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Is Mediation a Process of 'Law'? A Hart-Ian Perspective

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ABSTRACT

Mediation, as a form of dispute resolution, is widely practiced. Nations across the world recognize it as an increasingly appropriate form of dispute resolution. But the existential question remains. Can we rightly ascribe the word 'law' to the processes of mediation? This article makes one qualified proposition. Mediation is an extra-legal process, unless it is used to realize the law (and justice). This is for two reasons. First, mediation's processes and mediated outcomes do not in themselves cause judges' obeisance and adherence. Mediated settlements must rely on the law of contract for its validity and efficacy. Second, even if mediation is legislated to form part of our law, it is extra-legal. It does not comport with the minimum content of natural law in that it does not guarantee the realization of the law and access to justice. If we are to regard mediation as law, mediation must be used to realize the law and guarantee access to justice.

Keywords: mediation; appropriate dispute resolution; access to justice; jurisprudence; HLA Hart

INTRODUCTION

Mediation, historically regarded as a form of 'alternative' dispute resolution, has in recent times been regarded by the legal industry (including the Courts, lawyers and litigants) as an increasingly 'appropriate'[1] forum for dispute resolution. For lawyers and litigants, this is especially so in contracts where it is predominantly the norm to include a dispute resolution clause referring the parties to mediation (often coupled with arbitration clauses) when a dispute arises.[2] For the Courts, this is the case especially at the case management stage,[3] where the primary concerns of the Court are to ensure that public resources vested in the Courts are applied in the best and most efficient means possible, and to conduct and conclude cases 'efficiently, economically and expeditiously'.[4]As Justice French of the Federal Court of Australia (later Chief Justice of the High Court of Australia) noted, albeit extra-judicially, '[a]t a certain point in the pre-trial program [consideration of] the question of alternative dispute resolution and referral to mediation will have to be considered'.[5] By this token, when Courts as sites of law-adjudication in a legal system adopt a preference for mediation as an 'appropriate' form of dispute resolution, it invites the inference that mediation is a part of the law's toolbox.[6]

Indeed, mediation has been lauded as forum for efficient and amicable dispute resolution, and therefore an increasingly 'appropriate' forum for conducting and concluding cases.[7] Aside from the interests of costs and efficiency, it promises to be able to preserve working relationships between parties in dispute and allow parties some control of the outcomes of the resolution process, something which the Courts do not readily facilitate. Part of its allure is its ability to facilitate focus on 'commercial solutions' for parties to a dispute.[8]These are perhaps reasons why there has been growing support amongst industrial nations for the *United Nations Convention on International Settlement Agreements Resulting from Mediation*[9] (*Singapore Convention*) on enforcing mediated settlements across borders.[10]

There have been substantial literature extolling the advantages of mediation.[11] However, these claims appear overstated. This article offers a critique through the schema of HLA Hart's *Concept of Law*.[12] This article questions whether mediation can be considered legitimate norms or rules of law,[13] and whether it can be considered a legitimate part of our *legal system* as processes of law.[14] While there is little doubt that Court referred and sanctioned mediation serves to further the interests of the Court in ensuring cases are dealt with efficiently, economically, and expeditiously,[15] a question about whether mediation ought to be regarded as being a part of the law remains. This article makes the case for one qualified proposition – that mediation has an *extra-legal* characteristic, and it can only be

considered to be 'law' if it realizes the law. This examination does not only provide an account law's nature but posits how we ought to behave and what we ought to pursue.[16]

WHAT IS MEDIATION

There exist a wide and sparse patchwork of mediation practices in different contexts.[17] It is widely accepted to mean a process by which parties, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.[18] The role which mediators play vary. In *facilitative* mediation, mediators are facilitators of the process rather than an authority figure who provides substantive advice or pressure to settle. In *evaluative* mediation, the mediator is hired as an authority figure who will evaluate the case and offers advice on how the dispute should be resolved.[19] In *transformative* mediation, mediators foster empowerment and recognition in the parties this is done by encouraging the parties to communicate and make decisions more effectively, subject to their own choices and limits.[20] Mediators exercise a varying degree of authority in mediation.

The role which mediators play is a simple but essential: they act as 'agent of reality' who impress upon the parties the benefits but also the costs and detriments of failing to reach a negotiated agreement.[21] Sometimes (particularly in *evaluative* mediation), the mediator acts as a figure of authority that imposes settlements. Successful mediation usually results in an exchange of promises – a contractual settlement.[22]

MEDIATION'S PROMISE AND PREMISE

PROMISE

Mediation offers several lauded *benefits*. First, it offers a cost-and-time effective[23] fix – a more efficacious means of resolving (or avoiding) disputes than traditional forums, ie: litigation.[24] Second, it delivers a *feeling* of procedural justice (not to be confused with procedural fairness) to disputants.[25] Implicit in its growth is the recognition of the high costs of litigation and potential of mediation to *deal* with both legal and non-legal issues more quickly, cost-effectively and informally.[26]

Mediation promises to resolve disputes by freeing disputants from the 'encumbrances of formal rules' in view of 'fostering a relationship of mutual respect, trust and understanding',[27] enabling them to meet 'shared contingencies without formal prescriptive rules'.[28] Carroll describes the Mediation process as one that is: interests focused, voluntary, consensual, flexible, participatory, informal, norm-creating, collaborative, relationship-oriented, private, confidential and transparent.[29] Underpinning these are five philosophical tenets that illuminate these capacities – voluntariness, confidentiality, neutrality, empowerment, and unique solutions.[30] The authoritative sources of literature on Mediation all agree that the benefits of Mediation accrue from the underlying and fundamental conception of freedom to consent. Mediation is consent based, and its efficacy and effectiveness rely upon party's consent.[31]

PREMISE AND UNDERLYING TENSION

Herein lies a key problem. Mediation's claim to legitimate authority and legitimacy lies upon the free and informed consent of parties, and the ability of parties to do so free: from want or fear of prejudice or collateral disadvantage,[32] from coercion,[33] to determine one's own solution from bias,[34] and to resolve disputes creatively and free from rigid legal rules.[35] When parties, operating under a relationship of mutual respect, trust and understanding, fully consent, a justiciable dispute does not arise, even though the bargain consented to is unjust.[36] Freely given consent, in this context, cures all defects.

However, there is dissonance between the utopian narratives extolling the wonders of mediation, and the reality of mediation. Mediation's legitimacy is consent based; yet, the very reason parties choose to go to mediation vitiates consent. Mediation is a process that entice because it looks economical and promises better outcomes. Parties who 'freely' agree to use it to resolve their disputes consent to it, even if it is unjust, because they operate under the assumption that not to do so would result in more detriments. Consent in the context of mediation is not free, but *relatively* free. It is a choice one makes between the frying pan and the fire (or between a rock and a hard place). Corollary, there is a fundamental disagreement

here. The premise of the utopian promises of mediation can never really be attained, because its internal conditions of legitimacy (e.g., consent) can never be absolutely satisfied.

On the other hand, law in a democratic society makes a claim to legitimate authority and legitimacy premised upon a social contract between the governed who consent to law's authority based on law's promise of justice it can deal to the its subjects.

Two tensions resonate throughout this article: 1. Tension between what parties subjectively feel justice is and justice embodied in rules; 2. tension between justice *inter-partes*[37] (justice subjectively considered; or justice as an end between parties) and a 'public policy' conception of justice (justice objectively considered; or justice as understood as an end of a legal system).[38]

IS MEDIATION 'LAW'? AN EXTERNAL CRITERIA OF LAW IN LEGAL SYSTEM

RULE OF RECOGNITION: AN EXTERNAL CRITERIA OF 'LAW' IN 'LEGAL SYSTEM'

1. The Idea of a Rule of Recognition

Mediation's growth signals society's intention to regard mediation as *law*. However, not all apparent obeisance to rules are evidence of 'law'.[39] There is distinction between habitual practice that is congruent with the law, and positive acknowledgement and adherence to law. Hart argues that the foundations of a legal system do not consist of habits of obedience to a legally unlimited sovereign (Austin) on the threat of sanctions,[40] but instead consist of *adherence* to, or *acceptance* of, an ultimate *rule of recognition* by which the validity of any primary rules (rules which require members of the community to do or forbear from doing certain things[41]) or secondary (rules that govern the operation of the rule-system itself[42]) rule may be evaluated.[43]

Central to Hart's thesis is that the *rule of recognition* is a set of criteria by which officials determine which rules are or are not part of the legal system.[44] The *rule of recognition* of a legal system identifies those features a rule must possess if it is to count as a legal rule of the system in question.[45]

2. The Criterion of Validity

a. Sufficient Criteria of Exact Reason

A rule, assessed with Hart's *rule of recognition*, is a valid part of a legal system when that rule is treated by the Court as a normative[46]*reason* or *justification* (can be moral or otherwise, but must be 'legal'[47]) for the its decision.[48] A rule is valid as law only if practiced by the courts and accepted as law.[49] In this sense, there must be positive judicial *acceptance* of that rule for a rule to be law in its use as *reasons* and *justification* for a decision, but a valid rule need not always be *adhered* to, *accepted*, or *practiced*.[50]

This criteria has been met with criticism from Joseph Raz and Ronald Dworkin, who argue that it does not explain how rules can be reasons for action.[51] Both Raz and Dworkin argues that Hart's *rule of recognition* does not explain the normativity of rules or authority of rules outside strict confines of judicial decision-making.[52]

b. Necessary Criteria of Some Reason

Recognizing pluralism in the law, Marmor[53] proposed a slightly different but not inconsistent criteria of Hart's *rule of recognition* for identifying law. He regarded *rules of recognition* as 'constitutive conventions wherein a necessary reason for following a rule which is a social convention consists in the fact that others follow it too',[54] and 'are actually practiced in the [law-making and judicial] community'.[55]

That is not to say that every social practice is a valid rule and is valid 'law'.[56] Judges must look to those common recognition practices in order to identify the content of the recognition rule that they must follow.[57] In Marmor's conception of Hart's *rule of recognition*, the idea and criteria of the rules of recognition are constitutive conventions of partly autonomous social practices[58] – practices that have some acceptance and adherence to by the judiciary.[59] The

distinction between Marmor and Hart are that in Marmor's view, the rule does not need to provide reasons or justification for why Judges must follow them – it is enough that Judges do recognize and follow them albeit for reasons and justifications that may outside of that rule.[60] Marmor infers from the fact that when Judges give effect to a certain rule, it implies the existence of and correlation with *some* reason and justification that it be law.

c. Convergence and Divergence in these Criterion

According to Hart, an official who regards a rule as valid must treat that rule as a *reason* or *justification* for his or her decisions and official practices. Common official practice as regards that rule supplies officials with reasons why they ought to accept and follow that rule.

According to Marmor, common official practice allows the identification of what judges must follow in order to adhere to the rule of recognition of their legal system, not necessarily supply them with reasons. An official who regards a rule as valid could treat that rule as *a reason* of justification for his decision, or *an auxiliary reason*, or not at all. Judges may do so for a variety of different reasons stemming from, for example, morality, religious belief or self-interest,[61] that could be (but not required to be) incommensurable with that rule.[62]

Marmor's reading of Hart's rule of recognition is broad and all-encompassing. A rule that seems to attract judges' obeisance, or a customary practice by judges in faith of some rules, while in Hart's *Concept* would not necessarily constitute valid law (Hart requires a higher threshold of positive judicial recognition of the rule), could in Marmor's reading, be valid law. The divergence of Marmor's account from Hart, lies in the role to which the rule plays in reasons for Judges' decision. In Hart's view, rules of law must be the *exact* reason or justification for Judges' decision. Judges' must appeal to the rule in normative language. In Marmor's view, rules of law need not be the *exact* or *direct* reason or justification. It is enough that some reason supports its classification as law.

Where Hart's and Marmor's account collide, is in the basic requirement that legal rules must be recognised by the judiciary (state) as being enforceable as part of a triadic dispute-resolution process (between parties and the state).[63] Consistent with this is Kantorowicz's *Definition of Law*: law as 'a body of rules prescribing external conduct and considered justiciable'.[64] Practices that are pure dyadic (as in between private individuals without any state recognition of it) cannot be, in both Hart's and Marmor's view, valid law.

CAN MEDIATION BE CONSIDERED LAW?

Successful mediation results in a contractual settlement agreement. The Courts may then hand down consent orders. While mediation outcomes are enforced, it is not the processes of mediation that are recognized as legitimate nor given value as 'law'.[65] Courts enforce the contract or agreement that result from Mediation, either through a consent order, or by enforcing that contract or agreement. Here, Courts recognize first and foremost the sanctity of the contract and the freedom of contract, and the public policy to not to interfere with that freedom,[66] subject to the usual vitiating factors.

This view is supported by provisions of the *Singapore Convention*. Crucially, Articles 4 and 5 requires that settlement agreements are signed,[67] and with it, evidence that the agreement resulted from mediation.[68] Article 5 puts mediation in a position deferential to contract law. Article 5 provides that mediation agreements should not be enforced, where the processes and rules of mediation leading to the creation of agreement are not up to standard (breaches and failures by mediator or mediation ethics), or contrary to public policy.[69]

It might be dogmatic to consider that the processes of mediation are law just because they can be logically implied as part of the 'law' by other connected rules the validity of which has

already been recognized.[70] But under Marmor's account, mediation has some force as 'law' because its outcomes are enforced. In this sense mediation can be described as law because of its correlation with its outcome being capable of enforcement.

However, ascribing the term 'law' to mediation would be an abuse, even under Marmor's account. It is not a body of enforced and enforceable rules, but a mass of *real facts*[71] of which only its outcome in the form of a contract is enforceable. Mediation – its processes and rules – are not the objects directly and *triadically* enforced as the reasons for judicial decision. It is the outcome – contracts, or agreements, and the associated costs-and-time savings which result from mediation – that is being given consideration as law.[72] If we accept and receive mediation into our definition of law because there are other associated reasons why it could be 'law', law would be a body of rules the coherence of which is its own guarantee,[73] reliant on a vicious cycle of circular and fallacious reasoning for its legitimacy. It is paramount, that if we are to regard mediation as functionally law, it must realize or actualize the law.

LIMITATION OF THIS ANALYSIS

While the analysis concludes that mediation itself cannot be considered *law* now, it does not definitively proscribe that mediation will never become law in the future. Hart's and Marmor's conception of the *rule of recognition* is tool used to discover the *existence* of a rule at the time of an analysis.[74] Mediation, its processes and rules, may be valid law if the law changes. This brings us onto another enquiry.

CAN BE MEDIATION BE 'LAW'? AN INTERNAL CRITERIA OF LAW IN LEGAL SYSTEM

RULE OF CHANGE AND THE INTERNAL CRITERION OF LAW

Mediation may, in form, constitute valid law when it is, through a legal system's *rule of change*, received into law. The enquiry then evolves into whether mediation should ever be regarded as valid law.[75]

Hart claims that legal rules, as an *existential* condition going to the internal criterion of law, must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it – ie: *minimum content of natural law*.[76] If law is to command obeisance, there is a necessary condition of a *minimum content of natural law* – of justice or of morality.[77]

I do not press a particular conception of justice or morality. Instead, to make my point that mediation has an *extra-legal* character, I need only show that the necessary condition is not met – Mediation does not *guarantee* justice nor morality.

THE LANGUAGE OF MEDIATION VIS-À-VIS LAW: POWER VIS-À-VIS RULES

Mediation assumes that no case is certain until litigated.[78] Indeed, no case is certain until recognized by an authority capable of promulgating one side as the correct side.[79] As the oft-quoted adage goes, 'disputants [often] bargain in the shadow of the law ... when the law itself is shadowy'[80], and where 'they have little basis to estimate what ... is fair [or correct]'.[81]

With positions of law and of fact premised as uncertain, the language which actualizes law – rights, duties, justice, power and authority, entitlements, rules and principles[82] – shifts to non-juristic, non-legal terms of greater apparent certainty – interests:[83] needs, concerns, fears and aspirations. The latter group often embody the motivations of parties taking a position perhaps (but not definitively) backed by law. This shift in *language* signifies a shift from a rules-based enquiry to a power-based enquiry.[84] This poses two concerns:

1. Administration of Justice

   To administer the law not in the language embodying law, but in terms of the motivations for why disputants use and rely on the law, with little regard for the law substantive, would make it difficult to reconcile the practice of mediation with the overarching pursuit of law (justice).[85] To practice the law without the law describes a process which Fisher and Ury expresses as a means of merely getting parties to agree

and 'say yes'.[86] If we are to reconcile the practice of mediation as actualizing and fulfilling the law (and justice[87]), we must refrain from regarding mediation as a discourse describing the law, but a process or forum where law can and should be administered, in different but incommensurable terms.[88]

2. The Pursuit of Justice: Power, Not Rules

Secondly, to couch the language of dispute resolution, not in terms of the law, but motivations (or reasons for action) that are more objectively certain but rests outside the law or perhaps thinly veiled by uncertain law, we relegate questions of legal uncertainty, correctness and righteousness to be dealt with at a latent stage, or not at all.

Mediation is a game of needs and concerns, of power and attrition, feelings and emotions, divorced from legal notions of correct and right. Needs and concerns, when addressed by options generation, or alternatives, may resolve the perceived competition between interests which caused the conflict, thereby re-validating core concerns and the emotions that were invalidated by the perceived competition of interests.[89] A dispute may be resolved in this manner, but it is no measure of the morality, correctness and legality of the resolution. The radical difference between traditional forums of dispute resolution (i.e.: litigation and arbitration) and mediation lies in the realization of different forms of justice. In Litigation, the focus is on justice embodied in the rules of law. In mediation, the focus is on therapeutic justice, not justice as the rules of law in a legal system requires.

a. Focus on Therapeutic Justice

Mediation places emphasis on feelings, premised on the idea that people care more about emotions in bargaining over rights than do the unemotional inhabitants of neoclassical rational actor models.[90] In this sense, mediation places the individual at the heart of the process and tries to improve the relationship between parties.[91] Mediation was borne out of a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter.[92] Mediation focuses on satisfying the parties' needs, not legal rights, responsibilities, duties, obligations, and entitlements. This allows better response to psychological and emotional needs instead of focusing solely on the legal aspects of the dispute.[93]

A corollary of this view is that emotions such as fear and anger disrupt normal rational thought and reasoning capabilities.[94] Mediation can help to filter out the non-legal issues from a dispute by re-focusing on the competing interests and concerns, and thereby allowing for focused attention onto the legal issues.[95] However, there is much skepticism about how much of a dispute can be resolved in this way.[96] If mediation's goal is to make disputes go away, it reeks more of dispute avoidance, than doing justice to parties in dispute.

b. Forum and Mediator Bias

Mediation practices do not squarely meet its underpinning philosophies. Charlton notes that these tenets are *fictions*[97]– concepts that have variously 'mutated by being expanded or contracted'.[98] Notably, 'freedom' in mediation appear to be an illusion. There appears to be an element of coercion involved (apart from *relative* freedom discussed above),[99] particularly with non-facilitative forms of mediation, ie: where the mediator advises and evaluates.[100]Condliffe refers to research that shows mediator neutrality to be a myth and a 'linguistic device' used to 'legitimize' mediation.[101]In this sense, mediation ignores the quality of justice.[102]

Mediation prides itself as a flexible forum where parties can tailor the process to their needs *inter partes*. Such lack of formality, lack of procedural rules, and the absence of effective legal monitoring on the work of mediators

risks abuse.[103] The principle of mediator neutrality guides the mediator to avoid control over the choice of issues because such behaviour might jeopardize his or her appearance of impartiality. A choice of agenda made by the mediator is more likely to be interpreted by the parties as bias than is a choice made by the parties themselves or with their active involvement.[104]Neutrality, however, is not possible in the context of mediation.[105]

The reality of mediation practices is that mediators often adopt a facilitative style in conjunction with elements of transformative or evaluative mediation. The mediator adopts an advisory or evaluative role that involves intervening in the content and outcome of the mediation, as a 'value-add' service,[106] especially where efficiency is a primary goal.[107] (This is an obvious inference. Why choose a particular mediator if he or she does not add value to a service?) Here, it is more often than not that mediators pressure (or use subtle forms of pressure) parties to change their positions, to make concessions, and to settle.[108] Mediators use pressure tactics for a variety of reasons. Most crucially, mediators have an interest in an agreement obtained by the parties because the legal industry and many mediators consider an agreement to be evidence of a successful process and view a lack of agreement as a failure of both the process and the mediator.[109] Pressure tactics can take many forms. Most commonly, mediators pressure disputants by aggressive evaluation, by setting a close deadline for decision making, by making use of power differences between himself and the parties, or by shuttling between parties, forcing parties to make quick, often ill-thought compromises – e.g., 'Chinese wall' caucusing.[110] The content of the concept of *fair*, in this context, is tempered by industry expectations.

Such pressure is incompatible with ethical mediation.[111] First, pressure by mediators jeopardizes the parties' autonomy because the purpose is to reduce their freedom to choose between alternatives and to direct them towards an end preferred by the mediator.[112] Secondly, pressure tactics affect the quality of consent given by the parties to continue their participation in the process or to accept its outcome.[113] Thirdly, putting pressure on the parties is unfair. It is the opposite case of treating them with dignity and respect.[114] Lastly, by pressuring the parties towards settlement, the mediator risks losing his appearance of impartiality (and in my opinion, mediators tend to do so).[115] All these are an affront to the philosophical tenets of voluntariness, confidentiality, neutrality, empowerment, and unique solutions,[116] which mediation supposedly prides itself on. Here, doubts on the neutrality and legitimacy of mediation are not unfounded.[117] Mediation attempts to 'legitimize' new forms of social control under the auspices of a false premise of voluntary participation.[118]

Unsurprisingly, Fisher and Ury describe mediation as means of merely procuring consensus and agreement.[119] While there is a sense of justice felt by disputants, resolutions reached by mediation are neither a measure nor description of the law nor justice.[120] Uncertainty in the law is not the only limitation on guarantees of justice in mediation. The mediator plays a huge role in facilitating and impeding access to justice.

c. Remarks

Mediation is not a *legal* process. There is no *guarantee* of access to justice. If disputants are to resolve any legal conflict – conflicts of rights, principles and duties, it would require greater skill, engagement with, and opposition to the views of the mediator. Justice in this *extra-legal* process is dependent on how disputants (or their legal representative) control, tailor, and manipulate the process to achieve justice embodied in rules. It is the 'common fate of the indolent to see their rights become prey to the active

[and informed], misused or abused'.[121] Disputants must muster the moral courage to name and recognize injustices in mediation,[122] to call it out when we see them, to do what is right and not what is easy, and to keep the streams of justice pure.[123] This obviously requires skill. Its apt to note that commentators in Australia, at least, have noted that 'superior wisdom alienates mere peasants'.[124]

MEDIATION PRACTICE AND ACCESS TO JUSTICE: 'SUPERIOR WISDOM ALIENATES MERE PEASANTS'

1. Mediation Susceptible to Fallacies

Mediation emphasizes interests (wants) over positions (law and legal entitlements),[14] focusing on motivations and reasons behind a position held – i.e.: asking 'why'.[125] In stark contrast to litigation where facts and evidence are thoroughly examined to get to the bottom of the matter, to seek truth, etc.; mediation shifts away from these and focuses on making parties disclose reasons for their motivations. This is perhaps to question why parties have a dispute in the first place, but it is also possible that it is to facilitate an attack on those reasons with rationality and to paint disputants as unreasonable in the attempt to persuade or inveigle conflict resolution.

But this is fallacious – the process of mediation assumes that there is only one tract of reasons for a position taken. Mediation also assumes that rules of law *ipso facto* are not a reasonable nor valid reasons for action. This makes us jump to false conclusions based on subjectivity and heuristics.[126] As Kahneman and Ranadive describes this as the "what-you-see-is-all-there-is" phenomenon, or law of small numbers.[127]It makes us 'infer and invent causes and intentions', even if they are untrue.[128]

In similar vein, Raz observes that in conversations, 'we never make a full and complete statement of our reasons'.[129] All we do is 'state part of them, based on how much the hearer already knows, what he wants to know, the strength of the reason,[130] and to what extent we are willing to take him into our confidence'.[131] To assume that disputes arise from solely one tract of reasons, without regard for other equally important reasons (such as obeisance to law – which mediation avoids), may result in resolutions tainted by the fallacy of essentializing – resolutions that are misconceived, incorrect, irrational or unreasonable. The decisions made are only as good as the reasons disclosed. The overzealous pursuit of efficiency in mediation may entrench hasty decision making.

Mediation is a process susceptible to cherry-picking, misleading and deceptive conduct, and positional anchoring. Such process could allow parties to cherry-pick points to argue, usually arguing to easy-to-win points and ignoring the tougher-to-prove points, to paint the other side as unreasonable, as an oft-successful attempt to obfuscate the dispute. It allows one to assume any reason (regardless of its truth) – raise a straw man – as a means of getting what he or she wants.

In this sense, mediation is about negotiating power between disputants, not so much about attaining real justice or righting wrongs.[132]

2. Outcomes Dependent on Advocates Skill; Integrity and Trust in the Mediator

The promise of efficient dispute resolution and the corollary assumption of quick and efficient administration of justice weighs heavily on the skill and agility of the advocate to optimize, strategize and play the game of decision theory and game theory in a fast paced, impulsive atmosphere. The skills of a lawyer (and where absent a lawyer, the disputant themselves) play a quintessential role in ensuring that the client (or the disputant themselves) obtains justice. Processes of mediation imposes huge obligations on legal representatives to be competent in negotiation and mediation, and an even more tenuous obligation on litigants-in-person themselves.[133]

Where the mediation process prohibits disputants' access to legal representation,

or where a disputant cannot afford legal representation, disputants are at the mercy of those who have access to legal representation, or the mediator. This is a concern, especially considering pervasive literature that highlight that majority of mediation processes do not allow or limit the role of lawyers in representing clients in mediation. As a matter of practice, the presence of attorneys at a mediation is extremely rare. Almost all mediators prefer mediation without the disputant's lawyers present.[134]

Mediators are also concerned that lawyers' impact on mediation may also involve a focus on legal rights instead of on the needs and interests of the parties, and direct negotiation between the lawyers instead of direct communication between the parties.[135] Such dominant involvement of the parties' representatives is viewed to be incompatible with mediators' perspectives on an 'ethical' and 'fair' conduct of mediation.[136]

Mediators are often suspicious of lawyers.[137] Lawyers, who have their clients best interests in mind, from a legal point of view, are viewed by mediators to disrupt the conduciveness of mediation as a process of dispute resolution.[138] Mediators are concerned about the lawyer being a barrier between the mediator and parties, in that the lawyer may direct his or her client to withhold information from the mediator and limit cooperation with the mediator. Mediators are concerned that lawyers' presence reduces the psychological well-being of the parties because the mediator would not be able to do his or her job and thus the likelihood of a successful mediation diminishes.[139] By this token, the mediation process requires that disputants put all their trust in the mediator, which can be misplaced, given the dissonance between mediation's promises (and the premises assumed) and the practical reality of mediation.

Restricting disputants' access to legal representation and competent legal advice in a bid to allow parties to settle disputes amongst themselves, or to pressure them into conflict resolution without adequate assistance to navigate the complexities of the mediation process that has been deliberately designed to create environments conducive to settlement, is plainly unjust. The process is simply lacking in safeguards.[140] There is no capacity in mediation for defined bright lines of minimum standards or rules within the process.

CONCLUSION: CAN MEDIATION BE UNDERSTOOD AS LAW?

The fundamental idea of mediation is to free disputants from the 'encumbrances of formal rules'.[141]Implicit in this is the assumption that there would be scope for the process to venture outside the law. The practice of mediation that has developed over the past few decades strongly indicate that mediation processes venture outside law. Herein lies the problem. Mediation is increasingly being preferred and sanctioned by the Courts, not only as an 'alternative' mode of dispute resolution, but as an 'appropriate' form of dispute resolution. When Courts as sites of law-adjudication in a legal system adopt a preference for mediation as an 'appropriate' form of dispute resolution, it invites the inference that mediation is a part of the legal toolbox. In the discussion above, this article makes the point that mediation, in any event, cannot be understood as law, unless it is used to realize law and access to justice.

There is little guarantee of a *minimum content of natural law* in its processes. In a positivist sense, 'rules are applicable in an all-or-nothing fashion'.[142]Corollary, a rule (in this case, process) is either law or not law at all. Mediation is only legitimate in and of itself. It is not a legitimate source of law nor valid 'legal system' in the eyes of our law. If we are to regard mediation as law, there is an impetus that mediation be used to realize the law and guarantee access to justice.[143]

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NOTES

[1] Edwin Tong, 'The Singapore Convention on Mediation and the Future of Appropriate Dispute Resolution' (Conference Panel Discussion, American Society of International Law Virtual Annual Meeting, 25 June 2020). See especially [17:00] to [17:30] of the recorded proceedings. https://www.asil.org/events/singapore-convention-mediation-and-future-appropriate-dispute-resolution, archived at https://perma.cc/JK75-29X9 [08 December 2020]; Edwin Tong is second Minister for Law in the Parliament of Singapore; See also, (former WA Chief Justice) Wayne Martin, 'Alternative Dispute Resolution – A Misnomer?' (Speech, ADR Address 2018, Australian Dispute Centre, Perth, 6 March 2018) 17-18. <https://www.supremecourt.wa.gov.au/_files/Speeches/2018/Australian%20Disputes%20Centre%20ADR%20Address%202018%20-%20Alternative%20Dispute%20Resolution%20-%20A%20Misnomer.pdf>, archived at <https://perma.cc/BRG4-QPA3>[29 November 2020]; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929; RhainButh, 'Zombie Mediations' (2015) 36 *Australian Dispute Resolution Journal* 104.

[2] Former Malaysian Attorney-General Tommy Thomas was critical of the increasingly popular use of alternative forums of dispute resolution (i.e., arbitration, but in my view this can also be extended to mediation): Tommy Thomas, *Abuse of Power: Selected Works on the Law and Constitution* (Strategic Information and Research Development Centre, 2016) 276-83.

[3] In Malaysia, the High Court at the pre-trial case management stage, may make "appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including … mediation in accordance with any practice direction for the time being issued": *Rules of Court 2012* (Malaysia) O 34, r 2(2)(a); In Western Australia, see *Rules of Supreme Court 1971* (WA) O 1 r 4B, O 4A; See also, Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, 1998) [6.2]-[6.12]; Camille Cameron and Elizabeth Thornburg, 'Defining Civil Disputes: Lessons from Two Jurisdictions' (2011) 35(1) *Melbourne University Law Review* 208.

[4] *Westpac Banking Corporation v The Bell Group (in liquidation) [No 2]* [2009] WASCA 223, [4] (Wheeler J); See also, *Rules of Court 2012* (Malaysia) O 34, r 2(2)(a).

[5] Justice Robert French, 'The Role of the Trial Court Judge in Pre-Trial Management' (FCA) [2004] *Federal Judicial Scholarship* 10 <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2004/10.html>, archived at <https://perma.cc/9LWM-UYKM> [29 November 2020].

[6] There is much controversy about whether this inference can be drawn. This is a point sorely contested through the inclusive-exclusive positivism debates. However, through the realist view of law, this inference can certainly be drawn. See e.g., Danny Priel, 'Farewell to the Exclusive-Inclusive Debate' (2005) 25(4) *Oxford Journal of Legal Studies* 675; Hägerström is of the view that the resolution of moral uncertainty (ie, normative enquiry of what should be law) implies the resolution of epistemic uncertainty (ie, what *is* the state of law): Axel Hägerström,*Inquiries into the Nature of Law and Morals*, ed Karl Olivecrona, tr C D Broad. (Stockholm: Almqvist &Wilksell, 1953) 201-2.

[7] In this sense, there is a shift from regarding mediation not only as an 'alternative' form of dispute resolution, but an 'appropriate' forum of dispute resolution sanctioned by the Courts.

[8] Parliament of Singapore. *Parliamentary Debates*, *Official Report* (6 August 2018) <https://sprs.parl.gov.sg/search/fullreport?sittingdate=6-8-2018> at 56-57 (K Shanmugam, Minister for Law, Singapore), archived at <https://perma.cc/DRL6-4AU7 [16 November 2018]

[9] *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019; See also, Settlement of commercial disputes – International Commercial Mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation, note by the secretary, UNCITRAL 51st session, 2 March 2018, A/CN.9/943, Art 15-19 https://undocs.org/en/A/CN.9/943 [5 December 2020].

[10] 'About the Convention', *Singapore Convention on Mediation* (Webpage) <https://www.singaporeconvention.org/convention/about-convention/>, archived at <https://perma.cc/3SJK-KCYU> [29 November 2020].

[11] See generally, John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime & Justice* 1, 82-3; Robyn Carroll, 'Appointing decision-makers for incapable persons – What scope for Mediation' (2007) 17 *Journal of Judicial Administration* 5, 81, referring to L Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 1996) 35; Kathy Douglas and Rachel Field, 'Looking for Answers to Mediation's Neutrality Dilemma In Therapeutic Jurisprudence' (2006) 13 *eLaw Journal* 177.

[12] H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994).

[13] See, e.g., Christine Harrington, 'Socio-Legal Concepts in Mediation Ideology' (1985) 9 *Legal Studies Forum* 33, 35-8; Andrew Morrison, 'Is Divorce Mediation the Practice of Law – A Matter of Perspective' (1987) 75(3) *California Law Review* 1093; Douglas Lind, 'On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence' (1992) 10(2) *Mediation Quarterly* 119.

[14] Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 79-84; In this article, we make the assumptions that rules are intelligible: Charles J Ten Brink, 'A Jurisprudential Approach to Teaching Legal Research' (2005) 39 *New England Law Review* 307, 311-4.

[15] Mediation, by being practiced at and sanctioned by Courts as sites of law-adjudication, can be phenomenologically regarded as law. The question about whether it ought to be regarded as law remains.

[16] Legal theory is in this sense useful. For justification, see, Kevin Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8(5) *Philosophy Compass* 457, 457-8.

[17] Nadja Alexander, 'Mediation and the Art of Regulation' (2008) 8(1) *Queensland University of Technology Law Journal* 10; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 2002) 25.

[18] Robyn Carroll, 'Appointing decision-makers for incapable persons – What scope for Mediation' (2007) 17 *Journal of Judicial Administration* 5, 81.

[19] This form of mediation faces some controversy. It may not involve a neutral evaluation. *Contra* Justice Robert French, 'The Role of the Trial Court Judge in Pre-Trial Management' (FCA) [2004] *Federal Judicial Scholarship* 10 <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2004/10.html>, archived at <https://perma.cc/9LWM-UYKM> [29 November 2020].

[20] David Spencer, *Essential Dispute Resolution* (Cavendish, 2nd ed, 2005) 65; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 48-74; Robyn Carroll, 'Appointing decision-makers for incapable persons – What scope for Mediation' (2007) 17 *Journal of Judicial Administration* 5, 82 (footnotes omitted).

[21] Jennifer Brown and Ian Ayres, 'Economic Rationales for Mediation' (1994) 80 *Virginia Law Review* 323, 325.

[22] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition of Mediated Settlements' (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 42; see also, Jing Zhi Wong, 'Singapore Convention on Mediation: Better Enforcing Cross-Border Mediation Agreements', *Perth International Law Journal – UWA International Law Society Blog* (Blog, 18 November 2018) <https://www.perthilj.com/blog/2019/2/19/singapore-convention-on-mediation-better-enforcing-cross-border-mediation-agreements>, archived at <https://perma.cc/7H7X-SL8M> [29 November 2020].

[23] Lord Bingham, *The Rule of Law* (Penguin, 2011) 85-6; Christopher Hill, *Liberty Against the Law* (Allen Lane, 1996) 266, referring to John Cook, *Unum Necessarium: or, the Poore Man's Case* (Matthew Walbancke, 1648).

[24] E.g., *Bolitho v Banksia Securities Limited (No 7)* [2020] VSC 204, [22]- [27].

[25] Tim Cowen, 'Justice Delayed is Justice Denied' (Conference Paper, World Justice Forum, 2-5 July 2008) 18, 19, 24, 25; Lord Bingham, *The Rule of Law* (Penguin, 2011) 88-9; National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for Standards* (2001) 4, 70-71.

[26] See generally, Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study Into Mediator's Understanding' (2017) 29(1) *Bond Law Review* 69, 71; See also, Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1.

[27] Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6.

[28] Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6

[29] Robyn Carroll, 'Appointing decision-makers for incapable persons – What scope for Mediation' (2007) 17 *Journal of Judicial Administration* 5, 81.

[30] Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 15; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 48-74.

[31] This is achieved either through the parties in dispute willingly giving their consent to participating genuinely in the mediation, or through ethical and professional duties imposed on their lawyers as officers of the Court. A practitioner's duty to the Court and administration of justice is paramount: See e.g., *Legal Profession Conduct Rules 2010* (WA) ss5, 32.

[32] Confidentiality; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 85-7.

[33] Voluntariness; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 87-8.

[34] Neutrality, as impartiality and equidistance from dispute; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 88-98.

[35] Unique solution; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 99-100.

[36] Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6.

[37] E.g., *ASIC v Kobelt* [2019] HCA 18.

[38] E.g. see Charles T Kotuby Jr, 'The Foundation of Choice of Law: Choice and Equality by SagiPeari [Oxford University Press, 2018, 344pp, (2020) 69(1) *International and Comparative Law Quarterly* 263, 264-5.

[39] An example of this distinction can be seen in the identification of customary international law. Hans Kelsen, quoting Friedrich Karl von Savigny, posits that social-fact sources of international law are the 'badge, but not the origin of positive law'. The question of whether social-fact sources of law are indeed constitutive of law remains: Hans Kelsen, *Pure Theory of Law* (University of California Press, 1970) 227, quoting Friedrich Karl von Savigny, *System des Heutigen RomischenRechts* (Berlin: Veit, 1840) 35; For further discussion, see Jing Zhi Wong, 'Comparative Legal Methodology and its Relation to the Identification of Customary International Law' (2019) 4 *Perth International Law Journal* 81, 86-7.

[40] Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 38.

[41] Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 375.

[42] Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 39.

[43] H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 110.

[44] Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 40-1.

[45] Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 375; H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 109-11; 'ultimate crirerion': Kevin Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8(5) *Philosophy Compass* 457.

[46] Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 375; H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 55-7, 83-91, 102-3, 109-10, 111, 116-7.

[47] In the triadic sense, see Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32(2) *Comparative Political Studies* 147, 163-4; Julie

Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 379-81.

48 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 376; H L A Hart, *The Concept of Law* (Clarendon Press, 1994) 103-5.

49 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 383.

50 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 384.

51 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 56–8.

52 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 57; Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 388.

53 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 394; Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001).

54 Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 5, 22, 24.

55 Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 5, 22, 24.

56 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 394.

57 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 396; H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 108, 254-68.

58 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 393.

59 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 394.

60 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 396.

61 Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 32-3; Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 398.

62 Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 400.

63 Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32(2) *Comparative Political Studies* 147, 147, 163-4; In Shiner's account of Hart's *Concept of Law*, 'Law presupposes at a minimum a degree of institutionalization and a degree of "ruled-ness"': Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Clarendon Press, 1992) 30.

64 Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 21.

65 Nadja Alexander, 'Mediating in the Shadow of Australian Law: Structural Influences on ADR' (2006) 9 *Yearbook of New Zealand Jurisprudence* 332, 335, 340-1; In Western Australia, parties cannot be ordered to go to mediation where they are liable for mediator remuneration. See *Rules of Supreme Court 1971* (WA) O 29 r 2.

66 Alfred Denning, *The Road to Justice* (Steven & Sons, 1955) 88-9.

67 *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019, art 4(1)(a).

68 *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019, art 4(1)(b).

69 *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019, art 5.

70 Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 31.

71 Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 31.

72 E.g., *Bolitho v Banksia Securities Limited (No 7)* [2020] VSC 204, [22]-[27].

73 Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 31.

74 i.e., in a 'momentary' legal system.

75 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 95-6; Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 38-41.

76 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 185.

77 This minimum content of natural law goes to the idea that while law and its merits are distinct enquiries, positivism presumes that law rests on some minimum degree of legitimacy. Hart does this by modelling his idea of secondary rules (of change, adjudication, and recognition) in his *Concept of Law* on the British legal system, where it is safe to assume that rules sanctioned by the system has a minimum degree of legitimacy such that its citizens follow it. See Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Clarendon Press, 1992) 20, 23-4.

78 Matt Harvey, Maria Karras and Stephen Parker, *Negotiating by the Light of the Law* (Themis Press, 2012).

79 Lon Fuller, *The Morality of Law* (Yale University Press, 1965).

80 Robert Mnookin and Lewis Kornhauser, 'Bargaining in the shadow of the law: the case of Divorce' (1979) 88 *Yale Law Journal* 950.

81 Robert Mnookin and Lewis Kornhauser, 'Bargaining in the shadow of the law: the case of Divorce' (1979) 88 *Yale Law Journal* 950.

82 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 172.

83 Nadja Alexander and Jill Howieson, *Negotiation: Strategy Style Skills* (LexisNexis, 2nd ed, 2010).

84 This shift in language is an attempt to change the narrative (or '*a priori*' underpinnings) on which disputes should be resolved: Daniel Bonilla Maldonado, 'The Cultural Analysis of Law: Questions and Answers with Paul Kahn' (2020) 21 *German Law Journal* 284, 289; Paul Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press, 2019) 39-40, 62, 94, 123-30, 203, 234; In mediation's point of view, the legal order and the content of 'law' should not be rules and rights, but of negotiating power and attrition.

[85] H L A Hart, *The Concept of Law* (Clarendon Press, 2nd, ed, 1994) 18-25; R M Hare, *The Language of Morals* (Oxford University Press, 1952).

[86] Roger Fisher and William Ury, Getting to Yes (Penguin, 3rd ed, 2011); *contra*Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 243-8; See also Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette Law Review* 155, 159-60.

[87] Positivists would say law is separate and apart from the idea of justice.

[88] I have conscientious reservations to this perspective of law.

[89] Daniel Shapiro and Roger Fisher, Beyond Reason: Using Emotions as you Negotiate (The Penguin Group, 2005).

[90] See generally, Peter Huang, 'Reasons within Passion: Emotions and Intentions in Property Rights Bargaining' (2000) 79 *Oregon Law Review* 435, 438.

[91] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 247.

[92] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243. 249; See also Ellen Waldman, 'Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?' (2005) 5 *Psychology, Public Policy, and Law* 1103, 1105-6.

[93] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 249; See also Ellen Waldman, 'Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?' (2005) 5 *Psychology, Public Policy, and Law* 1103, 1105-6.

[94] Peter Huang, 'Reasons within Passion: Emotions and Intentions in Property Rights Bargaining' (2000) 79 *Oregon Law Review* 435, 439; See also, Robert Adler et al, 'Emotions in Negotiation: How to Manage Fear and Anger' (1998) 14 *Negotiation Journal* 161, 168-74; See generally, George Loewenstein, 'Out of Control: Visceral Influences on Behavior' (1996) 65 *Organizational Behavior and Human Decision Processes* 272, 288.

[95] See e.g., Timothy Bowen, 'Using Mediation in Situations of Withholding or Withdrawing Life-sustaining Treatment: A New South Wales Perspective' (2009) 17 JLM 74, 74-76.

[96] Peter Huang, 'Reasons within Passion: Emotions and Intentions in Property Rights Bargaining' (2000) 79 *Oregon Law Review* 435, 438-41.

[97] Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 7-14.

[98] David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 84; Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 15.

[99] C W Moore, *The Mediation Process: Practical strategies for resolving conflict* (Jossey-Bass, 1986) 5.

[100] E.g., settlement mediation, compromise mediation, and evaluative mediation; see David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 101-2.

[101] Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) 253.

[102] Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) [7.10] 254-6, referring to Roman Tomasic, 'Formalized 'Informal' Justice — A Critical Perspective on Mediation Centres' (Seminar Paper, Sydney University Institute of Criminology, March 1982).

[103] Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) 251.

[104] Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) 258.

[105] Various philosophical and sociological enquiries cast doubt on whether neutrality exists at all: eg, Siân Evans, 'Neutrality is an Oppressive Myth, or: Teaching Freshman About Neutrality and Knowledge', *Medium* (online), 30 May 2018 <https://medium.com/@sinevans/neutrality-is-an-oppressive-myth-or-teaching-freshmen-about-neutrality-and-knowledge-9e8d92d6c0c3>, archived at <https://perma.cc/8FFA-QAP6> [29 November 2020].

[106] See generally, Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette Law Review* 155.

[107] Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study Into Mediator's Understanding' (2017) 29(1) *Bond Law Review* 69, 71.

[108] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 260; See also, Jacqueline Nolan-Haley, 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 *Cardozo Journal of Conflict Resolution* 57, 68.

[109] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 261-2.

[110] SeeJennifer Brown and Ian Ayres, 'Economic Rationales for Mediation' (1994) 80 *Virginia Law Review* 323, 325, 326.

[111] To my knowledge, University of Western Australia PhD Candidate Sergey Kinchin is writing his doctoral thesis on ethically questionable practices in Mediation. Sergey is investigating legal practitioners' attitudes towards various negotiation tactics, and where they would draw the line on negotiation tactics. His aim is to determine legal practitioners' attitudes and use of various negotiation tactics: 'Negotiation Tactics Survey' (Webpage, UWA Law School (Qualtrics), 17 June 2020) <https://uwa.qualtrics.com/jfe/form/SV_d0Dgxkswvn-lodtb?fbclid=IwAR0nUHksA26qQEzL6kTA3p5LdnOYft0D4GmJdr4KaDUErATNrmSkUdybsWQ>, archived at <https://perma.cc/GWS2-XXUR>[29 November 2020].

[112] Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm

of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 261-2.

113 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 261-2.

114 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 261-2.

115 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 261-2.

116 Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 15 David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 48-74.

117 See, Kathy Douglas and Rachel Field, 'Looking for Answers to Mediation's Neutrality Dilemma In Therapeutic Jurisprudence' (2006) 13 *eLaw Journal* 177.

118 Christine Harrington, 'Socio-Legal Concepts in Mediation Ideology' (1985) 9 *Legal Studies Forum* 33, 35.

119 Roger Fisher and William Ury, *Getting to Yes* (Penguin, 3rd ed, 2011); John Murray, Alan Rau and Edward Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (Foundation Press, 1989) 111-3.

120 Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950; See generally *Moore and Moore* [2008] FamCA 32, [760]; *Loddington and Derringford (No 2)* [2008] FamCA 925, [193]; *MacKillop and MacKillop* [2007] FamCA 851, [9]; Lord Bingham, *The Rule of Law* (Penguin, 2011) 86; *Financial Integrity Group Pty Ltd v Farmer (No 4)* [2014] ACTSC 145; James Goh, 'The Self-represented Litigants' Challenge: A Case Study' (2018) 43(1) *Alternative Law Journal* 48.

121 Alfred Denning, *The Road to Justice* (Steven & Sons, 1955) 88-9.

122 Baroness Hale, 'Moral Courage in the Law' (Speech, Worcester Lecture 2019, Worcester Cathedral, 21 February 2019) 1, 9, referring to *St Helens Borough Council v Derbyshire & Ors* [2007] UKHL 6, [2007] 2 AC 31. <https://www.supremecourt.uk/docs/speech-190221.pdf>, archived at <https://perma.cc/645K-TBZ4>[29 November 2020].

123 Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106, 128, referring to Lord Denning, *The Discipline of Law* (Butterworths, 1979) 314.

124 Phrase articulated in Janet Albrechtsen, 'High Court in the Crossfire of Runaway Judicial Activism', *The Australian* (14 February 2020) <https://www.theaustralian.com.au/inquirer/high-court-in-the-crossfire-of-runaway-judicial-activism/news-story/631a06647c8216cbf7ec264e461181a9>, archived at <https://perma.cc/J3PH-T2NS> [29 November 2020].

125 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 15-21; Douglas Lind, 'On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence' (1992) 10(2) *Mediation Quarterly* 119, 123-4.

126 See Ameet Ranadive, 'What I learned from "Thinking fast and slow"', *Medium* (online), 21 February 2017 <https://medium.com/leadership-motivation-and-impact/what-i-learned-from-thinking-fast-and-slow-a4a47cf8b5d5>, archived at <https://perma.cc/3RVB-VL8S> [29 November 2020]

127 Ibid; Daniel Kahneman, *Thinking Fast and Slow* (Penguin, 2011).

128 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 129-132.

129 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 22.

130 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 25.

131 Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 22.

132 'real justice': e.g., *Davies v Eli Lilly & Co* [1987] 1 All ER 801, 804 (Sir John Donaldson MR).

133 E.g., see, John Allison, 'Five Ways to Keep Disputes out of Court' (1990) *Harvard Business Review* 166.

134 Randy Kandel, ''Developmental Appropriateness' as Law in California Child Custody Mediation' (1995) 35 *Journal of Legal Pluralism and Unofficial Law* 75; See generally, Kevin Farmer, 'An Investigation into the Effect Representatives have on their Client's Perception of Justice in Mediation' (UnpublishedPhD Thesis, University of Massachusetts Amherst, 2006).

135 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 264.

136 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 264,.

137 Ken Yin, 'The Re-Killing (Perhaps) of the Donoghue Gastropod – And Sone Suggestions to Tinker With The First-Year Legal Education Curriculum' (2017) 10 *Journal of the Australasian Law Teachers Association* 189, 189; Lionel Murphy, 'The Responsibility of Judges', Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed), *Law, Politics and the Labor Movement* (Melbourne: Legal Service Bulletin, 1980) 5.

138 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 266-7.

139 Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 266-7.

140 This should not come as a surprise. The whole idea of mediation is to free disputants from the 'encumbrances of formal rules': Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6; Corollary, the implication of this is that mediation lacks safeguards that law would otherwise provide. Mediation is only commensurable with law if it delivers what law can provide.

141 Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6.

[142] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 24, 27.

[143] This is what the legal industry should aspire to achieve.

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