act (*EU-MediationsGesetz*).[645] The general legal structures comprise further civil and procedural law regulations as well as professional rules for lawyers and notaries in the conduct of mediation. There are also ethical guidelines for mediators prepared by a mediator umbrella organisation and developed from the European Code of Conduct for Mediators.[646]"

On the other hand, the *restrained regulation module* supporters believe that "the institution of mediation is as yet insufficiently established or widespread for any need for regulation to be assessed and met. On the contrary, the precipitate regulation would hinder the development of mediation methods by the practitioners, academics and associations involved. Any comprehensive regulation of mediation is also partially rejected on the grounds of an underlying incompatibility with the intrinsic nature of mediation as a discrete procedure outside civil litigation."[647] With such a stand the development of mediation and the training of

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[642] Hopt and Steffek conducted a comprehensive comparative study on the regulation of mediation involving the Roman legal system (eg. France, Italy, Spain), Germanic legal system (Germany, Austria, Switzerland), Nordic (Norway), Anglo-American (USA, England, Ireland, Australia, New Zealand) and others. See: Edited By: J. Hopt & Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (1st, Oxford University Press, 2013) 8-18

[643] See: Id Hopt and Steffek at 18

[644] Study also provided France and Japan as examples of such approach of regulation; see: Id Hopt and Steffek at 18

[645] See: Id Hopt and Steffek at 19 where cited "Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivilund Handelssachen in der Europäischen Union (EU-Mediations Gesetz – EU-MediatG), BGBl. I 2011/21."

[646] See: Id where cited "Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf"

[647] See: Id at 19

mediators in these countries remain in the hands of private associations and other private initiatives. Nevertheless, the legislature intervenes selectively, largely in the area of the law of costs, so as to promote the exercise of self-determination and the free play of market forces.[648] Demonstrative examples for this model of regulation is provided by England[649] and the Netherlands[650].

Without engaging in such debate, it is important to note here that the legislature has an important role to play in addressing both concerns of the mediation inner and outer circle teams. Capturing the true meaning of the different mediation value and adopting the theory of educated self-determination can bring clarity and unity to the mediation field. As for the search for the true meaning of the different mediation values, we start by mediation neutrality.

3) Mediators' Neutrality – What does it actually mean?

In the search for the meaning of neutrality as a broad concept; most dictionaries offer the following: "Neutrality is: the condition of being neutral in a disagreement or war"[651] in an attempt to understand such a vague definition; neutrality can mean "the refusal to ally with, support, or favour any side in a dispute; 'belonging to neither side nor party'."[652]

The question here is; does the mediators' neutrality fall under such understandings of neutrality? The importance of such question appears with a closer look at the several challenges surrounding setting an acceptable unifying definition for mediator neutrality.

First, the unique nature of the mediators' role dictates intervention and support which in turn contradicts with the traditional concept of neutrality; in elaboration, enhancing the communication levels is considered to be one of the most important objectives in

[648] See: Id

[649] See: Id where Hopt and Steffek say: "The English legislature has largely restricted itself to creating cost incentives for the use of mediation in general civil and commercial proceedings, as well as to supporting it through obligations in pre-action proceedings. In England there is also the interesting example of the Civil Mediation Council, a state supported but privately constituted organisation that ensures a degree of unity and minimum standards among private mediation associations by means of issuing a quality seal." (Citations have been omitted)

[650] See: Id where Hopt and Steffek say "The Dutch legislature follows a similar regulatory approach and has intervened only selectively in the field of the law of costs, specifically by providing legal aid. Instead of state law, private organisations provide private regulation, model rules and codes to establish a framework for mediation. These include a standardised mediation clause, a model mediation agreement for the relationships between the parties and the mediator, regulations on the process of mediation, a code of conduct for mediators, regulations for formal complaints procedures against mediators and disciplinary procedures."

[651] See: Cambridge dictionary at: http://dictionary.cambridge.org/dictionary/english/neutrality and also see http://www.thefreedictionary.com/neutrality both accessed in 26/02/18

[652] See: Susan Nauss Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2007-2008) 42 USF L Rev 577 at 580 where she cites "THE AMERICAN HERITAGE DICTIONARY 460 (1983)."

mediation.[653] To achieve that, mediators must successfully build rapport with the parties and that shall require from the mediator to demonstrate excellent active listening skills (showing empathy), the use of caucus, assuring confidentiality, asking questions (ex. how does that make you feel?) and acknowledgment (ex. I feel your pain).[654] All these legitimate mediation techniques can be perceived to be a breach of neutrality without even mentioning the tool of reality checking and providing legal advice.

Secondly, another challenge is the vague concept of mediator neutrality; it is often used as an umbrella term incorporating a variety of concepts, therefore creating an ambiguous concept to be defined.[655] Even facilitative mediators who hold the mediation neutrality as their highest value are incapable of articulating how neutrality actually functions in practice.[656]

Thirdly, many scholars have reached a conclusion that the unique nature of the mediator's role would lead to an unavoidable influence to the outcome of the process.[657]

This makes it clear that mediators play a very different, active, intervening and supportive role in the mediation process. Perhaps such observation is the reason that there are endless definitions afforded to the concept of mediator neutrality and equally as many criticisms of those definitions.[658]

Scholars and policymakers have followed several approaches in response to these challenges. Some have decided to level down the concept of neutrality by using the term impartiality instead.[659] Such approach is to recognise and allow mediators' necessary intervention, yet demanding them to do so in an impartial manner. This approach has been criticised by scholars who assert that defining neutrality using the concepts of impartiality

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[653] See: Chapter one of this work.

[654] A legitimate and recognised set of skills in many mediation training courses; for example see: CEDR, *The Mediator handbook* (4th, 2004) under skills for effective mediation at 106 and also in the mediation academic writings for example see: Richard Salem, 'The Benefits of Empathetic Listening ' [2003] Conflict Research Consortium, Uni of Colorado .

[655] K Douglas and R Field, 'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) eLaw Journal at 4

[656] See: Id Douglas and Field at 4

[657] For example see: B Mayer, 'What We Talk About When We Talk About Neutrality: A Commentary on the Susskind Stulberg Debate' (2011) 95(3) Marquette Law Review 861 also see: Becker D, 'The Controversy over Mediator Neutrality: Input from New Zealand Mediators' (2013) [Master of Laws Thesis University of Otago. P. 20

[658] See: B. Mayer, 'What We Talk About When We Talk About Neutrality: A Commentary on the Susskind Stulberg Debate' (2011) 95 (3) Marquette Law Review at 860

[659] Some mediation standards required impartiality instead of neutrality and defined impartiality by "freedom from favouritism and bias in words, actions and appearance" see: Hawaii Mediators Court Guidelines available at http://www.courts.state.hi.us/docs/docs2/guidelines.pdf accessed at 26/02/18

and/or non bias is invalid as it is impossible to intelligently expect mediators wholly to disassociate themselves from their emotions, beliefs and values.[660] Any mediator's actions and decisions in the process will unavoidably be guided by these feelings.[661] As all the interventions or non-interventions by the mediator are founded upon the mediator's perceptions and opinions, a mediator can therefore not be regarded as impartial.[662] Moreover, scholars found that well-recognised mediator techniques such as summarising the parties' positions may be perceived as mediator bias by the parties.[663]

With that end other scholars decided to avoid confrontation in dealing with the challenge by referring to impartiality without defining it, for example, several states refer to impartiality by simply requiring a mediator to be impartial without giving any meaning or standards for such requirement.[664]

Others have decided to abandon the concept of mediator neutrality altogether. According to such view, scholars assert that mediators should be free from the neutrality ethical obligation to allow them to effectively intervene and carry on with their role and most importantly to have the mediators capable of dealing with the power imbalance dilemma in mediation.[665]

To better appreciate the gravity of the mediator neutrality dilemma; reviewing the findings of a recent study investigating the concept of mediator neutrality can be insightful as it suggests that "Mediator neutrality has no consistent or comprehensible meaning and is not capable of coherent application. Requirements for mediator neutrality encourage covert influencing tactics by mediators which itself threatens party autonomy. Mediator intervention ensures: (a) ethical and moral implementation of justice; (b) removal of epistemological

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[660] E Rock, 'Mindfulness Meditation: The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice' (2006) 6 (2) Cardozo Journal of Conflict Resolution at 153

[661] See: Id Douglas and Field at 9

[662] See: S. Douglas, 'Neutrality, self-determination, fairness and differing models of mediation' (2012) 19 James Cook University Law Review at 25. Yet it is important to note that this same observation applies to any human agent in the justice system, even Judges. In Terry Maroney's "Angry Judges" 2012 *Vanderbilt Law Review*, vol. 65, no. 5, pp. 1205–1286 she argues that human emotions are essential to good judging.

[663] A. Garcia and others, 'Disputing Neutrality: A Case Study of a Bias Complaint during Mediation' (2002) 20 (2) Conflict Law Quarterly 223

[664] For example see: Mediator Standards of Conduct the Michigan Supreme Court where impartiality provision states: ''A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. '' available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf last accessed at 26/02/18

[665] For example, see: M Noone and L Ojelabi, 'Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014) 45(1) Washington University Journal of Law & Policy at 166 also see: R Zamir, 'The Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic' [April 2011] 11(3) Pepperdine Dispute Resolution Law Journal at 49

implications of subjective fairness; (c) compensation for lack of pure procedural justice in the mediation process. Party autonomy requires mediators to intervene ensuring: (a) parties adequately informed of the law; (b) equal balance of power."[666]

In an attempt of providing practical solutions in dealing with the mediator neutrality dilemma, Susan Exon in her research presented several proposals.[667] First, *The No-Action Approach to Developing Impartiality Requirements*: for the districts which haven't yet established mediators ethical standards Exon advised them to take no action in creating one; instead they should wait, allowing the concept of mediation neutrality to develop and become clearer before including such concept to mediator's ethical standards.[668] While such advice does not actually provide a solution she presents: secondly, *Redefine Mediation to Remove the Requirement of Mediator Impartiality:* in respect of the scholarly view that challenges neutrality as a mediation value.[669] Exon observed that the traditional mediation definitions include key values such as parties' self-determination and mediator neutrality. Moreover, she observes that the mediation field is evolving by industry needs and calls to address fairness concerns, which created a new trend toward ensuring informed decisions and balancing power between the parties. Thus; she proposed that the definition of mediation should be redefined to keep pace with all the changes occurring in the field. [670] Exon Explains by saying: "The new, simplified definition of mediation also removes requirements of mediator impartiality... Concurrently, existing Standards would need to be modified to delete the requirements of mediator impartiality. By removing impartiality requirements from corresponding Standards, regulators would enable any and all types of mediator styles and mediation models to comply simultaneously with the broader definition of mediation and the simplified Standards. All mediator styles, therefore, could stand side-by-side with ethical Standards that have deleted

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[666] See: 'In The Context Of Mediation, Is Safeguarding Mediator Neutrality And Party Autonomy More Important Than Ensuring A Fair Settlement?' International Journal of Law in the Built Environment. (Under Review)

[667] See: Susan Nauss Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2007-2008) 42 USF L Rev 577, 611-620

[668] See: Id Susan Exon at 611-612

[669] See: Id Susan Exon at 611-612 where in her research referred to the work of Robert D. Benjamin where he argues that mediators should be "balanced" in their communications with parties to protect both parties rather than neutral. Benjamin theorizes that a mediator cannot be neutral since she becomes part of the system (Exon cites: Robert D. Benjamin, *Understanding "Operative Mythology," in* The Effective Negotiation and Mediation of Conflict: Applied Theory and Practice Handbook 2.3 (9th ed. 2003).) also mentioning the work of John Lande of which he believes in the eclectic nature of mediation. He makes also argue that existing mediation values, such as confidentiality and neutrality, may not be absolutely necessary. (Exon cites: "John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. Disp. RESOL. At 333"

[670] See: Id Susan Exon at 612-614 where she proposed that the new mediation definition should be "a conciliatory process of using a third party to assist disputants to reach a desired goal."

requirements of mediator impartiality."[671] Exon acknowledged that such proposal could unleash a wave of criticism[672] although she presents a counter argument for such criticisms[673], yet she proceeds with the third proposal which is: *redefine mediation to suit mediator styles*. In this proposal, she acknowledged that dove mediators and eagle mediators could provide two entirely different processes. Thus; she argues that the process delivered by dove mediators can maintain the traditional definition of mediation as they are expected to be able to respect neutrality and impartiality in mediation. As for the eagle mediators and their tendency to evaluate and even uses heavy-handed techniques needs to be freed from the neutrality obligation. Consequently, she proposes the process that eagle mediators deliver should be called mediated settlement conference, and the definition of such a process should not include neutrality.[674] Finally, Exon suggested *Creating an organisational Hierarchy of Values Within a single set of Mediation Standards* where all the possible values of mediation, along with neutrality, should be included and recognised in mediation standards. Yet in the case of conflict between such values, the essential value shall trump and be applied over the rest. The complexity of such alternatives is deciding which value is more important than the other. Exon offers the example in respect of informed consent and parties self-determination where the mediator finds that a party cannot adequately practice party self-determination due to lacking essential knowledge regarding his legal rights, for example, the final proposal can dictate the mediator to sacrifice his neutrality by educating the weaker party in the case of power imbalance; giving hierarchy to self-determination value and fairness to trump the mediation neutrality value.[675]

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[671] See: Id Susan Exon at 614

[672] Exon predicts several criticisms stating that scholars such as Moffitt can argue that "The proposal of a mediation broad definition can be Impractical and severe because it appears to push the mediation field backward rather than allow it to progress forward… As a broad definition is not helpful if a descriptive definition lacks the dual components of structure and behaviour." See: Id Susan Exon at 614 where she cites: "Michael Moffitt, 'Schmediation and the Dimensions of Definition' [2005] 10(I) Hav NEGOT L Rev 69, 89"

[673] Exon defends her proposal and responds to Moffitt criticisms by several counter arguments such as; the several mediator definitions such as "facilitative mediator" and "family law mediator" can contribute in enhancing the behaviour competent of which may be lacked in the broaden simplified mediation definition. Moreover, Exon emphasis that such criticism fails to acknowledge several practical challenges such as; most jurisdictions lack enforcement mechanisms in connection of complying with mediation values such as neutrality also Without a mandate for mediator licensing, anyone may fit to act as a mediator which all indicates the importance of adopting the her proposal of a broaden mediation definition free from neutrality requirement. See: Id Susan Exon at 615

[674] See: Id Susan Exon at614 – 617

[675] See: Id Susan Exon at 618- 619

3.1. In conclusion

The broad understanding of the concept of neutrality of which governing adjudication should not be stretch to govern mediation as well, for several reasons.

The role of the third party in adjudication is quite distinct from the role of the mediator. In elaboration; the third party in adjudication has the power to decide over the outcome and being neutral through the process is a strong indication that the outcome they will deliver shall be objective and fair. Furthermore, it is visible for the third party in adjudication to maintain neutrality because the passive, non-intervening role they play in the process of adjudication especially in the adversarial legal system. Lastly, there are clear rules and mechanisms to assess and enforce the neutrality requirement in adjudication. With that in mind, mediators play a very different role in mediation as the mediator positive, interactive, supportive and intervening role is a key aspect of the mediation process, not to mention that mediators do not control the outcome as a judge and arbitrator do. Moreover, some argue that the hallmark of a successful mediator is that both parties leave the mediation equally believing that the mediator was on their side;[676] as it can be a strong indicator that the mediator has successfully managed to build rapport with each party and consequently enhanced the communication level.

Other important reason, the application of the broad traditional understanding of neutrality in mediation shall restrain mediators and leave them restrained especially in connection with addressing the fairness concerns and dealing with the self-represented parties in mediation.

Lastly, there are many practical challenges in implementing neutrality with its traditional meaning in mediation. For example, the use of caucus and a strict application of the confidentiality protection in mediation shall be a serious obstacle in proven a case of breaching neutrality and in turn present a serious challenge in placing enforcement mechanisms in respect of mediation neutrality.

All these reasons and more presents the need for the mediation filed to adopt a different understanding in respect of the concept of neutrality. Such understanding should comply better with the unique nature of the mediator role, allow mediators to deal with the fairness concerns more effectively and capable of coherent application.

[676] A common repeated advice that I have personally received from mediators throughout my mediation training and practice.

This chapter proposes that mediation neutrality should be limited to the assurance that the mediator is free from any possible conflict of interest.[677] Such proposal can preserve the integrity of the mediation process by confirming that mediators' ultimate motive is to assists all parties. Moreover, it shall allow both dove and eagle mediators to function effectively with addressing the fairness concerns by removing ethical requirements of which vague and almost impossible to comply with. Furthermore, a simple disclosure before the initiation of the mediation process can provide smooth enforcement for such requirement without conflicting with the confidentiality protection. Lastly, many existing mediation standards share the same line of thoughts and treat mediation neutrality, or impartiality, as a conflict of interest consideration.[678] For example, California Court rules links impartiality with the requirement of disclosing any possible conflict of interest as it states:

"(b)Disclosure of matters potentially affecting impartiality: (1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include: (A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and (B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1."[679]

One more important evidence to support this proposal is the ongoing UNCITRAL have a similar view on the topic of mediation as it states:

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[677] One can question this proposal by asking two questions; a mediator with no conflict of interest may make a snap judgement about one party at the start and then behave in a very biased manner. One could equally imagine someone with huge conflict of interest e.g. a father, a colleague or boss mediating with complete impartiality. How would the substantive dimension of neutrality be assured? In the first scenario the concept of participation consent means that the party is under no obligation to remain in the mediation once they feel the mediator is no longer helpful for any reason, adding to this that one of the main purposes of the mediator is to help both parties. In the second scenario participation consent would allow the party to veto the mediator upon such a disclosure of vested interest; they are under no obligation to remain in the mediation or indeed to use this particular mediator. Should the party acknowledge and accept the neutral after disclosure this point becomes a non-issue.

[678] For example: Indiana Rules of Court Rules for Alternative Dispute Resolution rule 7.4(E): prohibit a mediator from taking part in a mediation where she is related to, or employed by, one of the parties. Also, Colorado Model Standards of Conduct for Mediators Rule II. A.: Impartiality: "The mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality." Moreover, The Wisconsin Association of Mediators (WAM) Ethical Guidelines for the Practice of Mediation Rule 4.1 Impartiality: "we disclose to the parties any dealing or relationship that might reasonably raise a question about our impartiality. If the parties agree to participate in the mediation process after being informed of the circumstances, we proceed unless the conflict of interest casts serious doubt on the integrity of the process, in which case we withdraw." Available at: http://www.wamediators.org/publication/ethical-guidelines-practice-mediation last access 26/02/18

[679] See: California Rules of Court 2015 Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal available at http://www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_855 last accessed at 26/02/18

Article 4 — Grounds for refusing to grant relief

"1. (e) There was a failure by the conciliator to disclose circumstances to the parties that raise justifiable doubts as to the conciliator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement"[680]

This all confirms the line of thoughts that mediation neutrality must be limited to the absent of conflict of interest.

With this understanding of mediation neutrality; mediators can effectively educate the weak party with the needed knowledge, even the legal, and as far as providing legal advice, of which can bring balance and address the fairness concerns in mediation. This conclusion leads to the importance of answering the question is mediation a practice of law.

4) Is Mediation a Practice of Law?

In the search for an answer to the question "is mediation a practice of law? the work of Clark can be seen as the ideal reference; in his book, he emphasised that the answer depend on one's perspective on what mediation entails and what the practice of law actually involves.[681] He acknowledges that bringing such a question to the surface would be particularly puzzling for the dove mediators who practice a 'lawless' type of mediation; where the legal issues have barely any relevance to their pure facilitative approach of the mediation process.[682] Dove mediators do not advise parties, offer an evaluation of their legal positions nor do they express views on likely court outcomes. Yet with all the developments occurring in the mediation field which allowed the eagle mediators to hold a steady foot in the arena with their tendency to focus on the legal matters of the disputes; has led scholars to suggest that mediation amounts to the practice of law. As Menkel-Meadow, has pointed out, "to the extent that mediators, especially those who work within court programs or by court referral, 'predict' court results or 'evaluate' the merits of the case (on either factual or legal grounds),

[680] See: United Nations Commission on International Trade Law (UNCITRAL) Working Group II (Dispute Settlement) Sixty-seventh session Vienna, 2-6 October 2017 project on: An International convention on Settlement of commercial disputes International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation. The definition is under Article 2.4 Available online: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html last visited 28/02/18

[681] Id

[682] Id

they are giving legal advice".[683] Besides providing legal advice, mediators also may be involved in drafting legally binding settlements as an attempt to address fairness concerns associated with self-representative parties. Clark emphasised that these activities have made it clear that in some contexts mediators in their practice can carry out functions of a legal colour. However, the question here: is it enough to paint such activities as a legal practice?[684]

Clark examines the different approaches set by scholars and policymakers in addressing such question starting with analysing whether *the relationship between the party and the mediator resemble the client-lawyer relationship.* In this sense; the principles laid out by the ABA section on dispute resolution concluded that mediation did not amount to the practice of law because their analysis indicates that mediators do not represent the parties at the mediation in the same way that a lawyer does, even if legal issues were discussed between them, given the absence of any pervading client-attorney relationship between the mediator and the parties.[685] This stand has also been supported by scholars who suggested that mediators cannot be seen to be practising law even when providing legal advice within mediation and drafting settlements. For example, John Cooley in defending such position asks "Where is the representative relationship?...What is the fiduciary duty owed by whom and to whom?…How can the mediator receive confidential information from two parties with adverse interests and be practising law concerning either of them – or both of them? How can a mediator accept a service fee from two people with adverse interests, yet be practising law with respect to both of them? If a lawyer were practising law in such a situation, would not he or she be in a classic conflict of interest situation?"[686]

Another approach in answering the question *is the level of the parties' reliance*. In elaboration, when parties seek out and rely upon the legal advice provided by the mediator in the same manner that parties would work with their lawyers; then mediation must amount to the practice of law.[687]

With that end, Clark suggests a different approach of which shifting the question of "is mediation a practice of law?" to the question of "when is mediation a practice of law?" In elaboration, this approach acknowledges the need to analyse better the mediators conduct in

[683] See: Menkel-Meadow C, 'Is mediation the practice of law?' (1996) 14(5) Alternatives High Costs Litigat 57
[684] See: Id Bryan Clark at 92
[685] See: Id Bryan Clark where he cites "American Bar Association (2002)."
[686] See: Id Bryan Clark where he cites "Cooley J (2000) Shifting paradigms: the unauthorized practice of law or the authorized practice Of ADR."
[687] See: Id Menkel-Meadow C, 'Is mediation the practice of law?' at 55-61

connection with providing legal advice and drafting settlements to clearly determine when the mediator may be engaging in a case of practising law.[688]

Starting with *the legal advice*: Clark points out that several US state rules have differentiated between providing legal information and providing legal advice; considering only the last to amount to the practice of law.[689] For example, the Virginia Guidelines on Mediation and the Unauthorized Practice of Law; instruct that "a mediator may provide the parties with legal information but may not give legal advice".[690] In explaining the different between legal information and legal advice Clark resort to the work of Schwartz and clarify that "Legal advice in this context amounts to the applying of law to the facts of the case in such a way as to (a) predict the outcome of the case or an issue in the case, or (b) recommend a course of action based on the mediator's analysis. Mediators may, however, issue general, legal procedural information and legal resources and ask reality-testing questions that engage legal issues germane to the dispute."[691] Similarly in Germany, the process of mediation itself does not amount to the provision of legal services, yet non-lawyer mediators are prohibited from indulging in activity deemed to amount to legal practice within mediation such as proposing legal solutions, evaluating underpinning legal issues.[692]

Many criticisms have been raised against such stand. First, it can affect the efficiency of the mediator role as the American Bar Association (ABA) noted that "[w]here a particular state's definition of the practice of law would permit a mediator to discuss legal issues with the parties, including offering a neutral perspective on strengths and weaknesses in a case, the parties and mediators would be ill-served by rules similar to those adopted in Virginia. . ."[693] Second, within the midst of a mediation session it can be incredibly challenging to determine if the mediator has actually managed to stay within the border of providing legal information or have crossed to the zone of providing legal advice; especially with the use of reality checking questions and the mediator's tone and body language.[694] Lastly, it can be practically difficult to enforce such stand in mediation with the application of a strict confidentiality

[688] See: Id Bryan Clark at 92-93
[689] See: Id Bryan Clark at 93
[690] See: Id where Clark cites: "Drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, and the North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999"
[691] See: Schwartz J, 'Laymen cannot lawyer but is mediation the practice of law?' [1999] Cardoza Law Rev 1737
[692] See: Id Clark cites "the Legal Services Act 2008 ("Rechtsdienstleistungsgesetz") S 2 Abs. 3 Nr. 4."
[693] See: Id where Clark cites "American Bar Association (2002)"
[694] See: Id

provisions.[695]

As for *drafting legal agreements;* when a mediator record the parties' settlement agreement, the ABA in its guidelines sets a line to determine when such activity can be considered as a practice of law. According to the Guidelines: "When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys."[696] Clark observes that this understanding comes in alliance with the scholarly stand mentioned above of which the level of parties' reliance on the mediator as a method of determining if the mediator activity considers as a practice of law.[697]

Clarks conclude this topic by saying "The reality is that mediation has in many contexts become more infused with the law, legal norms and practices. No more is this true than in the court-connected context, where the process has thrived. Particularly where the parties themselves are not legally represented and the need for lawyers to respond to the parties' legal requirements becomes compelling," and proposes that "At the very least, within the court-connected context, it may be contended that, just as lawyers require training in mediation techniques, non-lawyers should receive some education in law"

4.1. In conclusion

The issue of mediation and the practice of law can be viewed as a matter of the dove mediators' survival in the field. In order to survive; the dove mediators need to prove that they can compete with the eagle mediator in addressing the fairness concerns generated from the unrepresented parties especially within the court-connected context; by demonstrating the

[695] See: Id

[696] See: Id at 49 where Clark cites: "American Bar Association (2002), section headed, "drafting legal agreements"."

[697] See: Id

ability to educate the weaker party and provide the needed legal requirements. In settling the issue of mediation and the practice of law or in other words the survival of the dove mediators, three possible solutions can be proposed.

The first proposal, the dove mediators can give up the fight and leave the eagle mediators to dominate the mediation field. Considering the mediation practice, a practice of law where only lawyers can act as mediators shall effectively address the fairness concern associated with the self-representative parties especially with the proposed understanding of mediation neutrality mentioned above. Yet, such solution can be very costly because by sacrificing the dove mediators; the mediation field shall be negatively affected by struggling to meet with the quality proponents. To address such concern the eagle mediators need to be soften, meaning getting eagle mediators more sensitive towards the quality proponents and more aware of the importance of the non-legal aspects of the dispute, perhaps by requiring them to undertake facilitative trainings, yet even extensive training will not be able to produce the same prime facilitative service that dove mediators provide, leaving the landscape of mediation forever changed to focus on efficiency rather than the quality proponent.

The ***second proposal*** entails that the dove mediator decides to fight for their survival by recognising the need for them to adapt and develop in order to compete with the eagle mediators to maintain their standing in the field. This proposal comes in alliance with the scholarly call that facilitative mediators should attempt to inform themselves on the relevant laws associated with their case.[698] The second proposal sets two stages for the dove mediators to accomplish; first, dove mediators should be required to specialise in a certain type of cases. For example, a dove mediator would announce that they specialise in mediating custody cases in family disputes which requires that they fulfil the second stage; to be sufficiently well versed in the associated laws, in this example, regarding the custody cases in family law. Such a proposal would allow the dove, non-lawyer, facilitative mediators to effectively respond to the fairness concerns associated with the self-representative parties by demonstrating their ability to educate the weaker party about the legal matters if needed, even if they are not coming from a strong legal background like the eagles. When dove mediators reluctantly act against their nature and uses the knowledge and experience they possess in their specialised field and decides to go as far as to provide legal advice to the self-representative parties to assure a fair settlement; is still should not be considered to be a practice of law and they

[698] For example see: Id Bryan Clark and Id Michael T. Colatrella Jr.

should not be required to be lawyers. In support of such point of view; according to UK laws one can apply to become a magistrate judge without any formal judicial experience or even specific legal qualifications. The candidate will receive full training for the role, and also will get a legal adviser in court to help him or her with all expected questions about the law.[699] With this in mind, if some jurisdictions allow acting as a judge without being a lawyer, a mediator should be able to go as far as provide legal advice or drafting legal agreements, when undertaking sufficient training, without being a lawyer. The downside of such proposal is that it can taint the Purist orientation of the dove mediators by asking them to be concerned about the legal matters of the dispute. In response to such a concern, the dove mediators shall not change their orientation; simply be prepared for a last resort, all other aspects of their practice can remain unchanged. The dove mediator will use this added weapon in their arsenal only when they feel that one party is being directly disadvantaged based on their lack of understanding of the associated laws, rather than acting like an eagle mediator who will use their legal expertise as a first, rather than last, resort.

The third proposal recognises the importance of maintaining the dove's beautiful spirit. Therefore this proposal suggests that the dove mediators should be fought for by the system. The system and the service provider should be the one who takes on the responsibility of addressing the fairness concerns and relieve the dove mediators from the burden of educating the weaker party about the legal aspects of the disputes. This proposal requires from the dove mediators to explain their limitation regarding educating the parties of the legal matters of the dispute when securing the participation consent and only accept to mediate cases where the parties are well informed of their legal rights. In return, the service provider should ensure that the parties are well informed about their legal rights, especially in the case of a mandatory mediation referral, when they are assigned to a dove mediator. This can be accomplished by having a legal aid system in place, an affiliation with university law school legal advice programmes, or establishing a legal assistant office[700] inside the court or community mediation centre as a fundamental part of the mediation service that they provide. Another option would have a judicial review of the mediated settlement agreements to make

[699] See: the official UK governmental website on how to become a magistrate available at: https://www.gov.uk/become-magistrate/can-you-be-a-magistrate last accessed at 26/02/18

[700] For example, according to Egyptian family law number 1 for the year 2000 organising the family disputes article 3 that the court should assure that the parties have received the needed legal assistance by either appointing a lawyer for them or refer them to the legal assistant office placed in the legal family courts.

sure that the settlement is fair and complies with the law.[701]The downsides of such a proposal are not likely to be of relevance to private mediation companies whose services tend to be expensive, with wealthy clients armed with well-informed legal representation; yet for the public service providers like the courts and community mediation centres concerns arise that the proposed process can be expensive and consume several resources; when considering these concerns we must bear in mind that the main goal of inviting mediation to play an important role in the arena of resolving disputes in communities is to enhance the quality of justice in the society and recognising what dove mediators can provide in respect of the quality proponent. Therefore, when courts invite mediation to bask within its formal system, they should not be classified as selfish courts[702]and should be prepared to allocate the appropriate resources to ensure that fairness is delivered through all of its services. The same should apply to the community mediation centres, recognising that allocating funds for their services should not just cover providing mediators but should also provide lawyers for the self-represented parties especially when the dove mediators are the ones providing the mediation; again accessing NGO's, law schools and local legal aid systems would help reduce the cost to the centre and the courts, making such a proposal more appealing and accessible.

With this new understanding of mediator's neutrality and the importance of being familiar with the law, there is another important value that can stand as an obstacle behind holding the mediator accountable and the application of the educated self-determination theory. The meaning, scope and limitation of mediation confidentiality are to be discussed in the following.

5) Mediation Confidentiality:

> *Rogers VP described confidentiality as going to the 'root of the mediation process'. He stated that unless there was compliance with the principles of confidentiality: [T]he whole mediation system will come to naught and people will use mediation as a tactical advantage and then seek to introduce evidence which has come from an unsuccessful mediation and somehow bring that into court proceedings. That is quite contrary to anything, which was envisaged in the process of mediation.*[703]

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[701] In the United States two cases have been subject to a judicial review after being settled in mediation and the judge found that the settlement is not fair and such settlement should not be enforced. See: Kullar v. Footlocker, Inc. 168 Cal.App.4th 116, decided in 2008 and High-Tech Employee Antitrust Litigation, 11-cv-2509. 2014

[702] See: Judge Brazil discussion in that regard mentioned in section two introduction chapter of this work.

[703] See: In the Hong Kong case of *S v T*, [2011] 1 HKLRD 534 [2010] HKFLR 234 (CA) at paras 3 and 4. cited with approval in *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD 897 mentioned in the work of Nadja Alexander, *The Mediation Manual: Hong Kong Edition* (1st, LexisNexis, 2014) 58-59

One of the main purposes of mediation is to enhance communication between the parties, and an essential milestone in achieving that is to build rapport and create a safe atmosphere for parties to speak and share information. [704] Mediators assure confidentiality in the outset of the mediation process and stress on it all across the process as an effective way of building trust, safety and ultimately enhance communication.[705] Mediation scholars acknowledge that confidentiality is considered as an essential quality of mediation as it ensures the integrity of the mediation process, protects the interests of all mediation participants, and presents an attractive proposition to many parties as they can disclose information to the other party and the mediator which they would otherwise withhold in a public hearing which in turn; the extended information basis reveals possible solutions that the parties could not discover without the disclosure.[706]

5.1. The importance of protecting mediation confidentiality:

To present the argument of protecting confidentiality in mediation; the following four key points can be elaborated as a chain reaction on the importance of mediation confidentiality:

1. Confidentiality promotes candour in mediation.
2. Candid discussions lead to successful mediation.
3. Successful mediation encourages future use of mediation to resolve disputes.
4. The use of mediation to resolve disputes is beneficial to society.

Confidentiality Promotes Candour in Mediation:

The American Uniform Law Commission explains: "[M]ediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and … encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."[707]

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[704] See chapter one of this work.

[705] See: Chapter one of this work.

[706] See: B Clark and C Dawson, 'ADR and Scottish commercial litigators: a study of attitudes and experience' [2007] 26 (April) Civil Justice Quarterly 228 and Nadja Alexander, *The Mediation Manual: Hong Kong Edition* (1st, LexisNexis, 2014) under confidentiality chapter 2 page 58 and Id Hopt and Steffek at page 50

[707] National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act, *Prefatory Note* (2003)

Mediation confidentiality thus serves to "assure prospective [mediation] participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement."[708]

The extent of this effect is not readily measurable. It is common sense, however, that a person will be more likely to disclose sensitive, private, embarrassing, or harmful information if the person receives assurance that the disclosure will not later be used against her.[709]

Candid Discussions Lead to Successful Mediation:

"It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful."[710] The California Law Revision Commission explains: "A frank settlement discussion can help disputants understand each other's position and improve prospects for a successful, mutually satisfactory settlement of the dispute. A gesture of conciliation or another step towards compromise can increase the likelihood of reaching an agreement".[711]

Similarly, the California Supreme Court has perceived that candour is "necessary to a successful mediation."[712] According to the Court, mediation "demands … that the parties feel free, to be frank not only with the mediator but also with each other."[713] The Court has thus warned that "[a]greement may be impossible if the mediator cannot overcome the parties'

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[708] See: the California Law Revision Commission study on Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Preliminary Analysis of Relevant Policy Interests at Memorandum 2014-6 where cited : "*Cassel*, 51 Cal. 4th at 132-33; see also Fair v. Bakhtiari, 40 Cal. 4th 189, 194, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (mediation confidentiality provisions of Evidence Code "were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings"); *Foxgate*, 26 Cal. 4th at 15 (purpose of confidentiality is to promote candid and informal exchange regarding past events); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philsophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.N. 2663, 2663-64 (1995) (when representatives in dispute have constituencies with widely different views of case, and meeting with "enemy" itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy)."

[709] See: Id California Law Revision Commission study Memorandum 2014-6 page 4

[710] See Id California Law Revision Commission study Memorandum 2014-6 Page 4 where cited "Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond,* 12 Rev. Litig. 665, 665 (1983); see also Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L.J. 955, 959 (1988)."

[711] See: Id California Law Revision Commission study Memorandum 2014-6 page 5 *where cited "Admissibility, Discoverability, and Confidentiality of Settlement Negotiations,* 29 Cal. L. Revision Comm Reports 345, 351 (1999)."

[712] See: Cassel v. Superior Court 2011 51 Cal. 4th at 117.

[713] See: Foxgat v. Superior Court 2001 26 Cal. 4th at 14.

wariness about confiding in each other during these sessions."[714]

The extent of this effect is also not readily measurable; as it can be hard to measure how candid mediation parties and other mediation participants are, and determine whether increased candour helps achieve a settlement. Yet a gut perception of experienced people might be the only reasonable measuring tool available, and such perceptions are sometimes wrong. Still, it is worth noting that "[t]here is broad consensus that …confidentiality is crucial to effective mediation."[715]

Successful Mediation Encourages Future Use of Mediation to Resolve Disputes:

Another premise underlying mediation confidentiality is that successful mediation of a dispute will promote future use of mediation to resolve other disputes; parties coming to mediation are influenced by prior mediation success rates. For mediation to seem attractive disputants must view mediation as an effective means of achieving a satisfying settlement and referring to the mediation success rates can increase the volume of future mediations.[716]

The Use of Mediation to Resolve Disputes is Beneficial to Society

The last premise underlying mediation confidentiality is a widespread belief that "[i]t is in the public interest for mediation to be encouraged …."[717] In California, the legislature stressed this point by stating:

"In the case of many disputes, litigation culminating in a trial is costly, time-consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes…Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system…"[718]

Mediation thus promotes multiple policy objectives by allowing the disputants to participate in the process of which help them to reach "a mutually acceptable agreement."[719]

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[714] Id: Foxgat

[715] See: Id California Law Revision Commission study Memorandum 2014-6 page 7 *where cited "Mediation Confidentiality,* 26 Cal. L. Revision Comm Reports 413 (1996)*."*

[716] See: Id California Law Revision Commission study Memorandum 2014-6 page 8

[717] See: California Code of Civil Procedure Section 1775 (C) Referring to chapter three of this work it can be pointed out that adjudication romantics will reject this assertation.

[718] See: California Code of Civil Procedure Section 1775 (b) and (c)

[719] See: California Evidence Code Section 1115 (a)

In conclusion, reaching to such chained results can be strongly linked to the importance of mediation confidentiality as confidentiality is considered as a central value of mediation. The assurance of mediation confidentiality can encourage parties to engage in a full and frank discussion of their differences with a view to finding a resolution to the conflict. Parties should not be concerned that what transpires in mediation may be used to their disadvantage in subsequent adjudication. On a similar note, confidentiality can also be viewed as a supportive tool to the mediator impartiality insofar as it prevents mediators from giving evidence of various kinds of mediation communications in subsequent proceedings. All can effectively contribute to the promotion and success of the mediation process and allow the harvest of the several benefits mediation can offer to the society. With such convection on the importance of assuring mediation confidentiality, three questions are raised; 1. What does mediation confidentiality cover and what is the scope of such protection? 2. How can mediation confidentiality be assured and what is the source of such protection? 3. What is the nature or the ownership of such protection?

5.2. The Scope of the Mediation Confidentiality:

In examining the scope of the confidentiality privilege to the various aspects of the mediation process, there can be two main aspects subject to such privilege: the various communications that occur during the mediation process and the mediation outcome.

There are several legislative[720] and scholarly[721] attempts in defining the meaning of mediation communications; the following list can be offered:

- Information created or shared in a joint mediation session, such as the mediator's notes and documents and visual material prepared for the purposes of mediation;
- Information provided to the mediator in a private session or a phone call or email with one of the parties;
- Observations on the behaviour and conduct of participants in mediation; and
- The reasons for failure to reach agreement at mediation.[722]

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[720] For example see: Hong Kong Mediation Ordinance section 2 (1): 'mediation communication' means:
(a) anything said or done; (b) any document prepared; or (c) any information provided, for the purpose of or in the course of mediation, …"

[721] See: Id Nadja Alexander Chapter 10-1 The Legal Framework for Mediation: Part 2
Confidentiality and Other Rights and Obligations in Mediation Page 380 where she cites: "K Reichert, 'Confidentiality in International Mediation' (2005) 59 Dispute Resolution Journal 62." In adopting the provided list.

[722] See: Id

As for the mediation outcome or settlement agreements, it is important to note that the common law doesn't generally consider agreements to mediate, which initiate mediation, and mediated settlement agreements, which are usually drafted at the mediation process conclusion, to be part of the mediation process,[723] holding the parties responsible of providing the desired degree of confidentiality protection to such agreements by including a confidentiality provision to such agreements.[724]

To better comprehend the scope of mediation confidentiality Alexander in her book provides three types of confidentiality: insider/outsider confidentiality; insider/insider confidentiality; and insider/court confidentiality.[725]

Insider/Outsider Confidentiality:

The Insider refers to anyone who is involved in the mediation process such as parties, mediators, advisers, experts, interpreters, witnesses and relevant support staff. This type of mediation confidentiality prohibits the insider from disclosing any confidential communication in mediation which been exposed to her to people who are not involved in the mediation process (the outsider). This type of confidentiality can take the form of legislative and or contractual protection.[726]

Insider/Insider Confidentiality:

This type of confidentiality is concerned with the flow of information within mediation, especially in relation to private sessions (also known as caucuses) between the mediator and a party. This type of confidentiality does recognise the principle that the free flow of information in mediation is essential for building trust and rapport and encouraging full and frank negotiations among the parties yet it acknowledges that parties may wish to be able to communicate with the mediator on a confidential basis. In practice, the insider/insider confidentiality can take one of two approaches, the open communication approach and/or the in-confidence approach.[727]

The open communication approach entails that information shared with mediators in private sessions is not treated as confidential unless explicitly requested by the disclosing party. This approach ensures parties specify pieces of information they wish to keep

[723] See: Id at 381 where Alexander cites: "*Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280, [1988] 3 All ER 737 (HL)."
[724] Explained in more details in this chapter, under the section "the sources of the mediation confidentiality protection".
[725] See: Id Nadja Alexander Chapter 10-1 page 382
[726] See: Id
[727] See: Id at 384

confidential. Without this explicit statement of confidentiality, the mediator is free to share information shared with the other party. This practice of requiring explicit requests for confidentiality has been criticised by scholars as it can negatively affect candour and the parties' ability to feel they can confide in the mediator.[728] The other approach, the in-confidence model, operates by treating all information disclosed privately as confidential unless otherwise indicated by the disclosing party.[729]

This type of confidentiality with its two approaches can be protected by the mediator's code of conduct[730] and her desire to maintain good reputations as a competent mediator.

Insider/Court Confidentiality:

One of the main obstacles in the road of frank and smooth flow of information leading to an acceptable settlement in mediation for the parties and especially their lawyers[731]; is the possibility that something said or done in, or for the purposes of, or otherwise in the course of, mediation might be used to their disadvantage in existing or subsequent proceedings of adjudication.[732] Therefore, insider/court confidentiality entails the rights and obligations associated with protecting these mediation communications from being legally discovered or admitted in evidence in court and arbitral proceedings.[733]

While the insider/court confidentiality seems similar to the insider/outsider confidentiality where the "court" can be viewed as "outsider", Alexander elaborates and stress on the differentiation by saying "technically this area is not about confidentiality but rather about the admissibility of evidence. Specifically, it is about the admissibility of mediation communications in evidence in court or tribunal proceedings."[734]

Insider/court confidentiality may generate a host of potentially complex legal evidential issues, yet Insider/court confidentiality is regarded as the most significant type of confidentiality in terms of potential litigation.[735] This type of confidentiality can find protection in the law, parties' agreements and most important judicial precedents.

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[728] See: Id at 384 where Alexander cites "K Reichert, 'Confidentiality in International Mediation' (2005) 59 Dispute Resolution Journal at 65"
[729] See: Id
[730] For example, the European code of conduct for mediator's article four: confidentiality.
[731] See: Id at 385 where Alexander cites: "J Reich, 'A Call for Intellectual Honesty: a Response to the Uniform Mediation Act's Privilege against Disclosure' [2001] Journal of Dispute Resolution 197, 217–218."
[732] See: Id
[733] See: Id
[734] See: Id
[735] See: Id

5.3. The sources of the mediation confidentiality protection:

In examining the sources of protecting mediation confidentiality, there are two main players that can provide such sources; the parties themselves along with the aid of the service provider and public policy along with the aid of the courts.

Confidentiality Protection provided by the parties with the assistance of the service provider:

Parties through the power of consent can agree on the scope, the level and limitation of mediation confidentiality protection. In this regards, the mediator and/or the service provider can assist them by providing a confidentiality model clause. For example, CEDR offers the following clause:

> "4. Every person involved in the Mediation: 4.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement … and 4.2 acknowledges that all such information passing between the Parties, the Mediator and/or CEDR Solve, … may not be produced as evidence or disclosed to any judge, arbitrator or other decision maker in any legal or other formal process, except where otherwise disclosable in law. 5. Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make the disclosure. 6. The Parties will not call the Mediator or any employee or consultant of CEDR Solve as a witness, nor require them to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with their dispute and the Mediation; nor will the Mediator nor any CEDR Solve employee or consultant act or agree to act as a witness, expert, arbitrator or consultant in any such process…."[736]

In this example it is easy to witness that the three mentioned types of confidentiality had been addressed as the insider/outsider confidentiality is covered by the provisions 4 and 4.1

[736] See: CEDR Model Mediation Agreement available at http://www.cedr.com/about_us/modeldocs/ accessed at 28/02/18

and the insider/insider confidentiality is covered by the provision 5 and the insider/court confidentiality is covered by provisions 4.2 and 6.

The service provider can also assist the parties by including confidentiality protection to the applicable mediation rules, for example, JAMS international mediation rules under confidentiality states:

> "11. All information, records, reports or other documents received by a mediator while serving in that capacity will be confidential. The mediator will not be compelled to divulge such records or to testify or give evidence in regard to the mediation in any adversary proceeding or judicial forum. The parties will maintain the confidentiality of the mediation and will not rely upon or introduce as evidence in any arbitral, judicial or other proceeding: (i) views expressed or suggestions or offers made by another party or the mediator in the course of the mediation proceedings; (ii) admissions made by another party in the course of the mediation proceedings relating to the merits of the dispute; or (iii) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by another party or by the mediator. Facts, documents or other things otherwise admissible in evidence in any arbitral, judicial or other proceeding will not be rendered inadmissible by reason of their use in the mediation."[737]

In this example, it is also easy to observe the three types of confidentiality along with a more detailed understanding of what forms mediation communications.

Lastly, the mediator may desire to maintain a good reputation as a competent mediator and complying with the code of conduct adopted by the service provider can be another manner by which a service provider can aid the parties in connection with maintaining confidentiality protection. For example; the American Model Standards of Conduct for Mediators adopted by the ABA and AAA states under standard V:

> "A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation unless otherwise agreed to by the parties or required by applicable law…. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. …

[737] See: JAMS International Mediation Rules available at http://www.jamsadr.com/international-mediation-rules/ accessed at 28/02/18

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person…."[738]

In conclusion, holding the parties responsible for setting the different dimensions of the mediation confidentiality protection through drafting their own mediation provision in their mediation initiation agreement or by allowing them to refer to the service provider model agreement, rules and code of conducts complement the theory of educated self-determination. This reflects the importance of the mediation informed consent especially the mediation participation consent explained in chapter three and the duty of the mediator to educate the parties about the mediation confidentiality to better allow them to draft a confidentiality provision of which address their needs especially if such parties are not repeated players.

Confidentiality Protection provided by the law and courts:

The extent to which mediation confidentiality should be protected by law has been hotly debated. One side can argue that the importance of confidentiality does not require a comprehensive mandatory set of statutory rules for several reasons: firstly, there is no convincing reason as to why the parties should be forbidden from waiving the confidentiality rules since they are the ones who are to be protected and consequently should be able to waive this protection.[739] Secondly, the parties can protect themselves through the use of ordinary contract law. Mediation associations can reduce transaction costs by providing model confidentiality clauses.[740]

On the other side, there are at least three good reasons to be offered in support of statutory confidentiality rules. Firstly, state regulation is needed where the parties are not able to create their desired confidentiality by way of contract. In elaboration, some procedural rules regarding the admissibility of evidence are linked to public policy and only the legislator can set confidentiality protection.[741] Secondly, the contracting protection for confidentiality provided by the parties without a certain degree of recognition and support from the policymaker shall always leave such contracts vulnerable to be challenged and reviewed by

[738] See: Model Standards of Conduct for Mediators available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf accessed at 15/02/16

[739] See: Id Hopt and Steffek where cites: "(Switzerland) arguing that there are no convincing reasons to protect the mediator with a specific right to confidentiality."

[740] See: Id Hopt and Steffek

[741] See: Id Hopt and Steffek more over this point can be linked to the topic of 'without prejudice' in negotiation as mentioned later In this chapter and in that regard see: The English case Cutts v Head 1984 Ch. 290, providing the rationale behind the 'without prejudice' in communication rule.

the judiciary which in turn can frustrate the system of relying solely on the parties to protect mediation confidentiality. Lastly, holding the parties as the guardians of mediation confidentiality would entail their ability to waive such protection and even call the mediator to testify before the court. Such a thought can be very disturbing for the mediation profession, as a consequence negatively affect the mediation process and this point is to be examined in more details later in this chapter.

The main international initiatives inviting the policymakers across the globe to encourage and support the use of mediation have recognised the importance of statutory protection to mediation confidentiality. For example:

The United Nation UN general assembly in 2002 announced the work of United Nations Commission on International Trade Law UNCITRAL of the model law on international commercial conciliation/mediation, and the associated guide on how to enactment and use of such model law. The UN recommends that all States give due consideration to the enactment of the Model Law, given several benefits of which mediation can bring to the society. Under article 9 and 10[742]; the UNCITRAL Model law covers the topic of confidentiality and acknowledges the importance of assuring mediation confidentiality by statutory means along with parties' agreement.[743]

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[742] The two articles reads as follow:
"**Article 9: Confidentiality**: Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement." And "**Article 10: Admissibility of evidence in other proceedings:** (1) A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings; (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute; (c) Statements or admissions made by a party in the course of the conciliation proceedings; (d) Proposals made by the conciliator; (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator; (f) A document prepared solely for purposes of the conciliation proceedings. (2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein. (3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement. (4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings. (5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation."

[743] For the complete UN general assembly message along with the UNCITRAL model law on international commercial conciliation with guide to enactment and use 2002 see it available on http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdfLast accessed 28/02/18

Similarly in Europe; at the outset of the European Parliament Directive 2008/52/EC[744] the purpose of such directive is stated to build trust in the process of mediation within the EU. The Directive notes there are a number of advantages of mediation over litigation, including cost-effectiveness, flexibility and that agreement reached through mediation are more likely to be adhered to voluntarily without further recourse to the courts. The Directive provided that member states (apart from Denmark, which has opted out) be to ensure by 21st November 2010 that its terms were implemented into national law.[745] The directive recognised the importance of protecting confidentiality by statutory and provided article 7 as a model example for the member states to consider and even apply for stricter confidentiality protection if they wish.[746]

In conclusion, the different legal sources behind protecting mediation confidentiality can be identified in the following: *Private agreements, court judgments, court local rules, general evidence laws and specialised mediation laws*.

Private agreements: as explained, the parties with the aid of the service provider or the mediator can coat their mediation with confidentiality privilege through the power of contracts. Private confidentiality provisions typically occur in agreements to mediate.

Court precedents[747]*:* can also be a very influential source of recognising and protecting mediation confidentiality by stating the importance of confidentiality; for example in an English court decision the court stated: "parties should be encouraged as far as possible to resolve disputes without litigation and not discouraged by knowing that what they said in negotiation could be used against them in court – freely and frankly put cards on the table"[748] Or by enforcing and strengthening private confidentiality agreements, the American system

[744] For the complete Directive see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF last accessed 28/02/18

[745] See: http://www.libralex.com/publications/the-impact-o-the-EU-mediation-directive last accessed 28/02/18

[746] Article 7 of the EU Directive states: "Confidentiality of mediation: 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement. 2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."

[747] It is worth mentioning that some legal systems such as USA consider court precedents as a source of the law.

[748] See: The English case Cutts v Head 1984 Ch. 290, providing the rationale behind the 'without prejudice' in communication rule.

provides several examples.[749]

Court local rules: can provide confidentiality protection in connection with their local rules organising court-connected mediation programs.[750]

Finally the ***Law:*** can regulate and protect mediation confidentiality through provisions in general evidence laws[751] or a specialised mediation acts.[752]

The parties or the policymaker as the main players behind these different sources must answer two questions before setting confidentiality provisions; first who own the confidentiality privileges? Alternatively, asking the same question differently: are the confidentiality privileges set to protect the parties or to protect the mediation process? Second, what is the degree of protecting the mediation confidentiality? In other words, the issue of confidentiality exceptions and limitations. Both questions are to be discussed in the following.

5.4 Mediation Confidentiality, Is It To Protect The Parties Or To Protect The Mediation Process?

The American court decision by Judge Wayne Brazil, a well-recognised scholar in the field of mediation, in connection with the case "Olam V. Congress Mortgage Co"[753] has

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[749] See: Maureen Weston, 'Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation' (2003) 8 Harvard Negotiation Law Review available at SSRN: http://ssrn.com/abstract=2461905 (last access 28/02/18)at 46 where she site: "Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (breaching of a confidentiality agreement can result in liability); Parazino v. Barnett Bank, 690 So. 2d 725, 728 (Fla. Dist. Ct. App. 1997) (affirming dismissal and sanctions on plaintiffs who divulged to the media terms of bank's settlement offer and information protected by a court-ordered and written confidentiality agreement), *case dismissed*, 695 So. 2d 700 (Fla. 1997), *and review denied*, 705 So. 2d 9 (Fla. 1997)…"

[750] The American legal system can provide good examples in that regard, see: Id Maureen Weston at 47 where she cites "For example, court ADR rules for the Western District of Oklahoma provide express confidentiality protection for court-connected mediation. W.D. OKLA. Civ. R.16.3 Supp. § 3.7 (extending confidentiality privilege to all written and oral communications made in connection with any mediation, prohibiting disclosure of mediation communications to anyone not involved in the litigation or to the assigned judge or use for any purposes, including impeachment, in any pending or future proceeding in this court and providing testimonial immunity for mediator)."

[751] For example see: In Scotland Civil Evidence Act 1995 chapter 6 available at http://www.legislation.gov.uk/ukpga/1995/6 accessed 28/02/18 providing confidentiality protection to the Family Mediation. Also The American Federal Rules of Evidence rule number 408 states "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible *to prove liability* for or invalidity of the claim or its amount. Evidence of *conduct or statements* made in compromise negotiations is likewise not admissible. …" (emphasis added)

[752] For example see: the confidentiality provision at the new Egyptian mediation Act and the American Uniform Mediation Act.

[753] See: Olam v. Congress Mortgage Co., United States District Court, N.D. 1999 WL 909731 (N.D.Cal.) the full details of such case can be found at

raised a scholarly debate regarding compelling mediators to testify in civil cases.[754]

A brief summary of the facts of the case is offered by Richard Reuben: "a woman defaulted on her mortgage and ultimately sued the mortgage company alleging fraud and duress, among other things. The parties mediated through a voluntary court program, reaching an agreement after a single lengthy session. The woman had a change of heart the next day, and the mortgage company moved to enforce the mediated settlement agreement. Both parties wanted the mediator to testify in the case, and agreed to waive any confidentiality rights conferred by California law."[755] The court wrote, "The evidence from all sources demonstrates it is clear the testimony from within the mediation is essential to doing justice here."[756]

Without analysing the court decision, it is enough for the purpose of this section to mention that commentators on this decision stated that having both parties waiving the confidentiality privileges has eased the court in reaching to remove the confidentiality privileges.[757] This leads to the question; who owns mediation confidentiality? In other words, is confidentiality designed/intended to protect the disputants or to protect the mediator? While the assumption is that mediation confidentiality is essentially designed/intended to protect the disputants from having the information shared in mediation to be used against them later on in an adjudication proceedings, many states recognised that to achieve such goal there is a persisting need to prohibit mediators from testifying with respect to mediation communication.[758]

Indeed, protecting the mediator and prohibiting her from testifying shall serve two purposes: "First, it protects the disputants from the introduction of mediation communication into evidence in court disputes. Second, it encourages community members to volunteer their

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http://www.leagle.com/decision/1999117868FSupp2d1110_11067.xml/OLAM%20v.%20CONGRESS%20MORTG.%20CO. accessed at 28/02/18

[754] See: Jennifer C. Bailey, Mediator's Privilege: Can a Mediator Be Compelled to Testify in a Civil Case - California Privilege Law Says Yes - Olam v.Congress Mortgage Co.,2000 J. Disp. Resol.(2000)Available at: http://scholarship.law.missouri.edu/jdr/vol2000/iss2/11 accessed at 28/02/18 and Richard C Reuben, 'Court Issues Major Ruling on Mediation Confidentiality [notes] ' [Fall 1999] 6(1) Dispute Resolution Magazine 25

[755] See: Id Richard C Reuben, 'Court Issues Major Ruling on Mediation Confidentiality' at 25

[756] See: Id Olam v. Congress Mortgage Co at 1131-32.

[757] See: AaronJ Lodge, 'Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?' [2001] 41(4) Santa Clara Law Review <http://digitalcommons.law.scu.edu/lawreview/vol41/iss4/8> accessed 28/02/18 and Id Richard C Reuben at 25

[758] For example see: California codes evidence code section 703.5

services as mediators without fear of having to later testify in court."[759]

Two clear examples of statutory protection to the mediator can be provided. First; The California Evidence Code states:

> "Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator,...."[760]

Florida presents a much stronger example; according to the Florida State laws mediators enjoys an absolute immunity equal to the judicial immunity which judges enjoy.[761]

In conclusion, mediation confidentiality should be set to serve a greater purpose than just protecting the parties of mediation. Mediation confidentiality should protect the process itself. This entails that everyone in the mediation including the parties, the mediator and others such as witnesses or experts shall share the ownership of the privilege of the mediation confidentiality. In this vein, the Drafting Committee on the Uniform Mediation Act of the National Conference of Commissioners on Uniform State Laws, adopted by several states in USA, has taken a similar approach where parties, mediators and even non-party participants all hold and share the mediation confidentiality privilege.[762] This chapter proposes that the matter of waiving confidentiality privileges should require the agreement of everyone who took place in mediation (parties, non-parties and the mediator) as they all should share the ownership of such privilege. With that end, the question or the issue of which remains is the degree of protecting mediation confidentiality?

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[759] see: Id Aaronj Lodge at 1108 where cites "conflict resolution center of santa cruz county, information statement ("participation in the conflict resolution center mediation process is voluntary, both by you and by the mediators.)"

[760] See: California codes evidence code section 1121

[761] See: 2011 Florida Statutes Title V Chapter 44 SECTION 107 Immunity for arbitrators, mediators, and mediator trainees where states: ""(1) …, mediators serving under s. 44.102, and trainees fulfilling the mentorship requirements for certification by the Supreme Court as a mediator shall have judicial immunity in the same manner and to the same extent as a judge."

[762] See: The American Uniform Mediation SECTION 4 PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY: "…(b) In a proceeding, the following privileges apply:(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant. …" and see the drafters' arguments available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf Last access 28/02/18

5.5. The degree of protecting mediation confidentiality: Armour of Steel or Eggshells?[763]

There are two contradicting policy interests lingering when setting the degree of protecting mediation confidentiality. The first pertains to all the benefits explained above for society arising from creating a friendly mediation culture once candour and safe exchange of information within mediation is established as a consequence of assuring confidentiality.[764] The second is related to pillars of the judicial system which are judicial powers regarding disclosure and discovering the truth or justice consideration in general; as the strict protection to mediation confidentiality shall consequently prohibit courts from admitting evidence relevant to mediation communications which in turn can negatively affect making fair and accurate rulings. It can be a serious challenge to find the right balance between these two contradicting interest when setting the degree of protecting mediation confidentiality. To elaborate three different approaches regarding the degree of protecting mediation confidentiality can be presented: *absolute confidentiality*, *enumerated confidentiality* and *qualified confidentiality.*[765]

Absolute confidentiality: This approach favours the first interest of promoting mediation and understands the need for strict protection to the mediation confidentiality to better achieve an effective mediation process and culture at large.[766] A perfect example of such an approach is the California Evidence Code[767] and its enforcement and interpretation by the California Supreme Court. The Supreme Court established a line of clear and loud judicial precedents by which courts must comply with the legislator's purpose of protecting confidentiality and reject any interpretations that can create implied and unintended exception

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[763] The title is inspired from the title of Id Aaron J Lodge.

[764] See: This chapter under the title The importance of protecting mediation confidentiality:

[765] See: Id Maureen A. Weston at 49 where such names and category are mentioned.

[766] See: in general the importance of protecting mediation confidentiality explained earlier in this chapter also see: Id Aaron J. Lodge at 1112 where he explains this point by saying "Parties approach the table with a hope (sometimes faint) that a solution lies hidden in the mess of their complex conflict. The parties haggle, talk, and listen, proposing any idea that comes to mind, until a workable resolution begins to gel. For that to happen, all parties must share information openly. Exposing weaknesses, giving up some demands, and discovering new common ground are frequent occurrences in mediation. In support of the need for open communication, the Ninth Circuit Court of Appeals commented, '**the complete exclusion** of mediator testimony **is necessary**' for effective mediation." And cites the case "NLRB v. Macaluso, 618 F. 2d 51 (9th Cir. 1980)."

[767] See: CA Evid Code sections 1115 till 1128 where most importantly section 1119 reads: "… (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

to confidentiality even if that means undermining the second interest by giving up its judicial powers of disclosure for the truth. The precedents started with the Foxgate case[768] where the supreme court settled a legal debate between the trial court and the court of appeal regarding a claim to sanction a party who failed to act in good faith in connection to court order mediation where the provided evidence was a mediator report stating how such party failed to act in good faith within mediation. "The Supreme Court of California affirmed the court of appeal's reversal of the sanctions order but held that if on remand, the plaintiff elected to pursue a sanctions motion, no evidence of communications made during the mediation could be admitted or considered. In this regard, the supreme court specifically rejected the notion that there is any need for judicial construction of Evidence Code sections 1119 or 1121, or that a judicially crafted exception to mediation confidentiality was necessary."[769] The court reasoned that: "[t]he statutes are clear. Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during a mediation."[770]

Such a stand was affirmed by the California Supreme Court in later cases[771] and most recently in the Cassel Case[772]; where Michael Cassel, a party in a mediation session that lasted for fourteen hours, which end up in settling the case, sued his lawyer for malpractice where he claimed that his lawyer pressured him to settle and provided him with poor advice and evaluations. In order to prove such claim waiving mediation confidentiality was essential to use communications commenced during the mediation process as evidence. While the court of appeal granted him this claim and reasoned that the mediation confidentiality statutes were

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[768] See: Foxgate Homeowners' Assoc., Inc v. Bramalea Cal., Inc., (Cal. 2001) the full decision is available at http://caselaw.findlaw.com/ca-supreme-court/1072129.html last access 28/02/18

[769] See: Rebecca Callahan, 'Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?' (2012) 12 Pepperdine Dispute Resolution Law Journal 70 where cites "Foxgate, 25 P.3d 1117 at 1125"

[770] See: Id Rebecca Callahan at 70 where she cites "Foxgate, 25 P.3d 1117 at 1126"

[771] Three cases related to party misconduct and abusing the mediation process in general have been submitted to the court most impotently See: Rojas v. Los Angeles County Superior Ct., 93 P.3d 260 (Cal. 2004) at 271 where the court reasoned: *"In Foxgate,* we stated that "[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme .. . Unqualifiedly bars disclosure of' specified communications and writings associated with a mediation "absent an *express statutory* exception." We also found that the "judicially crafted exception" to section 1119 there at issue was "not necessary either to carry out the legislative intent or to avoid 71 an absurd result." We reach the same conclusion here . ..." Also see: Simmons v. Ghanderi at 946 where the court reasoned: "Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behaviour in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice"

[772] See: Cassel v. Superior Court available at https://www.lawyer.com/cases/13735814519465166183.html last accesses 28/02/18

intended to prevent damaging use against a mediation disputant of tactics employed, positions are taken, or confidences exchanged in the mediation, and were not intended to protect attorneys from malpractice claims by their own clients based on advice and other communications made by counsel. The court of appeal concluded that an attorney sued for malpractice could not use mediation confidentiality as a shield to exclude damaging evidence of private attorney-client conversations during the mediation.[773] On further appeal, the Supreme Court of California reversed, finding that the mediation confidentiality statutes must be strictly applied and do not permit judicially created exceptions or limitations even where competing public policies may be affected. The court reasoned: "Here, as in *Foxgate, Rojas, Fair, and Simmons,* the plain language of the mediation confidentiality statutes control our result.... Section 1119, subdivision (a), extends to oral communications made for *the purpose of or pursuant to* a mediation, not just to oral communications made *in the course* of the mediation. The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between opposing parties to the dispute, or with the mediator . … All oral or written communications are covered, if they are made "for the purpose of' or "pursuant to" a mediation. It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants."[774]

The Cassel decision has raised a heated debate among scholars and professionals to the extent that the legislature questioned such approach and to direct the California Law Revision Commission to analyse "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, as well as any other issues the commission deems relevant."[775] In order to return to the legislature

[773] See: Id Rebecca Callahan at 74 where cited Cassel v. Superior Court at 1084-5

[774] See: Id

[775] See: The Legislature specifically requested that the Commission examine the following matters, among others: (1) Evidence Code Sections 703.5, 958, and 1119 and predecessor provisions. (2) California court rulings, including, but not limited to, Cassel v. Superior Court (2011)…(3) The availability and propriety of contractual waivers. (4) The law in other jurisdictions, including the Uniform Mediation Act, as it has been

with a set of recommendation there is an on-going study conducting by the commission inviting people from the mediation and law field for their input. Many opinions have been received in favour of maintaining such approach on the basis of:

The pragmatic argument: Strong confidentiality protection would better serve the purpose of mediation by allowing each party to communicate in a frank, cooperative manner and settle their disputes away from the traditional adversarial processes. The purpose would be defeated if mediation itself were to create opportunities for more litigation.

The justice system argument: The strict confidentiality privilege can be one of the core reasons mediation in California has thrived and if the court decided to carve out new exceptions to confidentiality it may provide opportunities for parties to create new controversies, precisely the result parties are seeking to avoid by choosing to resolve their dispute through mediation.

The mediation/justice system integrity argument: If mediator cannot confidently assure the parties that confidentiality is established and mediation is a safe place for communication parties will be unlikely to place trust in the process. Setting any exceptions to confidentiality would shake such trust leading parties to walk away from such process.

The Utilitarian argument: Issues triggering the need for confidentiality exceptions, such as malpractice against attorneys, pale in comparison to the overwhelming high party satisfaction rate with mediation comparing to traditional litigation; making it unadvisable to risk such success by jeopardising the core element of confidentiality protection; a major appealing point to the parties. A more creative solution would be to allow the issues requiring confidentiality exceptions to be addressed without weakening mediation confidentiality by adopting other measures: for example, training for mediators and attorneys. [776]

With a different point of view, Peter Robinson's work [777] where he urged for exceptions to mediation confidentiality and allowing mediator testimony. He observed that "[w]hen a party is not permitted to disclose what happened in a mediation, he will be hard

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adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation. The on-going study is available at http://www.clrc.ca.gov/K402.html last access 28/02/18

[776] These points have been accumulated from reviewing several letters in favour of not introducing any exceptions and maintaining the absolute confidentiality approach in response to the commission call for input and most importantly drawn from the letter of the president of the Southern California Mediation Association on behalf of the association and its members. Available at: http://www.clrc.ca.gov/pub/2015/MM15-54s2.pdf Last accessed 01/04/2016

[777] See: Peter Robinson, 'Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened' [2003] () J Disp RESOL 135-173

pressed to prove an alleged defect in the making or implementation of a mediated agreement."[778] He thus concluded that "[b]y depriving courts of the information necessary to employ a standard contract law analysis, strict mediation confidentiality has the effect of transforming the mediated agreement into a 'super contract,"[779] which leads to "absurd enforcement results."[780] He warned that such "super contracts" have serious ramifications: "Strict mediation confidentiality essentially deprives mediation participants of many of the protections embodied in contract law principles. Where protections are absent, *abuses could flourish*. While mediation confidentiality protects and empowers participants in their moment of apprehension, it also makes parties vulnerable to the unscrupulous in enforcement proceedings. For example, an individual intending abusive negotiation strategies (like fraud or coercion) could insist on negotiating in a mediation and then cling to his right of confidentiality when enforcing the suspect agreement"[781] It is worth mentioning, that Robinson noted in his study that "[m]ediation confidentiality's interference with enforcement proceedings will be relatively rare because parties to a settlement agreement almost always voluntarily satisfy the terms of the settlement agreement."[782] It seems that Robinson is implying that the exceptions for confidentiality should not create a phenomenon where mediated settlements always end up in court.

With reviewing these different point views, three different approaches can be presented when it comes to regulating mediation confidentiality:

Enumerated confidentiality: this approach entails that the legislature would include specific exceptions to mediation confidentiality in the law to address the possible problems which might occur from an absolute confidentiality approach and also to create a clear and predicted vision of the mediation confidentiality protection and its limitations for the party to consider when mediating. To better explain what such exceptions may involve a referral to Hopt and Steffek's comparative study can identify the possible exceptional grounds used by the policy makers in several jurisdictions as follows: public policy violations,[783] disputes on the implementation or enforcement of the agreement reached in mediation,[784] claims against

[778] See: Id at 161
[779] See: Id and also see Id John Lande 1998 on the high quality consent topic
[780] See: Id at 148
[781] See: Id at 162-63 (emphasis added, footnotes omitted).
[782] See: Id at 142
[783] See: Id Hopt and Steffek at ch. 5, B (6), p. 348 referring to Bulgaria legal system.
[784] See: Id Hopt and Steffek at ch. 5, B(6), p. 348 referring to Bulgaria legal system; ch. 13, B(6)(d), p. 725 referring to Netherlands legal system; ch. 18, B(1)(d), p. 921 referring to Canada legal system.

the mediator for infringement of his or her duties,[785] crime detection and conviction,[786] fraud and abuse of power,[787] undue influence,[788] the protection of children and the integrity of persons against harm,[789] and adding to the list the issue of failing to act in good faith[790] especially in court order to mediation. The American Uniform Mediation Act presents an example of such an approach as it sets a specific set of exceptions and the conditions to apply such conditions,[791] providing clarity, predictability and preserving the second policy interest of maintaining the judicial powers of discovery for the truth.

The downside of this approach can be explained by saying that attaching a list of exceptions to the rule in effect renders the rule defunct; the door cannot be sealed except for a portion; it is either sealed or open; similarly, mediation is either confidential or it is not. To better elaborate; informed consent can identify the downside of such approach, especially the participation consent. One useful example of this is an educational mediation video prepared by James Coben as in this fictional scene the mediator's opening session delivering participation informed consent starts with assuring confidentiality. The parties buy-in is clear, they are relaxed and willing to participate as he builds the picture of confidentiality; the mood clearly shifts as the mediator begins to state the exceptions outlined in the applicable law, the Uniformed Mediation Act, tearing down all of the promises of confidentiality which drew the parties into the process.[792]

It is also worth mentioning that another possible downside to this approach is the language used when drafting a list of exceptions to be included in the law related to confidentiality. When the language is clear, and the list contains specific situations with examples to increase the level of predictability, it can better guide the courts on how to deal with claims requiring waiving the confidentiality privilege. Such language may leave the courts helpless against what time and developments can create new cases and situations which

[785] See: Id Hopt and Steffek at ch. 13, B(6)(d), p. 726 referring to Netherlands legal system; ch. 25, C(4)(b), p. 1289 referring to USA legal system.
[786] See: Id Hopt and Steffek at ch. 5, B(6), p. 348 referring to Bulgaria legal system; ch. 11, A(3)(f), p. 646 referring to Ireland legal system; ch. 13, B(6)(d), pp. 725 referring to Netherlands legal system.
[787] See: Id Hopt and Steffek at ch. 17, B(6), p. 888 referring to Australia legal system.
[788] See: Id Hopt and Steffek at ch. 6, B(6)(d), p. 403 referring to England legal system.
[789] See: Id Hopt and Steffek at ch. 5, B(6), p. 348 referring to Bulgaria legal system.
[790] For example see: In UK the case - Earl of Malmesbury v Strutt & Parker [2008] EWHC 424 (QB) where the judge applied cost sanctions on a party who have behaved unreasonably in mediation.
[791] See: The Uniform Mediation Act draft 2002 section 6
[792] Coben, James, "Uniform Mediation Act Overview (As Part of "Fictional" Mediator Opening Statement)" (2006). *Mediation Case Law Teaching Videos.* http://digitalcommons.hamline.edu/dri_mclvideo/3 last accessed 28/02/18

are not mentioned in the law. The only way to address that is to regularly amend the law and including such new situations to cope with the developments, which can't be a very feasible option with the rapid developments and the complicated, slow procedures needed to amend a law.

The concern regarding the *enumerated confidentiality* approach is: instead of balancing between the two policy interests mentioned above, it can actually jeopardise both interests. The first downside explains how such an approach can threaten the first policy interest and work against promoting mediation. As for the second policy interest; the other downside is that it can be very challenging for the legislator to cover and predict every single situation of which waiving mediation confidentiality might seem necessary; leaving the courts without its judicial powers in front of any updated situation which is not mentioned in the law.

Qualified confidentiality: this is a similar approach to the previous one, but instead of listing a number of specific exceptions to mediation confidentiality, the legislator shall draft the law in a manner that recognises the power of the courts and its discretion to waive confidentiality to achieve justice on a case by case basis. The legislator may thus use vague and very broad language in favour of the second policy interest regarding the judicial power in discovering the truth. This, for example, may entail stating that the court has the right to order disclosure in individual cases where needed to prevent manifest injustice or to enforce court orders[793].

According to this approach, the court does have the power to remove the confidentiality, yet scholars have pointed out that such power is not absolute and the court must be bound by a specific criterion which are the balancing test[794]. The balancing test is the method used in an attempt to find the proper balance between the two competing policy interests promoting mediation vs the need for testimony or the truth. The test has two stages; the court should first define the legislative intention of protecting confidentiality. The second stage is to weigh between the need for waiving the confidentiality privilege and the legislative intention to protect confidentiality and ruling in favour for what may seem more important on a case by case basis.[795] For example, The Olam court may set aside the mediation privilege to reveal the truth. The court wrote, "The evidence from all sources

[793] A perfect example is the Wisconsin State Law as rule number 904.085 organising communication and mediation and presenting mediation confidentiality. Yet, under 904.085(4)(e) reads '' In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.''

[794] See: Id Aaron J Lodge at 1117 and generally Id Olam case and Judge Brazil reasoning

[795] See: Id

demonstrates it is clear the testimony from within the mediation is essential to doing justice here." With those words, the court ordered the transcripts unsealed and admitted as evidence.[796]

This approach has been criticised by writers as one mediator suggested reciting the following to all mediation participants (analogous to Miranda rights, but for mediation proceedings): "You have the right to remain silent. I may later testify against you in court. Anything you say to me in mediation I may have to repeat in court."[797] Moreover, other writers argue that A balancing test creates uncertainty for those who would consider mediation as an alternative to litigation. On its face, state legislation provides confidentiality for communication during mediation, yet the courts can use a balancing test to virtually destroy that promise of confidentiality. Disputants and mediators cannot be certain that a future court will not order them to testify. The balancing test actually encourages caution rather than openness among prudent disputants. This would compromise the mediation process. Therefore, the balancing test potentially, if not certainly, harms the mediation process, and does not represent an adequate solution."[798]

In conclusion, mediation confidentiality presents great importance in promoting mediation yet it should not be a reason for parties to abuse the process which leads to the line of thought that exceptions are needed to better protect the parties and the process by allowing the court to supervise parties' conduct and review their outcome in mediation. Yet, it seems that once the idea of exceptions is presented the whole concept of confidentiality collapses. Therefore, there must be other ways to prevent the misuse of confidentiality and let it become a shield for any wrongdoing in mediation. To present possible manners to address that without needing the idea of setting exceptions to mediation confidentiality there is a need to understand and categorise the reasons of which might lead the parties to seek the court's interference.

5.6 Understanding and categorising the reasons that can lead the parties to seek court interference regarding their mediation:

From what has been presented three categories can be offered in respect of reasons of which parties might seek the court's interference regarding their mediation: *Unfair settlement*; *unfair behaviour* leading to the termination of the process and *criminal activities*.

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[796] See: Id

[797] See: Id Aaron J Lodge at 1118 where cites (Ron Kelly, *Mediation Information About Mediation* (posted temporarily online Jan. 20, 1999) (on file with author))

[798] See Id Aaron J Lodge

5.6.1 Unfair settlement:

Many aspects can contribute to having one of the parties feeling that the outcome of the mediation process resulted in an unfair settlement agreement. These aspects can be even further categorised under the sub-spheres of *harming the principle of party self-determination* and *disregarding the governing law*. The category of harming the principle of party self-determination is the umbrella for different aspects such as coercion, fraud, misrepresentation from his or her own lawyer or an incompetent or 'muscle' mediator. The other category entails that the settlement terms violate public policy or any law in general.

The two categories leading to an unfair settlement with all its sub aspects can be addressed and prevented by applying different and creative approaches- instead of relying on the idea of creating exceptions to confidentiality to better allow the court to interfere.

5.6.1.1 Approaches to address the unfair settlement concern:

This chapter asserts that the concept of informed consent as explained in chapter four can be one of the creative ideas of addressing the unfair settlement concern as it can better empower the parties, educate them and ultimately maintain the principle of party self-determination. Moreover, the proper implementation of informed consent can significantly help in assuring that the mediated agreements comply with the law. Ultimately the informed consent in mediation can address the unfair settlement concern, yet there are two other creative approaches which can aid mediation informed consent with such task; the cooling off period and the judicial review.

5.6.1.2 The cooling off period:

Nancy Welsh in her study examining the institutionalisation of mediation, the application of court-connected mediation programs and how it has created "muscle mediators". Muscle mediators are deemed to be mostly concerned with securing a high rate of settlement in the very short time allocated by the court has lead to the use of heavy tactics and very aggressive evaluation of the case and parties positions which can harm parties' self-determination. Welsh proposed the cooling off period approach to address such concern. [799] This approach entails; "the adoption of a three-day, non-waivable cooling-off period before mediated settlement agreements may become enforceable."[800] Welsh explains the concept as follows:

[799] See: Nancy Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' [2001] 6 Harv Negotiation L Rev

[800] See: Id Nancy Welsh at 6-7

> "Cooling-off periods have been introduced when it is known that high pressure tactics are being used with some frequency, when there are concerns that the people subjected to such behaviour are not truly exercising free choice in entering into agreements, and when it is not possible to regulate effectively the use of high pressure tactics. Under these circumstances, the introduction of a cooling-off period serves as an effective antidote to high pressure tactics, both because the cooling-off period protect those who have already been subjected to high pressure tactics and because the threat of easy rescission makes it less likely that rational actors will choose to use high pressure tactics …. *In the mediation context, both of these likely effects suggest that the introduction of a cooling-off period represents an effective means to protect the important principle of party self-determination."*[801]

She further noted that cooling-off periods "have even been applied to particular types of mediation."[802] As an example, she referred to a Minnesota statute, which provides that "a mediated settlement agreement between a debtor and creditor is not binding until 72 hours after it is signed by the debtor and creditor, during which time either party may withdraw consent to the binding character of the agreement."[803] She also cited a California provision pertaining to earthquake insurance disputes.[804] She also anticipated and sought to rebut several possible objections to the idea.[805]

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[801] See: Id Nancy Welsh at 89 (emphasis added, footnotes omitted).

[802] See: Id Nancy Welsh at 88-89

[803] See: Id Nancy Welsh at 89 where she cites "Minn. Stat. § 572.35."

[804] See: Id Nancy Welsh at 89 where she mentioned that "Insurance Code Section 10089.82(c) provides:

> If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded."

[805] The rebuttal goes as following:

> **Objection 1:** Some people might object to drawing an analogy between a mediator and a high-pressure salesman. **Response for 1:** The distinction between a mediator "selling" a settlement proposal and a "pitchman" might be "difficult to draw." Moreover, "we must remember that many litigants do not voluntarily travel to the courthouse or an office building for their mediation; they are ordered to participate in the process." See: Id Nancy Welsh at 91
>
> **Objection 2:** The proposal may be impractical, such as when mediation occurs on the eve of trial or when mediation involves sophisticated participants who wish to be bound immediately. **Response for 2:** "[I]t may be possible to craft reasonable exceptions to a cooling-off provision for court-connected mediation for the different types of parties and circumstances …." See: Id Nancy Welsh at 91

John Lande has since supported the idea and added that this approach could also address problems of misrepresentation.[806] He explained that "a brief cooling-off period before mediated agreements become binding" would "permit investigations about any material facts on which the parties relied."[807] Lande also noted that cooling-off periods "are potentially problematic because they could be abused."[808] For instance, "a party might agree in mediation intending to renege during the cooling-off period as a way to wear down the other side."[809]He nonetheless believed that the approach was worth testing.[810] Other scholars have also indicated that the cooling-off period may serve as a tool to protect vulnerable participants from the different aspects of which might lead to unfair settlements such as coercion or misrepresentations during the mediation process.[811]

It is important to note here, that cool off period idea can also be one of the manners that aid mediators in achieving mediation informed outcome consent as explained in chapter three.

5.6.1.3 Judicial review of mediated agreements prior to finalising it:

Another possible approach to address unfair settlement, especially in the court mediation and cases with possible power imbalance situations such as class action and family disputes, is to allow a system of judicial review of mediated settlements. Having a judge reviewing the settlement terms would assure that the agreement is in compliance with the law and parties' consents were proper and not harmed in the process.

There are several examples of such an approach including: the under Michigan family

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Objection 3: A cooling-off period "would permit parties to back out of agreements much more easily, possibly based only on buyers' or sellers' remorse." See: Id Nancy Welsh at 91 **Response for 3:** "This concern squarely raises the challenge of 'walking the talk' of self-determination. If self-determination — not settlement — is the fundamental principle underlying mediation, the benefits provided by this cooling-off proposal clearly outweigh the possible risks." See: Id Nancy Welsh at 91 In particular, *a cooling-off period is* "relatively straightforward, easily-administrable, and *unlikely to invite* litigation and/or *intrusions upon the confidentiality of mediation*." See: Id Nancy Welsh at 91 (emphasis added) importantly, the approach would also "reward mediators who view their role as primarily facilitative and penalize mediators who use techniques designed to force an agreement." See: Id Nancy Welsh at 91

[806] See: John Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' [2002] 50 UCLA L Rev 69-139

[807] See: Id Jhon Lande at 137

[808] See: Id John Lande at 137

[809] See: Id

[810] See: Id

[811] For example see: Stephan Landsman, 'Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings' [2010] 37 Fordham Urb L J 273-292 and Rebecca Hiers, 'Navigating Mediation's Uncharted Waters' [2005] 57 Rutgers L Rev at 577-78 also Peter Thompson, 'Enforcing Rights Generated in Court-Connected Mediation — Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice' [2004] 19() Ohio St J on Disp Resol 509 - 539

law when the court rejected a Mediated Custody Agreement in the Roguska v Roguska case, the Court of Appeals held that the Circuit Court did not err in rejecting the parties' mediated agreement concerning the custody of the children, finding that no custodial environment existed with respect to one of the parties' children, and applied the proper standard in evaluating the child custody factors.[812] Moreover, in the United States, two cases related to class actions have been subject to a judicial review after being settled in mediation, and the judge foundd that the settlementent is not fair and such settlement should not be enforced.[813] Such approach should be based on an automatic default judicial review after every mediated case, not depending on one of the party's requests in order to be more efficient.

Two main possible downsides of such approach can be raised. First, the revision might breach confidentiality, and secondly, it may burden the court and go against the idea of saving the courts resources by using mediation. As for the first concern, the judicial review can be considered as a part of mediation in the closing phase and even more the review can take a private manner not discussed in a public hearing or even going beyond and asking the judge to be bound by confidentiality regarding the communication shared in explaining how the party reached such settlement. As for the second concern, the argument raised by Judge Brazil in the concept of selfish courts[814] can be raised here as courts, by adopting and supporting mediation, should be only concerned with enhancing the quality of justice and prioritising the people. Moreover, regarding the second concern that a system of reviewing the settlement agreement directly with the parties before finalising it should not take more than a short session with the judge and In return can save many court resources by preventing the parties coming back with a claim regarding such agreement.

5.6.2 Unfair behaviour leading to the termination of the process (Good Faith Requirements):

The first category of unfair settlement presents a set of reasons used in the argument of lifting the shield of confidentiality to allow the court to police the outcome of mediation in general.

The category of unfair behaviour or the good faith requirement presents the possible reasons used in the arguments of lifting the shield of confidentiality to allow the courts to

[812] Unpublished opinion of the Court of Appeals, issued Septembe r 29, 2009 (Docket No 291352). In this domestic relations mediation, Available at http://www.leehornberger.com/UserFiles/File/Update-FAMILY-March-2010.pdf

[813] See: Kullar v. Footlocker, Inc. 168 Cal.App.4th 116, decided in 2008 and High-Tech Employee Antitrust Litigation, 11-cv-2509. 2014

[814] See: Chapter three of this work

police the process and make sure that its order has been properly enforced in the case of court-ordered mediation Indeed, the purpose of educating and introducing the parties to the mediation process through mandating them to mediate as part of court-connected mandatory mediation programs or through the use of cost sanctions in the English system can easily be frustrated and even turn to be a waste of time if it is not associated with the obligation to negotiate in good faith.

There is a debate on lifting the confidentiality shield in connection with the enforcement of negotiating in good faith and applying sanctions on the party who fails to comply.[815]

Before stating an opinion regarding such a debate, it is worth mentioning that it can be a true challenge to draft a clear set of requirements to acquire the good faith obligation. Even though there are existing attempts regarding such a list, it remains clear that it is hard to produce clear, objective, enforceable requirements. Moreover, there are some scholarly attempts to present possible approaches to enforce the good faith requirement without breaching mediation confidentiality by setting a checklist prior to the commencement of the mediation.[816]

With that being established this chapter proposes the good faith requirement should not be a reason to breach confidentiality as it shouldn't be a subject of enforcement as this might lead to crossing the line from coercion to mediate to coercion into mediation and the court ordered mediation should only be subject to have the parties attending the mediators opening statement allowing the mediator to achieve the participation consent as part of the mediation informed consent principle. As to address all the concerns regarding parties acting in a bad faith negotiation; it should be left to the mediators to deal with it by discouraging

[815] Some courts are in favour; for example in UK *Earl of Malmesbury v Strutt & Parker [2008] EWHC 424 (QB) , Farm Assist Limited v DEFRA (no. 2) [2009] EWHC 1102 (TCC) and in USA Nick v Morgan's Food Inc. and other courts against it; for example see in USA Id the Foxgate case.*

[816] For example see:S Zimmerman, 'Judges gone wild: why breaking the mediation confidentiality privilege for acting in "bad faith" should be re-evaluated in court-ordered mandatory mediation' (2009) 11 Cardozo Journal of Conflict Resolution 353-384 where Zimmerman's objective behavioural standards presented as: pre-mediation document exchange – parties should give the mediator and other side a statement of issues in dispute, parties' position, relief sought, and offers/counter offers already made; (ii) attendance and time limit? One hour attendance to afford the order of respect required (iii) undue delay of the mediation – a party is sanctioned if more than an hour late- shows lack of respect for other party and mediator; (iv) dress code – business attire or neat casual! – respect for process and parties; (v) cannot require a party to make or receive offers (vi) intent not to make an offer – if one party knows this they should make the other party aware of it prior to the mediation (vii) safe harbour provision – to complain about conduct it should be that the party has first raised it in the mediation with the mediator or other party to give a reasonable opportunity for the behaviour to cease

such behaviours and emphasising all the possible achievements by acting and negotiating in good faith. If this cannot be secured, then the mediator should simply terminate the process and courts should not cross the line to require the parties to negotiate in good faith, as this might lead to coercion into mediation.

Lastly, as for the category of ***criminal activity***, it is important to note that mediation confidentiality only protects mediation communication from being admissible as evidence in front of civil and commercial courts and is never protected in front of the criminal courts; therefore, the fear of criminal activity cannot be used as a valid reason to breach mediation confidentiality.

5.7 To conclude the topic of confidentiality

Confidentiality is an essential value to mediation and can better promote trust in the process and help enhance communication between parties. Yet, the topic of confidentiality is highly debated as it can prevent the mediation field from developing and responding to the different criticisms. The main obstacle is that mediators under confidentiality are immune against any claim or even complain as it cannot be proven without breaching confidentiality. This study is struggling with two conflicting goals. First, is to advocates that the mediator must be held accountable for delivering mediation informed (participation and **outcome**) consent. The second is to preserve the high level of mediation confidentiality. There are two possible solutions the study can suggest to maintain the balance:

1. the scope, limitation and exceptions of mediation confidentiality are to be determined by the parties' agreements after obtaining enough knowledge to draft the confidentiality level that better serve their needs and determine the level of the mediator accountability regarding delivering both participation and outcome informed consent.
2. Or, the public policy to set the scope of confidentiality only for the protection of the parties not the mediator.

6) Conclusion:

The mediation inner circle team need to recognise that there are serious criticisms and justice concerns levelling against mediation and its ability to deliver fair settlements. Moreover, holding tight on number of traditional or rather vague perspectives and mediation values is escalating such tension and holding mediation back from proving its abilities and

claiming a place as an effective dispute resolution method. Therefore, this chapter is presenting two options to deal with such predicament. First, is to revisit the values of neutrality and confidentiality in a manner that allows the application of educated self-determination theory. Moreover, is to require all mediators, lawyers and non-lawyers, to be familiar with the law(s) governing their field of expertise. The second option is for the dove mediators to give up such fight and remain within their comfort zone by limiting their services to the facilitation process. As explained in chapter one, the study proposes that the different between mediation and facilitation is the last do not share the responsibility of educating the parties and in turn achieving justice.

Lastly, it is worth mentioning that the study recognises its limitation and highlights that holding the mediator accountable for delivering both the participation and outcome informed consent along with all the suggested reforms in this chapter would lead to have the mediator exposed against complaints and even judicial claims. This requires further academic researches to study and analyse the possible practical and legal circumstances on the field of mediation.

Study Conclusion and Recommendations

This research journey was a search for meanings and understanding several ideologies including the meaning of mediation and its different values as well as the meaning of justice and its different forms. Several 'teams' have been painted, coloured and introduced ('dove and eagle' mediators, the mediation 'inner and outer circle', mediation and adjudication realists) to present the different schools of thought and to produce balanced and sound arguments.

The aim of this research is to restore the faith in mediation as an effective dispute resolution method of which capable of dealing with power imbalance and to prove that mediation can adequately aid conflicting parties in reaching fair settlements. To achieve that, the theory of educated self-determination has been identified and examined both in theory and practice.

The research concludes that the theory of educated self-determination has the potential to bring a sense of unity and clarity to the diverse and fast developing field of mediation. With the application of the mediation informed consent (participation and outcome) the theory of educated self-determination can be better adopted and applied in practice. With such application; the study urges the mediation outer circle team to consider mediation as an effective dispute resolution method of which capable of producing creative justice within the borders of the law. The study also sends a wakeup call to the mediation inner circle team. It is essential to start evaluating and amending the different mediation values and perceptions in a clear, practical and realistic manner, to better allow mediation to develop and stand strong against the several criticisms and justice concerns. The study sends another message to some of the mediation inner circle that may reject such call of reforms; one way to remain within your comfort zone is to limit your services to facilitation[817].

The following section sets out a number of recommendations along with recognition of the limitations of this study and resultant calls for future research:

1. There is a need to bring a sense of clarity and uniformity to the diverse field of mediation. One way to achieve this is to adopt a single, unified and internationally recognised mediation definition. Mediation in the simplest of words is an 'assisted negotiation'. This study recommends adding the theory of 'educated self-determination' to the definition. The definition proposed in this thesis is "***mediation is an assisted negotiation where the mediator honours the parties' self-determination***

[817] Facilitation as explained in chapter one of this work, is merely a process that enhances communications without the responsibility of educating the parties.

and assists them in making informed or educated decisions." The 'self-determination' aspect differentiates mediation from adjudication methods such as litigation and arbitration. The 'educated' aspect differentiates mediation from the other non-adjudication methods such as negotiation and facilitation.[818]

a. The study recommends that the term '**mediation**' be used more broadly to absorb the term '**conciliation**' and '**settlement conferences**' to avoid unnecessary confusion in the field.[819]
b. The study also recommends that what differentiates mediation from **facilitation** is only mediation would hold the responsibility of educating the parties and in turn achieving justice.[820]

2. The concept of '**Creative Justice'** requires a number of further studies to strengthen the meaning, need and importance of such a concept. Such studies are not limited to the law field but can involve sociology, political science, public policy, psychology, philosophy and peace studies. This is particularly essential because society, culture, policymakers and the courts continue to treat the law as the definitive source of normative rules despite all of its limitations. Perhaps these studies may help bring about a shift in mindset and start to recognise and appreciate creative justice as a parallel normative order that can be as beneficial to the society as it is to individuals.[821]
3. The mediation inner and outer circle teams are viewed to be polar opposites. Yet, the study reflects that they need to start recognising that they both stand on a common ground; they both care and wish to protect and enhance the quality of justice. The issue is that they view the concept of justice from different perspectives. While the first view is from the quality and creative justice perspective, the other view it from the efficiency proponents and formal justice perspectives. One way to have mediation function in a manner addressing the needs of both teams is to find the right balance in the relationship between mediation and the law. To achieve such a balance, the study recommends that:[822]

[818] For the rationale behind this recommendation see section one; introduction chapter and Chapter one.
[819] For the rationale behind this recommendation see Chapter one.
[820] Id
[821] For the rationale behind this recommendation see Chapter Two.
[822] For the rationale behind this recommendation see section two introduction Chapter.

a. Representatives from each team are invited when designing, drafting and establishing mediation laws, connected court programs, mediation community centres and private mediation centres. Perhaps when these two teams work together, they may shift to become mediation realists and adjudication realists.[823]

b. The study proposes and recommends to these two teams when working together to ensure **the adaptation and application of the theory of educated self-determination in their quest to find the right balance between mediation and the law** and to better enhance the quality of justice offered by mediation.[824]

4. The study recommends that one way to adopt the theory of educated self-determination in a practical manner and to bring ease to the mediation outer circle team concerns is the application of the concept of mediation informed (participation and outcome) consent.[825]

   a. To achieve **mediation informed participation consent**, the study highlights a **number of tools** that may be deployed such as the mediator's presentation in the convening or opening phase, the service provider's educational materials (such as videos, flyers, the roster mediators' profiles and website) and the mediation agreement checklist.[826]

   b. To achieve **mediation informed outcome consent**, the study highlights a **number of options** such as making use of cool off periods, judicial review, the presence of competent lawyers with the parties and the mediator applying reality testing evaluative techniques.[827]

   c. The study recommends **the establishment of a number of pilot projects** in court-connected mediation programs, mediation community and private centres in the jurisdiction(s) that wish to maximise the value of embracing mediation as a way to enhance the quality of justice. In such projects, the above tools and options should be applied. **Further research studies, observations and recommendations to be followed** including interviewing parties, mediators and service providers and examining mediation settlement

[823] Id
[824] Id
[825] For the rationale behind this recommendation see Chapter Three.
[826] Id
[827] Id

agreements. Such research may inform the future training requirements for mediators and service providing staff, the practical challenges behind applying the mentioned tools and options, how to overcome such challenges and lastly to identify new, creative and more practical ways to achieve mediation informed (participation and outcome) consent.[828]

d. The study also recommends further academic studies on the scope and limitations in respect of the 'educated' aspect of the educated self-determination theory. Specifically, this means that, **further studies are needed on the level and nature of knowledge that the mediator is responsible** for to assure the parties when practising their self-determination powers.[829]

5. The study recognised that the theory of educated self-determination might be troubling to the mediation inner circle team. The 'educated' part of theory can be viewed to be in contradiction with core mediation values; namely neutrality and confidentiality. Furthermore, there may be concerns that this approach may bring mediation too close to the law field. To address such concerns, chapter four was dedicated to examining the true meaning and importance of neutrality and confidentiality along with answering the question; is mediation a practice of law? In respect of these issues, the study recommends the following:
    a. The meaning of **the mediator's neutrality** must be defined in a very narrow manner where it only means the absence of conflict of interests. This approach comports better with the true nature of the mediator's role and fulfils the theory of educated self-determination.[830]
    b. The level of **confidentiality** applicable to mediation can stand as an obstacle against adopting the theory of educated self-determination and against any possible reforms. Therefore, the study suggests that:
        i. the scope, limitation and exceptions of mediation confidentiality are to be determined by the parties' agreements after obtaining enough knowledge to draft the confidentiality level that better serve their needs and allow the application of the educated self-determination theory. [831]

[828] Id
[829] Id
[830] For the rationale behind this recommendation see Chapter four.
[831] Id

ii. Or, the public policy to set the scope of confidentiality only for the protection of the parties, not the mediator.

iii. Further research is required to better evaluate these two suggestions.

c. The study recognises that holding the mediator accountable for delivering both the participation and outcome informed consent along with all the suggested reforms **would lead to having the mediator exposed to complaints and even judicial claims**. This requires further academic researchers on:

i. The different effects (negative and positives) on the mediation field including mediation accreditation and/or the legal requirements for one to act as a mediator or to be dismissed and/or penalised.

ii. The practicality and the legality of filing a malpractice claim against mediators. [832]

d. The study views the question of **is mediation a practice of law**? In respect of the question as to the survival of 'dove' mediators, such as those deploying facilitative and transformative mediation styles, the following can be stated:

i. Dove mediators must get familiar with relevant laws associated with their cases[833] and/or

ii. The system and the service provider should be the one who takes on the responsibility of addressing fairness concerns thus relieving the dove mediators from the burden of educating the weaker party. This proposal requires dove mediators to explain their limitations regarding educating the parties of the legal matters of the dispute when securing their participation consent and only further they should only agree to mediate cases where the parties are well informed of their legal rights. This can be accomplished by having a legal aid system in place, an affiliation with university law school legal advice programmes, or establishing a legal assistant office inside the court or community mediation centre as a fundamental part of the mediation service that they provide.[834]

iii. Or the dove mediators to quit such fight and limit their services to the facilitation process.[835]

[832] Id
[833] Id
[834] Id
[835] Id

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