

# Mediation v. Case Settlement: The Unsettling Relations Between Courts and Mediation — A Case Study

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## ABSTRACT

This article utilizes a case study of Israel's experiment with mediation in its court system to propose a re-conceptualization of ADR processes and to provide insights into the intricate relations between courts and mediation. Specifically, the article advances the proposition that all consent-based third party interventions or assisted negotiations should be clustered under two distinctively and paradigmatically different processes — mediation and case settlement. This proposition is grounded in the case study at hand, yet is well-suited for other contexts and offers generalizable insights.

At a more particular level, the article tells the sad story of the “mediation revolution” in Israel. It examines and analyzes how institutional and professional interests of the court administration, the judiciary and the practicing bar caused the idea of mediation as a vehicle for social and cultural change to be abandoned and generated an alternative concept of a case settlement. As such, the case study raises a host of policy questions and carries many insights and lessons for all legal systems that are bound to encounter similar problems and to face a similar strategic choice.

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\* Professor of Law, Haifa University Faculty of Law. The author would like to thank Professor Carrie Menkel-Meadow and Dr. Orna Rabinovich-Einy for their insightful comments and his research assistant Ms. Irena Nutenko for her contribution. This article features a case study rooted in the author's active involvement with the “mediation revolution” in Israel. Written from the standpoint of a participating observer, the article contains information where reference to a specific authority is simply unavailable and sections based on the author's own experience and firsthand knowledge are therefore without specific citation.

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## I. INTRODUCTION

Court systems have always had a complicated relationship with mediation. This article draws on the specific case study of Israel's experiment with system-wide mediation to provide important insights into this relationship. Israel's experience also offers a re-conceptualization of ADR processes: specifically, that all consent-based third-party interventions or assisted negotiations should be clustered under two distinctively different processes: mediation and case settlement. While this notion is rooted in Israel's experiment with mediation, it offers insights generalizable to other contexts as well.

At its core, this article explores the sad story of the "mediation revolution" in Israel, a tale of a broken dream and unfulfilled promise. It examines and analyzes the failure of the "mediation revolution," the abandonment of the concept of mediation as a vehicle for social and cultural change, and how the institutional and professional interests of the Courts Administration, the judiciary, and the

practicing bar contributed to mediation being replaced by case settlement as the mainstream dispute resolution process. For policy makers, scholars, judges, mediators, ADR practitioners, and the practicing bar, this case study raises a host of policy questions and carries many insights and lessons, the most pertinent of which the article explores. The article further suggests that other legal systems where mediation is already well established, as well as those that are currently making the first steps in introducing mediation, are bound to encounter similar problems and face similar strategic choices.

Israel is a highly litigious society. In a comparative study conducted in 2004, Israel ranked first out of seventeen countries in the number of filings for population size.<sup>1</sup> The average number of new filings per 1000 citizens in the seventeen countries was 89.56 while the number in Israel was almost double: 184.15.<sup>2</sup> The number of new cases per judge was 2335,<sup>3</sup> an astounding amount for a relatively small judiciary. Consequently, the litigation explosion and the court backlog have been a persistent problem in the administration of the courts.<sup>4</sup> The former Chief Justice of the Supreme Court, Justice Barak, once described the judiciary as six hundred judges chasing one million cases.

When mediation was first introduced in Israel in 1992, many supporters, including judges, court administrators, and lawyers, believed that it was intended to relieve the courts of their unreasonable case burden by subcontracting part of the court settlement activity to outside professionals. This approach was quickly repudiated by Chief Justice Barak, who admonished that mediation was not intended merely to solve the problems of the courts, but also to fundamentally change Israeli society's disputation culture.<sup>5</sup>

With energy and enthusiasm fostered by the new idea and vision, the first years of mediation's presence in the Israeli court system were full of promise and institutional innovations. The government established a unit within the Justice Ministry aimed at promoting mediation, and the Attorney General issued directives supporting the

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1. Raanan Sulitzeanu-Kenan, et al., *The Burden on Legal Systems: Comparative Analysis of 17 Countries, Final Report*, at 18, THE CENTER FOR PUB. MGMT. AND POLICY (2007).

2. *See id.* at 18.

3. *See id.* at 36.

4. The total number of judges in Israel during 2009, including the labor courts, was 607. The number of cases still pending from previous years was 468,443. *See*, COURTS MGMT., *The Courts System in Israel Six Month Report: 1.7.09-31.12.09*, 1 (2010).

5. Aharon Barak, *On Mediation*, 1 WITH CONSENT 4-5, 10 (2001).

idea of mediation<sup>6</sup>. Court-sponsored mediation programs mushroomed in order to meet the demand hundreds of people participated in mediation training. Even the Bar Association embraced the idea, establishing its own mediation center and leading business and civic organizations signed pledges encouraging the use of mediation.

But the fervor was short-lived: mediation soon lost the Justice Ministry's backing. The courts that were expected to play a pivotal role as change agents in the "mediation revolution" did not deliver. Instead, under mounting criticism of court inefficiency and excessive delays in litigation, the courts adopted a strategic goal of docket-clearing, which meant expanding and upgrading the courts' own case settlement services through in-court alternative dispute resolution ("ADR") or mediation substitutes. In addition, simply ending the litigation in pending cases emerged as the one and only criterion to determine success for the purposes of referring future cases to out-of-court resolution. Since case settlement is usually faster, shorter, and cheaper than mediation, it took the place of mediation as the mainstream dispute resolution process.

This article incorporates two seemingly different but closely related themes. The first is an attempt to re-conceptualize the field of mediation. It suggests that, after so many years and with so many attempts to define and classify different methods of mediation,<sup>7</sup> the field needs better anchoring through a new conceptual framework according to which all consent-based third-party interventions in dispute resolution are grouped under two paradigms: "case settlement" and "mediation." The second theme is the intricate and troublesome relationship between mediation — as defined in this article — and the institutional interests of the courts and the practicing bar.

The first Part of the article is devoted to the first theme. In addition to offering a new conceptual framework, it attempts to create a common terminology for the discussion — something that is always problematic in comparative discourse,<sup>8</sup> particularly so when writing

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6. Elyakim Rubinstein, *Mediating Disputes Involving the Government*, ATT'Y GEN. DIRECTIVE 60.125 (1999).

7. See, e.g., Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEG. J. 217 (1995) (book review) (reviewing three books which discuss, among other topics, the various theories behind and methodologies for mediation).

8. See Arnold Zack, *Conciliation of Labor Disputes: General Report*, Thirteenth Meeting of European Labour Court Judges 5 (Sept. 19, 2005), available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—dialogue/documents/meetingdocument/wcms\\_189533.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—dialogue/documents/meetingdocument/wcms_189533.pdf) (pointing out that even basic terms such as "mediation" and "conciliation" have entirely different meanings in different legal systems).

on ADR.<sup>9</sup> The succeeding two Parts are devoted to the second theme: the interaction of mediation, the courts, and lawyers. These relationships are discussed through a case study which recounts the story of the unsuccessful attempt to introduce mediation as a vehicle of paradigm shift in Israeli disputation culture.<sup>10</sup> Part II analyzes the milestones in the development of mediation in Israel, and Part III discusses the decline of mediation and analyzes the forces and developments that brought it about. The final Part and the epilogue summarize the findings and discuss policy implications thereof.

## II. "CASE SETTLEMENT" V. "MEDIATION"

The literature and the public debate regarding ADR notoriously suffer from terminological ambiguities and inconsistencies.<sup>11</sup> The definitional literature is voluminous and does not need repeating here. Nonetheless, as a modest contribution to the ongoing discourse, this article suggests distinguishing between two paradigmatic kinds of consent-based interventions: "case settlement" and "mediation."

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9. Carrie Menkel-Meadow has already noted that some terminology and categorization of processes and techniques can be problematic in the field of alternative dispute resolution. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 1 n. 2 (1991). For further discussion of these difficulties, see KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 23–25 (2d ed. 2000) (discussing various definitions of mediation); The Israeli legal definition of mediation process is to be found in Courts Law, [Abridged Version], 1984, S.H. 198, § 79B.

10. The focus of the article is primarily on the role of mediation in the resolution of disputes, to distinguish it from deal-making or transaction mediation. On the distinction between dispute settlement negotiation and deal making negotiation, see ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 128–29 (2000). On the use of mediation in deal making and transaction negotiations, see Scott R. Peppet, *Contract Formulation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON. DISP. RESOL. 283 (2004).

11. See *supra* notes 8–9 and accompanying text.

Generally speaking, case settlement and mediation share four common properties: (1) involvement of a third party;<sup>12</sup> (2) voluntarism;<sup>13</sup> (3) confidentiality;<sup>14</sup> and (4) legitimacy to engage in private caucusing and in meeting sub-groups of litigants privately.<sup>15</sup> These

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12. In Israel, the process of case settlement can be led either by the presiding judge on the case or by a special settlement judge. Off-the-record case settlement activities that are carried out by judges have always played an important part in litigation in Israel. This aspect of judges' work has never been formalized or regulated, and it is referred to in only one relatively recent regulation dating from 1996 which authorizes judges to examine, as part of the pre-trial stage, the possibility of ending the litigation by a compromise solution. Civil Procedure Regulations, 1984, K.T. 4685, 2220 § 140. In 1993 the Supreme Court introduced a set of ethical standards for the judiciary. Out of the sixty standards promulgated, only one standard deals with settlement, and it provides that a judge may not impose her/his solution on the litigating parties and may not permit the parties to negotiate the judge's proposal in a manner that is not appropriate in a court of law. See The Supreme Court — Ethical Standards for the Judiciary, 1993, rule D-11. In June 2007 new ethical standards were issued. Section 13(b) of the new standards stipulates that a judge may assist the parties in negotiating a settlement agreement as long as the dignity of the court is maintained. Ethical Standards for the Judiciary, 2007, KT 6591, 934, § 13(b) (Isr.); see also Yoram Elroi, *The Judicial Case Settlement and Mediation*, 29 THE JUDICIARY 68, 70 (1999). When case settlement is conducted by the presiding judge it should be referred to as "judicial case settlement." See Elroi, *supra* note 12. Case settlement may also be carried out by other persons, whether within or outside the court system. Mediation is usually conducted by an outside professional. One source of confusion is that many professionals who refer to themselves as "mediators" actually conduct out-of-court case settlement. Adding to the terminological confusion is the fact that judges often refer to their in-court settlement activities as mediation, judicial mediation, or quasi-mediation, presumably in an attempt to give such activities a greater degree of prestige. This practice is understandable considering the fact that the meaning of the Hebrew word for case settlement is "compromising" and the meaning of the Hebrew word for mediation is "bridging". See, e.g., Itzhak Zamir, *Mediation in Public Affairs*, 7 LAW & GOV'T. 119, 137–39 (2004).

13. In its simplest version, the concept of voluntarism refers to three points in time along the process: entering the process, remaining engaged, and bringing it to a close.

14. When judges conduct in-court case settlement, the confidentiality of communications is far less assured legally than is the confidentiality of communications in a case settlement or a mediation that is conducted outside the court. The latter is heavily regulated by law and governed by the case settlement/mediation agreement signed by the parties prior to entering the process. Limor Zar-Gutman, *Promise of Confidentiality During Mediation Process*, 3 GATES TO THE LAW 165 (2002); As to confidentiality in mediation, see CARRIE MENKEL-MEADOW, LELA P. LOVE & ANDREA KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY AND ETHICS* 317–42 (2006). But see, e.g., Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006) (raising doubt regarding the justification for conducting mediation under strict norms of confidentiality).

15. A case settlement which is conducted by the presiding judge can be carried out at any stage of the litigation, but private caucusing and sub-group meetings are not permitted. Some jurisdictions make a distinction between "in-court mediation"

common features, especially the fourth, are the source of terminological and conceptual confusion. With the exception of these four properties, case settlement and mediation are entirely different processes.

I highlight and discuss the distinctive features of case settlement and mediation using an analytical framework based in the following seven features: (1) the actors; (2) the discourse; (3) the substantive outcomes; (4) the influence over the parties; (5) the third party's role perception; (6) the character and objectives of private caucusing; and (7) time and costs. For the sake of discussion and analysis, the distinctive features are portrayed in broad strokes and each feature is presented as a continuum, with case settlement and mediation as prototypes or anchors at either end of the continuum. In practice, the distinction between case settlement and mediation is sometimes blurred and is often a matter of degree.

#### A. *The Actors*

Case settlement and mediation engage different participants and assign them different roles. Other than the third-party facilitator, the main actors in case settlement are the lawyers. The third party who facilitates the process attempts to convince the lawyers and the parties<sup>16</sup> to accept her offer for a compromise solution. In mediation, in contrast, the disputants themselves assume the key role, not their lawyers.<sup>17</sup> The mediator acts as a facilitator for the dialogue and the parties themselves have primary responsibility to present their stories and jointly search for and examine alternative solutions.<sup>18</sup>

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and "in-court settlement". The former provides opportunity for a party to meet privately with the judge and to convey confidential information to her or him. The latter is conducted during pre-trial conference, in open court, and in the presence of both parties. See Laurence Street, *Mediation and the Judicial Institution*, 71 AUSTRA. L.J. 794, 796 (1997).

16. Usually, in this order of importance.

17. The fact that lawyers do not play a leading role in mediation does not mean that they are necessarily less instrumental in mediation as compared to case settlement; only that their functions are different.

18. Sometimes, different people are required to sit at the negotiation table in mediation as opposed to case settlement. Generally speaking, mediation calls for participants who know the organization and the business well enough to conduct an interest-based dialogue and to come up with creative yet feasible solutions. Such familiarity is not needed when the discourse is limited to finding a purely financial compromise, as frequently occurs in case settlement. See Mordehai Mironi, *From Mediation to Settlement and from Settlement to Final Offer Arbitration: An Analysis of Transnational Business Dispute Mediation*, 73 INT'L J. ARB. MEDIATION & DISP. MGMT 52 (2007).

## B. *The Discourse*

The discourse of case settlement tends to be narrowly focused, rights-based<sup>19</sup> and backward-looking. It is based primarily on pleadings and other filed documents, and thus it accepts the narrative and the definition of the problems as they appear in the pleadings. Each party's legal position defines the discourse, which excludes each party's complete identity and nuanced narrative: the translation of the dispute into legal doctrines is all that is present.<sup>20</sup> Given the legal nature of the discourse, the parties speak primarily through their lawyers to the third party and each side speaks *about*, not *to*, the other side.

Relying on her professional status and subject matter expertise,<sup>21</sup> the person conducting the case settlement attempts to narrow the gap between the parties' positions in order to bring about a compromise solution. She provides a reality check by evaluating the legal merits of each party's case, the likely outcome of litigation and what is right or fair.<sup>22</sup> Typically, the negotiation will be positional and competitive, and the person conducting the case settlement will be expected to propose a potential compromise solution that serves as the basis for the ultimate agreement between the parties

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19. See WILLIAM URY, JEAN BRETT & STEVE GOLDBERG, *GETTING DISPUTES RESOLVED — DESIGNING SYSTEMS TO CUT COSTS OF CONFLICT* 41 (1989) (discussing the distinction between rights-based and interest-based discourse).

20. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–44 (1982).

21. Naturally, when it is a judge attempting to convince the disputants to accept a compromise solution, he has, in addition to expertise and formal status, the clout inherent in his position. This is the basis for the often-made allegation that settlement conferences carried on by judges tend to be coercive. See, e.g., Frank E.A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG., Fall 1999, at 11, 22.

22. The fact that the discourse of case settlement is evaluative has stirred an ongoing debate within the ADR community. Some writers regard evaluation as a legitimate tool in the mediator's tool box, while for others, evaluating transforms the process into a distinctive type of mediation calling it "evaluative mediation". See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25–31 (1996) (explaining the process of evaluative mediation); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 769–71 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 985 (1997). The proponents of "evaluative mediation" argue that this is what the parties, i.e., the lawyers involved, really want the process to be. See, e.g., Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 973–75 (1997). Others passionately contend that, because it is evaluative, the process cannot be considered as a form of mediation. E.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 92–93 (1998).



Mediation is typically quite different. The discourse tends to be non-evaluative, interest-based, and forward-looking.<sup>23</sup> Nonetheless, past events<sup>24</sup> are fully acknowledged and expressed by each party as part of their narrative<sup>25</sup> and then echoed, clarified,<sup>26</sup> and often re-framed<sup>27</sup> by the mediator. Since mediation accepts the validity of each party's narrative and allows them to co-exist,<sup>28</sup> the full story of the dispute that gave rise to the case is told as perceived by each party and in the operative language of the relationship, stripped of the legal discourse's restructuring and repacking.<sup>29</sup> Legal arguments<sup>30</sup> may be discussed and taken into account, but they are of secondary importance. The mediator helps the parties rewrite the story of the dispute and reframe the underlying controversy, usually through a prospective prism<sup>31</sup>.

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23. Thomas W. Walde, *Proactive Mediation of International Business & Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management*, 5 BUSINESS L. INT'L 99, 103 (2004).

24. Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 111-14 (2004).

25. The important contribution of telling one's story in full and being understood has been a cornerstone in mediation practice and theory. See generally John M. Conley & William M. O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS. 181, 187 (1988) (explaining that many parties to litigation believe the opportunity to tell their whole story is as important than the result of the litigation); Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 35 (2000).

26. See Menkel-Meadow, *supra* note 24, at 107. This practice, also referred to as looping or reflecting, assures that the party's narrative is told in full and completely understood.

27. By reframing, the mediator assists the parties to redefine the problem. Lynn Mather & Barbara Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC. REV. 775, 777, 780-81 (1981); Elad Finkelstien, *Privatization and Regulation: The Legal Regime Governing Mediation*, 30 TEL AVIV U. L. REV. 623, 630-31 (2008).

28. Menkel-Meadow, *supra* note 24, at 104.

29. See generally Mather & Yngvesson, *supra* note 27 (summarizing many disputes from different non-western cultures that are reframed according to legal discourse).

30. Primarily when needed to assess the alternative to a mediated agreement, Fisher and Ury coined the concept of best alternative to negotiated agreement ("BATNA"). See ROGER FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97 (Bruce Patton ed., 1991).

31. For instance, a claim regarding alleged breach of a joint-venture agreement, based on contract interpretation, might be transformed into negotiations aimed at reconstructing the relationships and renegotiating the joint-venture agreement. See Walde, *supra* note 23, at 104-06.

The discourse encourages disputants to recognize and accept each other's story, motives, needs, and constraints, to foster non-adversarial negotiations and to transform the relationship between the disputants.<sup>32</sup> The parties are engaged in direct, open, authentic, feeling-based<sup>33</sup> and non-adversarial dialogue. This dialogue is structured, led and supported by the mediator, who invites them to talk *to*, not *about*, each other.

The discourse in mediation is interest-based, and therefore it tends to be more engaging, broader in scope, and deeper than in a case settlement. Broader, as it enables the parties to present their identities — individual, collective, or organizational — in their totality and their full complexity. It's also a deeper kind of discourse, as parties are encouraged to delve into their needs, aspirations, fears, constraints, and emotions. As a result, the parties come to a new understanding about themselves and the other side.<sup>34</sup> Such discourse creates the trust needed for information-sharing, uninhibited brainstorming, and a joint adoption of creative solutions that can address parties' shared and competing interests and needs.

### C. *The Substantive Outcome*

If successful, the outcome of case settlement or mediation is an agreement. However there are substantive differences between the agreed upon outcomes rooted in case settlement and ones rooted in mediation. In case settlement, the agreement is intended to reflect the likely outcome of litigation, considering probabilities, time, and expected legal fees. Since the outcome reached is a compromise, it is distributive,<sup>35</sup> not "value creating,"<sup>36</sup> and is generally limited to the

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32. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005); Robert. A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989) [hereinafter *Mediation and Adjudication*]; See generally Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996) (generally describing various characteristics of mediation); Lisa B. Bingham & Tina Nabatchi, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001).

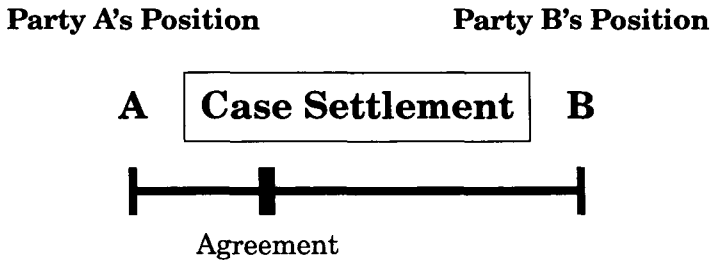
33. See Carrie Menkel-Meadow, *Scaling up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 LAW & CONTEMP. PROBS. 1, 3 (2011).

34. Menkel-Meadow, *supra* note 7, at 237.

35. RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

36. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 30 (1986).

remedies available in court. As shown in the figure below, the agreed upon solution in case settlement tends to be located somewhere on (or close to) the continuum connecting the opposing parties' positions.



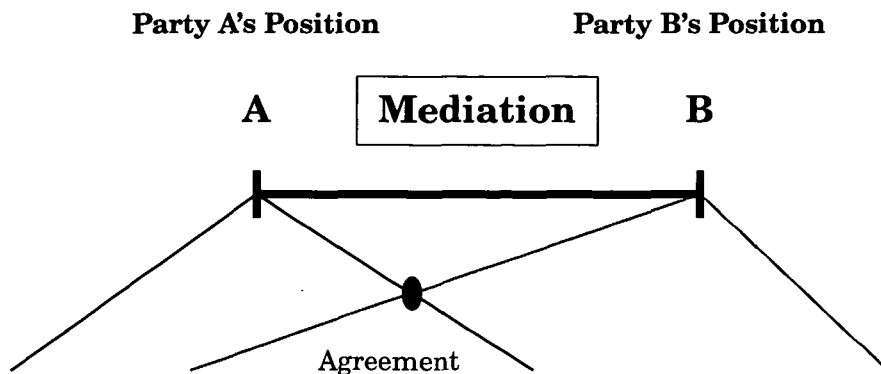
The basic assumption in mediation is agreed-upon compromises may be Pareto inefficient or sub-optimal solutions that are not necessarily good outcomes for either party.<sup>37</sup> The agreed outcome in mediation neither attempts to resemble those which would be decided by the court, nor is it limited to the remedies available in court.<sup>38</sup> The underlying idea for a good outcome is not to “divide value,”<sup>39</sup> as in a compromise solution, but to “create value”<sup>40</sup> through a creative solution which is the product of the disputants’ joint discovery and design. As shown in the figure below, the outcome will not be located on or close to the continuum connecting the parties’ positions in litigation, but in a distant zone where their common and different interests intersect.

37. A concept adopted from game theory referring to an outcome that makes every player as well off as the other player and as such cannot be improved upon without hurting at least one player. See MENKEL-MEADOW, LOVE & SCHNEIDER, *supra* note 14, at 61; WILLIAM URY & ROGER FISHER, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 57 (Bruce Patton ed., 1991).

38. The literature cites the ability to achieve remedies that do not exist in courts as a major advantage of mediation. See, e.g., Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 329, 366 (2005); Robert B. Moberly & Judith Kilpatrick, *Introduction: The Arkansas Law Review Symposium on Alternative Dispute Resolution*, 54 ARK. L. REV. 161, 167 (2001); Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 71–72 (2000) (“The parties can attain ‘extralegal justice’ due to the flexibility of ADR, which allows for a wider range of problems and remedies than litigation . . . .” (citing Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 503 (1993)); EDWARD J. BERGMAN & JOHN G. BICKERMAN, *COURT ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS* (1998); Kenneth R. Fienberg, *Mediation — A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5–S7 (1989); Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. ON DISP. RESOL. 337, 340 (1990).

39. MNOOKIN, PEPPE & TULUMELLO, *supra* note 10, at 11–43.

40. MENKEL-MEADOW, LOVE & SCHNEIDER, *supra* note 14, at 60.



#### D. *The Impact on the Disputant*

Case settlement is outcome-oriented. It is supposed to be a quick, cheap, and efficient way to reach an agreement that ends the litigation. The discourse is legal- and rights-based, while the person conducting the case settlement and the attorneys play the lead role. Consequently, the disputing parties and their relationship remain somewhat stagnant, learning only to appreciate the value of moving away from one's original position in the right circumstances. They typically do not learn anything new about themselves or about the way they should approach conflicts and manage disputes, and there is little incentive for them to nuance their perceptions of the other side and its perceived wrongdoings.

Mediation, in contrast, is process- rather than outcome-driven. It aspires to "create value," not only with regard to the substantive outcome, but also in terms of transforming the disputants themselves: both individually and in terms of their relationship. The participation in the mediation process is intended to produce personal growth;<sup>41</sup> it should teach the parties the value of mutual understanding and recognition, as well as the advantage of accepting that others might hold to different narratives<sup>42</sup> and have different needs.<sup>43</sup> At the same time

41. Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 2 PEPP. DISP. RESOL. L.J. 243, 247 (2008).

42. At times the mediator may assist the parties to construct a common narrative. See Toran Hansen, *The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L.J. 207 (2004).

43. Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 160–61 (1998).

it aims at empowering the parties<sup>44</sup> and improving their self-confidence, building faith in their ability to resolve the current and future disputes on their own, without resort to an outside authority.<sup>45</sup>

Mediation also helps transform the relationship between the disputants.<sup>46</sup> Assisted by the mediator, the parties learn to forgive without forgetting,<sup>47</sup> to de-demonize one another, and to gradually rebuild the trust and the relationship broken by both the dispute and the escalation associated with adversarial litigation.<sup>48</sup>

In many circumstances, the strong impact of mediation on the disputants and their relationship makes the process superior to other methods of dispute resolution, as it produces unique social<sup>49</sup> and personal<sup>50</sup> outcomes, both in the short term (through more Pareto-efficient solutions and better relationship-building) and in the long run (through parties' participation and autonomy aimed at strengthening interpersonal skills and confidence).

#### E. *The Third Party's Role Perception*

As compared to the disputants and their attorneys, the person who conducts case settlement is assumed to be in a superior position in terms of professional status, subject matter expertise, knowledge, wisdom, and experience. Because of this, she is expected to point out

44. BUSH & FOLGER, *supra* note 32; Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEG. J. 245 (1993); Janet Kelly Moen et al., *Identifying Opportunities for Empowerment and Recognition*, in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 112, 112–32 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1, 3, 5–21 (2001).

45. Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002).

46. Robert A. Baruch Bush, "What Do We Need a Mediator For?" *Mediation's "Value Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 28–29 (1996); Philip D. Gould & Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 FORDHAM URB. L.J. 2117, 2124 (2002) ("A highly desirable therapeutic outcome is one in which the parties learn how to preserve their existing relationship while also learning how to resolve their future conflicts without repetitive judicial intervention." (citing Natalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 56 (2000)).

47. Menkel-Meadow, *supra* note 24, at 112.

48. Riskin, *supra* note 20, at 41; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of Mandatory Settlement Conferences*, 33 UCLA L. REV. 485 (1985).

49. See Riskin, *supra* note 20, at 41; Menkel-Meadow, *supra* note 48.

50. Bush, *Mediation and Adjudication*, *supra* note 32, at 1 n.1.

factual and legal weaknesses in parties' positions,<sup>51</sup> to assess the likely outcomes in litigation, to have an opinion about "right" or "fair" outcomes, to propose a compromise solution, and to convince<sup>52</sup> the parties to converge around her proposed compromise solution. Given these role expectations, it is no wonder that retired judges and prominent lawyers have dominated the practice of case settlement.

Mediation entails entirely different role perceptions and expectations because it is an interest-based, feeling-based, and identity-based discourse, rather than a legal- and rights-based discourse. The mediator does not need superior subject matter and litigation expertise, nor must she master the details of the pleadings and the evidence base. General knowledge and familiarity with the case suffices, as the mediator is expected to employ her expertise and skills to empower the parties, to encourage them to adopt open, non-adversarial, and interest-based negotiations, and to convince the parties to trust each other and cooperate in their own search for creative solutions.

In sharp contrast to case settlement, the assumption in mediation is that the parties know better than the mediator about the real dispute that gave rise to the litigation as well as its context. Quite often, due to a previous relationship, the parties know each other and are better equipped to know what their needs and constraints are and which solutions will be feasible.<sup>53</sup> Hence, the mediator is not expected to generate options or to propose "fair," "right," or "wise" solutions: she provides the parties with a safe and sheltered space for the negotiation and cultivates the parties' open and creative dialogue.

#### F. *The Character and Objectives of Private Caucusing*

As stated above, except in the case of settlement conferences conducted by the presiding judge in the case (judicial case settlement), private caucusing and sub-group meetings are frequently used in

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51. Walde, *supra* note 23, at 101.

52. At times the person conducting the case settlement may exert pressure on the unyielding party. See Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 461 (Deborah M. Kolb & Assocs. Eds., 1994); James J. Alfini, *Trashing, Bashing and Hashing It out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 68-71 (1991) (labeling this style of mediation the "basher style").

53. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2 (2d ed. Abr. 1998); Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 58 (2000). STEPHEN B. GOLDBERG ET. AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 8 (3d ed. 1999).

case settlement and mediation alike;<sup>54</sup> only their purpose is vastly different. Since a settlement conference is a rights-based positional discourse, private and sub-group meetings are used mainly (1) to probe the parties' real positions and identify their "red lines"<sup>55</sup>; (2) to attempt to change the parties' positions and levels of expectation, primarily by means of "reality checks" or case evaluations of one sort or another; (3) to avoid the strategic barriers, especially the "reactive devaluation" associated with low-trust competitive negotiation;<sup>56</sup> (4) to discuss proposals and options that parties might feel are too risky to discuss in a joint or plenary meeting; and (5) to enable the person conducting the settlement conference to engage in positional negotiation<sup>57</sup> with the parties and to facilitate the internal negotiations often required among the team members of each disputing party.

By contrast, a mediator encourages the disputants to participate and cooperate in the search for creative solutions and decision making. She invites them to leave behind the competitive or adversarial mode, to accept and trust each other, and to negotiate openly in order to overcome strategic and cognitive barriers,<sup>58</sup> including those that are not treated in case settlement. Consequently, private caucusing in mediation is directed toward different goals: (1) to ensure and support parties' adherence and commitment to the new ground rule for

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54. There is no consensus within the practitioners and the academic community with regard to the legitimacy and the desirability of private caucusing in mediation. See Riskin, *supra* note 22; Menkel-Meadow, *supra* note 33; GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2009).

55. The phrase "red line" (also referred to as "resistance point," "bottom line," "reservation point" or "threshold value") is used to indicate a point beyond which a negotiator is unwilling to go. See CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, 220 (1986); HOWARD RAIFFA, JOHN RICHARDSON & DAVID METCALFE, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING, 110 (2002).

56. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 246-47 (1993).

57. JAMES C. FREUND, THE NEUTRAL NEGOTIATOR — WHY AND HOW MEDIATION CAN RESOLVE DOLLAR DISPUTES (1994); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 10 (1986).

58. One example is the fairness demand, the refusal to perceive good result objectively, seeking instead a result that is proportional to the wrongs previously caused by the other party. See Robert H. Mnookin & Lee Ross, *Introduction*, in BARRIERS TO CONFLICT RESOLUTION 2, 11-13 (Kenneth J. Arrow et. al. eds., 1995). Another example is biased attribution, the reluctance to believe that the other party's actions and suggestions stem from real constraints, and not from harmful intentions, while attributing sincere and honest intentions only to one's own actions and suggestions. See Mnookin & Ross, *Introduction*, *supra*, at 13-15.

the negotiation; (2) to examine the possibility of extending the boundaries of the discourse to include additional issues, participants, and stakeholders; (3) to empower the parties; (4) to enable the mediator to know and understand better each party's emotions, needs, aspirations, resources, inhibitions, and constraints; (5) to help each party's delegation to engage in brainstorming in order to find creative solutions that meet its own and the other side's interests; and (6) to enable the mediator to discuss and bring forward, as mediator's suggestions, creative ideas expressed in private, in case the party suggesting them is reluctant to raise these ideas in a joint session, fearing to appear weak or too avant-garde.<sup>59</sup>

The vast amount of information gathered during the private caucusing and sub-group meetings provides the mediator with a better understanding of the dispute and the disputants, and is not limited to the particulars of the case at hand.<sup>60</sup> This information provides the raw material which later will be used by the mediator and the parties to build creative solutions that often are both forward-looking and value-creating. Equally important are the trust and the bonds that are created between the mediator and the participants on each side during the private caucusing and sub-group meetings. These bonds are used by the mediator to both empower the parties<sup>61</sup> and to transform the relationship between the parties, preventing the mutual demonization that is often associated with litigation.

### G. *Time and Costs*

If the sole criterion for successful third-party intervention in disputes is reaching an agreement which brings an end to the litigation swiftly and at minimum cost, case settlement is usually superior to mediation. The narrow focus, the character of the discourse, and the limited objectives as to what the parties work to achieve during and as a result of the process all require investing shorter time and less money in case settlement as compared to mediation.

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59. MOORE, *supra* note 55, at 229–31.

60. JOSEPH B. STULBERG, *TAKING CHARGE/ MANAGING CONFLICT* 107–09, 121–22 (1987).

61. The concepts of empowerment and recognition are cornerstones of transformative mediation. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267–69 (1989); *see also* Cobb, *supra* note 44, at 245.



This is because the objective of mediation is not merely to reach a compromise settlement as quickly and cheaply as possible. The journey<sup>62</sup> and the process the parties go through have a value of their own. A broad, interest-based discourse involving active listening, empathizing, reframing, empowering, participating, and searching jointly for and crafting a creative solution requires more time. Sometimes the search for solutions calls for brainstorming, incubation, feasibility testing, and concretization; these practices often require several meetings with time intervals in between sessions. Finally, mediation can be lengthier than case settlement because the former aspires to rebuild mutual trust and self-confidence as well as to heal and to transform the relationship.

## H. Conclusion

In sum, case settlement is not a brand of mediation. Although case settlement and mediation are both consent-based dispute resolution processes — and have a few features in common — in most other respects they are distinct processes.<sup>63</sup> Case settlement is a positional

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62. Similar to the idea of the famous poem “Ithaca” (1911) by the Greek poet Constantine Cavafy:

When you set out on the journey to Ithaca  
 pray that the road be long,  
 full of adventures, full of knowledge.  
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always keep Ithaca in your mind.  
 To arrive there is your final destination.  
 But do not rush the voyage in the least.  
 Better it lasts for many years,  
 and once you're old, cast anchor on the isle,  
 rich with all you've gained along the way,  
 \*\*\*

Ithaca gave you the wondrous voyage.  
 Without her you'd never have set out.  
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As wise you've become, with such experience,  
 you will have come to know what these Ithacas really means.

C. P. CAVAFY, *Ithaca*, in C. P. CAVAFY: THE COLLECTED POEMS 37–39 (Evangelos Sachperoglou, trans. 2003).

63. This is why mediators should usually avoid the instinct to engage in case settlement, despite the fact that lawyers prefer mediation and it is quicker and cheaper than mediation. If mediation is to survive, it needs to brand itself as a distinct dispute resolution process that has special properties that make it superior, in terms of process, qualities, and outcomes, to all other alternatives, be they adjudication, direct negotiation, or case settlement.

rights-based negotiation led by a third party who uses her professional status and subject matter expertise to evaluate parties' positions, analyze the legal merits of the case and propose possible outcomes or compromise solutions. The discourse in case settlement is narrowly-focused and backward-looking, in which the third party (often a prominent lawyer or a retired judge) and the lawyers representing the parties get to play the main role.<sup>64</sup> Case settlement works best when one is looking for an efficient, fast, and cheap result-oriented dispute resolution process. This is why it is preferred by court administrators, judges, and the litigation bar as a superior way to clear cases off the court docket and to reach a quick compromise solution efficiently and with low cost.

Efficiency refers here to the administrative aspect, not to the quality of the agreed-upon solution reached through the process. Case settlement does not offer a real advantage over direct negotiation between parties or their attorneys in terms of avoiding a sub-optimal outcome or a Pareto inefficient outcome.<sup>65</sup> These limitations stem from the fact that case settlement shares so many contextual similarities with adversarial litigation and positional negotiations. While case settlement does end disputes via consent, it does not foster the change in relationship or mindset for which a mediated solution strives.

Thus, the defining element of a mediated outcome does not lie in some difference in the quality of the consent given by the parties,<sup>66</sup> but rather in process of building that consent. What makes mediation

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64. A similar idea is expressed in a report regarding mediation in Greece which explains: "Conciliation between lawyers differs substantially from mediation between parties." Nikki Bouras, *Mediation in Greece*, IN TOUCH (Ass'n for Int'l Arbitration, Brussels, Belg.), Aug. 2010 at 1, 4; see also Mercedes Tarrazon, *Arb-Med: A Reflection a Propos of a Bolivian Experience*, 2 N.Y. DESP. RES. LAW., Spring 2009, at 87. In the two jurisdictions the term used for case settlement is conciliation.

65. The presence of the person conducting the case settlement and the expectation that she will propose a compromise blocks open dialogue and reduces the amount, scope and reliability of information exchanged during case settlement, rendering parties unable to overcome the strategic and cognitive barriers in negotiations. See MENKEL-MEADOW, LOVE & SCHNIEDER, *supra* note 14, at 47-53; GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 47-54 (1983); Mnookin, *supra* note 56, at 246-47; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 26 (Kenneth J. Arrow et al. eds., 1995); Lela P. Love, *The Top Ten Reasons Why Mediators Should not Evaluate*, 24 FLA. ST. U. L. REV. 937, 940 (1997).

66. The assumption is that both require informed consent. See generally Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775 (1999).

distinctive and socially desirable is the high degree of control, involvement, participation, and responsibility of the parties in the discourse. The autonomy of the parties is the paradigm of mediation,<sup>67</sup> and its principal contribution is in the personal growth and empowerment of the disputing parties and the transformation of their relationship. This both empowers the community and strengthens its social and relational fabric.<sup>68</sup>

### III. THE DEVELOPMENT OF MEDIATION IN ISRAEL

Like in many other Western countries, in Israel the concept of mediation was initially introduced in labor-management disputes. The 1957 Settlement of Labor Disputes Law<sup>69</sup> provided for mandatory mediation by special labor relations officers at the Ministry of Labor in all labor disputes. Following the Ministry of Labor's decline in power and prestige in the 1970s, and as strikes became to a large extent a public sector phenomenon, this mediation service ceased to play a significant role in resolving labor disputes.<sup>70</sup>

The genesis of mediation in other types of disputes can be traced to the end of the 1980s. In 1989–1991 the Tel Aviv Small Claims

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67. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 49 (1996); Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 909 (2002); John Feerick, Carol Izumi, Kimberlee Kovach, Lela Love, Robert Moberly, Leonard Riskin & Edward Sherman, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95 (1995); Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 109 (2001) ("It is understood that a basic tenet of mediation is that the parties are autonomous and should have the ability to devise their own agreement."); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 7–8, 15–20 (2001); Kimberlee K. Kovach, *Good Faith in Mediation — Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 584 (1997); John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 460 (1997); Donald T. Weckstein, *In Praise of Party Empowerment — and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 531 (1997).

68. Bush, *Mediation and Adjudication*, *supra* note 32, at 6; Cobb, *supra* note 44, at 246; Main, *supra* note 38, at 372.

69. Settlement of Labor Disputes Law, 5717-1957, SH No. 221 p. 58 (Isr.).

70. The reason why mediation has not been used in the strike-prone public sector in Israel is the resistance of the Finance Ministry, which mistakenly believes that mediation necessarily entails ceding decision-making powers. See Ruth Ben-Israel & Mordehai Mironi, *The Role of Third Party Intervention in Resolving Interest Disputes in Israel*, 10 COMP. LAB. L.J. 356, 362–63 (1989).

Court, together with the Tel Aviv University Law School, ran an experimental mediation program.<sup>71</sup> Coincidentally, during the same years, a prominent public interest dispute indirectly affecting the Defense Ministry was successfully mediated.<sup>72</sup>

The development of modern mediation in Israel can be divided into three periods: the formative period (1992–1998), the “mediation revolution” period (1998–2004), and the period of decline (2004 to the present).

### A. *The Formative Period*

In 1992 the parliament passed an amendment to the Court Law introducing mediation into all areas of civil litigation.<sup>73</sup> The new rule applied to every court, including the Supreme Court,<sup>74</sup> and to all civil cases, including labor and employment disputes.<sup>75</sup> Mediation became a suggested, but not mandatory, method of case resolution. Under the new rule, a judge may propose mediation, and if all parties agree, court proceedings are stayed. There is no penalty for refusing mediation. There is, however, a fiscal incentive for the plaintiff: if the mediation is successful, the judge may order a full or partial rebate of

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71. The experimental program was jointly developed and run by Professor David Matz, the author, and Aharon Luxemburg (a family mediator). See David E. Matz, *ADR and Life in Israel*, 7 NEGOT. J. 11, 14 (1991). This program was subsequently adopted as a model for the guidelines issued by the Ministry of Justice for mediation practicum, which follows basic mediation training.

72. This was an emotional dispute over representation before the Ministry of Defense, involving war widows and orphans and parents of fallen soldiers. The dispute was mediated by the author at the High Court of Justice's request. It ended after three years of mediation with an agreement that eventually led to the establishment of an association for war widows and orphans.

73. Courts Law, [Abridged Version], 1984, S.H. 198, §§ 79C–D.

74. The general courts are in fact a three-tiered system, comprising twenty-eight trial courts, six district courts, and the Supreme Court. The latter is the highest appellate court. The Supreme Court's bench also serves as the High Court of Justice, exercising judicial review over all tribunals and non-appellable courts and deciding public disputes as a court of first and last instance.

75. All labor and employment disputes are brought before a specialized and separate system of labor courts. The labor courts system is two-tiered: there are five regional courts and one national court above them. The Supreme Court reviews the National Labor Court's decision through certiorari procedures, as these decisions are non-appellable.

court fees.<sup>76</sup> In order to encourage the use of mediation, the amendment assures confidentiality of all communication transmitted during mediation<sup>77</sup> and authorizes the court to give the agreement arrived through mediation the power of a court judgment.<sup>78</sup>

In the years following 1992, mediation was promoted by way of education, training and regulation. Law schools started offering courses in negotiation, mediation, and ADR. At the same time, courses for training new mediators attracted hundreds of people, who were interested in this new and promising profession that required relatively little investment in schooling.<sup>79</sup> In an effort to regulate a rapidly expanding industry, the Justice Ministry drafted mediation regulations and a standard mediation agreement.<sup>80</sup> The regulations were issued with mediation — not case settlement — in mind. They permitted mediators to propose solutions, but the evaluation and provision of legal opinions, which are at the basis of case settlement, were expressly forbidden, even in the mediator's area of expertise.<sup>81</sup>

It is somewhat telling that, notwithstanding the intention, the new provisions in the Court Law and the regulations used the term

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76. Courts Regulations (Court Fees), 2007, KT 6579, 42. In most cases court fees are 2.5% of the amount claimed.

77. Courts Law, [Abridged Version], 1984, S.H. 198, § 79C(h).

78. Courts Regulations (Court Fees), 2007, KT 6579, § 6(b)(4).

79. There has never been a licensing procedure for mediators. There were only minimal requirements for those who wanted to be included on the list of mediators kept by the courts. See THE CONSULTING COMMITTEE ON MEDIATION IN THE COURTS, REPORT ON THE QUALIFICATIONS AND EXPERTISE NECESSARY TO BE INCLUDED IN THE MEDIATORS LIST (1998) [hereinafter THE GADOT REPORT]; Court Regulations (list of mediators), 1996, K.T. 5766, 1325, § 3A. The list was created in 1999. Initially, there was no licensing procedure for mediation training centers. However in order to be qualified for list of mediators kept by the courts, one had to complete mediation training provided by a recognized mediation training center. Given the minimal qualifications stipulated in the regulations, the field expanded dramatically. By 2002 there were already forty mediator training centers. See Lital Dobrizki, *Mediation Instead of Litigation. Is It the End of the Dispute?*, Y Net News (Apr. 4, 2002, 9:32 AM), <http://www.ynet.co.il/articles/1,7340,L-1811629,00.html>. During the years since the court list's creation, more than 30,000 mediators have gone through training. Recently, the list of mediators has been canceled altogether. See Court Regulations, 2008, K.T. 6665, 838 (annulment of the list of mediators); Zvi Lavi, *The Courts bid is Opened for Dozens of Mediators*, Y NET NEWS (Feb. 25, 2008, 12:02 PM), <http://www.ynet.co.il/articles/1,7340,L-3510864,00.html>.

80. Courts Regulations (Compromising) 1993, K.T. 5529, 1042. This was the title of the regulations when they were first drafted. In 2001 the name was changed to Courts Regulations (Mediation)). See also Labor Courts Regulations (Compromising) 1993, K.T. 5539, 1045; Courts Regulations (Appointment of Compromiser) 1996, K.T. 5766, 1325.

81. Courts Regulations (Compromising) 1993, K.T. 5529, 1042 § 5(h). § 12 to the supplement stipulates that the mediator may offer solutions to the parties and may make proposals to end the dispute.

"pishur," a Hebrew word meaning "to bring about a compromise or compromising" which typically characterizes case settlement. Thus the terminology connotes a paradigm of case settlement despite what appeared to be a commitment to mediation as reflected by the strict rules regarding what mediator can and cannot do. Was it reflective of institutional inertia surrounding traditional school of thought on dispute resolution processes? Or was it an extension of the heavily litigious society's preoccupation with right-based discourse? Either explanation is plausible, yet it took nine years to change the legal term in the law and regulations to the more appropriate Hebrew word "gishur," which means "bridging." Albeit not perfect, in comparison to "pishur," this term better describes the process of mediation.<sup>82</sup>

During these years, various courts took initiatives to promote mediation. They ran programs aimed at exposing judges to mediation through lectures and workshops and experimented with different models for referring cases to mediation.<sup>83</sup> These initiatives were largely motivated by the idea that resolving cases through mediation would relieve part of the courts' burden. Despite all these efforts, the results were disappointing. Only few cases actually went to mediation during this period.

### B. *The "Mediation Revolution"*

Mediation came into its own only after Chief Justice Barak made it a priority. His commitment provided the energy needed in order to spark a wave of enthusiasm and hope as well as a number of institutional innovations and initiatives that changed the status of mediation. Reaching the last decade of his tenure as Chief Justice of the Supreme Court, Justice Barak fully understood the essence of mediation and the promise it held for Israeli society. Speaking at the inauguration ceremony of the Association of Israeli Mediators, he sent a clear, four-pronged message to the judiciary. First, mediation was needed even in the absence of case backlog. Second, mediation was not simply a means for clearing the docket; it represented a better way of life. Third, for too many years dispute resolution activity had been based on power discourse,<sup>84</sup> and the courts too represented a

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82. Courts Law [Abridged Version] (30th Amendment), 5761-2001, SH No. 1804 p. 498 (Isr.).

83. THE COMM. FOR THE EXAMINATION OF WAYS TO ENCOURAGE THE USE OF MEDIATION IN COURTS, *Report* (2006) [hereinafter *The Rubinstein Report*].

84. One commentator attributed it to the fact that due to the Arab-Israeli conflict, people in Israel have never lived without a threat of war, and that this conflict acts as a paradigm for all disputing activity. It teaches that conflicts can be managed only by force. Matz, *supra* note 71, at 12.

form of power (albeit one that is rights- or norms-based).<sup>85</sup> Lastly, if Israelis wanted to live in a better and more cohesive society, they needed to invest efforts in developing a consensual, non-power-based, and non-rights-based culture of dispute resolution.<sup>86</sup>

The central project of what Justice Barak called the “mediation revolution”<sup>87</sup> was to build a new culture around resolving disputes, with mediation, not case settlement, at its core. While reducing the court backlog was supposed to be a secondary goal of mediation, the existence of court backlog was to be used as a tool to promote mediation’s promise: courts would use the long waiting times for trial as leverage to push cases toward mediation.<sup>88</sup> Judges were going to play a pivotal role in the “mediation revolution,” not simply as gatekeepers whose function was to assign cases to mediation and clear the docket, but as educators and agents of change in the ailing Israeli culture of disputation and dispute resolution.<sup>89</sup> They were expected to use their high professional status and prestige to teach the disputing parties and the litigation bar about the value of mediation and its promise; to explain to them that, in the words of the late Yehuda Amichai,

From the place where we are right  
Flowers will never grow.<sup>90</sup>

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85. See Zamir, *supra* note 12, at 123.

86. See Barak, *On Mediation*, *supra* note 5.

87. *Id.* at 5. The phrase “mediation revolution” was inspired by the phrase “constitutional revolution,” attributed to Justice Barak in the context of his view that the two Basic Laws that were passed by the Knesset in 1992 — *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation* — provided the legal basis for the courts to exercise judicial review over legislation. The idea of a constitutional revolution received mixed responses. See David Kretzmer, *From Bergman and Kol-Ha’am to Bank Hamizrahi: The Path to Judicial Review of Laws that Restrict Human Rights*, 28 MISHPATIM 359 (1997); Moshe Landau, *Reflections on the Constitutional Revolution*, 26 MISHPATIM 419 (1996); Moshe Landau, *Granting a Constitution to Israel by Way of a Court Ruling*, 3 LAW AND GOV’T 697 (1996); Ruth Gavison, *The Constitutional Revolution — Description of Reality or a Self-Fulfilling Prophecy?*, ISRAEL DEMOCRACY INST. (1998). According to one commentator, there was no constitutional revolution but rather a natural evolution of constitutional norms that already existed in the Israeli legal system. See Yoseph M. Edrey, *A Constitutional Revolution or Constitutional Evolution?* 3 LAW AND GOV’T 453 (1996).

88. Sara Gadot, *Mediation in Israel-Theory and Practice*, 29 THE JUDICIARY 43, 53 (1999).

89. See Mordehai Mironi, *Mediation and ADR: Eighty Years of History as a Basis for Changing Court’s and Judge’s Role Perception*, 29 THE JUDICIARY 32 (1999).

90. YEHUDA AMICHAH, *The Place Where We Are Right*, in THE SELECTED POETRY OF YEHUDA AMICHAH 34 (Chana Bloch & Stephen Mitchell trans. & eds., 1986).

Within a remarkably short time, the value and strategic importance of mediation found a concrete expression in resource allocation and a host of institutional changes:

(1) Assisted by a task force of professionals who were already committed to and active in mediation, Chief Justice Barak convinced the Justice Ministry to establish a Center for Mediation and Dispute Resolution ("CMDR"). Introduced in 1998, this publicly-funded unit within the Ministry was charged with the promotion of mediation and other consensual processes of dispute resolution as an alternative to litigation.<sup>91</sup>

(2) After a year of deliberations, in 1999 the Attorney General issued a special directive supporting the use of mediation in cases where the state is a party to the dispute.<sup>92</sup> The directive made a clear distinction among case settlement solutions, like litigation and compromise, and mediation. The latter was praised for maintaining the parties' autonomy, transforming relationships and being a forward-looking, interest-based and creative process which could resolve an underlying dispute (as opposed to resolving the litigation). In conjunction with the directive, in 2000 the Attorney General appointed a steering committee to promote and oversee the use of mediation in disputes involving the state.<sup>93</sup> Both of these measures were greatly significant: as the state is party to nearly a third of all civil litigation in Israel,<sup>94</sup> these measures established a major player in the litigation system — in addition to the public service at large — as a role model for other disputants who might avail themselves of the benefits of mediation.<sup>95</sup>

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91. The CMDR, which was active until 2009, was assisted by a committee of experts. Among its many activities, the CMDR developed expertise and educational materials in various fields of mediation, including commercial, environmental, employment, family, community, people with disability, sexual harassment and restorative justice. It helped create a network of community mediation centers, and initiated and ran training programs to introduce judges and attorneys in the Public Attorney's office to mediation. It also developed draft ethical standards and qualification criteria for court appointed mediators and for mediation training, and initiated legislative changes and participated on various public committees for the implementation of mediation in new fields.

92. MEDIATING DISPUTES INVOLVING THE GOVERNMENT, *supra* note 6.

93. THE STEERING COMM. FOR MEDIATING DISPUTES INVOLVING THE STATE, *Report — Part A* (2003); *Mapping the State of Mediation in Israel*, 1 WITH CONSENT 24 (2001) [hereinafter *Mapping*]. The committee issued the first part of its report in 2003.

94. *Mapping*, *supra* note 93, at 25.

95. Some commentators attribute the underuse of arbitration in Israel to the state's longstanding reluctance to submit disputes to arbitration. The idea is that if arbitration is not good enough for the state, it is not good for individuals either. *See*



(3) Under the leadership of the Courts Administration, the courts structured and systematized their policies and practices regarding referral to mediation. Three major steps were of special importance. First, in 1998 a committee headed by District Court Judge Gadot issued its recommendations regarding qualifications of court-appointed mediators, which permitted the courts to compile lists of accredited mediators.<sup>96</sup> Second, beginning in 1998, Case Referral Departments, staffed with lawyers who had undergone mediation training, were established in every court in order to facilitate referrals to mediation.<sup>97</sup> Third, a special committee, headed by Judge Livne of the National Labor Court, issued a report aimed at streamlining and unifying the referral to mediation procedures within the Labor Courts.<sup>98</sup>

(4) As interest in mediation and ADR increased, no fewer than forty mediation centers were established<sup>99</sup> to provide mediation services and training new mediators. The academy followed suit. Three graduate programs and one academic research center were founded at leading universities,<sup>100</sup> and two professional journals began publication.<sup>101</sup>

(5) After years of resistance, the Bar Association adopted a policy embracing mediation. This was a fundamental shift of policy for an organization that has been notable for its resistance to change. As often happens in such cases, once the shift occurred, the pendulum

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KAREN FINKELSTIEN, SOLUTION FOR STRIKES IN THE PUBLIC SECTOR — EDUCATED USE OF THE CONSENSUAL ARBITRATION INSTITUTION 2 (Institution of Advanced Strategic and Political Studies: Jerusalem 2003); YARDEN GAZIT, MANDATORY ARBITRATION IN THE PUBLIC SECTOR (Jerusalem Institute of Market Research 2011).

96. THE GADOT REPORT, *supra* note 79.

97. Most of the Case Referral Departments were established following the recommendations of a committee, headed by the former Courts Manager Judge Revivi, which had issued its report in 1999. See THE COMMITTEE INSPECTING THE STRUCTURE OF THE CASE REFERRAL DEPARTMENTS, REPORT (1999); Courts Law, [Abridged Version], 1984, S.H. 198, § 82A; Courts Regulations (Case Referral Departments in the Courts and the Labor Courts), 2002, K.T. 6189, 1198. The Case Referral Departments' expertise was intended to assure a better selection of cases for mediation and mediators as well as following up the case while in the hands of the mediator. See *Mapping*, *supra* note 93, at 25.

98. THE STEERING COMM. FOR MEDIATION IN THE LABOR COURTS, *Report* (2001).

99. See *Mapping*, *supra* note 93.

100. *Id.* at 27.

101. These were WITH CONSENT, published by the Center for Mediation and Dispute Resolution at the Justice Ministry, and POINT OF MEDIATION, published by the Bar Association. Both have since ceased publication.

swung all the way: in addition to establishing a special sub-committee for mediation and ADR, the Bar Association founded its own mediation center, competing with private mediation centers in providing training and mediators.<sup>102</sup>

(6) Under the auspices of the President of the State of Israel, a pledge containing a commitment to mediation as a preferred process of resolving disputes was signed by many business organizations.<sup>103</sup>

(7) In 2000 an Israeli Mediators' Association was formed. Six hundred people, including the Justice Minister and Chief Justice Barak, attended the inauguration ceremony. Addressing the audience, Chief Justice Barak, expressed his strong commitment to mediation.<sup>104</sup> Within a short time the association grew to over 2000 members.

(8) The same year, the Government appointed, for the first time ever, a private professional mediator to help settle a high-profile public sector dispute: a 125-day nationwide strike of medical doctors against the state and other public health providers. The settlement of the dispute (and the end to the strike) was an important triumph for mediation.<sup>105</sup>

(9) As part of an effort to encourage potential litigants to use mediation even before initiating court proceedings, the legislature authorized judges to issue consent decrees bestowing the power of the court's judgment to agreements reached through pre-action mediation, i.e., in situations where a lawsuit was not filed.<sup>106</sup>

(10) Another legislative change aimed at increasing the use of mediation was the 2001 expansion of mediation to administrative and criminal cases.<sup>107</sup>

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102. *Mapping*, *supra* note 93, at 27.

103. The pledge was signed in 2003 by leading business organizations, such as: the Manufacturers Association, the Chamber of Commerce, the Association of Insurance Companies. See Ministry of Justice, *Pledge for Mediation in Business*, [http://www.israelbar.org.il/article\\_inner.asp?pgId=17424&catId=1185](http://www.israelbar.org.il/article_inner.asp?pgId=17424&catId=1185) (last visited Mar. 22, 2014). A second pledge, pertaining only to labor and employment disputes, was signed in 2005 under the auspices of the President of the National Labor Court by the Histadrut (Israel's comprehensive labor union) and the Coordinating Chamber of Business and Employers Associations. See Anat Mendelson, *A Pledge for Mediating was Signed Between Employees and Employers*, ISRAEL BAR ASSOC. (Jan. 24, 2005), [www.israelbar.org.il/article\\_inner.asp?pgId=17446&catId=2146](http://www.israelbar.org.il/article_inner.asp?pgId=17446&catId=2146).

104. See Part III.A.

105. See MORDEHAI MIRONI, *MEDIATION AND STRATEGIC CHANGE: LESSONS FROM MEDIATING A NATIONWIDE DOCTORS' STRIKE* (2008).

106. Courts Law, [Abridged Version], 1984, S.H. 198, §§ 79C(g)-(h).

107. See Zamir, *supra* note 12, at 125-58.

(11) In 2002 the Justice Minister appointed a committee whose mission was to examine ways of encouraging the use of mediation, including mandatory mediation.<sup>108</sup>

With Chief Justice Barak's leadership and commitment, as well as the host of institutional developments, the future of mediation could not have looked brighter.

#### IV. THE DECLINE OF MEDIATION

Despite the widespread acceptance of mediation's advantages over traditional case settlement, case settlement has overshadowed mediation as a primary conflict resolution process. The unique promise of mediation for Israel's conflict-prone and litigious society was pushed aside by two major forces fueled by the same problem: court backlog. First, under mounting criticism regarding court inefficiency and excessive delays in litigation, the Courts Administration made a strategic decision to launch a docket clearing operation and to invest all its energy and resources in creating in-court ADR at the expense of promoting out-of-court mediation. Second, in view of the Courts Administration's strategic goal, the speed and efficiency of case resolution became the one and only criterion for assessing success in referring cases to out-of-court mediation. Since case settlement is usually faster, shorter, and cheaper than mediation, it took the place of mediation as the mainstream dispute resolution process.

##### A. *The Development and Expansion of In-Court ADR*

The main reason for the decline of mediation has been the strategic decision taken by the courts to develop mediation substitutes within the court system over encouraging out-of-court mediation. In the years following the legislation that introduced ADR — and before the judges had time to adjust to the “mediation revolution” — the Courts Administration and the judiciary in general faced mounting public criticism of the increasing backlog of cases.<sup>109</sup> The pressure

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108. In 2003 the new Justice Minister replaced several members of the committee. The new committee was headed by Judge Michael Rubinstein of the Tel Aviv District Court. The committee submitted its report in 2006. See *The Rubinstein Report*, *supra* note 83.

109. In 2007, for example, there were fifty-five judges hearing cases in the labor courts. During that year 80,351 new cases were filed. Combined with the 52,885 cases still pending from previous years, each judge would have had to clear some 2500 cases in order to eliminate the backlog. See THE COURTS SYSTEM IN ISRAEL — SIX MONTH REPORT: 1.7.09–31.12.09 (Courts Management, 2010), *supra* note 4, at 5. The Supreme Court suffers from a similar problem. At the end of 2007 it had 6063 pending cases and fourteen justices. See *Court Administration — Supreme Court — Statistical*

came from the media, which ran stories on the effect of justice delayed<sup>110</sup> as well as from the State Comptroller and from the courts' Ombudsman who criticized the court backlog in their annual reports.<sup>111</sup> Pressure also came from the Bar Association, which, despite judicial objections, surveyed its members on the performance of judges, giving considerable weight to the speed, timeliness, etc. of judicial proceedings.<sup>112</sup>

As a result of these pressures, clearing the docket of court cases and shortening legal delays have become top priorities for the Courts Administration. Case statistics and judges' productivity (in terms of cases cleared) have become the single most important criterion in internal evaluation of judges, which means that each individual judge's incentive structure is heavily biased toward clearing cases as quickly as possible. Referring cases to voluntary out-of-court mediation does not fit within this new strategy, as judges have no time to spend on educating litigants and their lawyers on the merits of mediation or convincing them to try mediation. Furthermore, even when efforts to convince litigants to use mediation succeed, the proceedings are stayed during the mediation and thus do not contribute to docket clearing statistics. By contrast, in-court case settlement efforts are seen as more promising and in tune with the new policy and Courts Administration's priorities.

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reports — *Criminal Proceedings* 1 (2007) <http://elyon1.court.gov.il/heb/stats/sikum.htm>. As far as the Supreme Court is concerned, the number of cases per justice is somewhat misleading, as most cases are heard before three justices.

110. Tal Rosner, *The Critics of the Backlog in the Court System Are Justified*, YNET (Mar. 9, 2005, 3:59 PM), [www.ynet.co.il/articles/0,7340,L-3056136,00.html](http://www.ynet.co.il/articles/0,7340,L-3056136,00.html); Oshrat Nagar Levitt, *Two Judges Per 65 Thousand Inhabitants*, NRG (Oct. 15, 2007, 9:06 PM), [www.nrg.co.il/online/1/ART1/646/223.html](http://www.nrg.co.il/online/1/ART1/646/223.html).

111. See, e.g., THE OMBUDSMAN FOR PUBLIC COMPLAINTS AGAINST JUDGES, *Annual Report for the Year 2004*, 53–54 (2005), which stated that the prolonging of court proceedings is unreasonable and occurs as a result of misconduct of certain judges, lack of organization, inefficient use of time, lack of skill in allocating work according to appropriate criteria and correct priorities, among other causes.

112. This became, for a time, a serious issue in the otherwise good working relationships between the bar and the judiciary. It resulted in certain retaliatory measures taken by the judiciary, such as a ban on judges' participation in conferences and continuing legal education activities sponsored by the bar. The controversy between the judiciary and the bar was part of the impetus for the appointment of a special ombudsperson to investigate complaints against judges. See The Ombudsman for Public Complaints against Judges Law, 2002, S.H. 590; State of Israel-Ministry of Justice, *About the Ombudsman for Public Complaints Against Judges* <http://index.justice.gov.il/Units/NezivutShoftim/odothanezivot/Pages/odot.aspx>.

The resources and energy which previously had been channeled into encouraging out-of-court mediation have been diverted to expanding various in-court settlement processes. Under the new strategy, efforts have been focused on two existing in-court processes. The first is case settlement. The second is an innovative ADR process called "compromise judgment," a hybrid method combining case settlement, expedited arbitration,<sup>113</sup> med-arb,<sup>114</sup> and adjudication.<sup>115</sup>

### 1. *Expanding the Volume of In-Court Case Settlement Activity*

In line with the agenda of the Courts Administration, courts have intensified their case settlement activities in several ways. Some judges have been relieved of their regular court duties as adjudicators, and instead are assigned to act as special settlement judges.<sup>116</sup> At the same time, Case Referral Departments, which were in charge of facilitating mediation, have been downsized, and lawyers and clerks who would otherwise be assigned to these departments have been assigned to perform case settlement functions. In order to assist judges with their caseloads and to expand the court staff which provides case settlement services, the Courts Administration has recruited a large group of young lawyers who have been assigned to judges as legal assistants. These lawyers have enrolled in a basic mediation training course and subsequently have devoted part of each week to case settlement. Finally, some courts have asked retired judges to assist in case settlement activities as volunteers.

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113. On expedited arbitration, see Stephen B. Goldberg & Jeanne M. Brett, *An Experiment in the Mediation of Grievances*, 106 MONTHLY LAB. REV., Mar. 1983, at 23.

114. Med-Arb is a hybrid technique of dispute resolution. It combines the benefits of both the mediation and arbitration approach. Parties first attempt to negotiate and reach an agreement with the assistance of a mediator. If the mediation ends in impasse, or if issues remain unresolved, the parties move on to arbitration. The mediator assumes the role of arbitrator and renders a final and binding decision. On Med-Arb, see Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661 (1991);

115. A third process, early neutral evaluation ("ENE"), aimed at promoting early settlement, has been instituted in a number of courts on a limited or experimental basis. See Varda Virt-Livne, *Mediation in the Labor Courts*, 3 GATES TO THE LAW 89, 108 (2002). On ENE in general, see David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1 (1989); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994).

116. A judge acting as a special settlement judge may not hear the case if no agreement was reached. Civil Procedure Regulations, 1984, K.T. 4685, § 214K(c) & § 214K(d)(8).

## 2. *Compromise Judgments*

This settlement procedure was introduced for general civil litigation in 1992.<sup>117</sup> It is applied when a trial or appellate judge's efforts to settle the case are unsuccessful. The judge may then try a "procedural case settlement"<sup>118</sup> route, trying to persuade the litigants to forgo a full-fledged trial. If parties agree, the case is decided in summary fashion by the judge, who issues a compromise judgment. The judge is not required to apply substantive law, and the decision does not need to include a written opinion. While in theory a compromise judgment is appealable, in practice there is almost no possibility for appeal.<sup>119</sup>

In sum, under the pressure stemming from the huge backlog of cases, courts have become one-stop-shop settlement centers<sup>120</sup> where judges and other staff members of the courts, such as clerks, judges' assistants and lay judges in the labor courts, are offering free-of-charge case settlement services as their primary activity.<sup>121</sup> Working

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117. Courts Law, [Abridged Version], 1984, S.H. 198, § 79A. Prior to that time, this procedure was used in no-fault road accident litigation. See Hemi Ben-Nun & Amos Gavrieli, *Is Law Superior to Compromise? A Critique of Section 79a of Courts Law 1984*, 56 THE LAWYER 257 (2003).

118. An agreement reached through procedural case settlement does not bring the case to an end. Instead the case is referred by consent to resolution through another ADR process, such as arbitration. An agreement reached through a regular or substantive case settlement leads to a consent judgment. See OMBUDSMAN FOR PUBLIC COMPLAINTS AGAINST JUDGES, *Resolving Disputes Through Compromise or Compromise Judgment*, Letter of Opinion, July 6, 2004.

119. *Id.* at 260; Ofer Sagi, *Courts Law Sec. 79a — Implications for the Future*, 10 DIN V'OMER 31 (1999); Yoel Zusman, CIVIL PROCEDURE 858 (Shlomo Levin ed., 7th ed. 1995); CA 9065/03 Leviev v. Giller, Tak-Al 2005(2) 4489, 4491 (2005). According to Justice Grunis, the court intervenes in a compromise judgment only in three circumstances: (1) when it deviates from the range agreed upon by the parties; (2) when the outcome is completely unreasonable; and (3) when a severe procedural flaw is found in the process.

120. An informal, non-representative survey conducted by the author among judges participating in the special Master's Program for Judges at Haifa University Law School, suggests that judges and other court staff are responsible for 85% of the cases that are not withdrawn or settled by the parties on their own. Settlement by presiding judges accounts for some 30%; settlements by non-judges account for approximately 15%, and approximately 40% of cases end up with a compromise judgment.

121. As stated, this article does not deal with the question of whether in-court settlement processes are desirable. It is important, however, to note the impact they have had on judges. When settlement becomes the expected daily activity, it produces role confusion and an inconsistency between the criteria by which judges are selected for office and those by which their performance is evaluated. Judges are selected for their perceived adjudicatory abilities, as measured by their legal analytical skills and their integrity. Once in office, however, they are now evaluated primarily on the basis of their swift processing of cases. In practical terms, their success is dependent on

under considerable pressure and dividing their time and energy between docket clearing and various in-court case settlement activities, judges are not able to help litigants and lawyers explore out-of-court mediation and other ADR options. The expansion of in-court settlement processes has had a devastating effect on the prevalence of out-of-court mediation.<sup>122</sup>

### B. Case Settlement Takes Over Mediation

A second reaction by the courts to the mounting criticism about backlog and protracted litigation has been to characterize out-of-court mediation as “outsourcing” or as a mere extension of court case settlement functions. Consequently, whenever the courts refer cases to out-of-court mediation, they tend to evaluate it on the same basis as they would evaluate a traditional case settlement: the single criterion for measuring success is the degree to which the case can be cleared quickly and cheaply. Thinking of mediation this way fundamentally mistakes its purpose, yet under these circumstances, case settlement — which is almost always quicker and cheaper — clearly outstrips mediation by reference to the evaluation criteria embedded in the “outsourcing” assumption. Thus, it has replaced mediation as the mainstream out-of-court consensual dispute resolution process. The institutionalization of ADR has brought about its cooptation. “Mediation” has been robbed of its potential benefits, reduced instead to a slower “outsourcing” of case settlement, and has been abandoned. Case settlement, which resembles the adversarial litigation that ADR was supposed to replace, reigns supreme.<sup>123</sup>

If mediation is seen as an outsourcing of case settlement, rather than as a separate process with far loftier goals, then it is easy to dismiss out-of-hand as a poor substitute. This is exactly the kind of evaluation that brought about mediation’s demise, and it was made all the more devastating by the institutional interests of the practicing bar that heavily favored case settlement over mediation. Lawyers tend to have a strong preference for case settlement both when representing clients and when appointed as mediators. There are numerous reasons for this, among them: (1) lawyers feel more at home

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convincing disputing parties to settle or to allow the judge to issue a compromise judgment. See Ido Baum & Nurit Rot, *Bringing to Court a Business Dispute is Akin to Russian Roulette*, 24, 26 THE MARKER (July 16, 2009).

122. See *The Rubinstein Report*, *supra* note 83, at 23.

123. Rina Bogush and Ruth Halperin Kadari, *The Voice is the Voice of Mediation, but the Hands are the Hands of the Law: On Mediation and Divorce in Israel*, 49 THE LAWYER 293 (2007).

working in the rights-based case settlement framework;<sup>124</sup> (2) case settlement is similar in structure to adversarial litigation in that it is a goal-oriented, narrowly focused, and highly legal discourse led by an opinionated evaluator; (3) case settlement negotiation carries the familiar properties of a positional and competitive negotiation model; (4) lawyers who work under various contingent fee arrangements fear the loss of income as a result of the creative, non-monetary,<sup>125</sup> and future-looking non-quantifiable<sup>126</sup> remedies typical in mediation; (5) in case settlement lawyers get to play a pivotal role and retain much more control over the process<sup>127</sup>; and (6) insisting on promoting case settlement over mediation serves the institutional interests of the legal profession. As a legal rights-based discourse, case settlement may better protect lawyers' ability to add value not only as advocates but also as third-party interveners in dispute resolution.<sup>128</sup>

In sum, the court preoccupation with efficient and speedy clearing of cases has elevated the status of case settlement at the expense of mediation. This in turn has played into the hands of the practicing bar, which all along has insisted that case settlement and mediation are essentially the same.

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124. Lawyers tend to be less comfortable with feeling-based and interest-based discourse. See Jean R. Sternlight, *Lawyers Representing Clients in Mediation: Using Economics and Psychology to Structure Advocacy in Non-Adversarial Settings*, 14 OHIO J. OF DISP. RESOL. 269, 324-25 (1999).

125. Examples include recognition of wrongdoing, apology or joint press releases. For apology in mediation, see Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination* 102 MICH. L. REV. 460 (2003); Deborah L. Levi, *The Role of Apology in Mediation* 72 N.Y.U. L. REV. 1165 (1997).

126. Such as renewal or restructuring of business relationship.

127. Riskin, *supra* note 20, at 47. In order to provide maximum space for their clients and their narratives, lawyers in mediation must act contrary to what they are used to in trial advocacy. They must give up the lead actor role and shrink their presence in the room. It takes a great person to make herself invisible.

128. *Id.* at 52. The struggle over the boundaries of and entry to the profession has been evident especially in divorce mediation where family lawyers compete against non-lawyer mediators such as therapists, social workers and psychologists. The Israel Bar Association has tried to monopolize ADR and the Tel Aviv Bar passed a resolution recommending to its members to refuse take part in mediation or case settlement with non-lawyers. See Bogush & Kadari, *supra* note 123, at 312. The Israel Bar Association is very protective of its turf. This is only natural given the huge number of lawyers. With a population of 7,000,000 and a bar association of over 50,000, Israel probably has the largest number of lawyers per citizen in Western world. Anat Roeh, *Over Ten Years the Number of Lawyers in Israel Nearly Doubled*, THE ECONOMIST, May 19, 2009, at <http://www.calcalist.co.il/local/articles/0,7340,L-3288122,00.htm>.



## V. CONCLUSION

As one researcher once commented,<sup>129</sup> if countries were ranked by the number of conflicts that involved them and their citizens, Israel would be a world leader. One rough measure of the number of conflicts<sup>130</sup> is the number of new filings and pending cases relative to population size; a measure which puts Israel right on top among Western legal systems.<sup>131</sup> In addition to being an empirical proxy for the number of conflicts, it serves as one indication that people in Israel tend to resolve their conflicts through power-based and rights-based discourse.<sup>132</sup> That is why developing mediation, not case settlement, as a mainstream conflict resolution process was thought to be important for the society at large and for its citizenry's quality of life. The rhetoric and enthusiasm regarding the golden opportunity and promise of the "mediation revolution" had nothing to do with promoting case settlement. As a dispute resolution process, case settlement is an acceptable and efficient way to clear cases off the docket, but it lacks the educational and behavioral benefits of mediation. In addition, case settlement is socially counterproductive, as it strengthens the negative tendency to channel disputes into right-based discourse.

The Israeli case study — recounting the surrender of mediation initiatives to the strong forces that have promoted case settlement at the expense of mediation — is a poignant example of how the environment in which mediation was introduced transformed, framed and shaped the contours of the actual practice.<sup>133</sup> As a story it is distressing and devoid of a happy ending; it is indeed a story about a broken dream, where the promise of mediation was ultimately felled by the allure of the quicker, easier approach offered by case settlement.

While mediation and case settlement may sometimes be conflated, case settlement is *not* in fact a brand of mediation. The two approaches have several features in common which are probably the

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129. Matz, *supra* note 71, at 11.

130. This is not a precise measure since many conflicts do not find their way to the courts. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Dispute: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 525, 533(1980); see also Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture* 15 LAW & SOC'Y REV. 525 (1980).

131. See Sulitzeanu-Kenan, *supra* note 1.

132. The distinctions between power-based, rights-based and interest-based modes of conflict resolution was elaborated in URY, BRETT & GOLDBERG, *supra* note 19, at 3–19.

133. Menkel-Meadow, *supra* note 7, at 230–35 (exploring the possibility of transformative mediation).

cause of the conceptual confusion between them in theory and practice, but otherwise they are completely different dispute resolution processes. Both are legitimate and may be fruitfully employed in appropriate circumstances, yet each has distinct underlying assumptions, values, goals, structure, characteristics, output, limitations, and rules.

The social value of mediation lies in its focus on the parties' autonomy, which refers to the high degree of party control, involvement and responsibility in the discourse and the decision making. The parties' autonomy is the paradigm of mediation. It carries important implications for both the process and the criteria for measuring success. In mediation, the parties are empowered by their participation in the process itself. They come out believing in their ability to be partners to an open dialogue, to understand and accept the other side's narrative and needs, and to cooperate in a search for creative solutions of their own. It is the privilege and responsibility of the parties to understand, evaluate, and invent their own solutions. The mediator's role is to facilitate and nourish the negotiation process and provide the parties who are immersed in a dispute with a safe space to resolve their own conflict. This is why reaching agreement that brings an end to a lawsuit is not the criterion of success in mediation. Instead, success is the personal transformation and growth experienced by the parties going through the process. The social and educational promise of mediation lies in the belief that the cumulative experience of those who have participated in it will begin to strengthen the community and its social and relational fabric.<sup>134</sup>

In contrast, case settlement is much more strictly result-oriented. As a process, it is devoid of any other goal except reaching an agreement which will bring an end to the instant case in a time- and cost-efficient way. It is the quickest way to bring the parties to a compromise solution. This is why parties who are seeking a fast, one-time compromise solution and why those responsible for clearing the courts' dockets have a strong preference for case settlement over mediation. The same holds true for lawyers: in comparison to mediation, as case settlement offers lawyers a safer and more familiar environment that grants them of more control over the case. Naturally, they feel more at home in competitive positional negotiations where they

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134. Cobb, *supra* note 44, at 246; Bush, *Mediation and Adjudication*, *supra* note 32, at 14-20.

and the third party are the lead actors: it is a process firmly embedded in the adversarial litigation paradigm.<sup>135</sup>

It was only natural to expect that, when mediation for all categories of civil disputes was introduced in 1992, judges, court administrators, and lawyers would understand mediation to be a means of relieving the courts of their unreasonable caseload by subcontracting part of the court settlement activity to outside professionals. This perception was not shared by those who had labored on promoting the idea, led by Chief Justice Barak, and they had to work hard to promote the other possible goals for mediation as a dispute resolution paradigm. In his renowned speech about the "mediation revolution,"<sup>136</sup> Chief Justice Barak admonished the legal community that mediation was not simply a means for clearing the docket: it represented a better way of life. If the people of Israel wanted to live in a less contentious society, they needed to invest efforts in developing a consensual, non-power-based, and non-rights-based culture of dispute resolution. Hence, the project of mediation was far more ambitious than solving the problems of the courts: it sought to address the root cause of court backlog by improving dispute resolution culture in Israeli society writ large.<sup>137</sup>

When Chief Justice Barak announced the "mediation revolution" as a vehicle for a cultural change, case settlement was already an established practice within the court system.<sup>138</sup> Mediation was presented as a bold alternative with nobler goals. Farming out part of case settlement activity in order to expand court case clearing capacities could not justify the term "mediation revolution," nor could it explain the energy, enthusiasm, zeal, and institutional changes that were fostered by Chief Justice Barak's vision. For him and for the other proponents of the "mediation revolution," the advantage of mediation came not from the fact that it is rooted in consent, as is case settlement, but from the fact that mediation asks the parties to travel along a different road<sup>139</sup> to form a consensus. It was parties' *autonomy* through mediation<sup>140</sup> that Chief Justice Barak was after.

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135. See *The Rubinstein Report*, *supra* note 83, at 24; Kovach & Love, *supra* note 22, at 96.

136. Barak, *On Mediation*, *supra* note 5.

137. *Id.*

138. Chief Justice Barak insisted that the mediation revolution was needed even if the courts had no backlog. Barak, *On Mediation*, *supra* note 5, at 10.

139. Cavafy, *supra* note 62.

140. Main, *supra* note 38, at 374; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 90-91 (1996); Lisa B.

Despite its initial promise, mediation has not flourished in Israel. The tough realities of Israel's court system have defeated the dream. The unreasonably large caseloads in courts — coupled with an intensive focus on the speed of case resolution as the sole criterion for evaluating each individual judge's effectiveness — have emerged as the enemy of mediation. Under pressing institutional needs for speedy justice coming from mounting criticism regarding court inefficiency and excessive delays in litigation, the Courts Administration and the courts have changed course. Instead of investing energy in promoting out-of-court mediation, the courts have become settlement centers, developing in-court ADR or mediation substitutes and advancing out-of-court case settlement in the name of faster, cheaper methods of docket clearing than mediation can offer.<sup>141</sup> The effect on mediation was devastating.<sup>142</sup> Thus, instead of playing its expected role in the "mediation revolution" as an agent of change, educating and persuading lawyers and litigants to use mediation,<sup>143</sup> the court system ultimately brought about mediation's decline.

The failure of the "mediation revolution" is, at its core, the result of changing priorities and of a narrowing of focus. The promotion of mediation was envisioned as a strategic and a focused attempt at transforming Israel's disputation culture on a much larger scale. Unfortunately, the pressures on the court system were too strong to allow for such an ambitious project, and eventually the focus on narrower metrics and quicker case turnover displaced the quest for a longer-term change. It is rather ironic that in 2000 Chief Justice Barak admonished that mediation was not intended to solve the problems of the courts. He could not have expected that the problems of the courts would emerge as a strategic threat to mediation and ultimately bring about its decline.

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Bingham, *Control over Dispute System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 222–23 (2004).

141. This development, i.e., the replacement of mediation by case settlement, has been embraced by the practicing bar. See Bogush & Kadari, *supra* note 123, at 317, 329.

142. See *The Rubinstein Report*, *supra* note 83, at 23.

143. In retrospect, it was probably unrealistic to expect judges to promote the idea of mediation, given that they misunderstood its true purposes and the uses to which it could be applied, focusing instead on the utility of mediation as a means of reducing delays and backlog. This is particularly true given the fact that when a judge convinces parties to seek settlement assistance outside the court system, s/he is advocating a service that is similar to what is provided by the courts.

## VI. EPILOGUE

The lion's share of what is referred to as dispute mediation in Western countries, especially in "dollar disputes,"<sup>144</sup> is actually case settlement of one sort or another.<sup>145</sup> Hence, from the end users' perspective, mediation might be a luxury that must wait for its time. It may also be a solution suitable only for those categories of disputes and settings for which the parties' relationship is the true focus, like labor and employment, family, environmental, public policy, or community disputes. Finally, given the unreasonable burdens placed on Israel's relatively small judiciary, the preference of the Courts Administration and the judiciary for case settlement over mediation is understandable. Nonetheless, a focus on the short-term problems stemming from the litigation explosion and court backlog has completely monopolized the choice between mediation and case settlement. This narrow focus may function in the short term, but it addresses the symptom and not the cause. The larger promise of the "mediation revolution" as a vehicle for social change has been sacrificed in the name of clearing dockets faster.

When the political capital and institutional resources are available to attempt a second "mediation revolution," Israel must learn from the past if its move is to be successful. In particular:

(1) Case settlement clears dockets quickly, but it does not address the fundamental problems of an overly-litigious society. Instead it makes the situation worse. Sticking with case settlement forgoes the opportunity to teach parties the value of relationship-centric dispute resolution over traditional adversarial litigation and believing that they can solve their future disputes better and without resort to an authoritative decision maker. Furthermore, a combination of low filing fees, judges' tendency not to impose real costs on the losing side, and the fact that almost all cases end up in case settlement<sup>146</sup> creates further incentive to file frivolous claims with the hope of reaching a compromise. This incentive structure must be changed to focus on the longer-term goal of changing disputation culture generally, rather than simply focusing on getting cases through the court system as quickly as possible.

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144. Where the main remedy sought is money. See FREUND, *supra* note 57.

145. This is not to say that there are no programs that are not just case settlements: only that these programs are far less common.

146. Often free of charge.

(2) Research shows that as a dispute processing technique, mediation provides the highest degree of party satisfaction, regardless of outcomes.<sup>147</sup>

(3) If the outcome of the public debate is that mediation is to be promoted because of its social value and contribution, it must be backed up by unwavering institutional commitment that will also find expression in education, in general, and legal education, in particular. One question<sup>148</sup> which certainly will arise is whether to introduce, at least initially, mandatory mediation<sup>149</sup> of one sort or another.<sup>150</sup> The debate over this difficult policy question is beyond the scope of this article, and the Courts Administration and other policy makers should carefully consider the role of mandatory mediation

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147. Bush, "What Do We Need a Mediator For?", *supra* note 46, at 29; Mary Beth Howe & Robert Faila, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 THE JUSTICE SYSTEM 85 (2008); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661-63 (2002).

148. Another question is whether to provide an attractive and effective incentive system or subsidies to parties to enter mediation, similar to other services or products that are socially important. Such system needs to be designed in a manner that does not compromise the special qualities of mediation, primarily the autonomy of the parties. There is always a risk that without some measures of quality control, mediation may gravitate, process wise, towards case settlement. On assuring quality in mediation, see Orna Rabinovich-Einy & Faina Milman-Sivan, *Mediation between Procedure and Substance: On Privatization of Justice and Workplace Equality*, 11 LAW & GOV'T 517, 521 (2008).

149. The Rubinstein Report answered this question positively. Relying on the positive experience with mediation in other jurisdictions, the report suggested that mandatory mediation was essential for the following reasons: It conveys a public policy preference that people ought to learn to solve their disputes by themselves; it helps overcome the state's reluctance to use mediation; it eliminates the perception that it is the weaker party that is interested in mediation; and it eliminates the problem of the reluctance of lawyers to recommend mediation to their clients. See *The Rubinstein Report*, *supra* note 83, at 26, 40-41; BERNARD MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION, 57, 111-13 (2004).

150. Following the Rubinstein Report's recommendations, an interesting model of mandatory pre-mediation session was introduced. Litigants in civil claims exceeding 12,500 dollars are required to attend a meeting with a mediator, the purpose of which is to explain the process of mediation to the parties, exchange information and see whether the case could suitably be settled in mediation. Parties do not pay for this meeting, as the mediators who participate in the program volunteer their time. See Civil Procedure Regulations, 1984, K.T. 4685, § 99J, Supplementary Form 3A § 6. Up to now, the program has been introduced as a pilot in three trial level courts. In the absence of data, it is unclear whether the mediators insist on marketing mediation, case settlement, or some combination of the two processes. See Civil Procedure Regulations, 1984, K.T. 4685, §§ 99A-L; Announcement Listing the Courts in which an Information Exchange, Acquaintance and Coordination Pre-Mediation Session will be Conducted, YP 778 (Nov. 29, 2007).

in helping mediation gain a foothold in an environment that is hostile to its goals.<sup>151</sup>

(4) The citizens of Israel all live their lives in the shadow of a protracted and bitter conflict, which probably has affected the paradigm by which they view, manage and resolve conflicts.<sup>152</sup> This is but one explanation of why the disputation culture is heavily monopolized by power-based and right-based discourse. Consequently, introducing mediation discourse is essential for improving quality of life and strengthening the communal social fabric. In this sense, the revival of the “mediation revolution” is a strategic need.

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151. See Wissler, *supra* note 147; Timothy Hedeon, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary But Some are More Voluntary than Others*, 26 THE JUSTICE SYST. J. 273, 276–79 (2005); Frank E. A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 1 J. DISP. RESOL. 3, 6–8 (2000).

152. Matz, *supra* note 71, at 14.

