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The ADR / CR Divide: An Autoethnographic Interrogation of its Impact on the Theory and Practice of Mediation

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**The ADR / CR Divide:
An Autoethnographic Interrogation of its Impact on the Theory and
Practice of Mediation**

Volume 1 of 1

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Doctor of Philosophy**

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Abstract

Isabel Aline Phillips

The ADR/CR Divide:

An Autoethnographic Interrogation of its Impact on the Theory and Practice of Mediation

Key Words: Mediation; Conflict Resolution; Alternative Dispute Resolution; Autoethnography; Theory; Practice; Conflict Roles; Mediator Skills; Conflict Intervention; Ethics

There is a divide between the fields of Conflict Resolution (CR) and Alternative Dispute Resolution (ADR) that impacts on the transfer of knowledge and skills. This is the central hypothesis investigated and confirmed through analysis of the literatures of the two fields, the responses to a questionnaire to practitioners, and autoethnographic interrogation.

A generational analysis of authors is combined with the results of a (N=28) questionnaire with practitioners from both fields. This delineates the divide in the theory and literature as well as how those operating in each field identify, conceptualise mediation and what they read.

The autoethnography explores the fundamental impact of on conflict role definitions generally and the mediator specifically. It then looks at the impact of crossing the ADR/CR divide on mediation practice, highlighting the necessity for practitioners of a 'both and' approach to skills/ knowledge and attitude/qualities. This leads to the consideration of a framework for mediator competence across the ADR/CR divide.

The interaction of the mediators' normative project and the ability of parties to self-determine is explored practically and ethically. This highlights a range of issues with expectations mediation and mediators and foregrounds the impact on the mediator of the mediator role.

It ends with a call for further research using innovative methodologies, such as autoethnography, that illuminate mediation as a relational process.

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Table of Abbreviations and Organisations

Acronym	Full Name & Basic Info	Website
AAA	American Arbitration Association USA based ADR register and provider of services	www.adr.org/
ADRg	ADR Group UK based ADR service provider	www.adrgroup.co.uk
Berghof	Berghof Foundation German based CR service provider and research institute	www.berghof-foundation.org
CDRA	CDR Associates USA based “Collaborative Decision Services” provider – CR/ADR	www.cdrassociates.com
CEDR	Centre for Effective Dispute Resolution UK based ADR provider of services and mediator training	www.cedr.com
CMC	Civil Mediation Council UK ADR-based organisation that promotes the use of mediation in civil, commercial and workplace contexts through registration of mediators, mediation organisations and promotional activities.	www.civilmediation.org
Clarb	Chartered Institute of Arbitrators UK based provider of ADR services and mediator training	www.ciarb.org
CRS	Conflict Research Society CR focussed interdisciplinary society focusing on promoting flow of information on conflict and peace research.	www.conflictresearchsociety.org
CRM	Civil Rights Mediation CR focused organisation promoting and researching application of mediation in the civil rights context in the USA.	www.civilrightsmediation.org

Table of Abbreviations and Organisations

C-R	Conciliation Resources UK based CR practice and research organisation	www.c-r.org
IA	International Alert UK based CR practice and research organisation	www.international-alert.org
IMI	International Mediation Institute Netherlands based ADR organisation - aim to 'credential' mediation training and mediator standards.	www.imimmediation.org
IPRA	International Peace Research Association Research and grant making institution based in the USA.	https://www.iprapeace.org
JAMS	JAMS (Originally 'Judicial Arbitration and Mediation Service') USA based ADR service provider, with foundation arm	www.jamsadr.com
PON	Program on Negotiation, Harvard University: ADR training and research institution.	www.pon.harvard.edu
RI	Resolution Institute Australian and New Zealand provider of services and training, successor to LEADR.	www.resolution.institute
Regent's University	A private UK University, successor to Regent's College, provider of mediator training.	www.regents.ac.uk/adr
Swisspeace	Swiss Peace Foundation Swiss government funded Training and consultancy promoting peace activities and processes.	www.swisspeace.ch

Introduction

The Coping Chameleon

I sit on the windowsill, shivering. The snow bends the fir tree below me in an elegant arc. There is a bench, a rubbish bin and a path. All appear picturesque and evocative rather than mundane thanks to the snow.

So. I must let myself emotionally go there.

I allow the despair deep inside me to flow upwards. Like thick black oil it coats everything...I must hold onto the threads that will allow myself not to be consumed by it, to continue to hold at least my head above the surface.

Tears flow, my shoulders shake, the window frame cuts into my thighs.

...The questioning from the people in the room behind me becomes persistent and judgemental. I bark back at them, but also feel sorry for them. They are trying really hard. I wouldn't want to deal with me!

I am involved in a terrible, deep, emotionally exhausting, punishing conflict. And yet I am supposed to be: The Conflict Specialist; The Mediator.

Instead, I don't know what to do. Years of training and practice and reflection and I am now sitting on a freezing windowsill, trying to focus through my tears. I contemplate what has brought me to this point. I have no answers. No-one else seems to either.

I turn my head and let off a salvo of: 'Leave Me Alone! Leave Me Alone, or I'll jump.'

As I turn back, I see someone below me. They are looking up at me with a perplexed expression. I give them a broad smile and say *sotto voce*:

“Role-play...all good, don’t worry.”

In the same moment, I hear my colleague speaking to our trainees:

“Well done! Time up! Let’s go and debrief.”

I swing my legs back over the windowsill, clamber over the table, and walk to the bathroom. I stupidly put mascara on this morning, so it’s not just my emotional state that needs a cosmetic overhaul. In three minutes, I have to focus on the participants emotional journey in trying to cope with me. At the thought of just how awful I must look right now, I feel my face crinkle into a gallows-humour-powered smile.

I am a chameleon, I change my outer colour to signal, or to blend with my surroundings, but that doesn’t mean that what is happening beneath isn’t genuine.

~~~

You have just read an autoethnographic episode. It evokes my inner world, the emotional experience of an epiphany about what it means to engage with conflict as an individual and as a professional. It is about a moment of the repetition and reinforcement of the reality that I don’t have all the answers; there is no magic bullet, no panacea, no solution or re-solution. It is about a moment where I was, for a moment, hyper-conscious of my role as party to a conflict; of finding ways to cope and of needing the patience rather than the advice of others.

At the core of this PhD is how consonance and dissonance between human beings is dealt with over time both in the world of the ideal and the material. It brings the inner and outer experiential worlds of the practical experience in one specific conflict role, mediator, into sharp focus through the application of

autoethnography, in-depth analysis of literature on mediation theory and practice, as well as drawing on the experience and knowledge of 30 other practitioners.

In order to focus in this way a transgressive approach has been taken in subject matter and methodology. Instead of remaining within the philosophical, methodological, discourse and practice boundaries of one field, Conflict Resolution (CR), this study walks along the divide between CR and Alternative Dispute Resolution (ADR).

The approach is transgressive because of at least three boundaries: It interrogates CR and ADR not just on their own terms, but on each other's terms. It interrogates theory and practice, and challenges the disconnect arising out of the very human emotional and pragmatic concerns of the practitioner and academic/researcher. Finally, I have disclosed information of a type and quantity that usually appears in the academic context about 'research subjects', rather than about the researcher themselves.

In transgressing these boundaries, it uncovers information that makes a contribution primarily to the field of Conflict Resolution, but also secondarily to Alternative Dispute Resolution.

There are four particular areas in which it makes a contribution. The first is to analyse how this divide has arisen and to then begin to build bridges between them. The second is methodological innovation by applying autoethnography in two fields where it has not previously been used. The third is to strengthen the mediation theory/practice connections through the methodological innovation and comparative structure. The fourth is to identify and enable learning across the CR/ADR divide.

There are a number of original elements to this PhD. The originality of the application of autoethnographic methodology to this context is combined with



the originality of the findings arising out of bringing the inner and outer worlds together in this form.

There is substantial original content at both the micro and macro levels. The research design brings together emotional and individual qualitative experience of the ADR/CR divide with quantitative data drawn from other practitioners to investigate the nature and origins of this divide. It then makes further contributions through autoethnography, by probing this divide in relation to how emotions and individual experience connect with and influence agency in mediation.

### **Research Genesis**

After my MA in International Relations, I started post-graduate research on mediation. However, I came to the conclusion fairly quickly that the critique of academic theory, not understanding what it was like to deal with people waving guns in each other's faces, applied to me. My MA had produced the finding that there seemed to be a lot of 'telling' conflict parties what to do, and not much 'asking' what they wanted. However, the idea that I would therefore be able to produce something that was of assistance to those doing the 'telling' or 'asking' seemed to be utterly hubristic.

As a result of this epiphany, I decided to go into practice, to experience mediation. I was determined that if I did ever write something it should be 'useful' and come from a place of experiential *knowing*. I was at best naïve and at worst unconsciously incompetent in terms of my understanding of what this departure would mean.

I had had little training in anything but historical research methods and certainly didn't go into practice as a researcher in disguise. I wanted to do 'something useful' and I wanted to know what it felt. It didn't occur to me to think about whether this experience would be considered in any way legitimate knowledge in an academic environment.

From 2000 to the present day I trained and then worked practically as a conflict specialist. I have occupied the roles of mediator, coach, trainer and consultant for organisations in different contexts all over the world. I have worked extensively in the commercial, Non-Governmental Organisations (NGO) and Inter-Governmental Organisations (IGO) in all these roles.

I have therefore succeeded in getting some sense of what it is like. However, both the experience and finding a way to this visible in the academic context have proved to be more challenging than I ever originally imagined.

Qualifying and working in a CR dominated context initially led me to become quite concerned about both the connection of theory and practice, as well as some of the practice per se. I therefore took the unusual step of qualifying and working as a commercial mediator in the ADR context for a number of years. I wanted to experience and the mediator role as practiced in a context the mediator was chosen and paid for by the parties. This was followed by a number of years of crossing the boundary between these two fields, both in terms of context and practice.

This journey provided the bones of the primary hypothesis of this PhD and has had a profound influence on the sense that methodological innovation is central to getting information flowing across the theory-practice, academic-practitioner divide.

### **Key Concepts and Definitions**

Many of the terms used in the last two pages demand explanation and definition; they are either not self-evident, or their definition is a matter of extensive and controversial debate. The following section provides clarity for the reader on what is meant within this PhD by specific terms, it does not outline or analyse in depth the extensive debate around each of these terms. This is done in the subsequent chapters at length with extensive referencing to illustrate the analysis and discussion around these often-used terms that in some cases are highly contentious, in others left undefined.

### **The ADR/CR Divide**

*Alternative Dispute Resolution (ADR)* is both a specific theoretical construct and a field of theory, research and practice. As a theoretical construct the term refers to dispute resolution processes that are used as an alternative to litigation (going to court). As a field practice, it encompasses the theory and practice of a range of discrete processes that include, but are not limited to, mediation, arbitration, adjudication, early-neutral evaluation and expert determination.

The focus of this PhD is specifically civil-commercial mediation, so where simply 'ADR' is referred to this should be borne in mind; what I am saying may not always be relevant to all processes included within ADR. A further qualification is that mediation in the ADR context is generally divided into four areas of specialism: Commercial; Family, Restorative Justice(RJ) and Community. Unless specified otherwise, this thesis refers to civil-commercial mediation theory and practice. However, generally all four mediation specialisms are recognised in the Law and Business context ADR, with taught courses and research on ADR and its processes being conducted in the UK, USA, as well as many other jurisdictions around the world.

*Conflict Resolution (CR)* is a field of theory, research and practice. Its name is highly contentious, even within the field itself. However, as an academic discipline it is an interdisciplinary undertaking that concerns itself with advancing the understanding of conflict processing at all levels of society across the spectrum of the social, the political and the economic, with particular attention given to the international though, unlike IR, it is highly concerned with conflict on a much wider level than just the traditional inter-state concerns of IR. Whilst there is interdisciplinary work connecting with geography to economics, it rarely touches on the legal-commercial context.

*Divide* is used to encapsulate the idea of a gulf between two academic, cultural and disciplinary groups. It suggests a situation where those on either side of the gulf can theoretically see each other, but most of the time are too tied-up with their own concerns to be aware either of this gulf, or of those on the other side of it. The term divide has been chosen over alternatives such as 'split', because this divide is bridgeable and there are those who manage to cross it, albeit with difficulty.

### **An Autoethnographic Interrogation**

*Autoethnography* is a methodology that requires the user to apply ethnographic methodology to their own autobiography. The aim is to generate insight and knowledge on lived experience that cannot be gathered in any other way. It can be implemented in a range of different ways, but generally includes the demand that its practice takes the responsibility of the researcher to consider the interaction of their work with that of the reader so that the result aims to generate not only cognitive insight but also an emotional response.

Each autoethnographic episode is preceded by the following ~~~ to indicate its start, with the same ~~~ at its end.

*Interrogation* is the process of challenging and analysing my storying of my experience in order to mine it for learning purposes. It is the interrogation of what in emotional terms is driving particular conclusions and behaviours in relation to theory and practice of mediation.

### **The Impact of the divide on the Theory and Practice of Mediation**

*Impact*, is considered in terms of the presence, or absence of a range of different types of evidence. These include, but are not limited to, knowledge or use of theoretical concepts, conceptualisations, literature, authors, praxis norms, status identifiers, training courses.

*Theory* is the intellectually constructed frameworks of what mediation is(n't); what should(n't) be done, by whom, in what way, where, and for how long. It

also covers the rationales behind why it should(n't) be done, how it does(n't) work and who should(n't) be involved. Theory may arise out of the work of practitioners or academics, or those in between.

*Mediation* is the most difficult term to define. If it were easy and obvious a good part of this PhD would be unnecessary and there is extensive discussion of the term. Where it is used without qualification it is being used to denote a practical process where: A third-party, without stake in the outcome facilitates communication and negotiation between conflicting parties without advising, showing preference, or prejudice and without determining the outcome. However, it should also be noted that both ADR and CR commonly use different definitions, so there are places where I have used their own definitions to guide choices about data and analysis. These are specified within the text.

*Practice* specifically in relation to mediation is problematic due to the issues highlighted above; ADR and CR have different norms in relation to what falls within the categorisation of mediation. Generally, ADR classifies mediation practice as situations where the parties have explicitly signed up to a mediation process with a specific mediator.

Practical activities that fall outside this specific situation are called other things. However, where I talk about the practice context I take this somewhat more widely to encompass the interaction, training and writing context of practitioners. In CR a panoply of practical activities are casually referred to as 'mediation' that encompass (rare cases) of explicitly selecting a mediator and engaging explicitly in 'a mediation process', but also activities such as workshops, dialogue processes, training and consulting.

### *Conflict and Dispute*

As with mediation, both these terms are problematic because of their different usage in the two fields. Burton's analysis comments that ADR does not differentiate and uses the two terms interchangeably, largely stands in the practice context. In in depth discussions, particularly where the subject matter

goes outside the normal boundaries of ADR commercial mediation practice, there is recognition that disputes could be described as the acute, visible eruption of conflict into the legal arena.

In CR the Burtonian definitions of conflict being deep-rooted issues that connect with basic human needs and issues such as structural violence and oppression, whilst disputes are the manifestation of superficial issues is broadly accepted as read.

From a relational, practical, perspective of the mediator the manifestations of the superficial and the deeper underlying levels are not always so easy to distinguish when one is only dealing with a superficial 'dispute'; the one can be a manifestation of the other. Therefore, conflict is defined broadly to refer to situations of serious tension arising out of the perceived or actual opposition of wants or needs.

### **Hypotheses and research questions**

The primary hypothesis of this thesis was that Conflict Research (CR) and Alternative Dispute Resolution (ADR) have diverged from each other and at present the characteristics of two different fields in relation to the theory and practice of mediation.

On the basis that this hypothesis proved to be supported by the analysis of the development of ADR and CR, their literatures and the experience of other practitioners, a further hypothesis was developed. This secondary hypothesis was that knowledge transfer between CR and ADR on mediation theory and practice would be possible but has been impacted by this divide.

Finally, if the first two hypotheses were supported by the evidence then a third and final hypothesis was developed: The development of a framework for the analysis of mediation which allows the transfer of knowledge and skills across the boundaries of different fields of mediation is possible and would be beneficial to both fields.

Flowing from these hypotheses are four research questions:

1. Is there an ADR/CR divide between mediation practice and theory?
2. If 1, has this divide reduced the transfer of skills and knowledge in relation to the theory and practice of mediation?
3. If 1 and 2, what skills and knowledge could be helpfully be transferred between these fields?
4. If 1, 2 and 3, is there a framework for analysis that allows the transfer of knowledge and skills between the two fields?

### **Structural Outline**

Probing the experience of crossing the divide and bringing this into conjunction with theory from both fields a number of areas of cross-field learning emerge. These are presented in the next seven chapters.

This chapter unusually prepares the way for a direct plunge into a literature review of Chapter 2 which incorporates elements of the original findings from the research conducted for this thesis. This is appropriate due to the nature of a study that looks at practice and theory across two different fields.

The chapter analyses the origins of the two fields and the interaction of their respective storying of their origins. At this point the first of the original findings of the research is introduced for the first time. It is a tabular generational map that combines key personal and publication data on authors from the two fields to build up a picture of who was writing when.

This is followed by an analysis of the philosophical underpinnings of the two fields, the dominant epistemology and ontology of the fields and the outlines of some of the important debates arising out of philosophical controversy, or the lack of it, within the two fields. The conceptualisations and definitions of mediation in ADR and CR are then explored in some depth encompassing similarities, differences and in places views of each other. This is then rounded

off by the analysis of the types of mediation dominant in the practice of the two fields.

Chapter 3 provides insight into the epistemology, ontology, philosophical approach, methodology and methods applied. It includes substantive analysis of Autoethnography as a methodology. This is both because it is still an unusual methodology per se, and because of it being highly unusual (and possibly unique) as a methodology in a Conflict Resolution PhD.

Chapter 4 builds on the analysis of the literature and evidence presented in chapter 2 through the presentation of findings from a small sample practitioner questionnaire. This generated data on how practitioners view themselves, how they conceptualise the field, which authors they have knowledge of and which they cite as influences. This data is used to build a fuller picture in relation to the division and connections between practice and literature across the two fields.

The overall findings indicate a division between the two fields, apparently arising in the late 1970's and early 1980's. This became embedded through divergence of attitudes to practice and research. They demonstrate different philosophical concerns in relation to the conceptualisation and praxis of mediation. There is also some evidence of boundary crossing and the value of this, suggesting a divide rather than a complete split.

Chapters 5, 6 and 7 present the findings of the autoethnographic research. Each chapter builds on the previous one, and each presents analysis of specific issues through autoethnographic episodes connected to critical analysis of theoretical and practical literature and practice evidence drawn from the two fields. The autoethnographic work provides a unique insight into the profoundly relational nature of mediation and the way that it has impacted on me as a person and as a mediator.



Chapter 5 focuses specifically on the issue of conflict roles and the impact of role clarity role-switching. It draws out the particular differences between the roles of mediator, third-party advisor and judge. In doing so it demonstrates that role differentiation, or a lack of it, can have fundamental relational impacts in conflict intervention and therefore impact on outcome. This is particularly true of claiming one role whilst occupying another.

Chapter 6 explores the impact and prioritisation of mediator skills, knowledge, attitude and self-reflexivity in the two fields. It challenges the assumptions of both fields by taking the suggestions of both seriously. The findings indicate that skills and knowledge complement attitude and qualities. In other words, to present view work on personal qualities as sufficient mediator preparation, and/or to present skills and knowledge as things only relevant to 'rote practitioners,' is deeply irresponsible. However, it also indicates that underlying attitude and self-reflexivity are crucial to the effective implementation of skills and knowledge.

Chapter 7 builds on the implications of applying a clear definition to the role of mediator. This reveals the fundamental link between the application of different conflict roles, including that of mediator, and the reality of the degree to which parties retain agency within such processes. These findings raise challenging questions about conflict parties' agency and the ethics of the project of empowerment, emancipation and transformation.

The final chapter, chapter 8, reviews these findings and builds on them to make suggestions about the development of a joint framework for analysis across this divide. It also identifies and analyses issues and areas that require further research.

## **Literature Review: Theory and Practice**

This chapter analyses the ADR and CR mediation literature and lays out the evidence of a divide between the fields and begins to delineate its impact on knowledge and skills transfer. It highlights contrasting narratives around the origins of the two fields, different dominant strands to the philosophical discourse, different conceptualisations, approaches to definition and models of mediation practice. It also includes the first iteration of the tabular generational author analysis, that reappears in chapter 4. This author analysis presents a visual tabular historical timeline for the development of the literature of the two fields.

This chapter is therefore intimately connected with the results chapters and taken to further levels of depth in chapter 4. That means that this 'literature review' goes straight into the question of what it means to say there is a divide between ADR and CR and the evidence for this assertion.

The primary focus of this PhD is the UK. However, it is impossible to answer this question without drawing in information from the USA and other jurisdictions as appropriate. In the context of the literature, there are a number of different aspects to this divide that need unpicking. The first part of the chapter looks at the different histories written in the two fields about the interconnected events relating to the theory and practice of mediation. The stories told about the origins and history of a particular field is an integral part of the identity and sense of boundaries between one field and another.

Of course, both fields reflect the structuralist and post-structuralist debate of the last fifty years. However, the dominant philosophical framework has developed differently, which in turn has profoundly influenced both the development of theory and the presentation of practice. The second part of the chapter unpicks the philosophical discourse of the two fields.

In the third part of the chapter the philosophical discourse is connected to the contrasting conceptualisations and definitions of mediation of the two fields.

These conceptualisations are intimately connected to the fourth and final part of the chapter. This analyses the different dominant mediation models and practice evidence of the two fields. In view of the common issues around research and practice development, the divide between these two fields is an obstacle to the transfer of knowledge and skills.

The comparative structure has been applied, with each field looked at on its own terms, followed by an analysis of each area for convergence and divergence. This comparative is not only central to the research question, but also aims to proactively reduce the confirmation bias that can arise out of mono-disciplinarity (Vane and Mulhearn 2005) and the power of social proof (Cialdini 2009).

### **Origins of the fields**

The two fields tell different stories about their history, with divergent landmarks, events and publications presented in summaries of the history of the two fields. If each of these stories were put into one sentence, they sound something like this: CR in its current academic conception emerged through an interdisciplinary challenge, during the early 1960s, to traditional mono-disciplinary IR state-centred power politics; ADR emerged out of the demands for legal reform in the US, with the Pound conference of 1976 seen as the big bang moment.

These two sentences tell different stories of different concerns, academic fields and time frames. These differences are reinforced by evidence of their distinct literatures and foci and views of the connection between ADR and CR expressed within each of their respective literatures. There are also less obvious overlaps and convergence. This section presents some of the context from the written sources. This foundation will be deepened and broadened in chapter 4 through the presentation of the results of the primary research.

### **Alternative Dispute Resolution (ADR) and the legal field**

The legal field views ADR as its own specialism; something that emerged as a result of the needs and demands of developing and maintaining legal systems.

The Pound Conference of 1976 is actually described as the ‘Big Bang’ of ADR (Moffitt 2006), after which ADR spread rapidly; a story that removes the need for explanation of provenance. This story is common and whilst Moffitt admits the idea that there may also be truth in the idea that the ideas were there ‘all along’, it is the big bang that is attractive in a low-context telling of the story.

A mid-point is the sort of general summary given by Auerbach (1984) that argues mediation and related methodologies have always been present on the fringes of American dispute resolution practice. However, the embedding of the legal within the wider social context and the connections to the non-legal world is seldom given more than lip-service. Moffitt’s nods in the direction of the non-legal with a sentence on contributions to ADR from Theology to Mathematics but his handbook on ADR actually is mono-disciplinary in its Business Law contributors<sup>1</sup>(Moffitt and Bordone 2005).

In reality, by 1976 there had been a whole generation of criticism of existing systems in relation to civil rights, labour rights, social justice and access to justice. By 1978/79 organisations providing and promoting ADR generally, and mediation more specifically, were being founded. Most of those that feature in the subsequent publicly acknowledged history of ADR tend to be those with a legal background, such as JAMS (originally the ‘Judicial Arbitration and Mediation Services’) and IICPR in 1979 (2017). However, countless others with connections to family, labour law and the civil rights movement, who were critics of the legal system and/or practitioner activists were founding organisations and providing services across the US by 1978 (Mayer 2004). CDR Associates are notable, as some of its partners have a strong profile within the legal and business contexts, despite most of the partners being social scientists by background.

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<sup>1</sup> This point is further illustrated both by the predominance of high status academics from American business schools and the way that sections such as that on processes are subdivided (Negotiation; Mediation; Arbitration; Litigation; Consensus Building and ADR; Bargaining in the Shadow of Management; Selecting an appropriate ADR procedure).

1979<sup>2</sup> saw the founding of the Harvard Program on Negotiation, the institution that has come to dominate the legal academic work on ADR in the USA and abroad. Whilst PON did and still does connect the worlds of business and organisational psychology with law, most of the really big name academics in this field (Mnookin, Fisher, Patton, Bazerman, Susskind and Bordone), are Harvard lawyers, with Ury being a notable exception. Given the name of the institution, it is understandable that the best-known work is on negotiation, not mediation. However, this is in itself characteristic of the presentation of mediation within ADR. It is a book on negotiation that is most frequently cited in ADR mediation training; 'Getting to Yes' by Roger Fisher and William Ury, first published in (1981).

The dominance of Harvard in writing on negotiation, contrasts with diffusion in the writing on mediation, an arena which Harvard seems to have largely avoided<sup>3</sup>. Christopher Moore is the first author with substantive ADR connections writing specifically on mediation in (1986). He is a founding partner of CDR Associates, Colorado. His book is very practically oriented and gives specific guidance to mediators on how to mediate.

The ADR story outside the USA tends to start with individuals who claim to have been the first to have 'brought' mediation to their jurisdiction from the USA. Examples of this phenomenon include Christopher Besemer in Germany

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<sup>2</sup> The PON can't quite decide when it was founded:  
[https://www.pon.harvard.edu/research\\_projects/harvard-negotiation-project/hnp/](https://www.pon.harvard.edu/research_projects/harvard-negotiation-project/hnp/)  
1979 <https://www.pon.harvard.edu/about/> 1983 Last accessed 7 Nov 2017

<sup>3</sup> Whilst there is an almost unknown work on international mediation by Fisher (with Ury) Fisher, R. and (with Ury, W. (1978) *International Mediation, A Working Guide: Ideas for the Practitioner*. New York: International Peace Academy. PON have put out no landmark academic works on mediation and the 1978 publication is erased from all the official publication records for Fisher and Ury. Hard copies can be found at a handful of universities and it is logged on worldcat.org.

(1996), Eileen Carroll<sup>4</sup> and Henry Brown (2015) in the UK and Anstey (1993) in South Africa.

In the UK, ADR providers offering mediation appeared in the late 80s and early 1990s in the UK, such as the Alternative Dispute Resolution Group (ADR Group) and Centre for Effective Dispute Resolution (CEDR) were founded between 1988 and 1990<sup>5</sup>. These organisations, as with the USA, were succeeded by publications specifically on mediation such as “A Sudden Outbreak of Common Sense: Managing Conflict through Mediation” (Acland 1990) and on how ADR could ‘fit’ into the jurisdiction “The ADR Practice Guide” (Mackie et al. 1995). These organisations and publications were all connected to lobbying to embed mediation into the legal system. In the UK this was formalised with the Access to Justice Final Report (The Right Honourable Lord Woolf July 1996), commonly referred to in legal circles as ‘The Woolf Report’, that formalised the principle of ‘proportionality’<sup>6</sup>.

Since the Woolf report, mediation has become an accepted part of the stable of ‘ADR’ processes in the UK, alongside negotiation, early neutral evaluation, adjudication and a range of other specialist processes. Its theory and practice in the context of law/jurisprudence tends to divide mediation into different types, with different literatures, training programmes and practice norms:

- Family mediation – Legal disputes involving minors, usually in the context of divorce.
- Community mediation – Disputes between neighbours which are pre-legal proceedings.

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<sup>4</sup> [https://www.cedr.com/about\\_us/people/?p=Eileen-Carroll](https://www.cedr.com/about_us/people/?p=Eileen-Carroll) last accessed 21 October 2017

<sup>5</sup> The precise dates seem to vary from anecdotal and website information.

<sup>6</sup> This is the idea that the resource required to resolve a dispute should be proportional to the proportions of the dispute; in other words that the time, money and effort of the dispute resolution process should be less than the amount in dispute, and should certainly not exceed it.

- Restorative Justice (RJ) – (Also sometimes called victim-offender mediation) broadly covers processes which come under the jurisdiction of the criminal courts.
- (Civil-)Commercial mediation – Disputes in all other areas which are immediately pre-issue or at any point post-issue of legal proceedings. This can cover anything from clinical negligence to commercial contract, employment, supply of goods and probate.

Essentially anything which doesn't fall into Family, Community or RJ tends to get put into the catch-all of commercial. The 'civil' is added in this context to ensure clarity in relation to the context being the 'civil' rather than the 'criminal' legal context, rather than it being about 'nice behaviour' / or 'civil(ian)' as opposed to 'military'. This general division holds up in the USA, the UK, Australia, New Zealand and in a good number of Commonwealth and European jurisdictions. It is important to reinforce once again, that this PhD focusses primarily on divide between mediation in the CR and ADR contexts, focusing on civil-commercial practice in ADR (rather than family, community or RJ). In other words mediation in cases of commercial contract; intellectual property; construction; employment and workplace; clinical negligence; probate etc..

The largely mono-disciplinary field of ADR with its focus on practical action, and scepticism of even legal academic research is central to the identity of ADR and mediation practitioners, despite (or maybe because of (see chapter 4)) the Harvard connection. The exception to the mono-disciplinarity is the willingness to apply ideas from psychological research such as the work of Kahneman (2013) and Cialdini (2009). This scepticism of academia is illustrated both by the response of CEDR (Allen 2012) to the research of Genn (2007) and by Roger Fisher's contrast of his work as opposed to Kelman's: "*I've much more thought of myself not as 'in the academic field', but as trying to develop ideas of use to people in dealing with their differences.*" (Fisher 2005).

**Conflict Resolution (CR) and the socio-political field**

CR, by contrast to ADR, is a field infused with the aspiration to multi-disciplinarity. CR views itself as emerging from critiques of the restrictive power-politics discourse dominant in post-war International Relations. Burton, for instance, cites attending the Pugwash conferences as a crucial turning point in disillusionment with this discourse. It was John Burton and the multi-disciplinary group involved in the 1965 CIBA conference who distilled this growing sense of disquiet into an emergent field (Burton 2000).

The results of this conference were published in 1966 as *Conflict in Society* (De Reuck and Knight). Those involved at this point were academics and scholar-practitioners, with backgrounds in sociology, psychology, mathematical psychology, social anthropology, organisational development, in addition to international relations, economics, politics, history and philosophy. Amongst the best known, aside from Burton and de Reuck are Anatol Rapaport (1961), Johan Galtung (1976), Elise Boulding (1964), Morton Deutsch (1968) and Adam Curle (1971). Bearing in mind the aspiration of Burton to multi-disciplinarity, the complete absence of lawyers/legal scholars from the list of contributors is noteworthy.

Whilst Roger Fisher was at Harvard in the 1970s too, it is Herb Kelman and his work on interactive problem-solving that seems to be considered more influential in CR. ADR is presented in CR as being at best a 'superficial' diversion, at worst actually 'dysfunctional' in its function of disputes whilst failing to resolve underlying conflicts. (Burton 1996). Understanding these connections requires a different level of research than is possible simply through literature review and will therefore be returned to in chapter 4.

The idea of connecting the academic with practical action has been central to the identity and debates of the field since, at least, the mid-sixties. Most of those with big reputations in the field in terms of academic writing and research also have experience as practitioners, both in the earlier generation including Galtung, Glasl, Burton, Curle, Kelman and others, as well and the newer



generation of authors such as Schirch and Lederach. As illustrated by Fisher's comments about Kelman<sup>7</sup>, there were different attitudes towards practice and to each other; CR very explicitly accepted scholarship as part of its identity, ADR that rather neglected it. It seems unlikely that any of these scholar-practitioners would view the practice, as Fisher puts it, as 'incidental'. However, there are definitely more signs within the CR field of scholarly conventions, such as referencing and being more circumspect about making assertions about 'what works' on the basis of individual experience, than in the ADR context.

This field of Conflict Resolution, with all its debates about its name, its methodologies and priorities, remains a broad church with difference and debate, however this seldom includes ADR and almost never includes legal-commercial contexts. For example Crocker (1999) draws together contributors applying different methods and processes in a variety of contexts. However, despite the title "Herding Cats: Multi-party Mediation in a Complex World" which would in no way preclude its inclusion, international commercial mediation doesn't feature. A similar pattern is present in the survey text of the field 'Contemporary Conflict Resolution' where the commercial, and specifically ADR, is barely if at all mentioned (Ramsbotham et al. 2011). Similarly authors such as Lederach barely reference the commercial or legal contexts, and if they do it is to place ADR outside the boundary of what they are concerned with (Lederach 2005).

### **Origins of the fields: Convergence and Divergence**

There are areas of convergence between these fields: Both emerged out of systemic criticism of existing structures; international structures and discourse

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<sup>7</sup> "It was a combination of research and doing it, but they were kind of embarrassed about doing it...He thought, 'I'm an academic. I must study about conflict and I should just incidentally talk to the Middle Easterners'...I've much more thought of myself not as "in an academic field", but as trying to develop ideas of use to people in dealing with their differences." Fisher, R. (2005) Parents of the Field. <http://activity.scar.gmu.edu/parents-of-field/roger-fisher>, George Mason University.

in the case of CR; legal structures and access to justice in the case of ADR. Both consider themselves to be innovative and aim to make practical difference to 'real life'. Both present their history in this light.

However, there is also considerable divergence. The point at which they choose to 'start' their histories is very different. In CR 1965 is just one of many possible starting points as much is made of the academic pedigree of those whose work preceded this date; Quincy Wright, Anatol Rapaport, Mary Parker Follett, Pitirm Sorokin, David Mitrany to mention but a few. The development of the field from there results in a broad set of 'parents of the field' as presented by SCAR at George Mason, who are acknowledged and whose work is drawn on extensively<sup>8</sup>. A further example of this is the recent resurgent interest in Adam Curle (Woodhouse and Lederach 2016). Within this bigger picture CR characterises ADR as its younger sibling, concerned with the 'superficial' level of disputes between individuals (Burton 1996), despite the fact that much of the literature and discourse around ADR is largely unknown in the CR context.

ADR tends to apply the terms 'conflict' and 'dispute' interchangeably in sharp contrast to the academic field of CR. In CR the formative debate, triggered by Burton, about what constitutes 'conflict' and 'dispute' (Burton 1979) means there is an assumption that the two are not interchangeable. The impact of this, in practice, is a range of organisations that *look* like they are intellectually situated in CR but are in fact concerned with and dominated by the legal ADR discourse.

A good example being the International Institute for Conflict Prevention and Resolution (previously known as CPR). ADR rarely acknowledges the existence of CR as a field at all, highlighted by Chris Mitchell's interview of Roger Fisher (Fisher 2005), and when it does certainly doesn't recognise it as an older and wiser sibling (Noll 2011)! This difference is clearly visible when the authors are presented in the generational table of authors above.

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<sup>8</sup> <http://activity.scar.gmu.edu/parents> last accessed 15.12.17

**Fig. 1: Generational Analysis of Authors in CR and ADR**

(N.B. Large version can be found at appendix 2.)

Purple text = author that is suspected to be boundary crossing  
 Blue text = author from ADR origin  
 Red text = author from CR origin (mentioned at most by one questionnaire respondent)

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|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2007-2016</b> | <b>James Fagot</b><br>pub. 2008/2011<br>Law<br><br>Tight definition of mediation (from legal field)<br><i>Mediation in Political Conflicts</i>                                                                                                                                                                                                                                                                                               | <b>Douglas E. Moll</b><br>pub. 2010<br>Law<br><br>Application of 'Modern Diplomatic Strategies' to world conflicts<br><i>Elusive Peace</i>                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                       |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |
| <b>1997-2006</b> | <b>Robert H. Moskoff (Peppet, Tulameño)</b><br>pub. 1986/2000/2004<br>Law<br><br>Children and Family Law<br><i>Negotiation, Conflict Resolution, Child, Family and State; Beyond Writing</i><br><i>Negotiating to create value in deals and disputes</i>                                                                                                                                                                                     | <b>Douglas Stone, Bruce Patton &amp; Sheila Heen</b><br>pub. 1999<br>Law, Business<br><br>Law, Business<br><i>Difficult Conversations: How to discuss what matters most</i><br><i>John Crawley &amp; Kathryn Graham</i><br>pub. 2002<br>Business?                                                                                                                                                                                                                                                                                                | <b>Michael L. Moffitt &amp; Robert C. Bordone</b><br>pub. 2005<br>Law<br><br>ADR, Negotiation; Mediation<br><i>The Handbook of Dispute Resolution (contribs. incl. Bazerman, Shapiro, Heen, Peppet, Moffitt)</i><br><b>Hazel Genn</b><br>pub. 1996<br>Sociology; Law                                                                                                                                                                          | <b>Marshall Rosenberg</b><br>pub. 1968/1983/1999<br>Clinical Psychology<br><br>Communication; Compassion; Teaching<br><i>Diagnostic Teaching: A model for non-violent communication; Non-violent</i><br><b>Lisa Schirch</b><br>2004/2005<br>International Relations/ CA and Resolution<br><br>Peace Building & Keeping/Gender/Security<br><i>Resource &amp; Training Manual; Little Book of Strategic Peacekeeping</i> | <b>John Darby</b><br>pub. 1976 / 2003<br>History<br><br>Conflict; Northern Ireland<br><i>Peace Processes Conflict in NI</i><br><b>Bernard Mayer</b><br>pub. 2004/2009/2012<br>Peace Studies<br><br>Moral Imagination, Web approach, Building peace<br><i>Building Peace: Little Book of CT; The Moral Imagination;</i>                     | <b>Louis Kriesberg</b><br>pub. 1973 / 1998<br>Sociologist<br><br>Link of constitutional level and social level of structure and conflict.<br><i>Contemporary Constructive Conflicts; The Sociology of International Conflicts</i>                                                                      | <b>Oliver Ramsbotham, Tom Woodhouse, Hugh Miall</b><br>pub. 1999<br>Peace Studies, History<br><br>Cosmopolitan conflict resolution<br><i>Contemporary Conflict Resolution</i>                                         | <b>Harriet Martine, Antonia Potter</b><br>pub. 2006<br>Journalism; Peace Studies?<br><br>Internal info on process of track 1 processes<br><i>Kings of Peace, Poems</i> | <b>John Winslade &amp; Gerald Monk</b><br>pub. 2000/2008<br>Counseling ?<br><br>Schools counseling, conflict and narrative<br><i>Narrative Mediation; Practicing Narrative Mediation</i> | <b>Kevin Avruch</b><br>pub. 1991/1998/2013<br>International Relations<br><br>Social and Organisational Psychology<br><i>Anthropology</i> | <b>Oliver Richmond</b><br>pub. 2005/2008<br>Cultural impact on conflict; critique of Burton<br><i>Peace in International Perspectives; Context and Pretext; Culture &amp; B/W</i> |
| <b>1987-1996</b> | <b>David Richbell</b><br>pub. 1997/2006/2015<br>Communication & Surveying<br><br>Mediation<br><i>Practice of ADR in the UK</i><br><b>Andrew F. Adnan</b><br>pub. 1990/95/2011<br>Russian and Italian / IR<br><br>How to Mediation and ADR from consumer perspective<br><i>A Sudden Outbreak of Common Sense; How to resolve disputes without going to court; Perfect People Skills</i>                                                       | <b>Karl Mackie, (David Miles, William Marsh)</b><br>pub. 1991/1995<br>Law, Business<br><br>Practice of ADR in the UK<br><i>The ADR Practice Guide</i><br><b>Mark Anstey</b><br>pub. 1982/1991<br>Law<br><br>7 Labour Relations<br><i>Labour relations; Negotiation; Mediation, Identity politics</i>                                                                                                                                                                                                                                             | <b>Leonard Rikkin</b><br>pub. 1984/1998/2014<br>Law<br><br>Broad and Narrow Evaluation/Positive Suggestions for teaching mediation at law school.<br><i>Dispute Resolution and Lawyers; Understanding mediation orientations strategies and techniques</i><br><b>Janet Rifkin</b><br>pub. 1976/1984/1991<br>Law<br><br>Feminism; ADR; Narrative mediation<br><i>Working with Groups; Practice and Paradigm</i>                                | <b>Robert Caldwell</b><br>pub. 1971/1984/2009<br>Law; Organisational Development<br><br>Persuasion, Influence;<br><i>Influence: Science and Practice; Influence: The psychology of persuasion</i><br><b>Stephan Covey</b><br>pub. 1970/1989<br>Religious Education; Business<br><br>Effective Habits; Leadership; Interdependence<br><i>The Seven Habits of Highly Effective People; The Eighth Habit</i>              | <b>Robert A Baruch Bush; Joseph P Folger</b><br>pub. 1994/2005<br>Law; Organisational Development<br><br>Transformative mediation<br><i>empowerment and recognition</i><br><b>Loraleigh Kneashley</b><br>pub. 1982/1997/2005<br>Social Psychology<br><br>Social Psychology: An applied Approach<br><i>Interactive Conflict Resolution;</i> | <b>Jacob Bercovitch (+ Jeffrey Crocker, Fen Osler Ruben)</b><br>pub. 1984 d.2011<br>International Relations; Psychologist<br><br>Quant on Hard/Soft mediation and effectiveness<br><i>Social Conflict and Third Parties; Mediation in International Relations; CWM Dataset w. Delvaux&amp;Papicrno</i> | <b>Pamela Ash, Chester Hampton</b><br>pub. 1996<br>International Relations; History<br><br>Former sec of state - track 1, 'Power' mediation<br><i>Herding Cats; Grasping the Nettle; Taming intractable conflicts</i> |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |
| <b>1977-86</b>   | <b>Christopher W. Moore</b><br>pub. 1986/2014<br>Political Sociology; Labour Relations<br><br>How to mediate<br><i>The Mediation Process: Practical Strategies for Resolving Disputes</i><br><b>William Ury</b><br>pub. 1978/1981<br>Politics; Organisational Development<br><br>Conflict management; Organisational Development; Mediation<br><i>Idios for the Practitioner; Getting to Yes; The Third Side; The power of a positive no</i> | <b>Adam Curle</b><br>pub. 1971, d. 2006<br>Educationalist; Philosopher<br><br>Application of needs theory to CR, 2nd order change; problem solving method<br><i>Conflict in Society; Controlled Communication; World Society; Conflict Resolution and Prevention</i><br><b>Friedrich Glasl</b><br>pub. 1980/2013<br>International Relations<br><br>Biased 'power' mediators; Facilitator/Formulators/ Manipulators<br><i>The Negotiation Process: Theories and applications; International Mediation; Conflict Resolution and power politics</i> | <b>John Burton</b><br>CAC 1966/1990 d.2010<br>Clinical Psychology; Human Development<br><br>Intractable Social Conflict<br><i>The Structure of International Conflict; Theory and Practice of Events Research; Intractable Conflict Resolution (w. Burton); Patented Social Conflict</i><br><b>Elise Boulding</b><br>pub. 1976 d.2010<br>Civil Society; 200 year present; Craft and skills<br><br>One small plot of heaven; Cultures of Peace | <b>Edward Auer</b><br>pub. 1974/1990 d. 1991<br>Historian; International Relations<br><br>Structure of International Conflict; T2 interventions; Horn of Africa<br><i>The Structure of International Conflict; Zones of Peace; The Nature of intractable Conflict</i>                                                                                                                                                  | <b>Christopher Mitchell</b><br>pub. 1981/2014<br>Historian; International Relations<br><br>Structure of International Conflict; T2 interventions; Horn of Africa<br><i>The Structure of International Conflict; Zones of Peace; The Nature of intractable Conflict</i>                                                                     |                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                       |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |
| <b>1967-1976</b> | <b>Roger Fisher</b><br>pub. 1964/1978/1981/2005 d. 2012<br>Lawyer<br><br>International Conflict; Principled negotiation; Emotions and neg<br><i>International conflict and behavioural science</i><br><b>William Ury</b><br>pub. 1978/1981<br>Theory and Methods of Social Research; Peace Research-Education-Action<br><i>Conflict Management</i>                                                                                           | <b>Johan Galtung</b><br>PHD 1960<br>Philosophy, Sociology, Mathematics<br><br>Program on International Conflict Analysis and Resolution, Harvard;<br><i>Interactive problem-solving</i>                                                                                                                                                                                                                                                                                                                                                          | <b>Herbert Kelman</b><br>pub. 1957<br>Social psychology<br><br>Peace, Conflict, Defense<br><i>Perspectives on the Economics of Peace; Conflict and Defense</i>                                                                                                                                                                                                                                                                                | <b>Kenneth Boulding</b><br>JCR 1957, d.1993<br>Economics<br><br>Metarology<br><i>Quant -logarithmic evaluation of deadly conflict</i>                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                       |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |
| <b>1957-1966</b> | <b>Marton Deutsch</b><br>pub. 1949/1962/1973/2000<br>Social psychologist<br><br>Competition and Cooperation; Group Dynamics<br><i>Theory of Conflict and Cooperation; Preventing WWI; The Revolution of Conflict</i><br><b>Handbook of Conflict Resolution</b>                                                                                                                                                                               | <b>Abraham Maslow</b><br>pub. 1954, d.1970<br>Psychologist<br><br>Hierarchy of needs<br><i>Motivation and Personality</i>                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>Anthony de Reuck</b><br>pub. 1966; d. 2017<br>Physics<br><br>CERN publication, Reuck et contris Deutsch, Boulding, Burton, Galtung, Rapoport, Nicholson et. al.<br><i>The Statistics of Deadly Quarrels</i>                                                                                                                                                                                                                                | <b>Lewis Fry Richardson</b><br>d. 1993 pub 1960<br>Mathematical; Meteorology<br><br>Theory, Tis-for-tis to Axelrod, 2nd Order learning<br><i>Operational Philosophy</i>                                                                                                                                                                                                                                                | <b>Anatol Rapoport</b><br>56371954/1965 d. 2007<br>Mathematical; psychologist<br><br>Game & General Systems Theory, Tis-for-tis to Axelrod, 2nd Order learning<br><i>Operational Philosophy</i>                                                                                                                                            |                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                       |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |
| <b>1941-56</b>   | <b>Mary Parker Follett</b><br>pub. 1898/1942, d. 1933<br>PPE<br><br>Business organization; Leadership; Violence<br><i>The Speaker of the House of Representatives; Freedom &amp; Coordination</i>                                                                                                                                                                                                                                            | <b>Pilgrim Sorokin</b><br>pub. 1941/1957 d.1968<br>Criminology, Sociology<br><br>Functionalist approach to overcoming win-lose<br><i>A Working Peace System</i>                                                                                                                                                                                                                                                                                                                                                                                  | <b>David Mitrany</b><br>pub. 1942/1962 d.1970<br>Political Science/Law?<br><br>War<br><i>A Study of War; Preventing WWI</i>                                                                                                                                                                                                                                                                                                                   | <b>Quincy Wright</b><br>pub. 1942/1962 d.1970<br>Political Science/Law?<br><br>War<br><i>A Study of War; Preventing WWI</i>                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                       |                                                                                                                                                                        |                                                                                                                                                                                          |                                                                                                                                          |                                                                                                                                                                                   |

(N.B. A large version of *Fig. 1* can be found at Appendix 2.)

*Figure 1* provides an overview of a wide range of authors from both fields considered important either within the literature, in terms of the research they have done, or because of their influence in the practice context. This literature review does not in any way attempt to discuss the contributions of all of them, but rather to contextualise them within this larger picture.

This table will be picked up at various points through this body of work with its connection and interpretation deepened and broadened. At this point it primarily illustrates the spread of the authors in the two fields and the generational shift created by the different approach to the storying of each field.

Signs of these different perceptions of self and other within these two fields are present but not always obvious. Furthermore, in my practical experience, it is perfectly normal for ADR practitioners (and to a lesser extent scholars) to never have heard of the ‘founders’ of CR, and to be innocent of the wider discourse of the CR field, and to use the terms conflict and dispute resolution interchangeably. Likewise, those in the CR field make assertions about ADR practice that are hard to support with practical experience of the field and seem to be unaware of some of the most fundamental elements of mediation culture in the ADR context, such as competence frameworks in relation to mediation skills.

Combining scholarship and practice is integral to the self-perception and aspiration of CR, with many of the ‘parents of the field’ moving between involvement in mediation, dialogue, problem-solving workshops as well as academic research and teaching. The writing in the field is imbued with traditional scholarly norms. ADR has focussed heavily on practice and the dismissiveness with which Fisher, as probably the single most influential academic in the emergence of ADR as a field, talks about research. The fact that his writing, as well as that of others at Harvard, doesn’t credit or reference

anyone else's work, conveys a profoundly different attitude to scholarship than that generally evidenced in the CR context.

Finally, multi-disciplinarity is written into the history of CR as a core element of its identity. ADR writes its history as a story of legal reform and development and its practice and academic writing are dominated almost solely by lawyers. Those from a non-legal background are usually psychologists and chaperoned in publication by lawyers (e.g. Fisher and Ury; Bush & Folger).

However, some of these assertions are based on acquaintance knowledge through my work in the two fields, with the danger that there is confirmation bias in my reading of the literature. Therefore, testing it demands looking at the background of people working in these two fields and asking them what they have read and what has influenced them. Therefore, the degree to which this reading is supported by the experience of others in the field further is tested in chapter 4.

### **Mapping the philosophical terrain**

The next section analyses the dominant epistemological and ontological positions of the two fields. The focus are core texts used in the English-speaking context to explain mediation to their 'home demographics' – in the case of the ADR this is primarily lawyers, secondarily business management. In CR, it is scholar-practitioners, scholars and NGO & IGO practitioners.

### **Philosophical discourse in ADR and the legal field**

The Anglo-American civil-commercial view of mediation rests on a foundationalist-materialist (structuralist) assumption of 'objective reality' that is discerned through the discovery of sufficient material facts. Determining the objective 'truth' relies on propositional information and uses a judge to affirm the views of one or other of the conflict parties as being 'right'. The judge is invested with the authority through the trinity of acquaintance knowledge (through experience of previous cases), competence knowledge (through knowledge of jurisprudence) and propositional knowledge (through ability to

rapidly comprehend, absorb and analyse information provided by parties and their advocates).

The gradual questioning of legal positivism during the 20<sup>th</sup> Century (Sebok 1998) led to pragmatism and legal and critical realism (Phang 1992) becoming increasingly dominant. From the philosophical perspective mediation and negotiation, which do not rely on a judge with this combination of knowledge and truth, could be seen as a fundamental philosophical challenge to the legal system. Something perceived as the risk by critics of ADR (Allen 2012) (Cobb 1997). This is because implicit in the suggestion that it might be possible to agree a way forward through the development of an appreciation of the simultaneous validity of different views, is a post-structural subjectivist, constructivist, or critical theoretic standpoint (Nolan-Haley 1996).

This makes the considerable opposition to mediation amongst the legal profession outside the ‘pacifist, liberal left-wing’(Faget 2011: p.12) unsurprising. Its gradual acceptance was in part due to ontological and epistemological re-branding in pragmatist terms in order to make it more acceptable to positivists and realists (Posner in (Sullivan and Solove 2003-2004), p.690). One half of this is the pragmatic justification of ‘proportionality’. In other words that whilst there may be one objective/correct view, it may be disproportionately costly and time-consuming to uncover this type of objective truth justly, and that therefore methods are needed that allow the courts to provide outcomes that are ‘proportionate’ in terms of cost and time to the value of the original dispute. This shift was first enshrined in the UK Civil Procedure Rules in 1998: “These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly *and at proportionate cost*” (MOJ 1998-2017).

The other half of the philosophical justification, is not the possible simultaneous validity of multiple different views, but rather mediation as the realisation of the individual freedom of consenting adults to come to agreements on whatever terms they deem to be mutually acceptable. This essentially libertarian rationale presents mediation as a process that returns decision-making power to the

individual and frees them from the oppression of judgement meted out by someone representing centralised state power.

If this has become the dominant position, it is not the only position. The fundamental criticism of mediation in the ADR context in critical realist terms, is that it not only does not and cannot deliver just outcomes, but systemically goes against the interests of justice and just outcomes. This criticism arises out of the logic that mediation simply enables whoever has the superior negotiating power to 'win' at mediation (Genn 2007).

Tomain also challenged the realist discourse from the constructivist perspective (1985), suggesting that agreements reached can be the intersection of two different realities, with each side accepting the same agreement but perceiving it as something completely different. He goes as far in the linkage as to say "constructivism can be seen as an ADR-forcing strategy" (1985) p.353). However, it is worth noting when Tomain wrote this well before ADR became firmly embedded in legal practice in the UK.

That structuralist positivism (moderated in places by pragmatism) holds a dominant position in the civil-commercial mediation context can be illustrated by the work of (Boulle and Nestic 2001) and (Mackie 2007) in relation to the definition of mediation. The third edition of ADR practice guide in commercial dispute resolution asserts one definition of mediation and a 'normal mediation procedure' (Mackie 2007: , p.43) without any supporting references; the same approach used in Harvard PON publications such as 'Getting to Yes' (Fisher et al. 2008).

The authors of the ADR practice guide are all mediators in the UK legal context and (the primary consumers of this text) 'names'<sup>9</sup> in the commercial field (Noll

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<sup>9</sup> I use the term 'names' in the same way as Noll throughout this work: 'Names' are men (and very occasionally women) who have public name-recognition, due to occupying (or having occupied) a position of military, diplomatic or political power. Currently good examples include Guterres and de Mistura. This type of

2011); illustrated by the choice of biographical details on the back cover of the book (Mackie 2007). This is acquaintance knowledge used as the primary basis for a 'claim to truth'; the claim to knowledge rests on a foundational and objectivist view of knowledge as structured, generalizable and cumulative and based on personally observed 'truth'.

This is logical within a logical positivist paradigm (Greetham 2006) in which their opinions are accepted as representing the 'truth' based on their a posteriori knowledge. This philosophical position can be illustrated anecdotally by a meeting between one of the authors of one of the key ADR 'textbooks' and an anthropologist who wished to research mediation using ethnographic methodology. The author expressed complete incomprehension about why ethnographic methodology could be considered proper research at all.<sup>10</sup>

Boulle and Nesic (2001) explore the issue of mediation definition in more detail. They define four different ideal-types of mediation which they admit "do not conform exactly to types of mediation practice. Mediations in practice might display features of two or more models." (Boulle and Nesic 2001: p.27). Instead of trying to resolve the tension between these ideal-types, they problematize it and present the different options. Whilst less positivistic in their willingness to allow competing models to coexist, this is still a highly structuralist approach.

Their call for empirical systematic research, suggests that Boulle and Nesic recognise a flaw in the data available on mediation, with a lack of objective, generalizable, structured information; they conclude the book with "*It will be exciting to follow these changes, which it is hoped will be based not only on theories or anecdotal evidence of what will serve the UK well, but will be premised on practical experience in mediation and systematic research that*

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name-recognition is self-reinforcing as recognition leads to appointment, on the basis that parties will respect someone with a 'reputation'. Their actions are then easier to comment on in the media as name-recognition is already given.

<sup>10</sup> This assertion based on verbal report given to me on these conversations by two of those present at these meetings.



*includes studies of an empirical nature.*” (Boulle and Nestic 2001: p.538). As demonstrated by Wall and Dunne, this is something that is still outstanding, with methodological replication in slightly different practice areas with little substantive empirical progress in terms of advancing the debate on mediator skills and process, participant or mediator experience, quality of outcomes, or efficacy measures on anything but superficial ‘settlement rate’ terms (Wall and Dunne 2012).

Further research on the proposition that mediation as a process fundamentally supports constructivist, post-structuralist propositions seems to be something that also remains unexplored in empirical terms; turned into the ‘dirty secret’ of ADR.

### **Philosophical discourse in CR and the socio-political field**

Divisions within the academic study of conflict in the socio-political and international contexts abound. Whilst CR may be an independent field from International Relations, with a discrete discourse and areas of concern, it exists alongside IR and is affected by the IR discourse on mediation. The result is the simultaneous presence of structuralist and post-structuralist discourse around mediation.

In much of the IR/Political literature the discourse has tended to be dominated by the realist-critical theoretic debate. Crocker (1999) demonstrates consistency with this approach. He presents two different paradigms of mediation, the structuralist and the social-psychological. Structuralism is “*based on a belief that through the use of persuasion, incentives, and disincentives...parties to a conflict can be led to and through a negotiated settlement.*” Social-psychological is presented as “*focuses on the process of communication and exchange as a way to change perceptions and attitudes*”. His section ‘Towards a synthesis’ suggests a dialectical process leading to a synthesised paradigm for mediation. What this synthesis is, is unfortunately unclear.

Faget, a lawyer by background, defines mediation with an unusual level of precision for the CR field. He picks up Crocker's definition and takes apart the 'Realist Scientific Approach' encompassing the work of Touval and Zartman (1985) Bercovitch and Rubin (1992), Kleiboer (1998). Faget highlights their focus on rational choice theory and the pursuit of "*the golden formula that would bring peace to the world.*" and contrasts this with the emergence of transformative mediation.

Faget encompasses Bush and Folger (2005) as well as the ideas of Galtung (2002) and Lederach (2005) into this idealist and anti-foundational school of thought. Faget characterises 'Conflict Resolution' as the "*world of corporate professionals, legal and political specialists*"; the embodiment of negative peace. He characterises Conflict Regulation as "*activist Social Science academics and social workers*" aiming to create positive peace (2011: p.5).

Faget's choice of labelling profoundly clashes with the much better known<sup>11</sup> work by Woodhouse, Ramsbotham and Miall (Ramsbotham et al. 2011). Ramsbotham et. al. would probably not disagree with the delimitation of the two fields, but they choose to use the term Conflict Resolution for the field they are operating in which is not primarily the "world of corporate professionals, legal and political specialists" but rather interdisciplinary CR in the acknowledged tradition of Burton and Curle amongst others; this is the field described by Faget as "embodying the aim of positive peace". This is a field that is heavily influenced by the post-structuralist discourse of academics and scholar-practitioners such as Lederach and Richmond. This is discourse that focuses on emancipation, differentiation and the development of heterodox, pluralist theories and practices (Richmond 2008).

This is a field that is not uncritical of Richmond's philosophical plaidoyer for "*ontologies, epistemologies, theories, concepts and methods [that] should be*

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<sup>11</sup> Contemporary Conflict Resolution is now one of the best-selling text books of the field and included on many university reading lists internationally.

*broadly representative of all actors at multiple levels, public and private, gendered and aged, and of multiple identities”* (Richmond 2008: 162, p.162).

However, it does take on the challenge. The work of Lederach is in the tradition of Curle in developing practices that acknowledge the limits of mediation in its traditional realist conception and pushes a post-modern and constructivist conceptualisation that allows for multiple realities and the transformation of relationships through the application of multiple realities.

The philosophical challenge of what it means to put such broad conceptualisations into practice, particularly in concrete situations where there is an ongoing clash between the right to individual self-determination and an acceptance of heterodoxy combined with a rejection of fundamental human rights and heterodoxy is a real challenge. The result has been in effect a two-track approach to the discourse on mediation; one track underpinned by a more structuralist critical theoretic basis, the other post-structuralist post-modern basis.

### **Philosophical Terrain: Convergence and Divergence**

There is convergence between these two fields in that neither has really come to terms with the profound philosophical challenge posed by the concept of mediation. Structural and post-structural justifications for mediation are possible, but neither deals wholly with the profound practical dilemmas thrown up by the idea of handing self-determination in conflict (or disputes) over to the conflict parties.

The structuralist argument, dominant in the ADR context and in traditional IR, uses a logic of ‘empowerment and emancipation’ in a libertarian form; returning the power of decision making to the individuals involved in disputes (whether they represent themselves, or (ironically) are speaking on behalf of ‘their’ company or organisation), and thus emancipating them from the potentially oppressive decisions made by a third party representing a centrally created and enforced legal decision. Nonetheless the acceptance of the supremacy of individual self-determination runs the risk of creating a system where the ability

to challenge oppression and injustice for weak (financially or otherwise) individuals or groups is made impossible because it allows the justification of the de-funding of systems that are able to override fundamental power-imbalances<sup>12</sup>. One of the only ways to actually respond to this is to take actual mediation practice into account with the ill-hidden constructivist alien at its heart; something that is picked up in chapter 7.

The post-structuralist argument, dominant in the CR context focusses on mediation and mediative capacity as methods of enabling empowerment and emancipation through conflict transformation. In other words, mediative activity is a way of transferring decision-making back to levels of society below the top level of power politics. The aim being to both prevent and process underlying conflict in more effective ways, thereby empowering and emancipating humans as web-based structures rather than individuals.

Whilst mediation as a 'method' should be a gift in relation to this emancipatory call, it raises the perennial problem of the extent to which tolerance and diversity should tolerate its antithesis, and the degree to which individuals can be trusted with self-determination. An emancipatory agenda advocating self-determination demands protection of diversity, emancipation and the defeat of hegemony of any type. However, leaving the choice of mediator, the terms and the outcome of the mediation to the parties creates a situation in which the parties could choose to do things which go against exactly this agenda.

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<sup>12</sup> This debate has been raised in the legal context, not least in the case of *Halsey*, where one of the consulted QCs raised the question of whether mediation flouted the fundamental right of access to justice (*Halsey v Milton Keynes NHS Trust and Steel v Joy and Halliday* [2004] Smith Bernal Reporting Ltd for Lawtel ). Whilst this was not considered a major issue by the court, once the introduction of the use of mediation is combined with the removal of funding for the vast majority of legal action and mediation is pushed as being 'cheaper', there is a strong argument that the situation is definitely at risk of creating a situation where social oppression through the application of private settlement and 'buying off' becomes a real risk.

This is a profoundly practical problem as this discourse comes into radical disagreement (Ramsbotham 2010) with groups and individuals willing to take up arms because of their fundamental rejection of ‘diversity, difference, heterodoxy and hybridity’ (Richmond 2008) and/or that stasis or oppression are actually in their interest. This highlights the inherent contradiction of post-modernism in creating new narratives, meta-narratives and hegemonies of diversity, heterodoxy and hybridity whilst criticising the meta-narratives and hegemonies of others. CR is therefore the mirror image of ADR, with its constructivist and post-modern instincts constrained by critical realist anxieties about the actual implications of accepting unfettered heterodoxy and subjective realities.

For both fields the underlying issue is therefore where should boundaries on self-determination be drawn? If there are no boundaries, what are the consequences? If there are boundaries, who draws them and what are the results? In the context of mediation this question is implicitly present at all levels: Who chooses the mediator? Who chooses the mediation approach used? Who controls the outcomes whether settlement, transformation, ongoing relationships or ‘divorce’? Who decides what is ethical? Who decides what the other options to mediation are?

### **Conceptualisation and definition of mediation**

The usage of the term ‘mediation’ in different places in the CR and ADR literature includes:

- One process amongst a range of defined resolution processes
- The interaction arising out of any intervention in conflict by a third party
- Long term conflict transformation with an emancipatory agenda

These summaries reflect different approaches to both conceptualisation of mediation and its definition. Both having a choice, making these choices, profoundly impact on mediation practice and research. Fisher and Keashley raised three important issues relating to the conceptualisation of mediation (1991). These were: the “*conceptual and practical morass*” around what actually constitutes mediation; the potential for the application of complementary

processes in conflict; the importance of timing (contingency) in the application of interventions. All three are addressed in the next section in relation to the two fields.

In the CR field, Fisher & Keashley's suggestions around contingency in this article were taken seriously, with a good deal of subsequent research and theorising around the timing of mediation. However, complementarity has received far less attention and the term mediation (and mediator) in the CR context continues to be applied to a wide variety of roles and activities.

In contrast mediation is relatively tightly defined in ADR, and the direction of the debate on contingency is different from that in CR. Complementarity as a basic tenet of ADR precedes (at least in the USA) Fisher and Keashley's article.

A final issue, that is fundamental to conceptualisation, is who controls the process and the outcome of mediation; is it the mediator, external parties or authorities, or the conflict parties themselves?

### **Conceptualisation and Definition in the ADR Context**

The basic conceptualisation and definition of what mediation is and isn't, rests on the principle of complementarity (Fisher and Keashley 1991). The fundamental principle of ADR is that a suite of different processes, applied according to need and context, is available to parties as *alternatives to litigation*. They include negotiation, tribunal, arbitration<sup>13</sup>, adjudication, ombudsman, expert determination and early neutral evaluation (Boulle and Nesic 2001) pp.76-104. These processes are chosen by the parties, and then applied individually, or in different escalatory sequences.

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<sup>13</sup> In some jurisdictions, such as China, Arbitration is very much considered to be part of the ADR stable. In the UK, it is now often considered both to be so utterly integrated into the litigation environment, that it is inappropriate to refer to it as 'ADR'.

All the processes mentioned take place in the UK (as well as the US and most OECD states) above the ‘safety net’ of a (broadly) functioning court system and the ability to escalate to the ECHR. Furthermore, penalties for ‘unreasonable refusal’ to mediate, and the statutory responsibility under the overriding objective (MOJ 1998-2017) make it the duty of solicitors to understand these processes and be able to advise their clients on these options.

The result is that mediation is presented as a specific, bounded process, defined positively through the role of the mediator and negatively through its difference from other ‘Alternative Dispute Resolution’ (ADR) processes. The definitions can be either conceptual, or descriptive (Boulle and Nestic 2001), for instance the Ministry of Justice offers a brief descriptive definition of mediation: *Mediation is a way of resolving disputes without going to court. It is cheaper and quicker than litigation and the outcome is usually beneficial to all parties. Mediation allows you and the opposing party to talk about the dispute with the help of a mediator. The mediator’s role is not to make a decision on the dispute but to help both parties find a solution that they are happy with*<sup>14</sup>. This contrasts with CEDRs conceptual definition: *Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.* (Allen 2015).

Boulle and Nestic offer alternative definitions and then say that mediation has “yet to develop a coherent theoretical base and an accepted set of core features” (2001), p.3). Their view of the difficulty with the conceptualist approach is that its “normative content might not reflect what actually happens in practice” (Boulle and Nestic 2001), p.4) whereas the descriptive approach risks giving “a value-free definition which overlooks its underlying philosophy” (Boulle and Nestic 2001), p.5). However, it is worth noting that this was 16 years ago and things have moved on, but more importantly even at that point these

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<sup>14</sup> <https://www.gov.uk/guidance/intellectual-property-mediation> last accessed 23 October 2017.

basic definitions already rule out a huge amount of activity labelled ‘mediation’ in the CR context. However, the consistent elements are that all the definitions present mediation as a non-adjudicative process, where the parties retain control over the outcome and its terms.

The argument that this clear definition is partly possible due to the acceptance of the conceptualisation of mediation as part of a complementary suite of options is highlighted by looking at the guidance on three of the other options in this suite that, in the CR/international context are often used somewhat interchangeably. The following excerpts, drawn from practical guidance to lawyers and the public, illustrate the clarity in the definition both of ‘ombudsman’, ‘adjudicator’ and ‘arbitrator’, including the roles taken by the relevant third parties.

Ombudsman processes vary but have similar core features applied at different societal levels. As an example, in the UK, the Local Authority Ombudsman in line with other government bodies uses extremely simple explanations, all split into little bits across the website, but used to provide the following information on their service: *“We are impartial: When we first start to investigate a complaint, we do not take the side of either the complainant or the body concerned but, if we then find fault by the body, we will look at how this affected the complainant and decide if the body needs to take any further action to resolve the complaint. However, we will not act unfairly – for example by asking for unrealistic amounts of compensation or for buildings to be knocked down.”*<sup>15</sup> This explanation highlights that this is an adjudicative process where the impartial third party makes a decision both about what has gone wrong and what should be done to put it right, but that there is variation in how binding this decision is; The guidance specified that the ombudsman findings are not legally *binding* but usually implemented by the government body.

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<sup>15</sup> <http://www.lgo.org.uk/about-us/what-we-do/> last accessed 27.03.13. This guidance has since been taken down, and replaced by radically simplified language in tiny bite-sized chunks, but covers the same ground. <http://www.lgo.org.uk/information-centre/staff-guidance>



Whilst this Ombudsman process might be adjudicative, it is a different role and process from that labelled ‘Adjudication’ in the ADR context in England & Wales. The guidance on adjudication provided by CEDR states the following: *“Adjudication was developed to allow for construction contract disputes to be resolved on an interim...In usual circumstances, adjudicators have to render their decision within 28 days from appointment. The adjudicator’s decision is binding unless or until the dispute is finally determined by court proceedings, arbitration or by agreement of the parties via negotiation or mediation. Its objective is to provide a fast working solution to an issue (pending the outcome of, or without the need for, a more formal dispute resolution procedure) so that parties can quickly resume or continue work under the contract.”*<sup>16</sup> So, this is an adjudicative process that is chosen by both parties (in legal terms *voluntary*) and the results are *binding* on them, until they are superseded by another complementary, voluntary ADR process.

In the ADR context adjudication and arbitration are distinct<sup>17</sup>. Arbitration is a binding private adjudicative decision made by a specialist impartial third party chosen by the parties. The guidance on the ICC website on arbitration is as follows: *“The parties can choose any place of arbitration, any applicable law, and any language for their arbitration...The freedom to choose the arbitrators also ensures that the arbitrators will be neutral if that is what the parties desire...The parties’ power to choose the arbitrators...inspires confidence in the individual decision makers and thereby the process. It also means that individuals with the relevant technical or legal expertise, or other desired*

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<sup>16</sup><http://www.cedr.com/solve/constructadjud/?qclid=CP798MjfnbYCFcHHtAodRjAAEA> (last accessed 27.03.13)

<sup>17</sup> Arbitration is now often criticized as being indistinguishable from normal litigation due to it now being hugely restricted in procedure, speed, and just as expensive and unpredictable as going to court. Critiques of arbitration include: World Arbitration and Mediation Review, 2011 Vol 5 No 2.

*qualities, will decide the dispute...all arbitrators must be, and remain, independent from the parties and impartial in deciding the case.”<sup>18</sup>*

There is variation in the definitions of ADR processes outside the UK. However, there seems to be tendency towards homogenisation as a result of the introduction of mediation and ADR into other jurisdictions. The EU directive on mediation<sup>19</sup> has meant mediation has been debated and accepted as an important part of dispute processing across Europe. Further afield donors, such as the IFC, have funded projects across Europe, South Asia, the Middle East and North Africa to train mediators and set up and integrate the use of mediation and arbitration into the legal systems of these countries<sup>20</sup>.

Judicial, or settlement mediation is more widely accepted in the USA. The single largest provider of ‘neutrals’ JAMS handles about 13,000 ADR cases per annum<sup>21</sup> and is known for providing former judges who mediate in a manner akin to adjudication. However, in this context this has led to cynicism about mediation in the USA where the role applied is incongruent with the name used. This is a jurisdiction where lawyers proactively choose mediators for a particular ‘style’ meaning that if parties want a non-binding adjudication (rather than

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<sup>18</sup> <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (last accessed 27.03.13)

<sup>19</sup> For a summary of the EU Directive see:

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33251\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33251_en.htm) (last accessed 26/03/13)

<sup>20</sup> For details of the initial IFC programme in the Balkans see:

<http://www1.ifc.org/wps/wcm/connect/991f510047e98d59a52ebd6f97fe9d91/PublicationBalkansGivingMediationAChanceADRStory.pdf?MOD=AJPERES> (last accessed 26/03/13) see also:

[http://www.cedr.com/?location=/news/archive/20090211\\_319.htm](http://www.cedr.com/?location=/news/archive/20090211_319.htm) (last accessed 26/03/13) for the current project across the MENA countries.

<sup>21</sup> Though it should be noted this is for all ADR processes, but considering Mediation, after Arbitration is the most common process, this still accounts for very large numbers of mediation. See:

[http://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/) last accessed 22/04/2013

mediation) this is what they can *knowingly* choose because of the reputation of such ‘neutrals’<sup>22</sup>.

The conceptualisation of mediation as *one of a number of complementary* dispute resolution options, is fundamental to the discourse of individual choice in how they wish their conflict (or dispute) dealt with. Mediation is now both offered and used at all levels of escalation within the commercial field, from workplace situations (where legal action is not even on the distant horizon) to the court of appeal. There were debates around contingency during the mid 2000s about whether mediation could be used pre-issue all the way through to the court of appeal, were stilled to an extent by the finding that party choice was of key importance; in other words that parties should not feel pushed to mediate at a specific point (Genn 2002).

A little later Mayer provides a conceptual definition: *“The essence of mediation, as I see it, lies in four characteristics: Impartiality. Mediators do not see their job as trying to promote one person or group’s interests at the expense of another; Process orientation. Mediators conduct a process to assist people in communicating about the issues that are of concern to them. They do not focus on the substance of the issues alone (although the role mediators play with regard to substance may vary considerably); Problem Solving. Mediators do not simply try to decide what the law dictates; they endeavour to help solve the problems that underlie the conflict. Often, but not always, this means taking an integrative or interest-based approach; Client focused. The mediator’s goal is to attain a solution that the disputants will accept rather than to impose one on them. Usually this means focusing on clients’ interaction, communication, emotions, needs, and decision-making process.”*<sup>23</sup> He then puts down the over-emphasis on the mediator role as lying at the core of the “Crisis in Conflict

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<sup>22</sup> It is also worth noting that the term ‘neutral’ is now sometimes used by JAMS instead of mediator, creating more ‘play’ in the system for divergent mediator styles.

<sup>23</sup> *“Defining Mediation: It’s important to take this broad approach since we won’t move our field forward if we create a mediation orthodoxy” p. 85*

Resolution”. His response, like Ury is to put forward a powerful argument for the need for a more differentiated and complementary model both of third-party conflict roles and points of engagement (2004).

Ury put forward his structure of ‘Third Side Roles’ for containing, resolving and preventing conflict in *The Third Side: Why We Fight and How We Can* (2000b). The fundamental idea seems to have rested on the idea of complementarity and ‘contingency’; combining specific roles with a stipulation of conflict escalation level and what sources of ‘tension, conflict and struggle’ can be ameliorated by the use of which role<sup>24</sup>.

| <b>Conflict level</b> | <b>Aim in Conflict...</b> | <b>Third-side roles</b>              |
|-----------------------|---------------------------|--------------------------------------|
| Power Struggle        | Contain                   | Witness; Referee; Peacekeeper        |
| Overt                 | Resolve                   | Mediator; Arbiter; Equaliser; Healer |
| Latent                | Prevent                   | Provider; Teacher; Bridge-builder    |

Ury provides a descriptive definition of mediation: *“The Mediator does not seek to determine who is right and who is wrong, but rather tries to get to the core of the dispute and help the parties resolve it. We may not think of it as mediation, but that is what we are doing whenever we listen attentively to people in dispute, when we ask them about what they really want, when we suggest possible approaches, and when we urge them to think hard about the costs of not reaching agreement.”* (Ury 2000b)

These ideas take the idea of complementarity a step further in suggesting that such clarity on conflict roles is actually helpful in the informal context as well as the formal context. Both of these authors are known in both the ADR and CR contexts, but as will become clear in chapter 4, their ideas fit in the discourse of the ADR field, more clearly than that of the CR field. Their ideas also reinforce

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<sup>24</sup> <http://thirdside.williamury.com/what-is-the-third-side/three-opportunities/> Last accessed 8 Nov. 17. Unfortunately as Ury provides no citations or references it is impossible to know whether there is a deliberate, or accidental, connection to the work of Fisher and Keashley.

the idea that different roles demand differentiated skills from those occupying them. This work has led to the increasing application of such ideas to training and consultancy in the corporate environment in relation to ‘conflict management’ in the workplace.

Mediation practice in the ADR context, has been investigated through a range of research projects, both quantitative and qualitative. Professor Dame Hazel Genn is a well-known academic legal scholar to have run empirical research projects on mediation, mainly on behalf of the UK government. Most of these have been linked with introduction and activity of court administered mediation schemes were carried out during the period 2002-2012. This research has provided a good deal of data on mediation outcomes in terms of settlement rates and satisfaction of parties and mediators<sup>25</sup>.

However, there seems to a lack of diversity to the empirical research, with repetitions of quantitative studies on party satisfaction and settlement rates. The call of Boule and Nestic in (2001) seems to have largely fallen on deaf ears. Empirical research on what works (and why) in mediation, why people don’t want to use mediation, the experience of parties and mediator during mediation and what constitutes ‘success’ in mediation is still sorely lacking (Wall and Dunne 2012).

More complex research questions, such as how mediation does or doesn’t work at different levels of complexity; whether there is a difference (or similarity) between mediating between two lawyers in dispute over partnership terms, and mediating a multi-million pound dispute between several complex transnational

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<sup>25</sup> As examples see: Genn, H. G. (2007) *Twisting arms : court referred and court linked mediation under judicial pressure*. London: Ministry of Justice.; Urwin, P. (2010) *Evaluating the use of judicial mediation in employment tribunals*. Vol. 7/10. Justice, M. O. London: Ministry of Justice. See also Prince, S. (2015) *ODR Advisory Group Small Claims and ODR*. Justice, M. O. <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/odr-small-claims.pdf>: MOJ; University of Essex. <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/odr-small-claims.pdf> .

oil corporations, is still minimally researched<sup>26</sup>. Where such cases are described it tends to be done in line within the intellectual tradition of the Harvard school of publishing without reference or methodological explanation; the claim to truth based on personal and institutional standing. This is not to say that the information put forward on this basis is not valuable, but it makes for a one-sided data set.

### **Conceptualisation and Definition in the CR Context**

Cross-cutting the competing philosophical traditions is the continuing confusion around terminology. Fisher and Keashley's frustration with the confused use of terminology in relation to 'consultation' and 'mediation', picked up on Burton's work (Burton and Dukes 1990a) and was expressed clearly in 1991: "*There has been an unfortunate blurring of the boundaries between mediation and consultation in some of the recent literature, which essentially attempts to subsume consultation as a form of mediation... This is especially surprising since a number of the seminal writers on problem-solving took pains to distinguish their approach from mediation. Fisher (1983) provides a discussion of the differences... in terms of underlying assumptions, third party identity, role, functions and tactics, and overall objectives.*" (Fisher and Keashley 1991).

Since then if anything the diversity of application has broadened further. One strand of this discourse covers the huge range of actions, practices and contexts encompassed by the 'pure' vs 'power' mediation (Bercovitch and Rubin 1992) debate. The other strand encompasses conflict transformation activities and 'mediative capacity' (Lederach 2005). Yet another is to define mediation more precisely and then to dismiss it entirely as superficial, dysfunctional, or unwanted (Burton 1996) (Lederach 2005).

Within these different strands are subsets that correspond to different philosophical positions. Amongst the structuralists, Touval and Zartman are

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<sup>26</sup> There are practitioner-based accounts such as Carroll and Mackie exist, but little academic qualitative observational research, with de Girolamo as an exception.

probably best known for work contrasting ‘power’ and ‘pure’ mediation. They coined the phrase “mediators with muscle”, an approach “requiring use of side-payments, penalties and sanctions” (1985). They focussed the debate in the late 1980s on the attribution of responsibility for lasting settlement on the mediation approach used, and the timing of the intervention (contingency) (Crocker et al. 1999: p.21). This debate continues, though not uncritically, through qualitative and quantitative work on ‘mediators’ who clearly have vested interests by authors such as Crocker (1996; 1999) Beardsley (2011) and Bercovitch (DeRouen Jr et al. 2011).

This discourse places mediators within tradition of Carlyle’s ‘Great Men’ (1963); ‘heroes’ defined by their identity, status and ‘power’<sup>27</sup>. These interventions are of the type that Fisher and Keashley identify as situations where ‘the third-party arguably becomes part of the conflict triad’ (1991). The evidence provided from within the qualitative studies indicates that parties rapidly view such ‘mediators’ (privately or publicly) either as partisan allies, biased arbiters, an additional conflict party, or biased advocates for other side. These are all easily named conflict roles, yet the ‘mediators’ are labelled with the term they choose, rather than the label being used by those they are ‘helping’ (Martin 2006).

Curle is an interesting case as he seems to have moved through his career from what might in traditional IR terms have been described as an ‘Idealist’ when writing about ‘pure mediation’ (though he does not seem to have used the term) to a much more radical position later in his career. However, ‘mediation’ by ‘mediators’ with no vested interests, other than the cessation of violence, as practised and theorised by Curle fits the term ‘pure’ rather well. It conceptualises mediation as a process of communication facilitation focussed on rebuilding relationships so that parties can once again negotiate directly (Curle 1986).

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<sup>27</sup> And they are usually men. Carlyle first published at the end of the 19<sup>th</sup> century. See Harriet Martin writing in 2006, for an up-to-date set example of all male history: Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum.

Harriet Martin<sup>28</sup> and Jaques Faget (2011) both provide precise definitions of mediation that fit into this pure mediation definition. Their theory building arises out of their case-study data Martin's applies a specific mediation definition through the choice of case studies, and through explicit comments such as: *"Unlike the backers of mediation who have money and threats to use as a carrot and stick to push the parties along, and unlike the parties at the table who are free to walk away at any time, the mediator is powerless. He has only his<sup>29</sup> neutrality and integrity to trade on"* (Martin 2006: p.xii).

Faget is strongly critical of labelling negotiations which don't even have the most reductive definition of third party involvement as mediation; a swipe at 'mediation with muscle' and the type of intervention criticised by Fisher & Keashley (1991). For Faget, mediation is a *"consensual process of conflict regulation in which an impartial, independent third party without any decision-making power helps people or institutions to improve or set up relations through exchanges and, as far as possible, to solve their conflicts."* (2011: p.2). A lawyer by background, it is not clear whether Faget recognises the close similarity between his mediation definition and those used in ADR, or that this distinction and divide is less marked in a Francophone context.

Lederach heavily criticizes the concept of 'the mediator': *"The image of 'a mediator' and the work that a mediator must do in international conflicts is specific and clear in many minds, but it does not match my experience nor my understanding of what is most needed in the settings of protracted conflict. I believe the image – the metaphor of a mediator – is actually misleading and misguided."* He does also provides a clear mediation definition *"Mediation...is*

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<sup>28</sup> Whilst Harriet Martin is a journalist, the book was commissioned by the Centre for Humanitarian Dialogue, which is an organisation which aims to provide professional mediation services, epitomised by the case study in the book on Martin Griffiths.

<sup>29</sup> And in terms of the sample chose by the CHD and Martin, mediators are represented as male.



*more narrowly defined as a task conducted by a person or team at the level of political negotiation, which is aimed at finalizing agreement.” (2005: p.95)*

Lederach’s specificity on mediation being about finalizing agreement clashes with Mayer and Ury (who both more or less explicitly link their work to CR, but are well known in the ADR context); both boundary their mediation definitions, but do not write the metaphor or reality of ‘a mediator’ as misleading or misguided. However, all three seem to be trying to broaden the thinking on interventional roles. Lederach’s terminology and mode is focussed not on specific conflict roles but rather on broad ideas relating to social spaces: “*what I would call an imaginative mediative capacity...[which] requires us to think about social spaces for constructive change processes that have intermediary impact.*” (2005: p.95)

Together with the work of Curle, particularly in more recent years a major influence on Lederach (Woodhouse and Lederach 2016), the result of this strand of work in practice has been to actually encourage the labelling of any activity that seems to be aimed at developing ‘mediative capacity’ as mediation in the practice arena. This includes work on stakeholder dialogue, workshops and the development of indigenous approaches. The impact of this is actually quite difficult to capture in the context of the literature as the core of the challenge is the mismatch between the fragmented and specific language used in texts on different approaches, as compared to the tendency to use ‘mediation/mediator’ as the catch-all, go to term in verbal interaction about theory and practice.

The Civil War Mediation (CWM) Dataset (DeRouen Jr et al. 2011) hoovers up mediation that falls into both categories and everything in between. It uses the mediation definition: *A process of conflict management where disputants seek the assistance of, or accept an offer of help from, an individual, group, or state, or organization to settle their conflict or resolve their differences without resorting to physical force or invoking the authority of law* (DeRouen Jr et al. 2011).

Clayton and Gleditsch have used the dataset to look at predicting both the onset and outcome of mediation. This is interesting and exciting work; particularly the attempt to look at out-of-sample predictive power. They differentiate between the fairly robust outcomes in terms of predicting the onset of mediation on the basis of structural factors and the difficulty of predicting outcomes. In their explanation they pay specific attention to '*the material capabilities of an intermediary*', referring back to the work of Bercovitch. (Clayton and Gleditsch 2014: p.279).

Internal structural features of particular mediation processes are woefully understudied in an adequate way; there is a chronic lack of quality data on exactly what and how internal variables influence the process. This is something that would on its own be a serious difficulty for output from analysis of the CWM. However, this is further compounded by mixing external structural variables in relation to the (non-) adjudicative nature of the intervention. As a result, the CWM puts processes with massively diverse external structural variables and internal structural variables into the same 'pot'.

There is substantial evidence from the legal context that, for instance, the external structural variable of adjudicative and non-adjudicative third-party interventions (for instance arbitration vs. mediation) lead to radically different behaviours including around settlement and enforcement rates<sup>30</sup>. Even accounting for the fact that the contexts are different, it is therefore unsurprising that a data set that doesn't differentiate these external structural properties, that have such a big impact on the behaviour of those involved in dispute resolution processes, is going to struggle to predict outcomes.

This is just one example of how the disconnect between the definitional and conceptualisation issues of the two fields impact on the way that research is conducted, and that knowledge is generated.

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<sup>30</sup> See Chapter 5 for figures.

Laue identified the five main intervention roles as activist, advocate, mediator, researcher, enforcer (Burton and Dukes 1990b), making 'mediator' a broad church. However, many of the activities hidden behind this catch-all 'mediative capacity' are in fact activist roles more akin to, advocate, researcher, and even enforcer rather than 'mediator' *in terms of how the parties in conflict perceive and react to the intervention*. This issue will be picked up in chapters 4, 5 and 6. The crucial issue being that the terminological imprecision creates issues both of transfer of information between theory and practice, research and practice and between different fields of practice such as ADR and CR. These blockages in turn impact on knowledge transfer and learning.

### **Conceptualisation and Definition: Convergence and Divergence**

There does seem to be some convergence in terms of the acceptance of the idea that the idea of specifically defined, complementary roles in conflict intervention could be helpful, as demonstrated by the dominant discourse in ADR and by some of the more recent writing by legal authors aiming at the CR audience, such as Faget and Noll. Ury and Mayer have both tried to encourage the development of more precise definitions relating to different conflict roles, going outside the complementarity of traditional ADR-based role-processes such as adjudication and arbitration

However, there are also areas of divergence. Much of the ADR debate is not now around the basic definition of mediation, but rather about the exact specificities of practice, including process and just how far mediators should go in sharing their opinions on content and potential outcomes. The conceptualisation still retains the dilemma encapsulated by Boulle and Nestic in 2001: a descriptive definition doesn't convey the underlying intent behind mediation; a conceptual definition doesn't always match with the reality of what happens.

In the CR context, one strand of the discourse labels third-parties with a direct stake in the conflict 'mediator', another strand rejects the idea of 'a mediator'

and yet advocates ‘mediative capacity’. The logic of breaking out of the straight-jacket of traditional IR discourse and exploring inclusive and emancipatory approaches to conflict processing is undeniable. However, the use of broad, ill-defined terms becomes profoundly problematic when moving from theory to practice. The result is a whole new level of confusion in the practice context about what is or isn’t mediation and who is or isn’t mediating. This lack of clarity impacts on what is considered legitimate research, what methodology is chosen, as well as the ability for practice and academia to maintain a two-way flow of information.

Whilst huge claims are made for mediation and practitioners and others have strong views on all these questions, the reality is that the challenges of accessing the sort of data required, never mind making the sort of judgements in practice about the difference between resolving conflicts and disputes (as iterated in Burtonian theory) present research challenges. These difficulties are compounded by gatekeepers to mediation processes who have a vested interest in ensuring that publicly available information is consistent with a chosen image: legal critics of mediation present formal legal process as a way of balancing power to produce ‘fair’ outcomes (Genn 2002); or in direct contrast mediation providers to promote and extend the use of mediation as a process which allows conflict parties to retain control of the decision-making process<sup>31</sup>. The term ‘mediator’ seems to carry a high level of social approval<sup>32</sup>. The result is that people want to give and receive information consistent with this view of the world, particularly where they have gone through a damascene conversion to mediation (Brown 2015)<sup>33</sup>.

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<sup>31</sup> See claims made by ADRg, CEDR and CI Arb amongst others.

<sup>32</sup> I don’t know of any quantitative research on this issue; I rely practice context experience for this assertion. High levels mediator trainees in jurisdictions where mediation is introduced rapidly leads to an oversupply of inexperienced mediators frustrated by the lack of opportunity to practice; the level of interest in mediating is simply not matched by the wish to ‘be mediated’; even mediators claim their own situations are inappropriate; lawyer-mediators assert that their cases, where they are acting as lawyer, aren’t suitable for mediation.

<sup>33</sup> This is often the case with lawyers who train as mediators after decades in legal practice. See Cialdini on the principle of commitment and consistency

Authors such as Noll (2011) and Bush (2001) use fictionalised accounts of what the mediator might say and what the parties might say in response and there is much less that directly interrogates the experience of the mediator. Writing by mediators (Crocker et al. 1999), or accounts of mediation written on the basis of interviews, focusing on the interactional relational process between the parties, tends to describe mediator behaviours and experience that are consistent with a presentation of *homo economicus*, the rational actor who stands over and apart from the irrationalism of the parties (Martin 2006). This is unsurprising, but there is little that gives any insight into the deeper relational process, let alone the lived experience of the mediator.

A sense of what is possible in this direction is given by de Girolamo's ethnographic research on mediation. Once the practice of mediation in the ADR field is studied from the perspective of what is actually happening within mediations, from outside its own paradigm (e.g. studying 'success' from the realist perspective of 'counting' numbers of 'settlements', or analysing it from the perspective of whether it delivers material 'justice'), by using ethnographic methodology as De Girolamo did, the results surface difficulties with tight definition and the dogma produced by people invested in the perpetuation of what they do and how they do it.

De Girolamo observed approximately 60 commercial mediations. These are mediations in the tightly defined sense adhered to in principle in the commercial field. However, what she observed is something rather other than that which is talked about in either field. In her view "*The emergence of mediator identities lays bare a process that remains, in its essence, a negotiation between parties whose structure contains the presence of a chameleon*". She lays waste to the idea of neutrality, and rather describes what she observes: Mediators as '*negotiators who hide behind such labels [reality-testing] to mask the nature of*

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Cialdini, R. B. (2009) *Influence : science and practice*. 5th ed., international edition. Harlow ; London: Pearson Education..

*their interactions. The mediator is negotiating the deal for the party and against the party. The labels, arguably, permit the charade. And, as a result, parties are accepting of the mediators' actions, and indeed, praise their actions. The impact of the mediator's action is to depersonalise the negotiation...Parties hear from a mediator that which they are not willing to hear from the other participants."*  
(2009: p.266)

This analysis lays into the heart of how mediation in both fields is portrayed to the outside world. It is so revealing because it looks, through actual internal observation of mediator, parties and mediator-party interaction into what is actually happening within mediation processes; processes where parties have selected to use mediation, selected an independent mediator and selected to participate in a pre-defined process with them retaining control of the outcome.

Very little research manages to capture and analyse experiential information in relation to parties or mediator. This is particularly true of the mediator. This is either because it is not recorded, or there are difficulties in conveying it. This is different from the analysis of linguistic speech patterns, or discourse analysis. These focus on the external interpretation of externalised speech; a limited information source in terms of how interactions develop, particularly in face-to-face interaction. This lack of access to information is of course in part due to confidentiality, but also because it is so transient – the relationships and the outcome will be different by the time the process is over than it is before or during. This relational information lies in the 'space between' two (or more) individuals involved in an interaction.

### **Mediation Models and Practice Evidence**

Neither ADR nor CR field have one uniform mediation model, and each has its own discourse on mediation practice. Practice guidance is the operationalization of a particular theoretical approach and structured to ensure internal validity and consistency, smoothing out the wrinkles and bumps of the discrepancy between theory and real life; something Boulle and Nestic allude to (Boulle and Nestic 2001). This cumulative impact of the origins, philosophy,

definition and conceptualisation on practice and research means different interpretations and conclusions in the two fields.

This section therefore references not just what is in the literature, but also how the two fields talk about practice and what is taught in the context of practical training.

### **Evaluative, Facilitative and Transformative mediation in ADR**

There are three ‘models’ of mediation that are regularly referred to in the commercial field: facilitative; evaluative; transformative (Brown and Marriott 1993). These will be reviewed in turn and their connection with ADR summarised.

In the commercial context ‘transformative’ usually references the work of the lawyer/non-lawyer team Bush and Folger model. This is highly directive both on why parties should make process decisions and yet strictly circumscribes their choices through stipulating joint sessions only (in other words it precludes private sessions or caucusing). The mediator role is described as enabling the parties to develop ‘empowerment’ and ‘recognition’; their own preferred outcomes (such as settlement) are secondary (Bush and Folger 2005). This is not an approach that is widely advocated in commercial ADR in the UK, but it has challenged mediators to reconsider their approach (Allen 2009) and to consider the extent to which they are enabling parties to address agendas other than just finding ‘a settlement’.

Following a model that originates with Riskin (1994), a spectrum model of viewing mediation as on an interventional spectrum between ‘Facilitative’ and ‘Evaluative’ is the norm in the commercial context (Allen 2009). At the facilitative end of the spectrum not settling is a possible and legitimate mediation outcome; it is not ‘settlement at any cost’. Towards the evaluative end, the tendency is to perceive the party mandate as finding settlement, with non-settlement described as ‘failure’. However, contrary to the perception of ADR in the CR context, ‘settlement mediation’ or pressuring the parties to settle is a highly contested

practice with different levels of acceptance in different jurisdictions. Even where it is practised (for instance Judicial mediation in the USA) it tends to be criticised for *not* leading to settlement as parties react against this pressure. Clark (2012) provides a differentiated analysis of the issue of judicial mediation and this issue will be picked up in further detail in chapter 4.

In practice mediators describe moving along this facilitative to evaluative spectrum, from probing what the personal, commercial and legal implications are for the parties if they don't reach agreement. There is general agreement that advising on what *will* happen or on legal *merits* is too far along the spectrum to be considered mediation (presumably exactly the sort of behaviour associated with settlement or judicial mediation in CR). A range of theoretical descriptions of such models are provided by authors such as Allen (2010), Hope (2009), Mackie (2007), Boule (2010) and Bordone (2005).

Essentially this question of mediator approach relates to the degree to which the mediator works with an agenda and outcome set by the parties, and how this is done. Does the mediator have their own outcome agenda (for instance that the parties *should* settle, or transform their conflict) or is open to and works with the possibly contradictory agendas of the parties? The other core question is *how* they work with this agenda? Do they provide advice and evaluation, or do they facilitate understanding and information exchange provided by the parties?

The different models vary not only on role stipulation, but also on process; though there are certain conventions or similarities. They tend to include: a commitment to process flexibility according to the needs of the parties (though whether this flexibility is chosen by mediator or parties varies); Process mapping (most use between four and seven phases with a cyclical indication of some sort); Defined roles and responsibilities for mediator, parties and legal



representatives; Defined expectations of behaviour and skills to be used and avoided by the mediator (Allen 2015)<sup>34</sup>.

The implementation of these models is embedded through literature, but also even more powerfully through practical training. In the UK different providers are associated with different models; Regent's University with a more heavily psychological and transformational focus and CEDR and Clarb with a commercial, facilitative-evaluative approach. These providers each have privately published materials and handbooks usually not available for purchase without course attendance. The result is a culture and understanding of different models that is largely hidden from normal literature searches.

Dogmatism around mediation models is an issue in the practice context, particularly where mediators have undergone a damascene conversion and believe one specific model to be the only correct way of doing things (Brown 2015). Some training is very prescriptive, some provides a 'safe model' but allows for flexibility. Even amongst those with a broader experience, there is often little recognition of the divide between conceptual learning tools, such as phase models, and the fact that reality does not always reflect these models. De Girolamo's (2009) research used ethnological methodology to build up a picture of what UK mediators in commercial mediation (ADR) actually do in practice and how this does and doesn't connect with what they say about what they do with fascinating results that will be returned to in the results chapters.

Given that there isn't generally explicit guidance on the application of such models at different levels there is an implicit expectation that they can be applied from the individual to the organisational and governmental levels, and that mediator(s) will adapt the process accordingly.

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<sup>34</sup> Evidence for this can be found not only in the CEDR materials, but also in the guidance of other providers such as Clarb and ADRg.

These phase models are now complemented in training with practical skills evaluation assessed against competence frameworks<sup>35</sup>. This provides a mechanism by which simple pre-existing identity (for instance as a 'name' in a particular field) can be de-coupled from the term 'mediator' and to take the mediator 'role' evidence of the ability to display practical competence (skills and knowledge) in mediation is required.

### **Pure, Muscle and Mediative Capacity in CR**

Mediation models in CR are defined by the intent of the mediator (not the parties), or by the societal level at which they are taking place. These models reflect dichotomous rather than spectrum conceptualisation: pure vs muscle (or transformative vs settlement; grassroots vs elite. The presentation of pure vs muscle as dichotomous has implications for theory and practice as it focusses on who they are and what access to resources (including the ability to manipulate and coerce) they do or don't possess. By this logic practical 'training', if deemed necessary, would focus on direct negotiation and traditional diplomacy. Writing on this type of 'mediation' reflects the concern with identity rather than training, with Crocker (1999) and Touval and Zartman (1985) providing good examples of this, whilst Noll powerfully critiques this type of mediation, with its obsession with 'mediators' who are 'names' (that is those who have public name-recognition, usually due to having occupied a position of military, diplomatic or political power) as well as its failure to apply what he (or his publisher) title 'modern diplomatic strategies'(2011).

Curle's work up to the mid-1980s<sup>36</sup> is an example of the pure side of the dichotomy. He describes the unofficial mediator (1986) who is without 'power' and whose agenda is halting violence. As mentioned in the previous section, for

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<sup>35</sup> Regents College, CEDR, ADRg, Clarb all have frameworks of this type, with IMI demanding that mediator courses have a competency framework to be IMI accredited. See glossary of abbreviations.

<sup>36</sup> Curle's thinking changed substantially over his career. This conceptualisation of the mediator is drawn from his work in the 1970s and early 1980s. His work from the 1990s until his death changed substantively and moved away from this conception.

him mediation is re-establishing communication so that they can negotiate directly. Mediation is therefore defined by mediator agenda and personal identity: ending violence; without power 'over'. Variations on 'pure' now include narrative mediation (Winslade and Monk 2000), a model that picks up the critiques of mediation in the 1990s such as that of Cobb (1993).

The other dichotomy is transformational vs settlement. This dichotomises the agenda of Curle's later work and that of Lederach grassroots level (indigenous) work aimed at conflict transformation vs one-off mediations aimed at producing a settlement. As mentioned previously Lederach advocates 'developing mediative capacity'. In practice, this has unintentionally fostered a discourse that labels a huge range of activities 'mediation' with or without 'a mediator'. Whilst the terminology seems to link conflict transformation with the Bush and Folger model (2005), this model circumscribes the mediator role very tightly, gives the mediator clear action directives and seems out of synch with the Lederachian discourse around 'mediative capacity'.

Therefore developing mediative capacity (Lederach 1997) along with elicitive mediation, dialogue processes and transformative workshops are weaved through the discourse (Ramsbotham et al. 2011). This impacts on research and practice. The impact on research is that there is little on what mediators actually do, how mediation is experienced by mediators or by mediation participants. The work of Faget and Noll, who are both lawyers, is not well-known and they are writing about a sort of 'pure' mediation that is little touched on in the transformative discourse. Practice research on 'transformative processes' or the implementation of 'mediative capacity' focusses on specific dialogue processes, or workshops or similar<sup>37</sup>. The broad use of the term mediation combined with the erasure of 'the mediator' also means the foci of practical training in conflict transformation are conflict analysis models, communication training and

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<sup>37</sup> As examples see: <http://www.swisspeace.ch/publications/working-papers.html> <http://www.berghof-foundation.org/publications/papers/> <http://www.c-r.org/accord>

personal qualities (Reimann 2017) even where ‘peace mediation’ is explicitly mentioned (Von Burg 2017).

These societal conflict analysis and escalation models are usually based explicitly or implicitly on the work of Galtung (2000), Glasl (1980), Lederach (1997) or Burton (1987). Communication skills training is usually combined with a focus either on personal ‘qualities’ or ‘virtues’ of those involved ‘conflict transformation’ / peace and conflict work. This content is illustrated by both the Swisspeace (Von Burg 2017) and Forum Civil Peace Service training (Reimann 2017), with its most extreme example being the ‘20 central virtues of elicitive peace workers’ listed by Dietrich (2014).

These priorities clearly mirror the focus on the goal of those intervening being ‘transformation’, of the focus on personal identity of those intervening and the analysis of social structure and escalation of conflict as the core skill<sup>38</sup>. Much of the guidance and discourse is silent on what the exercise of this role or process looks like, on what ‘mediators’ actually do, what skills they need to be competent (rather than what qualities they possess) and how to work with a bunch of people who want to at best shout at each other, at worst beat each other up. Even where there is specific guidance on mediation such as the Centre for Humanitarian Dialogue handbook (Slim 2007), there are no competence frameworks on offer to those taking on this role, in a formal or informal capacity.<sup>39</sup>

### **Mediation models and practice evidence: Convergence and Divergence**

The two fields converge as they encompass different models with variation in the level of mediator interference in content and outcome. Both fields suffer from a lack of high quality data on what happens within mediation, what does

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<sup>38</sup>The 2017 course overview illustrates this point, with one day spent on ‘mediation’ process design and communication theory, but no indication of what it involves or the implications of demonstrating inadequate practical skills. [http://www.swisspeace.ch/fileadmin/user\\_upload/Media/Activities/Training/Program\\_National\\_Dialogue\\_and\\_Peace\\_Mediation\\_2017.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Activities/Training/Program_National_Dialogue_and_Peace_Mediation_2017.pdf)

<sup>39</sup> This is the term used by OSCE, UN and EU.

and doesn't work and why, as well as reflective, rather than valedictory, writing about mediation by mediators.

The two fields diverge in a variety of ways. Where ADR focuses on mediator skills competence frameworks and contending process models, CR focuses on conflict analysis models and mediator qualities and identity. ADR suggests, albeit through silence, that the same practical skills and process models are scalable to any level of conflict, from individuals to multi-national multi-party disputes involving many stakeholders.

Despite the higher level of specificity of mediator role and what constitutes a mediation process, ADR also suffers from a lack of innovative research on mediation, despite voluminous practice. To put the current level of usage specifically of mediation in the commercial context, it is worth rehearsing some numbers briefly: The Ministry of Justice Small Claims Mediators conduct something like 16,000 one hour telephone mediations per annum (Prince 2015), whilst the Centre for Effective Dispute Resolution Seventh Mediation Audit estimates the annual number of commercial mediations (scheme, direct appointment and provider appointed) in the UK at about 10,000 (Massie 2009). That puts the number of commercial mediations at an absolute minimum threshold of about 26,000 mediations. This does not include the number of mediations being done in either the family, community or criminal contexts. This should give some sense of the amount of practice data theoretically available on mediation just from inside the context of the jurisdiction of England & Wales.

Unlike CR the difficulty is not therefore about where, or what is being done on mediation, but rather actual empirical evidence on what the actual mediation practice looks like. However, the little ethnographic research done on mediation (De Girolamo 2009) provides plenty of evidence that that there is a gap between the claims made for mediation and the evidence to support them. However, given that the definition and praxis excludes a lot of things that are included within 'mediative capacity' ADR can make a helpful contribution in

providing data on things such as the different settlement rates, and attitudes of parties to mediation as a relatively clearly defined process.

Theory and analysis in CR explicitly separate conflict transformation on the basis of the societal intervention level. However, it doesn't provide competence frameworks, or practical skills assessment, for those wishing to interact with conflicting parties. The complementarity of a range of roles from which I can choose as an individual involved in a fundamentally relational process is less explicit. Instead the identity and qualities (not skills) of the individual are the subject of a good deal of practical training. The intervener's (mediator) goal is pre-determined – redefined from ending violence under the 'pure' model – under conflict transformation it becomes the goal of whatever *the intervener* defines as an acceptable 'positive peace'.

## **Conclusion**

This literature review is structured as a comparative in order to address the questions of this thesis: Is there a ADR/CR divide? If yes, what is its impact and could be the benefits to crossing this divide?

The comparative has highlighted significant areas of divergence between CR and ADR, supporting the hypothesis that there is a divide between the two fields in their origins, philosophical underpinnings, conceptualisation, definition of mediation and in their practice models. There is also evidence of some convergence in each of the areas examined, suggesting that whilst there is a divide it is not a complete and total split.

Examination of well-known authors in the two fields and their formally published literature produced the generational author table included in the first part of this chapter which illustrates visually where the two fields seem historically to have diverged from each other. This is reinforced by the way the histories are 'storied' within the two fields.

Divergent philosophical underpinnings, with ADR dominated by structuralism and CR dominated by post-structuralism, are congruent with both the conceptualisation and definition of mediation displaying markedly different patterns. ADR generally uses quite specific definitions, whilst CR has moved from having a whole range of different definitions to a situation of almost rejecting the need to define it at all. Logically enough, this in turn has knock-on effects on the mediation models and practice evidence that the two fields produce.

In order to surface differences, perspectives and questions in relation to practice that would otherwise be inaccessible, as well as traditional published literature in the form of books and articles, I have also drawn on evidence such as websites and practice manuals to highlight this divergence. However, it should already be clear from this review that there are areas where further substantiation is needed of a sort not available through any of these sources. This is data on how other practitioners in the two fields identify themselves, what they are reading, what they believe themselves to be influenced by and how they conceptualise mediation. As this is clearly an area where further research is needed a start has been made through the use of a 'mediator' questionnaire, the results of which are presented in chapter 4.

The impact of the division between these fields is wide. So much work has been done generating so much experience and data on how to deal with human conflicts and disputes, it cannot be seen as anything but a waste that each should not benefit from the learning of the other. The opportunities for boundary crossing extend to each of the areas covered in this literature review: The transfer of sound theoretical literature, for instance on the impact of taking Fisher & Keashley's challenge on complementarity and contingency seriously; The transfer of practice information and training structures, for instance on implementation of practice at different social levels from CR and on skills competency frameworks from ADR; The transfer of research methodology in each direction to engage in an effort across both fields to identify methods that

enable the generation of data and analysis of what actually happens in mediation and what does and doesn't work.

Being unclear about what mediation is doesn't help research. It pours processes, roles, impacts and objectives all into an undifferentiated soup that make effective analysis of conflict interventions extremely difficult. However, the refusal to name and explain what you are doing means the parties don't know what to expect; choosing a decoy name when you don't want to name what you are doing, for instance saying you are going to 'mediate' when in fact you are going to train or arbitrate for instance, is not only patronising but also profoundly contrary to the whole discourse of emancipation and empowerment; it is to strip those interacting with you of the right to consent.

Mayer (2004) highlights the supply-driven nature of mediation generally and in the commercial context specifically. This is something well-recognised in the commercial field and raised earlier by Boulle (2001). Mayer then goes on to ask the question: *"When does an approach exhibiting these characteristics provide something people in dispute want, and when does it not?...When do people really want mediation, and when do they resist it? What type of mediation do people want, and why?"* (2004: p. 85).

These questions are so striking as they are apparently rare, or absent from the discourse in both fields. Instead, there is an assumption either that the concept of 'a mediator' is redundant, or that people simply need to be better informed. Drawing on data from both fields, I think the answers to Mayers' questions are more complex than information deficit or mediation being redundant. This work starts the process of getting information flowing across this divide, and in so doing may not only make a contribution to both fields, but begin to provide some groundwork for future research in answering Mayers' questions too.



## Methodology

*“We do not really understand the roots of conflict, seeing it primarily as an objective state of affairs and not as the states of mind that led to and subsequently sustained or exaggerated that state of affairs. Consequently our approach to conflict resolution is confused and inefficient...Our chief fault is failure to recognize that conflict is often largely in the mind and to that extent must be dealt with on that level; and that even when it is less so, as in the case of political oppression or economic exploitation, emotional factors exacerbate what is already serious” (Curle 1971: p.15)*

As a scholar-practitioner, Curle was trying to draw attention to a critical deficiency of so much of the discourse around conflict. This has changed to an extent, but the frequent failure to integrate quantitative and qualitative enquiry and to apply methodologies that generate and integrate data that deals with its relational nature that still plagues the understanding and development of mediation.

This *Autoethnographic Interrogation of the Theory and Practice of Mediation* is original in its application of autoethnography as a methodology in the ADR and CR contexts. This methodology is one way of gathering new and original insights into mediation practice through the interrogation of the first-hand lived experience of being a full member/participant (rather than researcher) in the fields of ADR and CR and mediating in these contexts. Given that the novelty of this approach, and the obvious question “Isn’t that just a memoir?” this chapter provides both a fuller analysis and discussion of autoethnography as well as an explanation of its application in this PhD.

The autoethnography is complemented by the use of a mixed methods study of the evidence for and impact on knowledge transfer of the divides between ADR and CR as well as the theory and practice of mediation. This mixed methods study uses an original combination of three methods: Tabular generational analysis of ADR and CR authors; Scholar/Practitioner/Author Self-Presentation Analysis; Mediation Scholar/Practitioner Questionnaire. Each of these methods

are explained briefly in this chapter, with more in-depth analysis and detail on methodological issues and implementation of the questionnaire provided in chapter 4.

### **Ontology and Epistemology**

The differences in the predominant ontological and epistemological positions in the fields of ADR/Law and CR/Peace and Conflict Studies impact on what the two fields consider appropriate and valid methodological perspectives (Crotty 1998). Therefore, comparing theory and practice in two different fields is challenging both philosophically and practically. These challenges are further compounded by the dilemmas presented by trying to maintain the theory/practice connection between the academe and mediation practitioners.

Mediation, if defined broadly as a process involving the facilitation of communication and negotiation between conflicting parties<sup>40</sup>, is an intensely relational process at whichever social or economic level it takes place. Those involved are in a constantly shifting interactional patchwork of emotions, perceptions, judgements, beliefs, assumptions and actualities. A state of flux within the relationships of those involved (including the mediator) is the norm. Some of this is externally observable, but only some of it, and the act of observing also changes the interaction. The constant interaction between the 'ideal' the 'material' and the relational as experienced within the heads of those involved that cannot be 'observed' externally, only asked about after the event.

Without methodologies that enable access, practice-theory disconnect results in *academically legitimate* output failing to make its way to practitioners who need it, and *practically useful* information failing to be heard and absorbed by the academe; Without a virtuous loop of knowledge transfer between practice, theory, research and experimentation echo chambers arise in academia and practice.

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<sup>40</sup> The question of how to define mediation, and the differences in the way mediation is defined in CR and ADR are dealt with in depth in chapters 2 and 5.

Epistemologically, mediation practice is in principle an anti-foundational process with outcomes created on the basis that they are non-cumulative, person/social group specific and context specific; in the philosophical sense, subjective and fragmented. However, mediations also often have quantifiable material outcomes. That means that information about mediation can be gathered on a foundational basis, yet conclusions drawn on this basis are somewhat questionable, given the logic of each case is specific, fragmented and dependent on the construction and perception of the world of the conflict parties.

This all leads to the basic problem for this volume of an either/or approach to epistemology, when the fundamental dilemma within this study is working with a subject matter that alternately highlights the limitations of both foundational and anti-foundational epistemologies as well as the limitations of dichotomous thinking on material and ideal ontologies. This tension is one of the areas of research and the real practical implications of taking different philosophical positions are explored in more detail in the later chapters.

This PhD draws primarily on ideal ontology and anti-foundational epistemology applying a moderated post-structural combination of constructivism and interpretivism. It is interpretivist and constructivist as it is concerned both with the individual research subject, and the interconnection of socially constructed fields of knowledge in the form of ADR and CR.

However, the research questions focusing on the flow of information between two areas of practice and theory demand that this post-structuralism is moderated by a degree of pragmatism. To quote Robson, I have had to consider "*whatever methodological approach works best for the particular research problem at issue*" (2011: p.28), as the nature of mediation practice also means real-world interaction about concrete, material realities that cannot be entirely shut out or denied. In this context the underlying question is: What methodologies and methods can get more and different information flowing

from the practice context to the academic context and from ADR to CR and vice versa?

### **Theoretical perspective**

The challenge of comparative work of this type is the different dominant theoretical perspectives of the two fields under consideration. The literature review demonstrated that ADR and the legal field are dominated by foundational approaches varying from positivism to critical realism. This is consistent with the predominance of quantitative research on mediation outcomes in the civil-commercial sector. Much of this work uses settlement rates and on-the-day satisfaction ratings as the metrics of 'success' for example Roberts (2005), Genn (2007), and Halliday (2009).

Quantitative research on ADR is complemented by qualitative data generated primarily through mediation practice guidance generated by mediators' assertions taken on the basis of their status and authority usually as legal experts, see for instance (Newmark and Monaghan 2005), (Mackie 2007). De Girolamo's ethnographic study of ADR is an absolute exception in this context (De Girolamo 2013) and presents a substantive and fascinating insight into mediation practice because of its methodology<sup>41</sup>.

CR to some extent identifies itself in contrast to IR through its tighter connections with anti-foundational assumptions, including feminism, constructivism and post-modernism (Miall et al. 2005). The willingness to do research that engages with diversity and is critical of the development of hegemonic concepts and narratives is much greater, meaning that the research is methodologically more diverse than in the ADR context.

Traditional quantitative methods are well-represented, particularly with those associated more directly with IR (Bercovitch and Rubin 1992) (DeRouen Jr et al. 2011). Qualitative work on individual conflicts is also well represented, both

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<sup>41</sup> An assertion substantiated by the results presented in the next chapter.

in the more traditional IR forms of the work of Faget (2011) and Crocker (Crocker et al. 1999), but also in more radical forms such as the work of Curle (1986) and Lederach (2005) focussing on methodologies underpinned by reflective practice.

The theoretical perspective of this PhD therefore acknowledges the dominance in conflict contexts of interpretivism, but rejects a completely dichotomous theoretical perspective given the interaction in the practice context of this ideal world with substantive material realities. It also recognises that studying only material decisions, and as studies of mediation outcomes in the ADR context often does in the form of the quantification of 'success' simply as 'settlement, without understanding the 'ideal' creates a disconnect between theory and practice in terms of 'knowledge' of mediation.

### **Mixed Methodology**

There is plenty of research on context *around* mediation, and easily measurable external *outcomes* of mediation. The epistemological and ontological norms in both ADR and CR have led to tight restrictions on what is considered legitimate research and the repeated application of the same research methods.

However, as highlighted by de Girolamo, there is a real lack of data on what actually happens in mediation (De Girolamo 2013). De Girolamo is an anthropologist who conducted an ethnographic study of mediation in the commercial ADR context. De Girolamo's ethnographic methodology is common in anthropology and highly unusual in the legal field. Her work is profoundly important and original contribution to the understanding of mediation, not just because of the content, but because of the insights arising out of the application of a methodology across an academic boundary.

This PhD also makes a contribution to knowledge through a multi-strategy design with the primary methodology being autoethnography. This is rare in IR, extremely unusual if not unique in CR and highly unusual in Law and ADR. The aim is to demonstrate the possibility of transferring information across the

CR/ADR divide, and through this to demonstrate both the potential of autoethnography in these fields, as well as presenting substantive and original knowledge on what these fields might learn from each other.

Autoethnography has been complemented by a pragmatic multi-strategy approach to demonstrate the divide between ADR and CR and that this divide has an impact on knowledge transfer between the fields as well as on the way that practitioners conceptualise mediation and their own practice. Key issues around multi-strategy approach will be briefly highlighted below and picked up in further detail in chapter 4. This is followed by a discussion of autoethnography as a methodology and its application within this PhD.

### **Research questions and methods applied**

The research questions were addressed through the iterative application of mixed methods. Due to the originality of applying autoethnography little guidance is available on the 'how to' particularly in the context of CR and ADR and particularly on how to combine autoethnography with other methods. A brief description of the iterative process applied is provided in connection with the research questions. Each of the methods are then described in further detail.

The initial hypothesis was that a divide between CR and ADR that I had experienced as a practitioner was not just a construct of my own perception. This led to the first research question: *Is there an ADR /CR divide in relation to mediation theory and practice?* This question was tested through multiple methods. The first was comparative literature analysis and the initial development of the tabular generational analysis of CR and ADR authors and the first piloting of the mediation practitioner questionnaire.

These initial results led to the development of the other research questions: *If there is a divide, has it reduced the transfer of skills and knowledge in relation to the theory and practice of mediation? If there is a divide what skills and knowledge could be helpfully transferred between these fields? Is there a*

*framework for analysis that allows the transfer of knowledge and skills between these two fields?*

It was decided, that to minimise the interference of the results of the questionnaire on autoethnographic process that the autoethnographic work should be completed first.

The research questions were used as the prompt for the writing of autoethnographic episodes that emerged out of the reflective process of learning arising out of crossing the boundary between ADR and CR. The episodes were analysed for patterns and repeating themes. Key themes emerged and the findings in chapters 5, 6 and 7 are structured to present these three areas of cross-boundary learning.

The autoethnographic work was followed by the roll out of the mediation practitioner questionnaire followed by the analysis of the results, both in terms of the research question and the triangulation with the tabular generational analysis and brief interviews in order to clarify outstanding areas of uncertainty.

### **Critical comparative thematic analysis**

In order to establish that there is a divide in mediation theory and practice in the two fields an in-depth analysis of the origins and history, the philosophical underpinnings, the definitions and conceptualisations, and the models of mediation of both fields had to be analysed. This critical comparative thematic analysis is presented in chapter 2, with the result that this chapter goes beyond the normal scope of a literature review.

There is an iterative element in this work, as the uncovering of original information through the questionnaire and research on practitioners/authors was triangulated with the information drawn from published sources; the reality being that analysis of published written information can only surface data that has made its way into written form. Furthermore, even where it makes it into written form, much of the practice literature (such as practice guidance from

training courses) is not freely available requiring further research in order to access and analyse such data. Particularly in relation to mediation practice, written sources provide only limited data on whether there is a CR/ADR divide and its impact on knowledge transfer and it can't really address the question of a framework for knowledge transfer.

### **Tabular Generational Analysis of CR and ADR authors**

As the literature was analysed a hypothesis emerged that the interdisciplinary nature of CR excluded legal scholar/practitioners, whilst ADR was dominated by legal practitioners, 'admitting' non-legal scholars where there was a reasonably direct personal connection of the author to the legal context.

In order to investigate this further an analytical tool in the form of a tabular generational analysis of authors within the two fields was developed. This demanded probing records for evidence of their disciplinary background (for instance their PhD), publication record, and collaborative projects and personal connections with other authors in a time-sensitive way. Drawing this together in a brief summary form allowed a generational 'map' of CR and ADR authors (in the English-speaking context) writing on mediation (or directly related subjects). The data drawn from the mediator questionnaire was triangulated with this table; authors repeatedly cited as influencers were added and the author categorisation as ADR/CR/Boundary-crossing further developed through the results of the triangulation of the thematic analysis research.

This analysis does not attempt to be exhaustive of all authors in both fields; the international nature of both fields means that the sheer number of authors would render this tool inappropriate. Instead it is a qualitative tool, with some quantitative underpinning, that seeks to provide a visualisation and overview of authors that relate to the fields of from a UK-centric CR and ADR perspective.

### **Scholar/Practitioner Self-Presentation Analysis**

Extensive research of written sources, in the form of author biographies in books, web-based self-promotion and organisational staff sites was conducted.



This involved analysing and cross-referencing biographies, CV's and wiki entries and triangulating them with sources such as OCLC Worldcat and official organisational, university records, published interviews and fact-checking requests/interviews with third-parties.

This data was used to build a picture of how those included in the tabular generational analysis, as well as the respondents of the mediation questionnaire, choose to present themselves. This was used both to triangulate data on where people locate themselves in relation to ADR and CR, and in terms of the interconnections between ADR and CR in personal terms.

### **Mediation Scholar/Practitioner Questionnaire**

The hypothesis that there is a divide in theory and practice between the two fields arose out of the combination of literature analysis (in terms of theory) and practical work experience and autoethnographic work (in each of the fields). However, in order to triangulate the findings that there is a divide, it was important to test this hypothesis by gathering data on the perception and knowledge of other practitioners in both fields.

To avoid confirmation bias, a number of steps were taken both in the selection of questionnaire respondents, the presentation of the questionnaire, and the questions asked. The sampling strategy is explained below in further detail.

The consent form is explicit about the fact that I will not be sharing the results of my autoethnographic or theoretical work in order to ensure that their ideas and views can contradict my own. The explanation stresses looking for boundary crossing between the two fields, rather than looking for evidence of a divide.

A pilot sample of three questionnaires were completed face-to-face as the first step in mediator interviews, in order to test the format and content. I remained silent whilst they completed the questionnaire, giving only minimal explanations of the questions when specifically asked. A number of small amendments were

then made. All but one of the subsequent respondents completed the questionnaire independently.

28 mediators operating responded to the survey; 12 from the CR context and 16 from the ADR context. Due to the different usage of the term 'Conflict Resolution' discussed in chapter 2, people were not asked to self-designate which context they were operating in. The designation of CR or ADR to each was based on the field in which they have been predominantly operating for at least the last five years.

|                                |        |
|--------------------------------|--------|
| Questionnaires sent            | 37     |
| Number of respondents          | 28     |
|                                |        |
| No of CR respondents           | 12     |
| No of ADR respondents          | 16     |
|                                |        |
| Overall Response rate (CR/ADR) | 75/76% |

The experience of most of them fits firmly into either ADR or CR, as they have either worked exclusively in the commercial context, or in the international socio-political context. There were four participants who have considerable experience in one field, and limited experience in the other, who could therefore be considered 'boundary crossing'. In such cases they have been classified by what they are currently involved in (which in each case is the field in which they have more experience).

As already highlighted the primary focus for this study is the English-speaking context, however what this means in the ADR and CR contexts is somewhat different. Due to the impact of the jurisdiction on the practice of ADR, the sampling focussed on UK mediators with a subset of mediators with knowledge of the UK, but predominantly practising in another English-speaking common-law based jurisdiction. The nature of practice in the CR context means that respondents needed to have substantive connections to the UK context either

organisationally, or academically, but were not generally doing their practical work in the UK.

Therefore, the results cannot be taken as representative of all ‘mediators’ in every CR or ADR contexts. The sample size and criteria aimed to produce an indicative result of the knowledge and perceptions of an experienced group of practitioners<sup>42</sup> operating primarily within the English-speaking CR and ADR contexts.

Inclusion was dependent on my ability to triangulate self-presentation data in relation to practice experience with external data (either organisational data, or published written records and the knowledge of other practitioners). All respondents<sup>43</sup>, with just one exception, are practitioners and in many cases also authors, many well-known within their respective fields either through their writing, or in terms of the demand for their practical services.

Providing conclusive data even for the UK context would require both a much bigger sample, and a good deal more questions. It is therefore important to recognise the limits of the generalizability of these results, without replicating the questionnaire on a much larger scale (Robson 2011).

### **Data Access**

One of the biggest challenges of this study was data access. Intense workloads combine with low levels of trust of academic research and motives, particularly in the ADR context. As an experienced practitioner in both fields, working with other practitioners, I was fully aware questionnaire requests primarily meet the ‘delete’ key. The exception is where there is a direct or indirect trust relationship with the person sending the request, and where the time required (in terms of questionnaire/survey type instruments) is kept well below ten minutes. In order

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<sup>42</sup> English-speaking: it is not possible to tell from external data which nationality each of the respondents is, though I am aware that some hold dual-nationality, and some are bi- or multi-lingual.

<sup>43</sup> One academic was included who does not have practice experience, due to the level of connection with and direct experience of the practice context.

for the requests to avoid this fate I spoke, or wrote, individually to each potential respondent and in some cases I asked intermediaries (people with whom the respondent had a direct trust relationship) to put the request for me.

The lack of data on mediation and mediators about themselves (other than in terms of self-marketing material) is testament to the difficulty of getting data from mediators. This dearth of data on mediation is highlighted by the reviews of mediation research done by Wall and Dunne (2012). They highlight the general failure of research on mediation to generate different perspectives and knowledge that bridge the gap between theory and practice. Exceptions to this rule, such as *The Fugitive Identity of Mediation* (De Girolamo 2013) are profoundly important and much too rare.

The data access challenge is exacerbated by the reality that the pool of active practitioners is actually fairly small in both fields. Whilst there are now a few thousand accredited commercial mediators in the UK, the numbers of those who are actually working regularly, never mind frequently, in formal mediation processes is actually fairly small something highlighted in the ADR context by the CEDR audits (Massie and Rogers 2016)<sup>44</sup>.

In the CR field the challenge of actually ascertaining that what people who say they are ‘mediating’ in the ‘field’ are actually doing (and whether it is plausibly categorised even by the broad definitions used in the CR field as mediation) is highly problematic. This is highlighted in the primary research done by Ana

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<sup>44</sup> This is based on calculations done by cross referencing knowledge of the number of formal mediations handled by the biggest UK mediation organization (CEDR), the number on their mediator panel and the numbers of mediations that mediators claim to have done in CEDR mediation audits ([www.cedr.com](http://www.cedr.com)). Successive audits have highlighted the degree to which those with regular practice experience is still very small. This reinforces the experience of working in the field and listening to mediators (in common with other professionals) inflating their practice experience and case-load when trying to ‘sell’ themselves and their competence to others. The most entertaining example of this was a talk by a famous commercial mediator who claimed to have done a number of mediations that (when calculated by the listener) would have meant doing 5 commercial mediations per week since he was about 12 years old.

Bauder (2007). This type of issue confirms my own experience of finding that the evidence to back up claims of ‘mediating’ was thin. These issues had therefore to be taken into account in the sampling process.

### **Sampling, Generalizability, Reliability, Validity**

Purposive sampling was applied in order to obtain an indicative sample from practitioners who have operated in similar contexts to those in which I have experience in order to provide external testing and triangulation of the data gathered through the other methods.

In the CR context, unlike the ADR context, a wide range of activities are referred to as mediation. Purposive sampling was applied, with the requirement that I had either direct evidence of practice experience, or was able to confirm practice experience through third-party sources (in other words that respondents’ practice experience was not purely a matter of self-certification).

The sample is further restricted to the two specific areas in which I have operated: as practitioner within the NGO/IGO consultant CR context (rather than as IGO full-time employed ‘track 1’ mediator/diplomat); and in the Civil-commercial ADR context (rather than in restorative justice, or family mediation). As there is a practice/theory focus within this study, participants were also sought who have experience in the training and teaching mediation, on the basis of the working assumption that this would mean some level of knowledge of the literature of the field in which the teaching was being done (and what literature was being drawn on within that field) would be apparent.

Given the different definitions of mediation in the two fields, the decision was made that it was appropriate to apply the ‘mediation’ term to each sample in keeping with the culture of each of the fields. The professional/academic background or origin of the individuals was not taken into account in the sampling.

With the emphasis on the two fields in the English-speaking context (UK, USA and South Africa), but with boundary-crossing experience present in the profile of many (whether between these countries or third countries). The aim was to get some cross-section in terms of age (ca. 35-80) in both cohorts, with the challenge of substantive practical verifiable experience being a challenge at the lower end of the age range.

Despite the lack of gender parity in either field, the aim with the sampling was to include a substantive female cohort in order to try and balance the tendency for work on mediation to exclude female experience and voices<sup>45</sup>. Near gender parity was achieved and some of the differences between the male and female cohorts were not the result of sampling strategy, but emerge of apparent differences in the male and female cohorts.

Some of the respondents are multi-lingual and have worked professionally in other languages and countries as well as in the US and/or the UK. They represent a range of approximately 7 different nationalities<sup>46</sup> all with experience in English-speaking countries. A different sample would be needed in order to generalise the results to a European cohort (with a proportionately small UK sample) selected proportionately to population, or to all the countries in Europe.

The sampling criteria can therefore be summarised as follows:

- Externally verifiable practice experience in track II/NGO/Commercial mediation
- Externally verifiable engagement in writing/teaching/training on mediation
- To maximise the age range represented in the sample
- To get as close to gender parity as possible

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<sup>45</sup> Martin's book being a case in point. Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum. Monaghan's being a similar example in the ADR context: Newmark, C. and Monaghan, A. (2005) *Butterworths mediators on mediation : leading mediator perspectives on the practice of commercial mediation*. Haywards Heath: Tottel Publishing.

<sup>46</sup> It has not always been possible confirm which nationalities some of the respondents hold, particularly where there is possible dual nationality.

- Inclusion primarily of practitioners and scholar-practitioners
- Inclusion of mono- and multi-lingual respondents in ADR & CR samples
- Experience and knowledge of the English-speaking contexts of either ADR or CR.

The questionnaire responses do not ask directly whether the mediator respondents experience the impact of the divide in the way that I describe in the later chapters of this PhD, or about whether they believe that information can or can't be transferred across the boundary. This would of course be interesting but is way beyond the scope of this study and its importance will be returned to in the concluding chapter.

### **Ethics**

Written consent was sought in from all those who completed the survey and confidentiality has been secured through access passwords and questionnaires being stored separately from respondents' personal data. Further measures have been taken in the presentation of the findings to ensure individuals cannot be identified. Confidentiality of the attribution of specific answers and the anonymity of the respondents in the presentation of the results has been maintained. The survey questionnaire is attached in Appendix 1.

### **Instrument design and administration**

Questionnaire was designed both in length and format to address the challenges identified in the section on data access. The logic was that return would be dependent on it being simple, visual, challenging and possible to complete in 5 minutes (i.e. it had to fit on to one page). The response rate highlights the success of both the sampling strategy and the instrument design:

|                                |        |
|--------------------------------|--------|
| Questionnaires sent            | 37     |
| Number of respondents          | 28     |
| No of CR respondents           | 12     |
| No of ADR respondents          | 16     |
| Overall Response rate (CR/ADR) | 75/76% |

The majority of the questionnaires were completed independently by the respondents following telephone or e-mail contact. The exceptions were three administered face to face early in the research process. Four later ones were administered by telephone for technically challenged respondents and one face-to-face, due to opportunity. The questionnaire can be found at Appendix 1.

The questions were carefully chosen to encompass the 'cultural' differences of ADR and CR. Therefore, the first question was a request to self-define as Academic; Practitioner; Scholar-Practitioner; Other: \_\_\_\_. These terms were chosen to identify terminological affinity with ADR or CR.

The second question was a sample book list test. The aim of this question was to uncover the level of cross-over between CR and ADR knowledge of literature. A list of 20 author names<sup>47</sup> who have written on and are primarily associated with ADR, CR, or both fields was put together. The allocation is highlighted on the generational map of authors in each field which includes their original academic background and that of their collaborators.<sup>48</sup>

|                         |                                      |
|-------------------------|--------------------------------------|
| Boulding (1988)         | Mackie, Miles & Marsh (1995)         |
| Boulle & Nestic (2001)  | Mayer (2009);                        |
| Burton (1990a);         | Miall, Woodhouse, Ramsbotham (2005); |
| Bush & Folger (2005);   | Mnookin (2000);                      |
| Curle (1986);           | Moffitt & Bordone (2005)             |
| Fisher & Ury (1981)     | Richmond (2008);                     |
| Ronald J. Fisher (1997) | Rifkin (2001);                       |
| Galtung (2002);         | Rosenberg (1999);                    |
| Hope (2009)             | Touval & Zartman (1985)              |
| Lederach (2005)         |                                      |

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<sup>47</sup> This was expanded from 17 to 20 authors after the first four interviews listed here in alphabetical order of author (N.B. The following reference list gives either the specific book I had in mind in the case of group authorship, and a sample publication of the individual authors):

<sup>48</sup> A summary map of this research was presented in the literature review, a complex version with the authors highlighted is presented later in this chapter.



Respondents were reassured that they would not necessarily recognise all the authors. The four options (read; skimmed; heard of; not heard of) were chosen with the aim of allowing face-saving. As previously explained, the questionnaire strategy aimed to gather reflex responses, and most questionnaires were completed independently. It is therefore important to caution that the results need to be interpreted with caution given that different respondents may have taken different amounts of time, maybe some cross-referencing to remind themselves of who different authors were whilst others will have answered quickly.

Questions three and four aimed to opened up the question as to authors that the respondents considered important on a theoretical and practical level<sup>49</sup>. They were: “Authors I would cite as being influential in my work on mediation:” and “Authors I would cite as having actually influenced my practice:”. This question generated interesting and extremely diverse responses, though it should be noted that first question should have been phrased slightly differently, for instance “Authors I would cite as being influential on me in relation to mediation theory”. This would have made the separation more conclusive. For simplicity the first question has been referred to as ‘Theory’ and the second as ‘Practice’ however, this ambiguity is accounted for in the interpretation of the results.

The two final questions aimed both to further test whether there is a divide and if so, if it extends to the conceptualisation of mediation practice, providing a complementary question to the evidence provided by the question about self-categorisation. The two questions were: If you were to put mediation approaches on a spectrum, what the ends would be? If mediation practice is part of what you do, where would you place yourself on this spectrum? It was anticipated both the terminology and the homogeneity would vary between the two sets of responses. It was hypothesised that the ADR responses would be

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<sup>49</sup> Again, the separation of the questions three and four was adopted after the first couple of responses indicated that there was likely to be a difference between the two answers.

more homogenous and focus on the terms facilitative, evaluative and possibly transformative. It was expected that CR would be diverse and focus both on the role of mediators and on the socio-political level of the intervention.

### **Autoethnography: Definitions, critiques, criteria and application**

“[The objective of research is] *to learn facts about the real world...no one cares what we think – the scholarly community only cares what we can demonstrate.*”(King et al. 1994)

*“Disciplinary territories...work to silence those who take other positions.”*  
(Dauphinee 2010)

The application of autoethnography allows this PhD to make a contribution to knowledge of that which cannot be externally observed; the lived experience of an intensely relational process. Unlike the other methods used, the application of autoethnographic methodology in CR and ADR is extremely unusual if not unique. Therefore, a critique and analysis of autoethnography is provided before a discussion of its application within this PhD.

#### **Definition**

The term Autoethnography is usually attributed to David Hayano, who applied it to writing an ethnography of one's own culture. This constituted a rejection of the concept of an omniscient *external* researcher and highlighted the value of an *indigenous* 'Complete Member Research (CMR)'. It highlighted issues with the labelling of the view that the outsider/researcher was 'objective' (for 'objective' read 'legitimate') and the indigenous being 'subjective' or 'partial' in their view (Hayano 1982).

Since the work of Hayano, the term autoethnography has also been applied to the writing of the ethnography of (elements of) ones' own autobiography. This is usually accepted to mean the combination of a number of elements including: the use of the first-person experience of the author (autobiography); the application of analytical tools to this information; the connection of this

experience and analysis with the experience of others (particularly those within the chosen knowledge community within which they are working).

In essence autoethnography emphasises the importance of the totality of lived experience including sensory context and feelings, rather than selecting out only the 'rationally justifiable' and cognitively based decisions. It rests on highly interpretivist epistemology and the understanding of knowledge generation as a relational process. It therefore emphasises the importance and validity of the totality of lived sensory experience and holds the idea of *objectivity* and *homo economicus* (the cognitively 'rational' human) as being profoundly misguided. It aims at something that makes an attempt to surface more than just the 'cognitive PR job' done after the decision-making (Haidt 2012) by admitting to, examining and presenting a more complete account of experience.

Ellis and Bochner are perhaps the best known practitioners of and writers about autoethnography. In 2011 they described it as follows: "*When researchers do autoethnography, they retrospectively and selectively write about epiphanies that stem from, or are made possible by, being part of a culture and/or by possessing a particular cultural identity...they must use personal experience to illustrate facets of cultural experience, and, in so doing, make characteristics of a culture familiar for insiders and outsiders. To accomplish this might require comparing and contrasting personal experience against existing research*" (Ellis et al. 2011: , p.3). At its core the approach raises the idea that the 'lived experience' of the author themselves is an important part of the information puzzle in the academic context.

The connection between writer and reader is taken seriously: "When researchers write autoethnographies, they seek to produce aesthetic and evocative thick descriptions of personal and interpersonal experience. They accomplish this by first discerning patterns of cultural experience evidenced by field notes, interviews, and/or artifacts, and then describing these patterns using facets of storytelling (e.g., character and plot development), showing and telling, and alterations of authorial voice."(Ellis et al. 2011: , p.4) This is relevant to the

consideration not only of academic work from the writer's perspective, but also from the perspective of the impact of the text on the reader.

Whilst contentious, those who have used and advocate the use of autoethnography do vary both in their epistemology and the approach to autoethnography advocated. As a methodology, autoethnography is largely unknown in Conflict Resolution, Legal studies and ADR, so it is worth exploring some of the debates relevant to its application within this PhD.

### **Applications and Critiques**

Leaving indigenous autoethnography aside, the analysis in this section will focus on the ethnography of (elements of) one's own autobiography. There are two main approaches to this type of autoethnography, which embody two different epistemological standpoints.

The first approach is post-structuralist in its epistemology and is essentially a discrete methodology, rather than another method within the traditional ethnographer's toolkit. This form of autoethnography has an emancipatory agenda that places high demands in aesthetic, evocative and narrative terms. It also demands the application of analytical and methodological tools of ethnography, though it does permit this to be done in a wide range of different forms, going as far as performance or visual art and poetry. The advocates of this approach, including Ellis (Ellis and Bochner 2006) and Dauphinee (2010) firmly reject the subject/object divide of traditional realist ethnography. This type of autoethnography, sometimes referred to by its critics as evocative autoethnography, holds itself to a high standard of transparency and advocates the use of methods such as the co-creation interviews where the author uses first, second and third person, rather than using the disembodied academic voice (in this view of things) to appropriate the voice of the interviewees.

Applying a more traditional epistemological approach, realists such as Anderson see autoethnography as a useful compliment to other ethnographic methods. He has advocated the label of 'Analytic Autoethnography' for 'realist

autoethnography' as a result of his critiquing of 'evocative autoethnography' as being too self-absorbed, failing to engage with external 'objective' views and theory building.

Anderson's criteria for analytic autoethnography are: "1) *a full member in the research group or setting, (2) visible as such a member in published texts, and (3) committed to developing theoretical understandings of broader social phenomena.*" (2006a: p.373) As a result of the critiques of this list, he adds dialogic encounter with other social actors beyond the self and authorial presence that is commensurate with the ethnographer's substantive presence in the field: '*so instead of seeing the criterion of moving beyond a more purely subjective focus in terms of...silencing the self, I want to emphasize its productive potential for positioning the researcher's self at a vantage point that facilitates richer analytic understandings.*' (Anderson 2006b: , p.456)

This quote also serves to demonstrate the contrasting epistemology of Anderson and Ellis. The label 'purely subjective' used by Anderson within the realist frame automatically undercuts the academic value and legitimacy of the thing labelled as such – as the aim within realist discourse is 'objectivity'. Though the name 'analytic autoethnography' in theory doesn't exclude other 'types' of ethnography from being analytical, in practice co-opting the term in this way conveys exactly this message. It is therefore unsurprising DeLysa Burnier expresses concerns about the proposal of this split: "*I fear that "both...and" features of autoethnography will be lost if his recommendation to divide autoethnography into two types of research prevails...Ellis disputes such distinctions [between analytic and evocative] with her claim that evocative autoethnographic stories offer 'self-conscious analysis in introspection, dialogue, or narration and move toward illuminating social science concepts'*" (Burnier 2006: p.416).

Brigg and Bleiker (2010) provide a powerful critique of realism on the basis that autoethnography shows up an element of how it often fails on its own terms. Their argument is that pretending a variable (in this case, the author) doesn't

exist doesn't make your work more 'scientific'. Instead 'hiding' author and agency is likely to cause errors at the point both of data generation and analysis. This failure is one of self-recognition, both in terms of assumptions and judgements, and in terms of the conflation of what is measurable with what is 'real'. They put forward a powerful claim for the inclusion of a broader selection of sensory and emotional information, not for aesthetic and evocative reasons per se, but because of its value in 'scientific' terms; exclusion of this type of 'data' obscures rather than enlightens the quest for understanding. This argument has a strong conceptual link with Boulding's ways of knowing (Boulding 1988) – whether or not Brigg and Bleiker are aware of it.

Like Ellis and Dauphinee, they also take issue with the subject/object divide but again from a slightly different epistemological position: *"Merely acknowledging that reality is socially constructed is not enough to deal with the implications of the fact that the author is both the subject and object of knowledge...As a result they neglect...the possibility that explicitly acknowledging the centrality of the self might serve as a valuable methodological resource – including for empirically based critical scholarship...The subject position and the subjectivity of the knower needs to be worked through rather than merely alluded to if a scholar is to adequately grapple with the ambiguous placement of humans as both the subject and object of knowledge."*(Brigg and Bleiker 2010: , p.783)

Their critique suggests that human interaction in the future could be analysed in the way that the reaction between two chemical elements are; but currently tools available for observing and measuring human interactions (for all the attempts to be 'scientific') are often blunt, and fail to capture much of the complexity involved.

For example, repeated studies of 'facts' such as 'settlement rates' in both fields produces apparently foundational, material information about 'outcomes'. However, this information is collected on the basis of 'ideal' categorisations and prioritisations. These contain, implicitly or explicitly, value judgements such as 'settlement good' / 'non-settlement bad'. Where these judgements are implicit,

there is the high risk that assumptions are made about what the material data (signed settlement agreements, violence levels etc.) say and/or represent about the *'reality'* of those involved. Autoethnography provides one way of contributing additional and different knowledge to the knowledge on mediation practice that is actually congruent with a previous generation of CR scholars, particularly Elise Boulding and Adam Curle, and their work on ways of knowing and reflexivity.

### **Evaluation criteria for autoethnography**

Unsurprisingly the different definitions, epistemologies and styles of autoethnography have brought with them considerable debate about how autoethnography should be evaluated. However, there do seem to be some common themes.

Probably the most frequently mentioned criterion is gathering *'knowledge that cannot be obtained in any other way'*. This is mentioned by Anderson (2006a), Dauphinee (2010) and Brigg (2010). There seems to be some recognition that there are certain situations and types of information that are hard to access through the researcher/informant divide, even with the more innovative ethnographic methods. The post-structuralist perspective of writers, such as Ellis and Bochner, makes the value of this knowledge fairly self-evident. Indeed even Anderson, with his more the realist perspective underscores this through his identification of the perspective that is a function of participating in rather than observing: *The imperative to understand the mutually constitutive relationship between myself and my informants took on a new dimension when I became a stakeholder in the social world I was describing*.(Anderson 2006a: p.453)

Another criterion, which appears in slightly different forms in different texts, is whether the autoethnography succeeds in creating practical and emancipatory knowledge. Anderson puts forward a passionate defence of the value of the knowledge, not for its own sake, or for self-absorbed navel gazing, but with what looks suspiciously like the activist, emancipatory agenda of post-

modernism: *I have little interest in knowledge that has no practical significance...When I suggest that there is value in using ethnography to analyze social life, it is for the purpose of exploring how people come to construct social worlds, what the consequences are, and how we might construct better worlds and enrich our collective lives in the process.* (Anderson 2006a: p.459)

Ellis is explicit about autoethnography having not just practical, but also practical emancipatory potential. She cites Holman Jones: *Autoethnographers view research and writing as socially-just acts; rather than a preoccupation with accuracy, the goal is to produce analytical, accessible texts that change us and the world we live in for the better* (Denzin and Lincoln 2005: , p.764).

A further criterion is that the reflexive authorial perspective adds a missing piece of the knowledge puzzle in the area under investigation. The idea is that there is knowledge that can only be gained from being able to write experientially and evocatively from the *participant* perspective, particularly where the issue under study is relational. Using the first person, rather than the disembodied omniscient academic voice, is seen as a way of reducing the ‘violence’ of appropriating the voice of research participants. This criterion also comes with connected demands, from realist and post-modern feminist authors alike, for high levels of transparency, reflexivity, engagement with and openness to different perspectives in order to avoid self-indulgent or self-absorbed navel gazing.

The concern of self-absorption leads to a further, somewhat ambiguous, criterion that the autoethnographer should be engaging with other perspectives on the experience being researched. The types and levels of engagement advocated seems to range from none at all (and this in some cases that are cited as being effective and high-quality autoethnography, such as Murphy cited by Anderson (2006a: p.479)), to the co-creation of interviews around experiences shared by the author and others (Ellis 2004).



Autoethnographers are encouraged to engage with external perspectives on their experiences. However, this comes with the acceptance that the results can be worthwhile even where this isn't always possible (Brigg and Bleiker 2010) (Anderson 2006a) (Ellis 2004). Even Anderson, who sees this engagement as a pre-requisite for his type of 'Analytic Autoethnography', seems to provide a get out, both by citing people like Murphy and by using the criteria: "*the degree of authorial presence should be roughly commensurate with the ethnographer's substantive presence in the field*" (Anderson 2006a)<sup>50</sup>.

The final recurrent criterion can be described in two ways. Ellis and Bochner talk about the aesthetic and evocative quality of writing. This is the explicit demand not to edit out emotional and experiential information, but rather to include and explore this as an integral part of a fuller picture of the 'knowledge' production process (see Ellis (2004) and Burnier (2006)). There is a clear conceptual link between this requirement and the work of Boulding in advocating a more holistic approach to epistemology; including and taking account of knowledge of the intuitive and emotional type as well just the cognitive.

Particularly for feminist autoethnographers, demanding the inclusion of such criteria represents the ultimate rejection of the value judgement that emotional information and evocation in the reader are not relevant, or valid as knowledge. The demand is therefore a way of actually *showing* rather than just *telling* their readers why this information is crucial to the academic enterprise. To adopt Burnier's summary of Ellis: *Autoethnography should involve "detailed, concrete" narrative that "highlights emotional experience" and foregrounds "multiple perspectives that include participants that include participants voices and interpretations"*. She also sees the use of the evocative for analytic purposes: *Autoethnographic stories offer "self-conscious analysis in introspection,*

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<sup>50</sup> Though having put down such a clear marker that suggests something that is materially quantifiable he remains silent on what might 'count' as presence, or how this commensurability might be measured in order to judge the author as having been (in)appropriate in choosing their level of authorial 'presence'.

*dialogue, or narration and move toward illuminating social science concepts.”*  
(Burnier 2006)

It is important to differentiate autoethnography written on the basis of the records deliberately written on a research context they have deliberately entered. In such autoethnographies, the researcher turns the focus from their normal ‘research subjects’ to themselves and their own records of the experience they have had in their chosen research context. The other type of autoethnography, described by Ellis (2004) in detail, is to write autoethnographically about experience that was not sought out in advance with a research agenda.

These two situations are different in a number of ways. For instance, the data sources for write up will be very different. The deliberate researcher will keep field notes, seek consent, record interviews, film rituals and so on. The autoethnographer who writes about ‘accidental’ experience will have a very different ‘evidence’ trail; It seems hard to imagine any circumstances in which there would be justification for entering an abusive relationship in order to keep extensive emotional ‘field notes’ in order to write an autoethnography. However, not having extensive field notes would not perforce mean that the resulting autoethnography would not make a contribution to the particular field. As highlighted by the previous evaluation criteria.

### **Autoethnography and Conflict Resolution**

*‘This fear of what self-awareness might reveal frequently leads to the development of a ‘public face’, a mask; the complement to the mask is the mirage...to the extent that we depend on the mask for self protection, we see a mirage of others’(Curle 1971: p.210-216).*

Curle was referring to conflict parties, but I contend that mediators are often not so different. The internal view of mediation is understudied not because it is unimportant or unworthy, and not just because of difficulties of access,

verification, and confidentiality. It is understudied because of the issues of maintaining the public mask of the mediator.

Brigg and Bleiker's claim that the key evaluation criterion for autoethnography is that it provides valuable insights that '*cannot be attained in any other way*' particularly through '*more conventional accounts*'. This essentially depends on the authors '*ability to employ her personal experiences to open up new perspectives on how knowledge, language and power are at play*' and recognises the methodological implications of knowledge production being an '*inherently relational activity*' (Brigg and Bleiker 2010: p.791).

In very different ways both Curle and Burton were employing their personal experiences as scholar-practitioners<sup>51</sup> to open up new perspectives. Both were highly concerned with how to build theory that connected intricately and directly to practical experience in peace making. In addition, particularly later in his career, Curle became much more explicit about the importance of personal reflexivity generally; not just as a scholar, practitioner, or even scholar-practitioner, but more generally as a human being as evidenced by the quote above.

These ideas link with the work of Elise Boulding who identifies the fundamental necessity of '*...attending to settings, agents of socialisation, and the kinds of faculties involved in the more complete knowing in which we are interested. The balanced development of cognitive/analytic, emotional/affective and intuitive ways of knowing.*' (Boulding 1988: p.93) Boulding strove repeatedly to underline that she was not advocating the replacement of the cognitive/analytic, but seeking complement it (1988: p.95).

This work takes Boulding and Curle's exhortation to reflexivity and more comprehensive 'ways of knowing' seriously and breaks with the academic

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<sup>51</sup> Burton's authority and approaches to 'problem-solving workshops' and his laundry list of steps were founded in his *experience* as a diplomat and someone who had practical experience of dealing with conflict.

tradition of assiduously editing out the self in order to maintain a mask. *'Placing the internal-external entwinement at the centre of research...is not to abandon the idea of science: quite the contrary, closely engaging the network of relations in which the author produces knowledge promises to deliver more nuanced, comprehensible and perhaps even more scientific forms of insight than approaches that strive for authorial self-sufficiency and detachment.'* (Brigg and Bleiker 2010: p.794)

The challenges of Curle and Boulding may have been 'forgotten' due to the level of challenge it puts to all those involved in the generation, analysis and transmission of knowledge. *'If the author is an integral part of producing and conveying knowledge, then we should, by consequence, embark on more systemic attempts to understand how knowledge is constituted through the self.'* (Brigg and Bleiker 2010: , p.780).

Whilst, particularly thanks to the work of Lederach and Woodhouse, there is a resurgence of interest in the work of Curle, it is important to bear in mind that particularly his later work was considered to be fairly radical in a touchy-feely kind of way by those of a more realist persuasion. Editing out completely, or only giving lip-service to authorial identity, is used as an enabler of claims to authority and 'objectivity'. The only exception being memoir, which is generally considered an academic data source, rather than a legitimate academic research output.

Diplomat-mediators whose memoir focusses on the first person on their own terms usually with an agenda in terms of presenting a particular 'face' to the reading 'public', or a particular view of 'substantive' events. Examples of this include accounts of the Oslo process by one of the Israeli lawyers involved (Singer 2004) and both Martin's and Crocker's work on international mediators (Crocker et al. 1999; Martin 2006). As a simple example of the impact of the public mask in the current practice context a mediator described attending a two-day symposium on mediation and humility. At the start of the symposium the mediator tried to bring up the linguistic, conceptual and experiential

connection between ‘*humility*’ and ‘*humiliation*’. This conversation was shut down forcefully and aggressively. During the following two days not one example of things going wrong in mediation was discussed. This is not to suggest that mediators will always behave in this way, but simply to illustrate the social power of the ‘public mask’ even when amongst others who are supportive of the practice of mediation.

In this context it is unsurprising that the lack of significant advances in the research and knowledge of mediation have been heavily criticised in reviews of research in the ADR field by Wall and Dunne (2012) and picked up by de Girolamo (2013). It is also unsurprising that de Girolamo’s groundbreaking UK based ethnographic study of ADR is not mentioned by the respondents to the mediator questionnaire (see chapter 4). This study used the participant-observer role to analyse the interaction and process applied by parties and mediators in commercial ADR. Similar studies of multiple processes (rather than individual specific case studies) within the CR context would provide a hugely useful research project that would provide a complementary wealth of knowledge. However, this is not the research project of this PhD. What the ethnographic methodology of de Girolamo cannot offer is insight from inside the mediator-party relational perspective, or of the internal processing within the mediators’ head.

### **Application of autoethnography in this PhD**

*“As graduate students we were told that “anthropology equals experience”...but when one returns from the field, the opposite immediately applies...anthropology is not the experiences which made you an initiate, but only the objective data you bring back.” (Rabinow 1977)*

*We may find ourselves more invested in what we can verify rather than what we can’t, not because the issues are always more important politically or ethically, but simply because we can verify. (Dauphinee 2010: p.812)*

My work as a practitioner led to the hypothesis that there was a divide, or compartmentalisation between the fields of ADR and CR. The academic investigation of this compartmentalisation through analysis of the literatures of the theory and practice led to the idea of a mediation scholar-practitioner questionnaire on the literature of the two fields applied traditional methods. However, these methods can only take the analysis so far.

Autoethnography is one of the few methods that offer the opportunity to integrate authorial experience into the academic context, as well as offering one (there must also be others) answer to the question: How can '*a posteriori*' knowledge gained through practice of a profoundly relational praxis be brought into the academic context? Chapter 2 has already examined the tendency in both fields for the same verifiable studies of externalised data in slightly different contexts to be repeated again and again, with the resulting critiques of Wall and Dunne (2012) and De Girolamo (2013). This provides further justification for autoethnography as it creates original and significant knowledge and data that is impossible to access/create in any other way.

I have used autoethnography because of its unique way of generating original data on the relational aspect of this specific relational process; mediation. Autoethnography allows me both to bring together my inner and outer experience, but also a vehicle that methodologically, not only allows for, but actually explicitly demands that the writing connect with readers in evocative, emotional terms, rather than just on the superficial cognitive level.

### **Data and Memory**

As previously highlighted the deliberate embedded autoethnographer is different from the accidental autoethnographer. This is true both of the experience, the connection to those in the context as well as the data sources and data generation processes. I would have felt differently (and will feel differently in the future) and would have been perceived differently in practice contexts had I perceived myself and others had perceived me as a 'researcher'

engaging in a participant 'role'.<sup>52</sup> This is not to suggest one is more legitimate than the other, but rather the data produced would be different. This is true of the type of reflection that would be involved and also the type of records that would be kept.

I was not a dual role researcher-ethnographer and mediation practitioner, I was a full member engaging in mediation with the priorities and concerns of a reflective practitioner. The focus of the reflective practitioner is to improve one's own practice for the sake of those subjected to my practice, not to draw out information from others for ones' own research purposes. Interrogating your own autobiography retrospectively with the aim of gleaning specific knowledge and learning, means that you are reliant on the various types of data left behind by the experience and, where possible, triangulation of these remains with external sources.

However, it is also important to note that many of these episodes present experience that have not previously been expressed externally. Whilst there is no suggestion that they are definitive, let alone objective, accounts of 'what happened', there is substantive evidence to suggest that writing about events actually substantively changes the memories that have been written about and reduces the accuracy of the memory. This means that the episodes that draw on pure memory (where there are not written records) may actually have different quality than where memory is cross-checked with notes and records (Enfield 2015).

The primary focus of this research is to uncover the personal narrative about why I do what I do, connecting to influential events through *the memory* of particular epiphanies. These memories are pivotal, not because they represent an objectively 'true' account, but rather because *my* version of events that

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<sup>52</sup> This is supported by the contrast with the work of De Girolamo who applied ethnographic methodology and deliberately entered her research context (an ADR service provider) as a deliberate participant-researcher-observer.

influences *my thinking and acting* as a practitioner; they influence action previous, present and future. That these moments were epiphanic for me is entirely unverifiable externally, and yet is one of the deciding factors in my actions, and information that *cannot be accessed in any other way* (Brigg and Bleiker 2010).

My contention is that more data from other practitioners of this type is needed, but that this type of information is so completely de-legitimised in the general academic discourse, and the ‘professional’ environment, that it is edited out of written and spoken accounts. It also presents a huge personal risk as it could be perceived as a breach of the public mask, and as with all personal information could be used to abuse and denigrate the individual willing to share such experience.

### **Data Generation Process**

I understand autoethnography, in line with Ellis (2011), as a methodology that brings autobiographic experience into connection with ethnographic academic methods and academic literature. In this work, I ethnographically mined my own autobiography to explore epiphanies that were made possible by being part of a culture, whilst also comparing and contrasting personal experience against existing literature and theoretical frameworks (Ellis et al. 2011).

There is no precedent of how to generate such data in the CR context. So I must simply describe how I ‘ethnographically mined my own autobiography’. The research questions provided the pivotal focus for the data generation process. In other words, was there evidence of a divide in my experience? If so what was its impact? Was there evidence that information could be transferred across the divide? What sort of joint frameworks might be possible?

The initial step was writing qualitative case studies, in a traditional academic style, about mediations and the use of ‘mediative capacity’ that I had been involved with at all levels of the Lederach pyramid (Lederach 1997). These case studies were located in either the ADR and CR contexts. These case studies



were then analysed using thematic coding: What evidence of the divide and learning across it coming up repeatedly in case studies written about situations at all different levels of the Lederachian pyramid?

These patterns were then evaluated on a completely different level. What were my epiphanic experiences of crossing this divide? What were the experiences that led me to taking experience across this divide? In other words, what emotional, embodied experience learning was influencing my practice, particularly in relation to the research questions? The response was a set of autoethnographic episodes. These were once again analysed for patterns. The result was the emergence of three key areas of learning related to the divide and crossing it: conflict role clarity; mediator skills; ethical issues of applying the mediator role. This resulted in the data set actual presented in the final PhD.

The process of even asking these questions, never mind responding and writing up the answers, was profoundly challenging and emotionally draining. It has demanded that I look intensely at very deeply difficult experiences. The resulting episodes record my memory of these epiphanic moments in pitiless detail, both in terms of relational interaction and in terms of feelings that supersede a sub-conscious process, hinted at only because of the feeling or physiological symptoms. The slow-lorry of 'thinking' only turns up well afterwards something well explained by Haidt (2012).

The process of re-learning to write in order to allow myself into the text was incredibly difficult. I have heavily invested in two roles with an ambiguous view of the self: the mediator (with the mantra, that it is not about my view, or advice) and disembodied writer used to the dictum "no-one cares what we think, only what we can demonstrate" (King et al. 1994). Stylistically these episodes are therefore a shock, particularly in the context of a PhD<sup>53</sup>.

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<sup>53</sup> For an example of such a PhD and the challenges involved see: Doloriert, C. and Sambrook, S. (2011) Accommodating an Autoethnographic PhD: The Tale of the Thesis, the Viva Voce, and the Traditional Business School. *Journal of Contemporary Ethnography* 40 (5), 34.

The autoethnographic writing and re-writing process is also part of the data generation process and is intimately bound up with the reflexive process (Ellis 2004). The data generation process therefore includes the analysis of what I had edited out of the writing, as well as analysing what I had included. For example, in line with the demand for “*openness and vulnerability to others and the outside world in general...a self-aware willingness to draw upon a full range of faculties – rather than solely the rational elements sanctioned by traditional social science methods...*” (Brigg and Bleiker 2010) p.794

Autoethnography is sometimes described as having therapeutic uses (Ellis 2004). This may be the case and the process of writing up these experiences may or may not have accidentally been therapeutic, but the motivation and experience was not connected to a wish to do self-therapy. Instead I was conscious that for this work to be useful, it demanded that I be open about the influence of things that didn't go as planned, that were personally extremely unpleasant, as well as things that are influential due to their positivity.

### **Ethics, consent, confidentiality and anonymity**

The confidentiality constraints of mediations mean that all notes and documents relating to cases (whether individuals or companies) have to be shredded at the end of the mediation. Therefore, this autoethnography draws on the combination of records and reflections of a professional, reflexive practitioner: Personal notes, not on the parties, but on my own learning process written after mediations as well as reflective work in relation to informal cases and wider conflict projects.

I am the research subject within this autoethnography and in the broadest terms the data involved is the learning process and epiphanies of this learning journey. However, without the other characters that appear in the episodes. They are not research subjects and there is (and was no) intent to use them as such; therefore, it would neither be appropriate or possible to seek their consent. However, without them these specific learning situations would not

have happened, or would have happened differently, and my memories and learning would have developed differently. As a result, I have a profound duty of care to them.

There are therefore a number of different measures that have been taken to ensure that none of the specific individuals involved in these memories can be identified: I have worked on a large number of cases in different countries and contexts all over the world. Having done lots of cases in a range of contexts and industries, many of which display similar characteristics, would already make it impossible to externally attribute these episodes to a specific real-life case. However, in order to ensure this is the case names, places, industries and specific details have been changed to ensure that it is absolutely impossible to identify organisations, individuals, or cases.

Where sensitive details about someone are included, further occlusion has been used through changing their apparent origin (through the choice of name) and context details have also been changed so that the learning epiphany and evocation are still conveyed, but their identity is protected. I have taken the further step of checking episodes confidentially with individuals who were in some way party to a situation, to see if they can attribute the episode 'correctly'. Their inability to do so, but their agreement that the anonymization does not obliterate the underlying 'meaning' has been an important method of ethically cross-checking the anonymization process.

Finally, it is important to raise the issue of informed consent in relation to the primary research subject, me. I cannot speak generally, or for anyone else on this. I can only provide my view of this. My experience of autoethnography is that it is incredibly difficult emotionally, cognitively and physically. Reliving events again and again, some of them highly traumatic is a punishing thing to do. The process of conscious deliberate recall and writing and re-writing also changes the relationship to these experiences. There is no way of 'withdrawing' consent once you have embarked on this process; you can't take back the changes that happen through the process. Whilst I feel strongly that

autoethnography has a powerful contribution to make. I would not embark on it lightly; it has consequences and no other methodology I have used makes the same demands on the researcher.

### **Conclusion**

Autoethnography represents innovation in methodology in CR and ADR: *“In addition to normal processes of selection and interpretation, the presentation of autoethnographic research should be characterised by a relatively high level of transparency. Rather than erasing the traces of the author as is customary in the social sciences, the result of an autoethnographic investigation must expose and retrace some of the most important ways in which the author’s experiences and faculties come into play in addressing the research puzzle.”* (Brigg and Bleiker 2010: p.796)

I have attempted to take Brigg’s admonition seriously and to be transparent about the way in which my experiences and faculties have affected the way I have addressed this research puzzle. This has involved being clear about the learning journey I have been on and the relationship of this journey to the different cultures I have had as a practitioner/participant in mediation and conflict. Reed-Danahay’s belief that *“the most cogent aspect to the study of autoethnography is that of the cultural displacement or situation of exile characteristic of the themes expressed by authoethnographers”* (Reed quoted in: Burnier 2006: p.412) chimes with my experience and demands not only transparency in relation to the learning journey, but also the impact of the displacement of crossing theory-practice and practice/practice boundaries.

Most importantly, autoethnography has provided a means to make a significant and original contribution to these fields through conveying the connection between the inner and outer worlds of mediation for the mediator. In addition, it does so in a way that should trigger both emotional and cognitive reactions in the reader, contributing to a different level of exchange in relation to this particular conflict process. In so doing it also provides an impulse and a

challenge to others to provide and/or generate such data both about mediation, and about the interface of the inner and outer worlds in other conflict processes.

Richmond (2008: p.162-3) calls for the development of a research agenda to develop multiple conceptions of peace focused upon the everyday life of their constituents in the context of an institutional framework and social contract. Ramsbotham, Miall and Woodhouse pick this up, advocating a conception of peace which is *'broadly representative of all actors at multiple levels...and of multiple identities'* and are vehement that this *'transformative cosmopolitanism'* should *'not [be] a covert name for imposing hegemonic interests under a subterfuge of unexamined 'universal values', but a genuine and inclusive local-global effort to determine what contributes to human welfare in general and to human emancipation world-wide'* (Ramsbotham et al. 2011: p.265).

If this is taken as a legitimate project, then in order to genuinely uncover covert hegemonic discourses of different fields, never mind 'universal values', comparative methodology is useful tool to protect against the temptation to build theoretical and the practical level silos dominated by particular academic disciplines or professional groups.

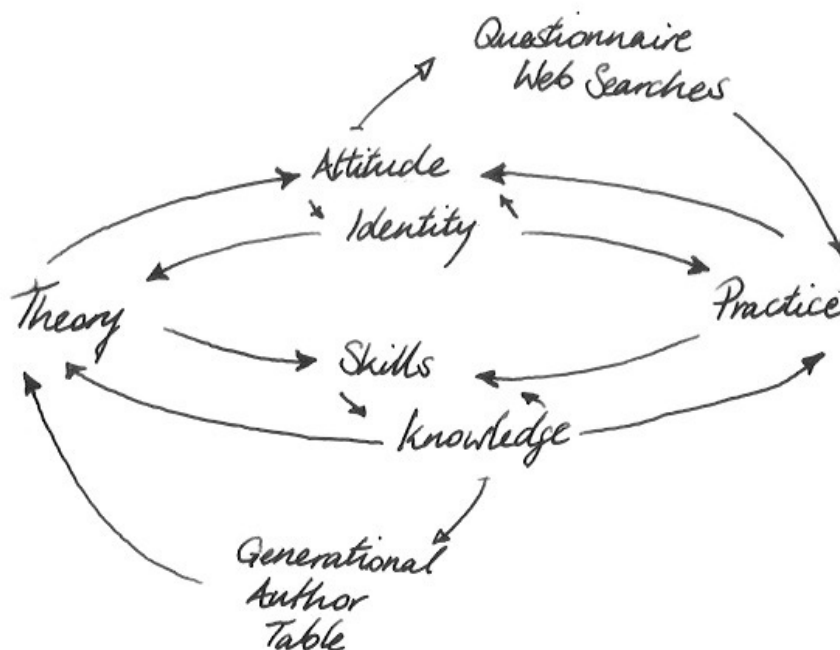
This furthers Burton's call for interdisciplinarity by bringing civil-commercial legal discourse into the CR picture. Interdisciplinarity in the context of mediation demands awareness of where knowledge 'communities' are being used to silence ideas and where heterodoxy needs to be fostered in order to gather and analyse data that is inaccessible in any other way. Applying autoethnography further broadens the potential for different voices to be heard. Surely this is a fundamental part of such an emancipatory agenda?

## The ADR/CR Divide

Chapter 2 has analysed the literature of the two fields in relation to the origins, philosophical approach, conceptualisation, definition and mediation in the two fields. The literature provides strong evidence of there being a divide in each of these areas, and that it is impacting on the transfer of knowledge and information between these fields.

The literature review also highlighted the need to test this analysis by gathering primary data to examine whether there is direct evidence of this divide. This chapter draws on three different data sources in order to test the analysis that there is a divide and to deepen the understanding of the impact of this divide on theory and practice. This combination of methods draws out information on theory and practice through knowledge testing and data on self-representation. This process and the location of the points of data extraction are represented by the following graphic:

Fig. 2: *The Theory-Practice Loop*



'Attitude and Identity' refer to the combination of how we view things and who we believe we are. These factors impact fundamentally on how we self-identify and how we consciously and unconsciously present ourselves to others.

'Knowledge' is shorthand here for 'things we know we know'; for instance, which books we have read and which authors we have heard of.

The first data source is the generational analysis of authors provided in the literature review. This research involved in this analysis was extensive, requiring data gathering on the academic qualifications, publications and key career landmarks of each of the authors included. This generational analysis is used to triangulate the data drawn from the questionnaire of CR and ADR practitioners.

The second data source was generated by the mediator questionnaire and provides insight into how a sample of individuals operating in the CR or ADR contexts self-identify, how they conceptualise mediation, their knowledge of the literature of the two fields, and who they identify as key influencers in theory and practice.

In order to interpret these findings more fully and to triangulate the information gathered, a third data source was used in the form of research of publicly available online information about the questionnaire respondents and about mediation organisations and other relevant bodies. This involved looking at their own web-sites and publications, and/or those of the organisations for which they work, for evidence of how they present themselves, or are presented by others, with their consent.

### **Data generation summary**

The previous chapter presented the methodology behind each of these data collection methods, including detailed information on sampling and data analysis. Before getting into the results a brief recap of the most important information on the data generation will be provided.

The emphasis in both fields was the English-speaking context (UK, USA and South Africa), but with boundary-crossing experience present in the profile of many (whether between these countries or third countries). The aim was to get some cross-section in terms of age (ca. 35-80) in both cohorts, with the challenge of substantive practical verifiable experience being a challenge at the lower end of the age range. Despite the lack of gender parity in either field, near gender parity was achieved in the sample, to try to contribute to breaking the pattern of women's voices being faded out through justifications of 'representative sampling'<sup>54</sup>.

The sampling criteria can therefore be summarised as follows:

- Externally verifiable practice experience in track II/NGO/Commercial mediation
- Externally verifiable engagement in writing/teaching/training on mediation
- To maximise the age range represented in the sample
- To get as close to gender parity as possible
- Inclusion primarily of practitioners and scholar-practitioners
- Inclusion of mono-lingual and multi-lingual respondents in both ADR & CR samples
- Experience and knowledge of the English-speaking contexts of either ADR or CR.

The questionnaire responses do not ask directly whether the mediator respondents experience the impact of the divide in the way that I describe in the later chapters of this PhD, or about whether they believe that information can or can't be transferred across the boundary. This would of course be interesting but is way beyond the scope of this study and its importance will be returned to in the concluding chapter.

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<sup>54</sup> Even traditional methodology endorses over-sampling matters of interest. See for instance the work of Philip Hauser Kitagawa, E. M. and Hauser, P. M. (1973) *Differential mortality in the United States: a study in socioeconomic epidemiology*. Vital and health statistics monographs. Cambridge, Mass.,: Harvard University Press..



The response rate highlights the success of both the sampling strategy and the instrument design:

|                                |        |
|--------------------------------|--------|
| Questionnaires sent            | 37     |
| Number of respondents          | 28     |
| No of CR respondents           | 12     |
| No of ADR respondents          | 16     |
| Overall Response rate (CR/ADR) | 75/76% |

The questions were:

First: Self-definition: Academic; Practitioner; Scholar-Practitioner; Other:\_\_\_.

The second question was a sample author list, with options given in a grid: “read; skimmed; heard of; not heard of”. The authors were:

|                         |                              |
|-------------------------|------------------------------|
| Boulding (1988)         | Mackie, Miles & Marsh (1995) |
| Boulle & Nesic (2001)   | Mayer (2009);                |
| Burton (1990a);         | Miall, Woodhouse, Ramsbotham |
| Bush & Folger (2005);   | (2005);                      |
| Curle (1986);           | Mnookin (2000);              |
| Fisher & Ury (1981)     | Moffitt & Bordone (2005)     |
| Ronald J. Fisher (1997) | Richmond (2008);             |
| Galtung (2002);         | Rifkin (2001);               |
| Hope (2009)             | Rosenberg (1999);            |
| Lederach (2005)         | Touval & Zartman (1985)      |

Third and Fourth: “Authors I would cite as being influential in my work on mediation:” and “Authors I would cite as having actually influenced my practice:” For simplicity the first question has been referred to as ‘Theory’ and the second as ‘Practice’ however, this ambiguity is accounted for in the interpretation of the results.

Five and Six: If you were to put mediation approaches on a spectrum, what the ends would be? If mediation practice is part of what you do, where would you place yourself on this spectrum?

### **The Divergence and convergence of ADR and CR**

The results of the questionnaire generally support the hypothesis that there is a divide between the two fields, but that it is not a complete and total split. There is evidence of boundary crossing between the fields in terms of theory, particularly amongst respondents whose responses indicate a high level of reading. This supports the hypothesis that the information used in the different fields is, at least in part, relevant to both sides of the divide.

There is evidence that the divide is particularly marked in the practice context is highlighted by the results of the questionnaire in relation to 'authors who have influenced my practice' and on the spectrum of approaches to practice and self-location.

The following section is structured in five sections. There is an initial analysis of the sample demographics and the questions this analysis raise around professional background and gender. The following section that looks at the self-definition and the scaling questions and draws out the variations in self-perception of mediators from the two fields and conceptualisation of mediation. This is followed by analysis of the results of the sample author list question, the influences named by the respondents with a final section that meshes these results with the generational author table first used in the literature review.

The final section of this chapter connects this information with the results of the analysis of the historical connections between key authors and publications in the two fields, in particular Roger Fisher and John Burton.

### Demographic Analysis of the Mediator Sample

Demographic information on the respondents was verified from information that they or the organisations they work for make publicly available. This information has been handled to ensure the protection of anonymity. The demographics of the two groups of respondents demonstrate different patterns that are indicative of elements of division and cultural difference between the two fields. The first part of this section will present these findings. It is important to reinforce the limitations of the data given the size and specificity of the sample.

#### Gender

There was a deliberate choice to sample in a way that got as close to gender parity as possible, but without compromising any of the other sample criteria. The result is a small male majority in both samples, and the m/f balance within the CR and ADR samples is similar:

*Fig. 3: ADR/CR Respondent M/F demographics*

|     |        | No. | %   |
|-----|--------|-----|-----|
| CR  | Male   | 7   | 58% |
|     | Female | 5   | 42% |
| ADR | Male   | 9   | 56% |
|     | Female | 7   | 44% |

As previously mentioned, the sampling deliberately included a range of seniority in age and it is worth noting that age and status do not necessarily correspond to the level of practical mediation experience. If I had selected only on the basis of age and status the demographic would have looked rather different as is evident from the senior, high status mediators selected for exposure in “Kings of Peace, Pawns of War” (Martin 2006) and in “Mediators on Mediation” (Newmark and Monaghan 2005) or CEDR Chambers:

*Fig. 4: 'Elite' mediator demographics*

|                     |        |    |      |
|---------------------|--------|----|------|
| ADR (CEDR Chambers) | Male   | 13 | 76%  |
|                     | Female | 4  | 24%  |
| CR (Martin)         | Male   | 6  | 100% |
|                     | Female | 0  | 0%   |

This highlights the obvious lack of anything approaching gender parity in fields that are not (in principle) averse to the idea of equality and, in the case of much of the mainstream CR work vociferously protest against oppression and claim emancipatory intent. This combines with the many conversations I have been involved with in both fields where people have explained to me (presumably based on gender role-assumptions) that women are 'natural' mediators, thus rather reinforcing the results of studies of prejudice that highlight that positive prejudice does nothing to counter negative prejudice in practice (Morrissett and Stuhlmacher 2006).

Just under half of the female respondents (particularly some of the highest status and most experienced) included informal apologetic messages, indicating that their opinions/response/experience couldn't be particularly helpful! I didn't receive a single response from any of the male mediators of this type. This observations of gendered behaviour in terms of verbally taking credit and status in relation to action and professional competence (Tannen 1995); a question that would be worthy of further exploration given the aspiration to support gender empowerment and inclusion in conflict situations is theoretically supported in both ADR (Carroll 2013) and CR (Brank 2013).

### **Professional Background**

In the process of building the CR generational table and research on the backgrounds of the generation involved in Conflict in Society (De Reuck and Knight 1966) the complete absence of lawyers, in an otherwise very interdisciplinary group, was striking. Professional background was not used as one of the sampling criteria for the questionnaire respondents, making the fact that the respondents clearly reflect this division interesting.

Unlike the generation involved in the 1966 generation, the CR respondents in this study almost all have postgraduate qualifications in peace and/or development studies in some form. However, looking at their undergraduate backgrounds, well over half of the respondents from the CR field come from a range of social science backgrounds, with the rest ranging across engineering, humanities and language backgrounds:

*Fig. 5: CR Analysis of Gender and Professional Background*

|                                                  | No. | %    |
|--------------------------------------------------|-----|------|
| Non-Lawyer                                       | 12  | 100% |
| Social Science (Peace Studies; IR; Anthropology) | 7   | 58%  |
| History                                          | 1   | 8%   |
| Planning / Engineering                           | 2   | 16%  |
| Languages / European Studies                     | 2   | 16%  |
| Law                                              | 0   | 0%   |

Given the importance of international law within the context of IR and the degree to which interdisciplinarity is considered fundamental to CR (Ramsbotham et al. 2011) it is interesting that whilst there is a wide diversity of the undergraduate degrees there is a complete absence of practitioners hailing from a legal background.

The ADR sample presents a different profile: They representative of the author table with the overwhelming majority having a background in law (75%) with the majority of the remainder coming from social science and psychology backgrounds.

*Fig. 6: ADR Analysis of Gender and Professional Background*

|                                         | No. | %   |
|-----------------------------------------|-----|-----|
| Law                                     | 12  | 75% |
| Social Science (Economics, Social Work) | 2   | 13% |

|            |   |    |
|------------|---|----|
| Psychology | 1 | 6% |
| Art        | 1 | 6% |

This highlights the domination of ADR by lawyers and CR by social science. It also highlights that in terms of practitioner background there may be more influence on ADR by social science than there is by law on CR. Despite the small sample size this represents a highly statistical significance:

*Fig. 7: Statistical significance of Professional Background*

|     | Law | Other |
|-----|-----|-------|
| CR  | 0   | 12    |
| ADR | 12  | 4     |

$P < .001$  for Fisher's Exact and chi-square tests.

This subject is picked up again later, as it connects both with the analysis of the recognition test of the sample book list, as well as the analysis of the table of CR and ADR authors by generation.

### **Gender and Professional Background in ADR**

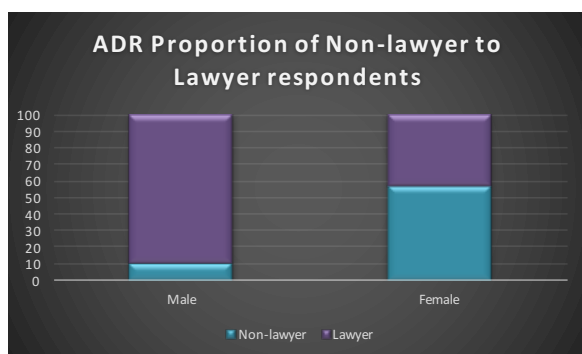
If the ADR sample is analysed by professional background and gender an interesting pattern emerges. The 25% of the non-lawyer ADR cohort are split as follows by gender:

*Fig. 8: ADR Analysis Gender and Professional Background*

|                              |   |                           |
|------------------------------|---|---------------------------|
| Total Non-Lawyer Respondents | 4 | (25% of total ADR sample) |
| Male Non-Lawyers             | 1 | 25%                       |
| Female Non-Lawyers           | 3 | 75%                       |

While 25% of the overall ADR sample are non-lawyers, 75% of the non-lawyer respondents are women. Once squared with the overall numbers within the male and female cohorts the *proportional result* within the ADR group are very different:

Fig. 9: ADR Professional Background by Gender



|                                             |     |
|---------------------------------------------|-----|
| Proportion of male non-lawyer respondents   | 11% |
| Proportion of female non-lawyer respondents | 57% |

With such a small sample, any hypothesis on why this is must remain tentative. However, if this data is triangulated with data from other sources including easily publicly available information such as the proportion of women and non-lawyers on ADR mediator provider panels<sup>55</sup> it is possible make some tentative suggestions:

Fig. 10: ADR Gender division of Non-lawyer Mediators

|                      |                    |   | Total M/F | Prop. total |
|----------------------|--------------------|---|-----------|-------------|
| Questionnaire sample | Male Non-lawyers   | 1 | 9         | 11%         |
|                      | Female Non-lawyers | 3 | 7         | 57%         |
| CEDR Chambers        | Male Non-lawyers   | 2 | 13        | 15%         |
|                      | Female Non-lawyers | 2 | 4         | 50%         |

My samples in both CDR and ADR include more women than seems to be common. However, in relation to the proportion of female mediators with legal and non-legal backgrounds it seems to be fairly representative of the proportions of one provider’s panel.

Whilst all the non-lawyer female mediators in my respondent group and on the CEDR chambers group have a wide range of mediator experience, they are almost all promoted for workplace/employment work. Both these areas could be

<sup>55</sup> The simplest publicly verifiable data available to support such assertions are the mediator panels available on websites such as [www.cedr.com](http://www.cedr.com) cited above.

characterised within the context of commercial mediation as the closest thing to 'women's work'; in other words, specialisms that are considered more acceptable areas for women generally and non-lawyers to operate in (Carroll 2013) (Morrissett and Stuhlmacher 2006)<sup>56</sup>.

This is despite the fact that employment law it is just as much a specialist area of law (including the use of tribunals rather than 'normal' courts) as construction, IP, clinical negligence, as well as the fact that mediation parties generally have lawyers present at mediation. In other words, mediation in the ADR field generally requires a level of relevant legal knowledge, and this is no less the case for employment than for other areas of practice.

The focus and sampling of this study does not allow firm conclusions given the results of the work done in the context of peace keeping (Karim and Beardsley 2017) to mention one example that suggests the same sort of boundaries being imposed implicitly on the activity and assumed competence of women in the area of mediation. The practical experience and impact of the influence of gender and age assumptions is picked up in the autoethnographic episode *"You're the Mediator?"*.

Given legislation against gender discrimination and the predominance of lawyers it is fairly rare for people to run the risk of flagrantly and explicitly saying that women are not suited to other types of mediation. In practice, even where there is considerable evidence of expertise and experience in other fields a range of mediators (both female and male) have confirmed this to me on an anonymous basis. However, in order to have a true and representative idea of

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<sup>56</sup> There is little that demonstrates this directly, but oblique evidence in writing: Whilst Carroll she doesn't explicitly mention workplace and employment, these are areas associated with 'emotional' content. Morrissett's study demonstrates different perceptions of males and females as mediators and the impact of stereotyping. She also highlights the lack of research on mediation. Consistent casual stereotyping to me, and other female mediators of the 'oh yes, well women are good at dealing with emotional cases; men are better at the heavy commercial stuff' are still pretty routine.



the scale and nature of this problem data needs to be gathered on a different basis and scale, and of course in a way that makes disclosure safe.

### **Demographic Analysis: Conclusions**

The professional background of the two cohorts of CR and ADR professionals confirm the hypothesis of a divide between the fields. This is indicated by the overwhelming domination of the ADR cohort by those with a legal background, particularly amongst male mediators, and a complete absence of those with a legal background from the CR cohort. However, the presence of social scientists in both cohorts suggests that there may be elements of transfer in the two fields and that it is a divide rather than a complete rift.

The sampling criteria attempt to bring out the female presence in these fields, despite the evidence that they have both been very male dominated. This point is picked up again in relation to the sample author list and the generational literature analysis later in this chapter. An area for further research which emerges out of the analysis of this sample is that whilst women are having some success in entering both fields, they remain seriously underrepresented at the higher levels. Some of the analysis in relation to the ADR cohort suggests that women are being contained within gendered boundaries in relation to their practice. There is enough evidence to suggest that issues around gendered restriction are worthy of serious further research. This is particularly the case given the general aspiration of both fields not to be agents of oppression.

This study cannot draw conclusions on ethnic identity, other than to note the reality of woeful underrepresentation. Two of the sixteen ADR mediators being from ethnic minorities is probably, sadly, an overrepresentation in terms of overall mediator demographics. The CR cohort does not include any ethnic minority mediators; reflecting my experience of there being involvement of 'local mediators' in the 'field' context, but little diversity (in comparison to national demographics) amongst the UK/US CR practitioners.

**Self-definition: Scholar, Practitioner, Academic, Scholar-Practitioner**

The hypothesis was that the divide would be evidenced by the way the CR and ADR cohorts would identify themselves. As mentioned the questionnaire gave them the choice of Academic, Scholar-Practitioner, Practitioner, Other and their responses were triangulated with research of publicly available information on the respondents to see how they, or the organisation they work for, present them. It was thought that the majority of the CR cohort would choose the 'scholar-practitioner' label as it is a common term that carries status within the CR context. It was expected that the majority of the ADR cohort would select the term 'practitioner' as my observation of the tendency in this field to take a negative view of academia, whilst in terms of credibility practical accreditation in mediation is considered crucial.<sup>57</sup>

These expectations were largely confirmed by the responses. All but one of the ADR respondents defined themselves as 'practitioner'. All but two of the CR respondents chose some variation of Scholar-Practitioner, with only one choosing 'Practitioner' and one choosing 'Academic'<sup>58</sup>.

*Fig. 11: Self-designation*

| <b>Self-Designation</b>          | <b>Raw</b> | <b>%</b> |
|----------------------------------|------------|----------|
| CR: Scholar or practitioner      | 3          | 25%      |
| CR: Scholar-Practitioner         | 9          | 75%      |
| ADR: Scholar-Practitioner        | 1          | 6%       |
| ADR: Practitioner                | 15         | 94%      |
| <b>Adjusted for book authors</b> |            |          |
| ADR: Scholar-Practitioner        | 6          | 38%      |
| ADR: Practitioner                | 10         | 62%      |

<sup>57</sup> This was based on a range of practical experience of a field where the term 'academic' tends to be used as 'an absence of useful, practical or useful knowledge' and that therefore even 'scholar' or 'scholar-practitioner' would represent a reduction in credibility and status, over 'practitioner'.

<sup>58</sup> Variations included Practitioner-Scholar, Academic (and some practice), and in two cases where the question was missed, but as I have very substantive information that the individuals have a high level of both academic and practice experience, I have designated them scholar-practitioner.

The evidence from the websites of a selection of NGOs operating in the field of CR suggests that having a PhD is seen more-or-less as a prerequisite for working at the higher end of the profession. The biographies of mediator/conflict specialist staff on the websites of organisations involved in practice such as Conciliation Resources, International Alert and the Berghof Foundation indicate that practitioners are required to have a high level of academic qualification with the majority at mid and senior levels (and not uncommonly even at junior levels) holding PhDs<sup>59</sup>, whilst practical accreditation<sup>60</sup> as a mediator is rarely mentioned and therefore does not seem to be a primary source of credibility, or status. Within this context it seems that 'Scholar-Practitioner' conveys the possession 'real-world' connection combined with a positive view of the status of being a scholar.

The equivalent ADR websites, such as Mediate.com, CEDR, Clerksroom etc. status is conveyed through practical mediator accreditation (such as those offered by CI Arb or CEDR, LEADR or AA<sup>61</sup>), combined ideally with legal qualifications (or failing that, qualifications related to a specific area of commercial practice such as surveying, HR or Accounting), the number of years of practical experience and/or numbers of mediations conducted.

Academic qualifications and/or publications may be included but, as demonstrated by the biographies of those from the CR context, is in no way

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<sup>59</sup> <http://www.c-r.org/who-we-are/people-and-partners/our-staff>  
<http://www.international-alert.org/staff>; <http://www.berghof-foundation.org/about-us/people/> last accessed 24.09.17

<sup>60</sup> Usually non-university training involving one-to-one coaching on practical mediation skills, rather than University based courses with 1 lecturer many students, with minimal or no individual practical attention and assessment done on the basis of written work and/or fragments of practical word.

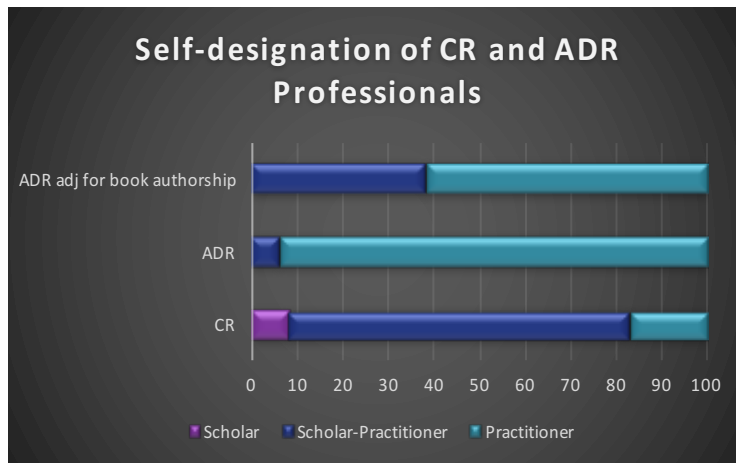
<sup>61</sup> In the UK/European context this tends to be both accreditation in practical mediation skills and being 'accredited' or 'registered' by some kind of official mediator body e.g. <https://www.cedr.com/skills/mediation-training/> / <http://www.ciarb.org/training-and-development/mediation-courses/> / <https://www.resolution.institute/training/mediation-training/leadr-meditation-training-and-assessment> / <https://www.adr.org/aaa-panel> In the US recognition by the AAA or similar provider is more pivotal than skills-based accreditation.

given the same prominence. Given that well over a third of the ADR respondents have published substantial books on the subject of mediation and many of them have done lecturing at a range of universities, there is substantive evidence that even those with a definite claim to scholar status in the ADR field don't use this as a primary "identity" label.

This could be taken simply as the two fields having different academic and practical expectations of those going into CR than into ADR, with CR expecting PhDs and ADR expecting practical accreditation and both sharing the judgement that, in essence, doing a PhD is the pre-requisite for the designation 'scholar-practitioner'. However, not all the CR cohort hold a PhD and whilst none of the ADR cohort publicly admit to having a PhD, I know of examples in the ADR context of excluding a PhD from the CV. The simple logic of the question: Does someone only become a 'scholar' if and when they are awarded a PhD? Given that PhD candidates seem to be generally firmly accepted as part of a scholarly community, even in strict academic contexts, this seems to be a highly questionable logic.

Whilst just having 'a book' published might not be considered qualification alone, where such a publication is substantive and demonstrates thought, research and analysis it could be used as a substitute 'metric' for the title. If the ADR result is amended so that 'practitioners' are re-designated as "scholar-practitioners" where that individual has published on mediation, the differential looks much less extreme. Without the self-designation process this difference between the fields could have been obscured. The self-designation makes for a very polarised graph:

Fig. 12: CR Self-designation and ADR Externally-adjusted designation



Therefore, the two fields seem to have different ways of demonstrating credibility, different attitudes to the status value of academia and research. These results provide evidence that the two fields may have distinct cultures, attach different values to the same practical and academic status and demand different 'qualifications' from their practitioners.

If this evidence is triangulated with the evidence of the attitude of Roger Fisher an interesting pattern emerges. As demonstrated later in this chapter, Roger Fisher had an overwhelming level of influence in the ADR context, both through his own publications and his position within PON. His clear rejection of the 'academic' in favour of things that would be 'useful to people in practice' (Fisher 2005), despite his position within academia, highlights the privileging of the 'practitioner' status and the rejection of the 'scholar' label.

### Conceptualisation of mediation practice

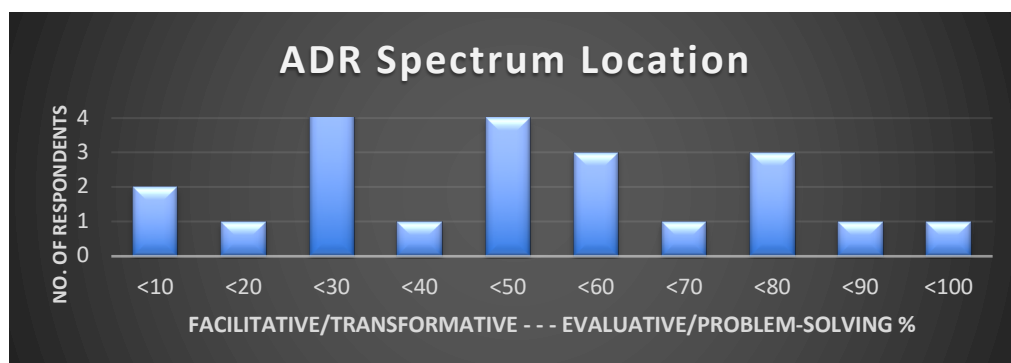
Having surfaced the indications of a cultural difference in the way the mediators from the two fields view themselves, the scaling question was designed to gather information about the conceptualisation of mediation and the mediator role. The hypothesis was that there would be internal consistency in the language used in each field, with variation between the two fields. This was broadly confirmed.

In summary, there was a certain homogeneity of response amongst the ADR respondents, with more diffusion amongst the CR respondents. The results indicate contrasting conceptualisations of mediator activity and practice behaviour. Both use terminology familiar within the discourse of the relevant field. The ADR mediators focused on the mediator approach with (in most cases) a facilitative to evaluative scale. In contrast, CR mediators gave a variety of scales. Most fell into two groups: Either 'elicitive to muscle', or 'informal/inclusive to official/elite'. These results are worthy of further exploration.

Eleven of the 16 ADR respondents used some variation of the spectrum Facilitative – Evaluative. The majority of those who responded to the request to place themselves on this spectrum placed themselves between 0-50%; in other words, at the facilitative end of the spectrum. A minority placed themselves between 50-75% and two indicated that they used the full range *depending on what the parties wanted from them* with the emphasis on the agency and choice of the parties in determining the level of evaluation by the mediator. This is represented at figure 11 by adding the base level of 2 mediators at each value, which whilst mathematically incorrect, gives a more representative visual on where the mediators from this group see themselves.

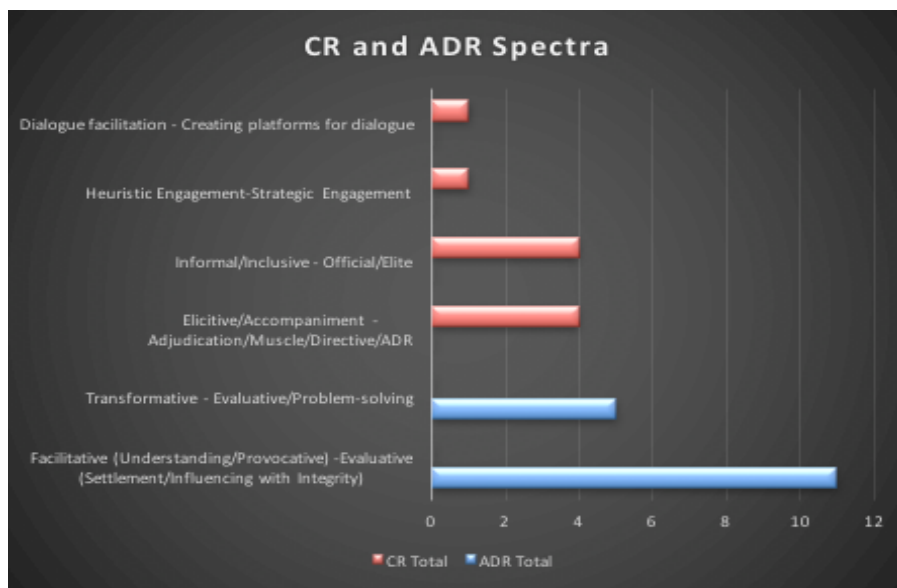
The other five chose variations of Transformative – Evaluative/Problem-solving. The CR context tends to imply that the transformative nature of CR contrasts with the superficial, status quo-oriented ADR context (Burton 1996). This finding presents a contrast of self-perception and representation of ADR in the CR field.

Fig. 13: ADR Spectrum and Location of Respondents



The CR respondents gave a much more diverse group of responses, represented by the red bars in *figure 14*. These presented divergent ways of conceptualising mediation. One of the two main groups represented defined the poles as the societal level of the intervention and/or its level of inclusiveness. This conceptualisation puts social levels as the primary differentiation in mediation. This suggests that the precise interventional role and corresponding individual/group dynamic are secondary, whilst the entry point in terms of social level (rather than what is done on entry) is the key factor of interest.

*Fig. 14: CR & ADR Mediation spectra*



As with ADR, one group of CR respondents defined the poles by the role of the mediator. Two of these reflected specific personal projects or conceptualisations of the respondents. All the others used elicitive (and in 1 case accompaniment) at one end, with a range of common CR terms for evaluative approaches including adjudication, muscle, directive and ADR. The last one illustrates the tendency of CR to represent ADR mediation practice being essentially evaluative, mediator-directed settlement and the clash between this and ADR self-perception.

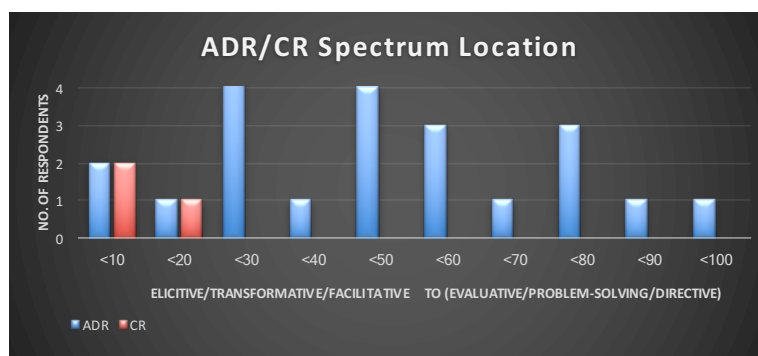
Many of the ADR respondents asserted that their approach varies according to the wishes of the parties and placed themselves on their own facilitative to evaluative spectrum in the range left to middle (i.e. at the facilitative end).

Only three of the CR respondents who chose a mediator-oriented scale placed themselves on this spectrum, making a direct comparison with the ADR context limited. However, as all three placed themselves on the far left (elicitive) it does suggest a conceptualisation of poles, rather than a spectrum, with themselves ‘poles apart’ from the directive. This contrasts with the ADR conceptualisation that suggests movement over time, connected directly to party-driven mandate, with a self-defined limit that stops well short of being totally evaluative, directive or adjudicative.

Given that there is a frequent focus within CR writing on its transformational nature, it is interesting that it was some of the ADR practitioners that placed ‘transformative’ at one end of the spectrum. None of those with a CR background did so. Chris Moore, of CDR Associates, and recognised by those in both the CR and ADR fields expresses concern about mediators having and insisting on their own transformative agenda (Moore and Benjamin 2017).

This highlights the somewhat contradictory discourse in relation to transformation; either the connection with ‘transformation’ is at the conceptual level, rather than the practical level, or that ‘transformative mediation’ as a practice has not taken hold in CR to the extent that one might expect. The final possibility is that practitioner concerns in the ADR context (around the of setting the mediator agenda as enabling ‘transformation and empowerment’ when the parties’ agenda may or may not include or encompass transformation) may be shared in the CR field.

*Fig. 15: ADR/CR Spectrum Location*





This question does illustrate the difference of CR and ADR in so far as several of the CR respondents defined mediation approaches not by what is or isn't done by the mediator, the process, or the outcome, but rather by societal level. Whilst difficult to interpret alone, this does seem to suggest two possible interpretations: Either it identifies societal level, rather than mediator role, or mediation process, as the defining feature of mediation – meaning that different things are 'mediation' at different levels of society; or that there is an assumption of the clarity of the definition of mediation that can be applied at different levels of society, and the 'approach' is applied by identifying social level.

The hypothesis was that there would be different reading patterns of the selected authors in relation to the two cohorts, with limited overlap. Respondents were asked to tick one of the four categories 'read'; 'skimmed'; 'heard of'; 'not heard of' in relation to a selection of 20 authors. *Figure 16* is a modified version of the generational author table included in the literature review with the authors included in the sample author list included and colour coded to indicate different levels of recognition of the authors.

Author names were used (rather than book names) as many of the authors have published multiple books. However, groups of author names were given where, due to a landmark publication, the names tend to be associated with another; the aim was to increase name recognition and to reduce the likelihood of confusion with other authors. Two of the authors included in the original list were excluded from the results. Hope, because she was unheard of by any of the respondents. The responses to Rifkin followed a very strange pattern, resulting in follow-up with respondents for clarification. It turned out each respondent was associating the name with a different author; for instance Janet Rifkin, Jeremy Rifkin, Malcolm Rifkind and Leonard Riskin.

# Sample author list: Analysis of differential levels of recognition

Fig. 16: Generational Author Table: Selected Questionnaire Authors

(Large version at Appendix 2)

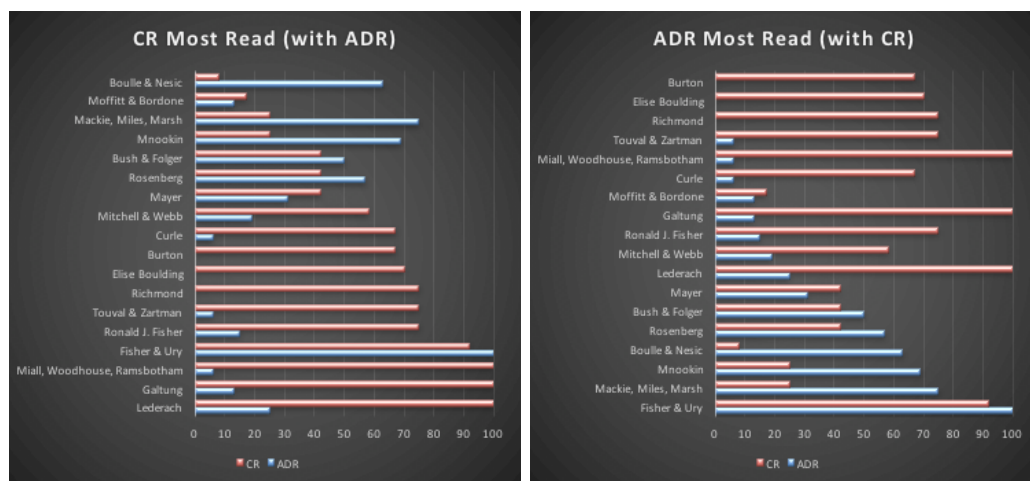
|                  | Blue text - Authors from ADR background                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Blue text, blue fill                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Blue text, red fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Blue text, total blue fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | n/a                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Purple text, total purple fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
|------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------|
|                  | Author included, but under 20% read                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ADR read 30-40% by both                                                                                                                                                                                                                                                                                                                                                                                                                                              | Author ADR read 40%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Author CR read 40%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Author CR read 40%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Read by 90%+ ADR and CR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
|                  | Red text - Author from CR background                                                                                                                                                                                                                                                                                                                                                                                                                                                              | n/a                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Red text, blue fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Red text, red fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Red text, dark red fill                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
|                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | CR read 30-40% by both                                                                                                                                                                                                                                                                                                                                                                                                                                               | Author CR read 40%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Author CR read 40%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Author CR read by 90%+                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>2007-2016</b> | <p><b>Debbie de Girolamo</b><br/>Anthropology<br/>pub. 2013</p> <p>Ethnographic research on mediation in the commercial context.<br/><i>The Fugitive Identity of Mediation</i></p>                                                                                                                                                                                                                                                                                                                | <p>Jacques Faget<br/>Law<br/>pub. 2008/2011</p> <p>Tight definition of mediation (from legal field?)<br/><i>Mediation in Political Conflicts</i></p>                                                                                                                                                                                                                                                                                                                 | <p>Douglas E Noll<br/>pub /2010<br/>Law<br/>Application of 'Modern Diplomatic Strategies' to world conflicts<br/><i>Evasive Peace</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>1997-2006</b> | <p><b>Robert M. Mesakin (Pepet, Tulumalo)</b><br/>pub. 1986/2000/2004</p> <p>Law</p> <p>Children and Family Law; Negotiation, 'Conflict Resolution'</p> <p><i>Child, Family and State; Beyond Writing: Negotiating to create value in deals and disputes</i></p> <p><b>Max H. Bazerman</b><br/>pub. 1983/2007<br/>Economics; Organisational Psychology; Economics</p> <p>Negotiation; Decision Making; Organisational Behaviour</p> <p><i>Negotiating in Organisations; Negotiation Genus</i></p> | <p><b>Douglas Stone, Bruce Patten &amp; Sheila Heen</b><br/>pub. 1999</p> <p>Law, Business</p> <p>Difficult Conversations; Conflict; structure of communication</p> <p><i>Difficult Conversations: How to discuss what matters most</i></p> <p><b>John Crowley &amp; Kathryn Graham</b><br/>pub. 2000</p> <p>?</p> <p>Trademarked the term "Interactive Mediation"</p> <p><i>Mediation for Managers: Resolving Conflict and Rebuilding Relationships at Work</i></p> | <p><b>Michael L. Moffitt &amp; Robert C. Bordone</b><br/>pub. 2005</p> <p>Law</p> <p>ADR, Negotiation; Mediation</p> <p><i>The Handbook of Dispute Resolution (contributes incl. Bazerman, Shapiro, Heen, Pepet, Moffitt)</i></p> <p><b>Lawrence Boule, Miryana Inesic</b><br/>pub. 2000</p> <p>Law</p> <p>Theory and practice of mediation in legal context</p> <p><i>Mediation: Theory, Principles and Practice; The Mediation Triangle</i></p>                                                                                                                                                     | <p><b>Bernard Mayer</b><br/>pub. 2004/2009/2012</p> <p>Social Work; Psychology;</p> <p>Long term conflict, multiple roles of third parties; Intractability; Interdisciplinary application;</p> <p><i>Beyond Neutrality; Staying with Conflict; The Dynamics of Conflict</i></p> <p><b>Ken Gole</b><br/>pub. 2000/2002/2005</p> <p>Law</p> <p>Personal &amp; Organisational Conflict; Narrative mediation</p> <p><i>Resolving personal and organisational conflict; Mediating Dangerously; Resolving conflicts at work</i></p>                         | <p>Lise Schirch<br/>pub. 2004/2005</p> <p>International Relations/ CA and Resolution</p> <p>Peace Building &amp; Security</p> <p><i>Women in Peacebuilding Resource &amp; Training Manual; Little Book of Strategic Peacekeeping</i></p> <p><b>Marshall Rosenberg</b><br/>pub. 1968/1983/1999</p> <p>Clinical Psychology</p> <p>Communication; Compassion; Teaching;</p> <p>Diagnostic Teaching: A model for non-violent communication; Non-violent Communication: A language of life</p> | <p>John Darby<br/>pub. 1976 / 2003</p> <p>History</p> <p>Conflict; Northern Ireland; Peace Processes</p> <p><i>Conflict in NI; Contemporary Peacekeeping: Conflict, Violence and Peace Processes</i></p>                                                                                                                                                                                                                                                                                                                                                 | <p>Louis Kriesberg<br/>pub. 1973 / 1998</p> <p>Sociologist</p> <p>Link of constitutional level and social level of structure and conflict.</p> <p><i>Constructive Conflicts; The Sociology of International Conflicts</i></p> <p><b>Diana Francis</b><br/>pub. 2002/2010</p> <p>Modern Languages</p> <p>Conflict Transformation; Peace Activism;</p> <p><i>Peace, peace and power: conflict transformation in action</i></p>  | <p><b>Oliver Ramsbotham, Tom Woodhouse, Hugh Miall</b><br/>pub. 1999</p> <p>Peace Studies, History</p> <p>Internal info on process of track I processes</p> <p><i>Cosmopolitan conflict resolution</i></p> <p><b>Kings of Peace, Pawns of War</b></p> <p><b>Peter T. Coleman</b><br/>pub. 2000/2014<br/>Social and Organisational Psychology</p> <p>How to mediate (non-legal)</p> <p><i>The Handbook of Conflict Resolution: Theory and Practice (With M. Deutsch)</i></p> | <p><b>Harriet Martin, Antonia Peeter</b><br/>pub. 2006<br/>Journalism; Peace Studies?</p> <p>Schools counseling, conflict and narrative</p> <p><b>Oliver Richmond</b><br/>pub. 2005/2008<br/>Anthropology</p> <p>Cultural impact on conflict; critique of Burton</p> <p><i>CR - Cross-cultural Perspectives; Context and Pretext; Culture &amp; BHV</i></p> | <p><b>John Winslade &amp; Gerald Monk</b><br/>pub. 2000/2008</p> <p>Counseling ?</p> <p>Narrative Mediation; Practicing Narrative</p> |
| <b>1987-1996</b> | <p><b>David Richbell</b><br/>pub. 1997/2008/2015</p> <p>Construction &amp; Surveying</p> <p>Mediation</p> <p>CEMR Mediator Handbook; Mediating Construction Disputes; How to Master Commercial Mediation</p> <p><b>Andrew F Adani</b><br/>pub. 1980/90/2011</p> <p>Russian and Italian / IR Terry Waite How to Mediation and ADR from consumer perspective</p> <p><i>A Sudden Outbreak of Common Sense; How to resolve disputes without going to court; Perfect People Skills</i></p>             | <p><b>Karl Mackie, (David Miles, William Marsh)</b><br/>pub. 1991/1995</p> <p>Law, Business</p> <p>Practice of ADR in the UK</p> <p><i>The ADR Practice Guide</i></p> <p><b>Mark Amstey</b><br/>pub. 1983/1991</p> <p>? Labour Relations</p> <p>Labour relations; Negotiation; Mediation, Identity politics</p> <p><i>Working with Groups; Practical Peacekeeping: A Mediator's Handbook</i></p>                                                                     | <p><b>Stephen Covey</b><br/>pub. 1970/1989</p> <p>Religious Education; Business</p> <p>Effective Habits; Leadership; Interdependence</p> <p><i>The Seven Habits of Highly Effective People; The Eighth Habit</i></p> <p><b>Hazel Genn</b><br/>pub. 1996</p> <p>Sociology; Law</p> <p>ADR, Mediation, Legal Reform, Civil Justice Systems</p> <p><i>Mediation in Action; Court Based ADR; Initiatives for non family disputes</i></p>                                                                                                                                                                  | <p><b>Leonard Riskin</b><br/>pub. 1984/1998/2014</p> <p>Law</p> <p>Broad and Narrow - Evaluative/Facilitative</p> <p>Suggests teaching mediation at law school; DR and Lawyers; Mediation orientations, strategies and techniques</p> <p><i>The Promise of Mediation; Designing med.</i></p> <p><b>Janet Rifkin</b><br/>pub. 1976/1984/1991</p> <p>Law</p> <p>Feminism; ADR; Narrative mediation</p> <p><i>Practice and Paradom: Deconstructing Neutrality in Mediation; DOR</i></p>                                                                  | <p><b>Robert A Baruch Bush; Joseph P Folger</b><br/>pub. 1994/2005</p> <p>Law; Organisational Development</p> <p>Transformative mediation - empowerment and recognition</p> <p><i>The Promise of Mediation; Designing med.</i></p> <p><b>Robert Cialdini</b><br/>pub. 1971/1984/2009</p> <p>Social Psychology, Business</p> <p>Persuasion, Influence;</p> <p><i>Influence: Science and Practice; Influence: The psychology of persuasion</i></p>                                          | <p><b>Ronald J Fisher, Loraleigh Keashley</b><br/>pub. 1994/1997/2005</p> <p>Social Psychology</p> <p>Interactive workshops; Peace-making through interaction</p> <p><i>Social Psychology: An Applied Approach; Interactive Conflict Resolution; Jacob Bercoivitch (+ Jeffrey Rubin)</i></p> <p>pub. 1984/1992 d.2011</p> <p>International Relations; Psychologist</p> <p>Quant on Hard/Soft mediation and effectiveness</p> <p><i>Social Conflict and Third Parties; Mediation in International Relations; CWM Dossier w. DeRouen&amp;Papieszna</i></p> | <p><b>Pamela Aal, Chester Crocker, Fen Osler Hampson</b><br/>pub. 1996</p> <p>International Relations; History</p> <p>Former sec of state - track I; 'Power' mediation</p> <p><i>Herding Cats; Grasping the Nettle; Taming intractable conflicts</i></p> <p><b>Wivienne Jabri</b><br/>pub. 1990</p> <p>International Politics</p> <p>Discursive conflict resolution</p> <p><i>Mediating Conflict / in southern africa</i></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>1977-86</b>   | <p><b>Christopher W. Moore</b><br/>pub. 1986/2014</p> <p>Political Sociology</p> <p>How to mediate</p> <p><i>The Mediation Process: Practical Strategies for Resolving Disputes</i></p> <p><b>William Wry</b><br/>pub. 1978/1981</p> <p>Social Anthropologist</p> <p>Negotiation; Third Side; Positive No</p> <p><i>International Mediation: Ideas for the Practitioner; Getting to Yes; The Third Side: The power of a positive no</i></p>                                                       | <p><b>Adam Curle</b><br/>pub. 1971, d. 2006</p> <p>Anthropologist; Educationalist; Philosopher</p> <p>Practical mediation experience in Biafra; Zimbabwe; Croatia</p> <p><i>Making Peace; In the Middle; Tools for Transformation</i></p> <p><b>Friedrich Glasl</b><br/>pub. 1980/2013</p> <p>Politics; Organisational Development</p> <p>Conflict management; Organisational Development; Mediation</p> <p><i>Konfliktmanagement</i></p>                            | <p><b>John Burton</b><br/>CAC 1966/1990 d.2010</p> <p>Clinical Psychology, Human Development</p> <p>Application of needs theory to CR; 2nd order change; problem-solving method</p> <p><i>Conflict in Society; Controlled Communication; World Society; Conflict-Resolution and Prevention</i></p> <p><b>William Zaretska (Yzouval)</b><br/>pub. 1978/1985</p> <p>International Relations</p> <p>Based 'power' mediators; Facilitators/Formulators/Manipulators</p> <p><i>The Negotiation Process: Theories and applications; International Mediation: Conflict Resolution and power politics</i></p> | <p><b>Christopher Mitchell (&amp; Webb)</b><br/>pub. 1983/2014</p> <p>Historian; International Relations</p> <p>Structure of International Conflict; T2 interventions; Horn of Africa</p> <p><i>The Structure of International Conflict; Zones of Peace; The Nature of Intractable Conflict</i></p> <p><b>Edward Azar</b><br/>pub. 1973/1990 d. 1991</p> <p>International Relations</p> <p>Potrated Social Conflict</p> <p><i>Theory and Practice of Events Research; International Conflict Resolution (w. Burton); Potrated Social Conflict</i></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>1967-1976</b> | <p><b>Roger Fisher</b><br/>pub. 1964/1978/1981/2005 d. 2012</p> <p>Lawyer</p> <p>International Conflict, Principled negotiation; Emotions and neg</p> <p><i>International conflict and behavioural science; International Mediation; Getting to Yes; Beyond Reason</i></p>                                                                                                                                                                                                                        | <p><b>Johan Galtung</b><br/>PRIO 1960</p> <p>Philosophy, Sociology, Mathematics</p> <p>Positive Peace; Structural violence; Conflict Triangle</p> <p><i>Theory and Methods of Social Research; Peace: Research-Education-Action</i></p>                                                                                                                                                                                                                              | <p><b>Herbert Kelman</b><br/>pub. 1957</p> <p>Social-psychology</p> <p>Program on International Conflict Analysis and Resolution, Harvard; Interactive problem-solving</p> <p><i>International Behavior: A Social-Psychological Analysis</i></p>                                                                                                                                                                                                                                                                                                                                                      | <p><b>Kenneth Boulding</b><br/>JCR 1957, d.1993</p> <p>Economics</p> <p>Peace, Conflict, Defense</p> <p><i>Perspectives on the Economics of Peace; Conflict and Defense</i></p>                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>1957-1966</b> | <p><b>Morton Deutsch</b><br/>pub.1949/1962/1973/2000</p> <p>Social-psychologist</p> <p>Competition and Cooperation; Group Dynamics</p> <p><i>Theory of Conflict and Cooperation; Preventing WWII; The Resolution of Conflict; Handbook of Conflict Resolution</i></p>                                                                                                                                                                                                                             | <p><b>Abraham Maslow</b><br/>pub. 1954, d. 1970</p> <p>Psychologist</p> <p>Hierarchy of needs</p> <p><i>Motivation and Personality</i></p>                                                                                                                                                                                                                                                                                                                           | <p><b>Anthony de Reuck</b><br/>pub. 1966; d. 2017</p> <p>Physics</p> <p>CIBA publication, Reuck ed. contribs Deutsch, Boulding, Burton, Galtung, Rapoport, Nicholson et. al.</p> <p><i>Conflict in Society</i></p>                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>Lewis Fry Richardson</b><br/>d. 1953 pub 1960</p> <p>Mathematics, Meteorology</p> <p>Quant - logorhythmic evaluation of deadly conflict</p> <p><i>The Statistics of Deadly Quarrels</i></p>                                                                                                                                                                                                                                                                                                                                                     | <p><b>Anatol Rapoport</b><br/>SGS1954/1965 d. 2007</p> <p>Mathematical-psychologist</p> <p>Game &amp; General Systems Theory; Tit-for-tat to Axelrod; 2nd Order learning</p> <p><i>Operational Philosophy</i></p>                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |
| <b>1941-56</b>   | <p><b>Mary Parker Follett</b><br/>pub. 1898/1942, d. 1933</p> <p>PPE</p> <p>Business organisation; Leadership; Violence</p> <p><i>The Speaker of the House of Representatives; Freedom &amp; Coordination</i></p>                                                                                                                                                                                                                                                                                 | <p><b>Plitrim Sorokin</b><br/>pub 1941/1957 d.1968</p> <p>Criminology, Sociology</p> <p>Social and cultural dynamics</p>                                                                                                                                                                                                                                                                                                                                             | <p><b>David Mitrany</b><br/>pub 1943, d. 1975</p> <p>Functionalist approach to overcoming win-lose</p> <p><i>A Working Peace System</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <p><b>Quincy Wright</b><br/>pub 1942/1962 d.1970</p> <p>Political Science/ Law?</p> <p>War</p> <p><i>A Study of War; Preventing WWII</i></p>                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                       |

(N.B. A large version of the graphic in *fig. 16* can be found at Appendix 2.)

With the exception of Hope and Rifkin, the results largely followed the hypothesised pattern, highlighting the divide between the two fields in terms of the authors that they are recognising and reading.

Only 25% of the ADR respondents had ‘read’ or ‘skimmed’ something by Lederach, who was the only author read (not ‘read’ or ‘skimmed’) by 100% of the CR. The other authors read or skimmed by 100% of the CR cohort had been read by less than 30% of the ADR respondents (Miall & Ramsbotham & Woodhouse, Galtung). 0% of the ADR cohort had even heard of John Burton, Elise Boulding and Oliver Richmond. The ADR respondents most read authors (with the exception of Fisher & Ury, to which I will return) were at the bottom of the CR list with less than 30% of the CR respondents having read Boule & Nestic, Mnookin, Mackie & Miles & Marsh. This is illustrated visually in *Fig. 17*.

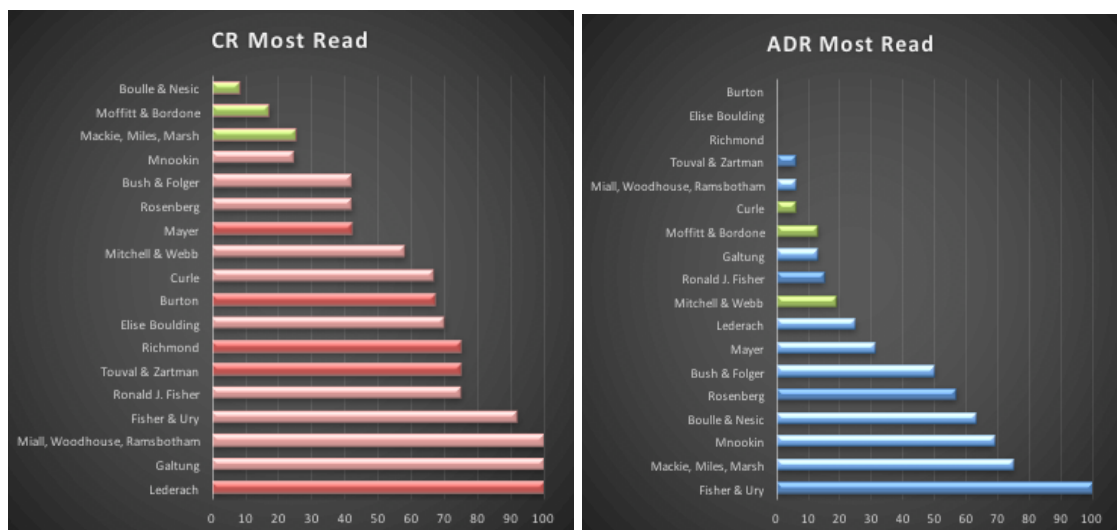
*Fig. 17: CR and ADR most read lists*



The following graphs demand that the reader look at the small print of the different order of the authors on the y axis. Putting the graphs next to each other also highlights the different breadth and depth of the two cohorts. This could be a symptom of a difference in the level of theoretical study and reading expected from practitioners from across the two fields, or that this difference

relates to the difference between a CR cohort who identify as ‘scholar-practitioners’ and an ADR cohort who identify as ‘practitioners’. An alternative explanation is that the ADR practitioners have read a wide range of other texts not included in this list. The final possibility is that more of the CR cohort used ‘skimmed’ as a face-saving device than the ADR cohort.

*Fig. 18: CR and ADR Most Read Lists*



The colour differentiation used in *Fig. 18* highlight two further patterns: A dark shade of red or blue indicates that all respondents marked ‘read’ (not ‘skimmed’). Assuming that asserting that you have ‘read’ a book leads to a deeper understanding and likely level of knowledge than skimming, it highlights some of the authors at the top and mid-levels of the results in both tables. It highlights that Lederach and Fisher & Ury have a particular status in the two fields having been read by 100% of the CR and ADR cohorts respectively. Fisher and Ury feature in fourth place with 90% the CR cohort acquainted with it.<sup>62</sup> Only 25% of the ADR cohort were acquainted with Lederach.

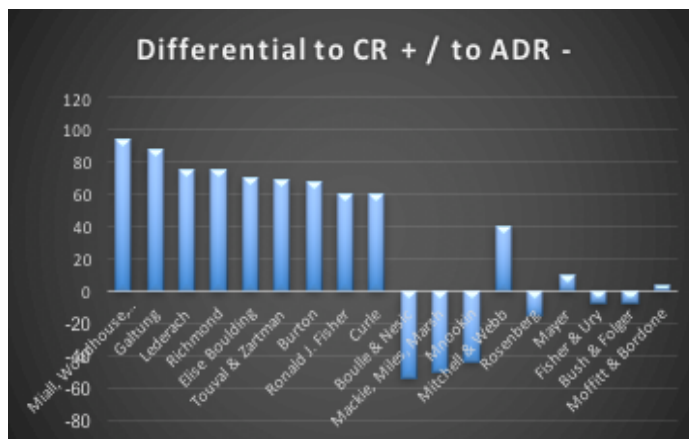
<sup>62</sup> Combinations of authors of particularly seminal books were given in association with each other rather than specific book titles, therefore in cases like ‘Fisher & Ury’ it is fairly safe to assume that the association was ‘Getting to Yes’.

The bars coloured green indicate that all respondents marked 'skimmed' (not 'read'). Due to the sample size this is in most cases between one and three people. This reinforces that the bottom three authors in the CR table are ADR authors. The bottom two, Boulle & Nesic, Mackie & Miles & Marsh, are respectively the second and fourth most read authors by the ADR cohort.

*Fig. 19* is designed to focus in on the differential levels of knowledge of authors. Minus scores indicate books read by ADR respondents, plus scores relate to CR respondents. By deducting the ADR score from the CR score for each author, a range of difference has been produced.

Those with low differential scores (right hand side of the graph) are the books I had hypothesised would be field crossing. Whilst those with high differential scores are mainly books that associate primarily with one or other of the fields. The notable exception is 'Fisher & Ury', to which I will return later.

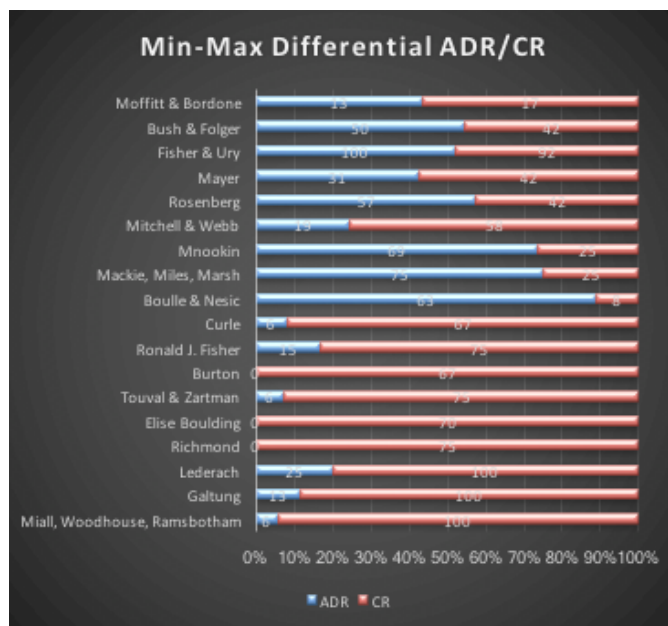
*Fig. 19: CR and ADR differential reading levels*



Bush & Folger; Fisher & Ury; Mayer and Rosenberg were read by a considerable *and similar* proportion of those in both fields, yielding therefore a low differential. Whilst this is also the case for Moffitt and Bordone (editors of a handbook on ADR) they received extremely low recognition scores from both fields meaning the low differential must be attributed to lack of recognition by both fields.

Lederach also had a reasonably high level of recognition from the ADR respondents, but because he has been *universally* read by those in the CR field there was a very big difference between the ADR and CR scores (meaning that he does not feature obviously in the above graph).

Fig. 20: ADR-CR Differential in relation to the test author list



The graphic above at Fig. 20 represents the same information in a way that may be clearer for some, as it includes the percentage of the respondents who have read that particular text.

**Sample author list: Conclusions**

The respondents confirmed the hypothesis both that there would be a divide in the levels of recognition of different groups of authors divide between ADR and CR. It confirms that it is a divide rather than a complete split; there is a cohort of those from each field who have read works that are not necessarily associated with their primary field and/or there is a cohort of authors whose work crosses the ADR-CR divide.

Looking at the sample, there is definitely a sub-set particularly of the ADR sample, many of those who have written and published on the subject of ADR

who indicate an overall volume of reading more similar to the CR cohort. These are the people who have read or skimmed Bush & Folger, Rosenberg and Mayer. In the case of Lederach those who have read or skimmed his work have all published on ADR, are the most widely read of the cohort and have crossed international boundaries professionally for a good part of the career. This suggests therefore that there is an element of the sample mediators crossing the boundary rather than the authors and that there is a group within the ADR cohort who would fit into the scholar/practitioner profile.

If the questionnaire responses are brought together with information about boundary-crossing authors a couple of other patterns emerge. The boundary-crossing authors have all made contributions in practical as well as academic terms, in other words have focused in some way on 'in the moment' of interpersonal interaction. However, as people like Boulding, Burton, Curle and Boule & Nesic have also written in practical terms this is obviously not the only part of the story.

Highlighted through the work on the generational author table, the other connection seems to be that involvement and/or connection to the legal field. On the most direct level, two of these books are from practitioners who have set up successful partnerships across the law/social psychology divide. Bush and Fisher were both lawyers, whilst their collaborators, Folger and Ury, social psychologists. In both cases these collaborations the 'senior partner' academically and in age was a prestigious person with considerable standing in the legal field.

Marshall Rosenberg's cross-field connection is less obvious. However, during the 70s he was working as a clinical psychologist in the context of young people and families and was using the language of conflict resolution. A good deal of those involved in conflict resolution in the US during the 70s, and before the ADR 'big bang' in 1978, including Mnookin and Frank Sander had strong connections with the family law environment at the time of the first uses of the

term ADR (Mayer 2004: 159). It seems therefore that social work and family law provided a bridge between the legal and the non-legal worlds.

Bernie Mayer is a social scientist and like Chris Moore, a partner in CDR Associates with practice experience in a wide range of social, public sector, environmental and commercial disputes. CDR Associates have been remarkably successful in maintaining connections into both CR and ADR, something that will be returned to in the next section. Mayer has authored books that include 'Beyond Neutrality; Confronting the Crisis in Conflict Resolution' (Mayer 2004) that clearly and explicitly and positively encompasses ADR. His understanding of mediation as a specific differentiated process is much closer to the ADR conception than the tendency to broad use within CR. Interestingly, he cites, and is married to one of the foremost legal authors on ADR in the US and Canada, Julie MacFarlane (2017).

This is perhaps particularly interesting as Mayer (in my mind boundary crossing, but interestingly before this research process more associated with ADR than CR) was read by more of those in the CR field than those in the ADR field. This may be more to do with the much higher consumption of the list of books overall than the ADR cohort. However, more of the ADR than the CR cohort had read both Rosenberg and Bush & Folger, despite the fact that non-violent communication and transformative mediation might be more obviously associated (at least in the minds of those involved with CR) with CR than with ADR. Finally, it is worth noting that the authors focused without legal connections, such as Burton, Curle and Boulding returned little or no recognition from the ADR respondents despite the salience of many of their ideas and practical relevance.

This suggests that it is a combination of practicality combined with connections with and access to the legal field that make an important contribution to books crossing the boundary between the two fields, particularly from CR to ADR.



### **Named influencers in mediation theory and practice**

Having a fixed list is helpful in determining relative levels of knowledge in an accessible way. However, it gives no insight into who the mediators believe have actually influenced their theory and practice, hence the request to name authors that had influenced 'your work on mediation' and authors who 'have actually influenced your practice'. The question was split into theory & practice after the test sample questionnaires highlighted that the two questions elicit very different answers.

The results are quite striking: Few authors are mentioned multiple times, with an overall impression of range and diversity of the influencers. This seems to underscore the interdisciplinary nature and diverse nature of influencers on mediation theory and practice.

An overview of the results is given in table form in *Figure 19*. It includes all the authors listed by the questionnaire respondents, sorted alphabetically and by frequency of mention. Responses from ADR are blue, CR are pink, and a CR/ADR mix are purple. For clarity each author is included separately, meaning that where there are famous partnerships, such as Fisher & Ury, they are split up and cited separately.

### **ADR Influencers**

In relation to theory, two author categories get repeat mentions; authors writing not specifically on mediation, but on aspects of interpersonal interaction; authors writing usually the first substantial book *specifically* on mediation within a particular timeframe or jurisdiction.

Figure 21 gives an overview of authors named as respondents by influencers:

Fig. 21: Additional authors named by respondents as influencers

|     | Influence my work on Mediation                                                                                                                        |                                                        | Pink=CR               | Purple=ADR&CR                               | Blue=ADR                                    | Actually influenced my practice                                                                                                                         |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|-----------------------|---------------------------------------------|---------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| A   | Pamela Aali; Abu-Nimer; Augsburger; Azar; AAA; Allen; Abraham; Axelrod                                                                                | Avruch<br>Anstey<br>Acland<br>Bercovitch               | 2<br>2<br>4<br>2      | Anstey<br>Acland                            | Anstey<br>Acland                            | Azar; Abu-Nimer<br>Maya Angelou; Axelrod                                                                                                                |
| B   | Bakhtin; Bohm; Bojer; Bowland; Elise Boulding; Boulding; Brigg; Broome; Burton;                                                                       |                                                        |                       |                                             |                                             | Burton; Benjamin; Elise Boulding; Banks; Bohm; Jeanne Brett, Burgess; Christine Bell; Bush                                                              |
| C   | Bazerman; Benjamin; Besemer; de Bono; Brand; Jeanne Brett<br>Clements; Cohen; Coy; Helena Cornelius; Croker; Sara Cobb<br>Carroll; CEDR, Covey; Crum; | Coleman<br>Curl<br>Cialdini<br>Clove<br>Crawley&Graham | 2<br>2<br>2<br>2<br>2 | Curl<br>Cialdini<br>Covey                   | Bazerman<br>Curl<br>Cialdini<br>Covey       | Bazerman; Besemer; Boule; Brand; Brett<br>Sara Cobb<br>Eileen Carroll; Patrick Cenconi; Charlton; Colosi; Crawley; Crum                                 |
| D   | Dukes;<br>Dana                                                                                                                                        | Darby                                                  | 2                     |                                             |                                             | Darby; Davey; Veronique Dudouet;<br>Dana; Micheline Dewdney; Dilts                                                                                      |
| E-F | Shoshana Faire; Fisas; Freire; Friedman;<br>Eddy, Clarissa Pinkola Esthes, Friedemann                                                                 | Francis<br>Fisher                                      | 3<br>6                | Fisher                                      | Fisher                                      | Riane Eisler; Mari Fitzduff; Folger; Diana Francis;<br>Bill Eddy, Ron J. Fisher                                                                         |
| G   | Gadamer; Gandhi; Garcia; Gulliver;<br>Eric Green; Goldberg; Gresser;                                                                                  | Glasl                                                  | 2                     |                                             | Galtung                                     | Gandhi; Glasl; Hildegard Gos Mayr; Jean Gos; Vincent Martinez Guzman;<br>Goleman; Goldberg; Gresser; Kathryn Graham;                                    |
| H   | Habermas; Hampson; Herman; Donna Hicks                                                                                                                |                                                        |                       |                                             |                                             | Sophie Haspeslagh; Donna Hicks; Herbolzheimer;<br>John Haynes; Margaret Heffernan; Matthew Hill; Sheila Heen                                            |
| K   | Kelman; Kleiboer; Kraybill                                                                                                                            | Kriesberg                                              | 2                     |                                             |                                             | Maya Kahanoff; Mareike Kleiboer; Kelman; Wendy Kroeker                                                                                                  |
| L   | Keirsey; Catherine Kessedjini; Deborah Kolb<br>Laue; Lederach; Marianne Lederer; Levinas;<br>Michael Leathes; Genie Z. Laborde; Lax                   |                                                        |                       | Lederach                                    |                                             | Keirsey; Kahneman<br>Laue<br>Lax; Leathes;                                                                                                              |
| M-N | Sara Malotane; Noll<br>MacGinty; John McConnell; Elaine McKay; Melchin; Mitchell;                                                                     | Mayer<br>Moore<br>Mackie                               | 3<br>6<br>2           | Moore                                       | Moore<br>Mnookin                            | John McConnell; Mitchell; Monk; Robert Muggah;<br>Noll<br>Malhotra; Marsh; McGovern; Monaghan; Newmark                                                  |
| P   | Pat Pfaff; Powell; Jenny Pearce<br>Picard, Powell; Miryana Nestic<br>Pat Pfaffort; Mechthild Pel; Consolate Peyron;                                   |                                                        |                       |                                             |                                             | Roland Paris; Cheryl Picard; Powell<br>Patfoort; Peyron; Peppet                                                                                         |
| R   | Riskin; Janet Rifkin; Rothman                                                                                                                         | Richbell                                               | 2                     | Richbell                                    | Richbell                                    | Robert Ricigliano; Rothman;                                                                                                                             |
| S   | Randolf; Raiffa<br>Semple; Spies<br>Sebenius; Sandler; Elizabeth Stokoe; Strasser; Susskind;                                                          | Richbell<br>Saunders<br>Shapiro                        | 2<br>2<br>2           | Richbell<br>Schirch<br>Stone, Patten & Heen | Richbell<br>Schirch<br>Stone, Patten & Heen | Randolf; Riskin; Rosenber; Rogers<br>Lisa Schirch<br>Sheryl Sandberg; Saunders; Sebenius; Senger; Shapiro; A Siegel; Stokoe;<br>Strasser; Susskind      |
| T-U | Touval;                                                                                                                                               |                                                        |                       |                                             |                                             | Thomas                                                                                                                                                  |
| W-Z | von Thun; Thomann; Todd<br>Webb; Paul Wehr; Leah Wing<br>Watzke; Weiler; Weis; Yarrow; Zehr                                                           | Ury<br>Winslade&Monk<br>Zartmann                       | 6<br>2<br>3           | Ury                                         | Ury                                         | Christoph Thomann; Schulz v Thun; Todd; Tversky; Tulumello<br>Wallensteen; Webb; Weaver; Theresa Whitfield; Leah Wing; Winslade<br>Watzke; Yarrow; Zehr |

Fisher & Ury are the stand-out authors with both receiving 6 mentions in relation to theory. *Getting to Yes* (Fisher et al. 2008) a book about negotiation, is incredibly well known, cited in practical training, recommended and cited extremely widely in relation to mediation and yet it is not actually about mediation, but rather focussed on how to negotiate more effectively. Cialdini (2009) and Shapiro (2005) are notable as authors writing respectively on influence and emotion in negotiation rather than on mediation specifically. Glasl (1980) and Mayer (2004) have both written specifically on mediation, but also on broader topics of conflict escalation, intractable conflict and roles in conflict.

Of the authors that are mentioned by the ADR cohort and have written specifically on mediation, Acland (1990) gets four mentions in the theory. He was the first author to publish something akin to the Moore's "Mediation Process" book (1986) in the UK and is referenced only by members of the cohort who started mediating in the mid 90s, as is Cloke (2000). Anstey (1993) published immediately after Acland and not long after Moore. Anstey had already been working extensively in labour mediation in South Africa when he published that book and like Crawley&Graham (2002) is only cited by mediators with a South African connection. Richbell was also one of the first authors on mediation in the UK, writing the first version of the CEDR mediator handbook in the 1990s<sup>63</sup> and heavily responsible for the design of early versions of the CEDR Mediator Skills Training Course<sup>64</sup>. Mackie (1995) gets mentions from the UK based generation who started mediating in the late 1990s.

Bearing in mind the phrasing of the first question, these results must be contrasted with the second question to examine the degree to which the respondents have differentiated.

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<sup>63</sup> The first version of: Allen, H. S., J Eds. (2015) *The CEDR Mediator Handbook*. 5th Edition edition. The Centre for Effective Dispute Resolution. See credits.

<sup>64</sup> Confirmed in correspondence with former CEDR Director of Training, Frances Maynard, 2016.

The list of those named as 'actually influencing your practice' is significantly different to the previous question. The ADR practitioners cite few authors who have written specifically about mediation. Of those writing on mediation specifically, only Anstey, Acland, Moore and Richbell still get 2 mentions each (from ADR respondents), whilst Cloke and Crawley&Graham disappear completely. This represents a mixed bag of lawyers and non-lawyers, with a predominance of the latter, and it is CDR Associates that crop up most repeatedly, not Harvard. It seems possible that the diffusion of ideas specifically on mediation from outside the Harvard 'stable', that have then spread outwards from the US to the UK, South Africa and elsewhere.

In contrast, almost all the rest of the authors who get repeat mentions are from within the Harvard stable and are writing on negotiation, influence and difficult conversations. Bazerman (2007), Fisher, Mnookin (2000), Stone, Patten & Heen (1999) are all lawyers and on the faculty at Harvard, as is Ury who (as mentioned already) is a social psychologist. Covey did an MBA at Harvard business school.

Cialdini is the odd one out as he has no clear link to Harvard and is a psychologist. However, his popular bestseller on influencing and persuasion has been strongly taken up in the commercial context.

All the above authors get repeat mentions, but only two each. Mnookin, Fisher and Ury all seem to have a much higher level of influence. Mnookin (2000) is mentioned only once in relation to theory, but 5 times in relation to practice. Like Fisher&Ury he is known primarily in terms of writing on negotiation, not on mediation. However, it seems in terms of the impact on those reading his work is greater, as of the 9 mediators who indicated that they had read (rather than skimmed) his work, 5 name him as an influence on their practice; about 56%.

Fisher and Ury both get 6 mentions each too and 100% of the ADR respondents ticked 'Read' in relation to 'Fisher&Ury' in the sample author list. However, every respondent had read it, only about 38% of the ADR cohort

name it as having influenced practice. Bringing the sample author list together with the question about influences on practice The results suggest that Fisher and Ury are highly influential in the ADR context. This stands in contrast to the CR context, where despite 92% of the respondents indicating in the sample author list that they had read Fisher and Ury, 0% cited them as an influencer in theory, or practice.

There is one consistent feature of all the books on the ADR influencer list and that is their format as their highly readable format in terms of language and length, and an absence of academic trappings such as citation or bibliography. The dominance of the Harvard presence is testament to its reputation, ability to recruit and then powerfully promote the work of a talented, homogenous set of authors, but also an extremely canny marketing strategy in terms of readability, combined with reflected credibility in legal terms by ensuring non-lawyers are twinned with legal co-authors.

### **CR Influencers**

In relation to theory Curle (1990), Saunders (2011), Darby (2008), Francis (2002), Kriesberg (2007) were/are notable scholar-practitioners with substantial experience in a range of roles in conflict, whose work connected theory and practice in some form. Few of them have written specifically and precisely on mediation, with the exception of Curle, most are concerned with how to create 'deeper levels' of peace and conflict resolution rather than mediation specifically. Avruch (2012), Zartman, Bercovitch (2011) are primarily known for research and commentary on conflict rather than practice, but have engaged in relation to the analysis of mediation practice specifically in relation to culture, empirical impact of conflict intervention or negotiation analysis.

Lederach, Galtung and Schirch are the only other authors who get two or more mentions in influencing practice. All have grappled with transferring theory into practice. This is true of the majority of those mentioned in the wider group, though their context and ages vary from those who are currently active in very specific conflict resolution practice environments, such as Sophie Haspeslagh

and Veronique Dudouet, to the incredibly famous 'greats' such as Gandhi and Paolo Freire.

Only Christopher Moore and Adam Curle are mentioned repeatedly in relation to both theory and practice. Though well known in the CR context, Curle features below Lederach, Fisher & Ury, Galtung and Miall, Ramsbotham & Woodhouse in terms of the proportion of those who say they have actually read his work. However, interestingly Lederach has talked about the influence Curle<sup>65</sup> has had on him and published 'Adam Curle: Radical Peacemaker' with Tom Woodhouse (Woodhouse and Lederach 2016). Lederach features with Curle as 'most mentioned' in relation to practice.

This result highlights that being famous does not necessarily translate to being at the top of the list of influencers in theory or practice and none of the 'most-read' authors get multiple-mentions in terms of theory and practice.

Unlike the ADR sample, there doesn't seem to be any strikingly obvious pattern, with an eclectic pick 'n mix approach to gathering the practical guidance and toolkit needed in the diffuse environments associated with 'mediation' in the CR context. However, if compared with the ADR sample there is one similarity and one difference that is striking: As with the ADR sample there does seem to be connections to the CDR Associates and Colorado in relation to work specifically bounded definitions of 'pure mediation'. Looking more broadly there is a pattern in absence, namely the almost complete absence of Harvard linked authors or publications, and authors with a legal background.

### **Boundary Crossing Influencers in theory and practice**

There is therefore little overlap between the lists from the two fields. There are only five authors mentioned by people from both fields as having influenced their work on mediation. CDR Associates Christopher Moore and Bernie Mayer, both from social science backgrounds come up again in this context as the

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<sup>65</sup> Keynote Speech; Adam Curle Conference, Bradford September 2016.

boundary crossers. Moore, is the only author mentioned by people from both fields as an influence on both their work and their practice, with a split of 2 CR / 4 ADR respondents mentioning him in relation to theory and 1 CR and 2 ADR in relation to practice. Mayer, included on the sample author list, is one of the other four authors mentioned by people from both fields. And their standing in the ADR context is highlighted by Moore's inclusion in the video series 'The Mediators: Into the Eye of the Storm' on mediate.com and the fact he is not a lawyer is remarked upon with surprise in the video interview with Moore (2017).

Moore published one of the first books written exclusively on mediation practice in 1986, after already having accumulated practical experience in mediation through a practice base encompassing commercial, labour, public sector and environmental mediation. The generational table of authors provided at *Figure 15*, highlights the fact that Moore's publication is the first that focuses specifically and exclusively on practical mediation, rather than on negotiation, or on peace-building or conflict analysis more broadly<sup>66</sup>.

In terms of interpretation of the result all the respondents who mention Moore have strong connections to the USA (are US citizens or have strong connections to the US) and are 50+ in age. This suggests that this boundary-crossing probably therefore arises out of the nature of specific practical guidance on mediating, as well as the pioneering nature of the publication. Those mentioning Mayer are slightly more diverse in age and mention him in relation to theory rather than theory and practice.

Anthony Acland, Peter T. Coleman, and Friedrich Glasl, all get one mention by someone from the 'opposite' field to the one they are more obviously associated with in relation to influence on theory. In every case the respondent who mentioned them is one of those whose questionnaire responses demonstrate a huge breadth of reading and a profile that could be described, in some sense,

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<sup>66</sup> Curle's 'In the middle' was also published in 1986 but seems unknown by those in ADR. More is said about Curle in the section on CR responses.

as 'boundary crossing'. In other words, it may be the questionnaire respondent, rather than the author, who is crossing the boundary.

### **Conclusions**

The most striking pattern of connection and homogeneity of authors mentioned repeatedly by those in ADR and CR is their demographic similarity. All 31 authors cited repeatedly are white. 27 of them are male and over 50. The other four are female, all of whom are over 40. This represents a striking lack of diversity in the influencers of those practicing mediation, considering the general aspiration of both fields for effective conflict and dispute resolution for all.

The generational map of ADR and CR authors at *fig. 21* highlights that these responses are unsurprising in that they replicate a pattern across both fields in terms of who is published and promoted within both fields. It seems hard to imagine that this lack of diversity and difference in perspective and life experience is helpful in creating theory and practice that speaks and connects to the breadth of contexts that the field claims to cover.

Overall the responses from both fields demonstrate a similar pattern: The authors split between those writing specifically on mediation, and a broader group of authors writing on related topics. However, the composition of these groups highlights the divergence of the fields.

Those writing specifically on mediation in the ADR context who are mentioned repeatedly are almost all lawyers. Those writing on related topics are almost all connected to Harvard law and business schools and usually combine a psychologist/social-scientist and a lawyer, usually on subjects relating to negotiation or business psychology.

Those writing specifically on mediation in the CR context are few and far between. Curle is the most notable, however he moved away from this in the latter part of his career. Most authors mentioned focus on aspects of



peacebuilding such as area studies/case studies, (non-)violence, reconciliation, emancipation and development. They represent a wide range of universities and contexts, with some diversity of background and a notable lack of connection to Harvard.

The only connecting factor seems to arise out of the work of the social-scientist mediators Bernie Mayer and Chris Moore in Boulder, Colorado from 1978 onwards. They seem to have influenced both ADR and CR for those with USA connections, and whether or not given credit, his ideas do seem to have influenced many of the other 'how-to' publications on mediation that succeeded his.

Overall this suggests a certain homogeneity of ADR practice sources focused specifically on mediation or on the output of Harvard in relation to negotiation and business psychology. It suggests something of a diffusion and huge diversity of CR practice sources with only a very small number of authors being mentioned repeatedly. This summary again highlights the divergence of definition, practice and approach to mediation and also begins to hint at a possible timing for this divergence.

### **CR and ADR: Conflict and Divergence in theory and practice**

The following final version of the author table indicates which authors were mentioned repeatedly as influencers and the level of recognition they got from the practitioner respondents. The result gives a fairly clear indication of the growth of both fields in the 70s and early 80s; the first round of publications of specific works on mediation happening in the 80s and 90s with a second round on alternative methods, such as transformative and narrative mediation emerging in the early 2000s.

Visually this diagram suggests that the division of these fields as ADR emerged out of CR in the late 1970s and early 1980s. Mayer and Moore identify and use the term Conflict Resolution but unusually include ADR positively and explicitly within this. Whilst there might be an assumption in CR that ADR is a subset of

CR, this does not seem to be shared by many of those active in ADR (a statement highlighted by the degree to which many of the key authors of the CR field are unknown in the ADR context). However, even if this were to be accepted, the lack of evidence of substantive contact or exchange between these fields, demonstrated repeatedly by the results of this questionnaire and literature analysis, suggest at best a dysfunctional relationship.

This begs the question that if CR emerged out of a movement wishing to find better ways of dealing with conflict after the second world war, spurred on by the cold war, why did ADR move away from the broader CR discourse? What happened to create a situation where there seems to be a lack of substantive exchange?

### **Putting the Conflict in Conflict Resolution**

The first and most obvious clue that struck me on moving from CR into ADR was reading the book 'Getting to Yes' by Fisher and Ury. Initially it puzzled me as a book, as it provided no citations or references for any of its content. I was unused to the Harvard business paperback convention. It seemed to present its contents as a 'virgin birth'. However, as I began to get used to this convention, I discovered it was a common approach to paperbacks published by PON and wrote it down to taken simply as a way of accessing a market that does not want to be weighed down by academic convention.

As I began to trace the history of the two fields it became clear that there seemed to be two key dates that kept cropping up just over 10 years apart; 1966 and 1978. Whilst there has been work on peace and conflict for as long as there has been academia, the current conception of CR brought a range of people from different disciplines together in an unusual form in the mid 1960s.

The work of de Reuck, Burton and others in making the CIBA conference in 1965 happen, followed by the publication of "Conflict in Society" (De Reuck and Knight 1966) seemed to provide a focus and impulse that energised the development of an interdisciplinary field. There were people involved from a

wide range of disciplines including languages, IR, social psychology, anthropology and mathematics.

In researching this, the absence of anyone with a legal background being involved struck me as surprising. Whilst the perception and status of law may have changed since the mid-sixties (with the involvement of lawyers and law at much earlier transactional stages before 'disputes' arise), Burton's aspiration to interdisciplinarity and the importance of international public law in the context of international conflicts it made the absence seem odd.

For instance, Burton was running problem-solving workshops from the mid-1960s and his influence and interaction with a whole range of scholar-practitioners seems to be well acknowledged (Clements 2015). Through the late 1960's and early 1970's there was a good deal of experimentation from a wide range of practitioners and scholar-practitioners trying out innovative practice in conflict. Aside from the international context, such as Burton's work in Cyprus and Curle's work in Biafra, mediation was being used in labour relations and the civil rights contexts in the USA from the mid-1960s onwards (Moffitt 2006) (Salem and Salem 2007) (Mayer 2004).

Though there seems to have been disagreement and division between different UK, US and European academics, such as Galtung, Glasl, Burton, Curle, Kelman, Richardson, Rapaport and others, the commitment to interdisciplinarity is demonstrated was embedded in the structure of organisations such as the Conflict Research Society and the International Peace Research Association<sup>67</sup> (Groom 2013).

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<sup>67</sup> <http://conflictresearchsociety.org/about-us/> and <https://www.iprapeace.org/index.php/about-ipra/ipra-statue> last accessed 11 Nov 2017.

Fig. 22: Generational Author Table: Including influencers

(N.B. A large version of the graphic in fig. 22 can be found at Appendix 2.)

| CR = Red                                                                                                                                    | Dark pink = min 2x mentions for influence on theory & practice<br>Light pink = 2x+ mentions for influence on practice<br>Light pink = 2x mentions for influence on theory                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                        | ADR = Blue                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Dark blue = min 2x mentions for influence on theory and practice<br>Light blue = 2x+ mentions for influence on theory                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
|---------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Boundary Crossing = Purple                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| Light pink + purple script = CR author background - mix CR + ADR mentions<br>Light blue + purple script = ADR author + CR mention in theory |                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 2007-2016                                                                                                                                   | Debbie de Girolamo<br>Anthropology<br>pub. 2013<br>Ethnographic research on mediation in the commercial context.<br><i>The Fugitive Identity of Mediation</i>                                                                                                                                                                                                                                                                                             | Jaques Faget<br>Law<br>pub. 2008/2011<br>Tight definition of mediation (from legal field?)<br><i>Mediation in Political Conflicts</i>                                                                                                                                                                                                                                                                  | Douglas E Noll<br>pub. 2010<br>Law<br>Commercial Mediation<br><i>Evasive Peace</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Mary Kendall Hope<br>pub. 2010<br>Theology, Mediation<br>Return to facilitative mediation<br><i>The Guided Method of Mediation</i>                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 1997-2006                                                                                                                                   | Robert H. Mnookin (Peppet, Tulumello)<br>pub. 1986/2000/2004<br>Law<br>Children and Family Law; Resolution, 'Conflict Resolution'<br><i>Child, Family and State; Beyond Wining: Negotiating to create value in deals and disputes</i>                                                                                                                                                                                                                     | Douglas Stone, Bruce Patten & Sheila Heen<br>pub. 1999<br>Law, Business<br>Difficult Conversations; Conflict; structure of communication<br><i>Difficult Conversations: How to discuss what matters most</i><br>John Crowley & Kathryn Graham<br>pub. 2002<br>? Trademarked the term "Interactive Mediation"<br><i>Mediation for Managers: Resolving Conflict and Rebuilding Relationships at Work</i> | Ken Cloke<br>pub. 2000/2002/2005<br>Law<br>Personal & Organisational Conflict; Narrative mediation<br><i>Resolving personal and organizational conflict; Mediating Dangerously; Resolving conflicts at work</i><br>Lawrence Boulle, Miryana Nesic<br>pub. 2000<br>Law<br>Theory and practice of mediation in legal context<br><i>Mediation: Theory, Principles and Practice; The Mediation Triangle</i>                                                                                                                                | Michael L. Moffitt & Robert C. Bordone<br>pub. 2005<br>Law<br>ADR, Negotiation, Mediation<br><i>The Handbook of Dispute Resolution (contribs incl. Bazerman, Shapiro, Heen, Peppet, Moffitt)</i><br>Marshall Rosenberg<br>pub. 1968/1983/1999<br>Clinical Psychology<br>Communication; Compassion; Teaching<br><i>Diagnostic Teaching: A model for non-violent communication; Non-violent Communication</i> | Bernard Mayer<br>pub. 2004/2009/2012<br>Social Work; Psychology; Neutrality, third party roles; Intractability; Interdisciplinary<br><i>Beyond Neutrality; Staying with Conflict; The Dynamics of Conflict</i><br>Peter T. Coleman<br>pub. 2000/2014<br>Social and Organisational Psychology<br>How to mediate (non-legal)<br><i>The Handbook of Conflict Resolution: Theory and Practice (With M. Deutsch)</i>        | Lisa Schirch<br>2004/2005<br>International Relations/ CA and Resolution<br>Peace Building & Keeping/Gender/Security<br><i>Women in Peacebuilding Resource &amp; Training Manual; Little Book of Strategic Peacekeeping</i>                                                                                                                                                                                                                         | Diana Francis<br>pub. 2002/2010<br>Modern Languages<br>Conflict Transformation; Peace Activism;<br><i>People, peace and power: conflict transformation in action</i>                                                                                                                                                                                                       | John Darby<br>pub. 1976 / 2003<br>History<br>Conflict; Northern Ireland; Peace Processes<br><i>Peacekeeping; Conflict, Violence and Peace Processes</i><br>John Winslade & Gerald Monk<br>pub. 2000/ 2008<br>Counseling ?<br>Schools counseling, conflict and narrative<br><i>Building Peace; Little Book of CT; The Moral Imagination;</i> | Louis Kriesberg<br>pub.1973 / 1998<br>Sociologist<br>level and social level of structure and conflict.<br><i>The Sociology of International Conflicts</i><br>Oliver Richmond<br>pub. 2005/2008<br>International Relations<br>Journalism; Peace Studies?<br><i>Contemporary Conflict Resolution</i> | Oliver Ramsbotham, Tom Woodhouse, Hugh Miall<br>pub. 1999<br>Peace Studies, History<br>Cosmopolitan conflict resolution<br><i>Contemporary Conflict Resolution</i><br>Harriet Martin, Antonia Potter<br>pub. 2006<br>Internal info on process of track 1 processes<br><i>Kings of Peace, Pawns of War</i> |
| 1987-1996                                                                                                                                   | David Richbell<br>pub. 1997/2008/2015<br>Construction & Surveying<br>Mediation<br>CEDR Mediator Handbook;<br><i>Mediating Construction Disputes; How to Master Commercial Mediation</i><br>Andrew F Adland<br>pub. 1990/95/2011<br><i>Russian and Italian / IR Terry Waite</i><br>How to ' Mediation and ADR from consumer perspective<br><i>A Sudden Overlook of Common Sense: How to resolve disputes without going to court; Perfect People Skills</i> | Robert Cialdini<br>pub. 1971/ 1984/2009<br>Social Psychology, Business<br>Influence: Science and Practice;<br>Influence: The psychology of persuasion<br>Mark Anstey<br>pub. 1983/1991<br>? Labour Relations<br><i>Working with Groups; Practical Peacemaking: A Mediator's Handbook</i>                                                                                                               | Karl Mackie, (David Miles, William Marsh)<br>pub. 1991/1995<br>Law, Business<br>Practice of ADR in the UK<br><i>The ADR Practice Guide</i><br>Stephen Covey<br>pub. 1970/1989<br>Religious Education; Business<br>Effective Habits; Leadership; Interdependence<br><i>The Seven Habits of Highly Effective People; The Eighth Habit</i>                                                                                                                                                                                                | Robert A Baruch Bush; Joseph P Felger<br>pub. 1994/2005<br>Law; Organisational Development<br>Transformative mediation - empowerment and recognition<br><i>The Promise of Mediation; Designing med.</i><br>Hazel Genn<br>pub. 1996<br>Sociology; Law<br>ADR, Mediation, Legal Reform, Civil Justice Systems                                                                                                 | Jacob Bercovitch (+ Jeffrey Rubin)<br>pub. 1984/1991 d.2011<br>International Relations; Psychologist<br>Quant on Hard/Soft mediation and effectiveness<br><i>Social Conflict &amp; Third Parties; Mediation in IR; CIMR Dataset w/ DoRouven&amp;Popemasza</i><br>Janet Rifkin<br>pub. 1976/1984/1991<br>Law<br>Feminism; ADR; Narrative mediation<br>Practice and Paradoc: Deconstructing Neutrality in Mediation; ODR | Ronald J Fisher, Loralie Keashley<br>pub. 1982/1997<br>Interactive workshops; Peacemaking through interaction<br><i>Social Psychology: An Applied Approach; Interactive Conflict Resolution;</i><br>Harold H. Saunders<br>pub. 1991 / 1999/2011<br>PhD Yale, subject? Former Secretary of state.<br>Sustained dialogue and conflict; Arab-Israeli peace process<br><i>The Other Walls; A Public Peace Process; Sustained Dialogue in Conflicts</i> | Pamela Aal, Chester Crocker, Fen Osler Hampson<br>pub. 1996<br>International Relations; History<br>Former sec of state - track 1; 'Power' mediation<br><i>Herding Cats; Grasping the Nettle; Taming intractable conflicts</i><br>Vivienne Jabri<br>pub. 1990<br>International Politics<br>Discursive conflict resolution<br><i>Mediating Conflict / in southern africa</i> |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 1977-86                                                                                                                                     | Christopher W. Moore<br>pub. 1986/2014<br>Political Sociology<br>How to mediate<br><i>The Mediation Process: Practical Strategies for Resolving Disputes</i><br>William Ury<br>pub. 1978/1981<br>Social Anthropologist<br>Negotiation; Third Side; Positive No<br><i>International Mediation: Ideas for the Practitioner; Getting to Yes; The Third Side; The power of a positive no</i>                                                                  | Elke Boulding<br>Sociologist<br>pub. 1976 d.2010<br>Civil Society; 200 year present; Craft and skills - a peace praxis<br><i>One small plot of heaven; Cultures of Peace</i><br>Friedrich Glasl<br>pub. 1980/2013<br>Politics; Organisational Development<br>Conflict management; Organisational Development; Mediation<br><i>Konfliktmanagement</i>                                                   | Christopher Mitchell<br>pub. 1981/2014<br>Historian; International Relations<br>Structure of International Conflict; T2 interventions; Horn of Africa<br><i>The Structure of International Conflict; Zones of Peace; The Nature of Intractable Conflict</i><br>William Zartman (+Touval)<br>pub. 1978/1985<br>International Relations<br>Biased 'power' mediators; Facilitators/Formulators/Manipulators<br><i>The Negotiation Process: Theories and applications; International Mediation: Conflict Resolution and power politics</i> | Edward Azar<br>pub. 1973/1990 d. 1991<br>International Relations<br>Protracted Social Conflict<br><i>The Negotiation Process: Events Research; International Conflict Resolution (w. Burton); Protracted Social Conflict</i>                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 1967-1976                                                                                                                                   | Roger Fisher<br>pub. 1964/1978/1981/2005 d. 2012<br>Lawyer<br>International Conflict, Principled negotiation; Emotions and neg<br><i>International conflict and behavioural science; International Mediation; Getting to Yes; Beyond Reason</i>                                                                                                                                                                                                           | Johan Galtung<br>PRIO 1960<br>Philosophy, Sociology, Mathematics<br>Positive Peace; Structural Violence; Conflict Triangle<br><i>Theory and Methods of Social Research; Peace: Research-Education-Action</i>                                                                                                                                                                                           | Adam Curle<br>pub. 1971, d. 2006<br>Anthropologist; Educationalist; Philosopher<br>Practical mediation experience in Belfast; Zimbabwe; Croatia<br><i>Making Peace; In the Middle; Tools for Transformation</i>                                                                                                                                                                                                                                                                                                                        | John Burton<br>CAC 1965/1990 d.2010<br>Clinical Psychology; Human Development<br>Application of needs theory to CR; 2nd order change; problem-solving method<br><i>Conflict in Society; Controlled Communication; World Society; Conflict: Resolution and Prevention</i>                                                                                                                                    | Herbert Kelman<br>pub. 1957<br>Social-psychology<br>Program on International Conflict Analysis and Resolution, Harvard<br>Interactive problem-solving<br><i>International Behavior: A Social-Psychological Analysis</i>                                                                                                                                                                                                | Kenneth Boulding<br>JCR 1957, d.1993<br>Economics<br>Peace, Conflict, Defense<br><i>Perspectives on the Economics of Peace; Conflict and Defense</i>                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 1957-1966                                                                                                                                   | Morton Deutsch<br>pub. 1949/1962/1973/2000<br>Social-psychologist<br>Competition and Cooperation; Group Dynamics<br><i>Theory of Conflict and Cooperation; Preventing WWII; The Resolution of Conflict; Handbook of Conflict Resolution</i>                                                                                                                                                                                                               | Abraham Maslow<br>pub. 1954, d.1970<br>Psychologist<br>Hierarchy of needs<br><i>Motivation and Personality</i>                                                                                                                                                                                                                                                                                         | Anthony de Reuck<br>pub. 1966; d. 2017<br>Physics<br>CIBA publication, Reuck ed. contribs Deutsch, Boulding, Burton, Galtung, Rapoport, Nicholson et. al.<br><i>Conflict in Society</i>                                                                                                                                                                                                                                                                                                                                                | Lewis Fry Richardson<br>d. 1953 pub 1960<br>Mathematics, Meteorology<br>Quant - logarithmic evaluation of deadly conflict<br><i>The Statistics of Deadly Quarrels</i>                                                                                                                                                                                                                                       | Anatol Rapoport<br>SGS1954/1965 d. 2007<br>Mathematical-psychologist<br>Game & General Systems Theory, TI-for-tat to Axelrod; 2nd Order learning<br><i>Operational Philosophy</i>                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |
| 1941-56                                                                                                                                     | Mary Parker Follett<br>pub. 1898/1942, d. 1933<br>PPE<br>Business organisation; Leadership; Violence<br><i>The Speaker of the House of Representatives; Freedom &amp; Coordination</i>                                                                                                                                                                                                                                                                    | Pitirim Sorokin<br>pub 1941/1957 d.1968<br>Criminology; Sociology<br>Social and cultural dynamics                                                                                                                                                                                                                                                                                                      | David Mitrany<br>Historian<br>pub 1943, d. 1975<br>Functionalist approach to overcoming win-lose<br><i>A Working Peace System</i>                                                                                                                                                                                                                                                                                                                                                                                                      | Quincy Wright<br>pub 1942/1962 d. 1970<br>Political Science/ Law?<br>War<br><i>A Study of War; Preventing WWII</i>                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                           |

Given the pressure for social change, civil rights, social justice and the increasing activism both by those involved at the interface between social justice and legal process in the late 1960's, it seems unsurprising that many of those who were instrumental in the development of ADR (and specifically mediation such as were Sander, Mnookin, Mayer and Moore) were involved with the family or labour law contexts.

The Pound Conference of 1976 is described as the 'Big Bang' of ADR and only just post-dates the first use of the term (Moffitt 2006). By 1978/79 organisations providing and promoting ADR in the legal context were being founded varying from organisations using legally trained 'neutrals' consisting of lawyers and former judges such as JAMS (originally the 'Judicial Arbitration and Mediation Services') and more unusually organisations using neutrals from other professional backgrounds such as CDR Associates whose neutrals are mostly social scientists by background. They emerge repeatedly in this study as an exception of a non-legal provider partnership that is well known, as demonstrated by the inclusion of Mayer (2017) and Moore (2017) in mediate.com's interview series that has strong links to the legal field<sup>68</sup>.

The explosion of ADR and its spread, initially in the USA and other common law jurisdictions tends to therefore be told from 1978 onwards, with the gradual process of legal reform and the shift in attitudes towards the expectation that lawyers take a proactive role in 'Dispute Resolution' (with the semiotic shift in the re-labelling of litigation departments as 'Dispute Resolution Departments' in the US and the UK largely complete by the early 2000s) through the use of negotiation, mediation and a range of other 'ADR processes'.

It is shortly after this that Getting to Yes (Fisher and Ury 1981) and the Moore's mediation 'how-to' appeared (1986). Publications relating to Moore's book then appear in other jurisdictions such as (Acland 1990) and were then followed by

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<sup>68</sup> This series was originally named 'Pioneers of the field'. It has now been renamed 'Views from the Eye of the storm', which seems to be a direct reference to Lederach's book title.

how ADR could 'fit' into the context of specific jurisdictions such as (Mackie et al. 1995) in the UK then begin to emerge.

Through researching and analysing the background of the practitioners and scholars involved in the CR in the 1960's and then began connecting this with research on those involved in ADR, I began to be puzzled by the way writers such as Burton, who had a reputation for being forthright (Clements 2015), is to be dismissive of ADR, to the point of criticism of it as superficial and/or dysfunctional (Burton 1996). For instance, there was something in the language and tone of the comments on ADR in 'Conflict Resolution: Its language and processes' suggested a level of antipathy that surprised me, particularly when they are put together with a knowledge of common practice in mediation in the ADR context.

It could in fact be read as a comprehensive take-down of ADR-based mediation practice: *"ADR typically lacks any analytical process. Frequently it makes no distinction between disputes and conflicts. It tends to apply existing legal norms in this more informal way."* *"Causing or any separate discussion between a party and the facilitator would destroy the neutrality of the facilitation process, and prejudice, also, the analytical process by which the parties are led to redefine relationships and make an accurate costing of their policies."* *"Mediation is an art. It varies greatly according to the belief systems of the mediator. If, in fact, the problem in relationships turns out to be a dispute, mediation can be successful. But frequently mediation does not reveal hidden issues, and mediators, frequently do not have the training required to bring these to the surface. What appear to be a dispute can turn out to be a conflict and mediation in these circumstances can be dysfunctional."* (Burton 1996: pp.15, 19)

Working forwards through time from a CR perspective creates a narrative where ADR emerges out of the wider field of CR. However, this narrative is not one that would be in any way obvious from the ADR perspective if the ideas are traced backwards in time through the dominant literature of the ADR field. From

an ADR perspective the reverse engineering of the literature goes back to the break point of 1981 (highlighted by the vast majority of my ADR practitioner respondents citing no influencers that predate 1981 in terms of substantive publication record), preceded only by the 'Big Bang' in terms of practice of the 1976 Pound Conference; indeed, the whole choice of the term big bang surely deliberately conveys the message that the provenance of this massive event is unknown?

These research results, combined with the questionnaire responses, brought me straight back to the oddity of "Getting to yes". As reported 100% of the ADR respondents have read Fisher&Ury and they are the most cited influencers and none of their predecessors<sup>69</sup> are mentioned repeatedly as practice influencers by the ADR cohort<sup>70</sup>. In contrast, whilst the CR cohort had also read Fisher&Ury, not a single person cites them as an influence. In contrast Curle, Galtung, Lederach and Schirch are repeatedly mentioned. These are all people whose work either preceded Fisher&Ury, or have credited others and named influencers including Burton, Kelman, Deutsch and Mary Parker Follett.

'Getting to Yes' is an accessible, unreferenced text without the trappings of academia; yet it comes with credibility derived from the academic Harvard name (Fisher and Ury 1981). It uses personal and business based scenarios that are almost self-consciously simple, and makes it clear that these are principles anyone could use; something which is certainly congruent with Fisher's assertion that he was interested in "*ideas that were of use to people in dealing with difference*" (Fisher 2005).

Stripping out the traditional additional information given in academic texts, such as references and bibliography, makes its appearance congruent with a non-

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<sup>69</sup> Whilst Fisher's career preceded Getting to Yes, because of the way the responses came in (almost all mentions connected the names Fisher&Ury, making which publication was meant clear).

<sup>70</sup> And the mention of Galtung coming from one individual who is both boundary crossing, and whilst working in ADR in the UK, is multi-lingual and has worked extensively in Europe.

fiction paperback. It also obscures provenance and interconnection and prevents any tracing of ideas backwards. Combined with the reality of the domination of ADR by law and jurisprudence it would be very easy to assume that *Getting to Yes* expresses entirely original ideas, wholly credited to Fisher & Ury. Given the interconnectivity of all academic work this would be a highly questionable logic in any field, but it fits well with the 'Big Bang' creation myth of ADR.

Once the ideas of 'Getting to Yes' are analysed with knowledge of CR research, and knowledge of the personal interconnections of those involved in conflict and peace research in the 60s and 70s the big bang theory looks shaky at best. Menkel-Meadow hints at this but doesn't go as far as to connect any of the previous work with 'Getting to Yes' (Menkel-Meadow 2006).

Analysis of Fisher & Ury's seminal work suggest strong connections with a range of their predecessors, including the work of Mary Parker Follett's mutual gains theory (Follett and Urwick 1949); Kelman's interactive problem-solving (Kelman 1966), Deutsch's cooperation and conflict; Maslow and Burton's ideas human needs theory (Maslow 1974); Burton (1969) and Doob's (1970) separate work on problem-solving workshops and process; as well as Curle's work on the reestablishment of channels of communication and the importance of relationship in conflict (1971). There are also clear differences, not least support for Burton's assertion that ADR didn't adopt his distinction between 'conflict' and 'dispute'.

The unreferenced texts of the Harvard stable, maybe done primarily to sell to the legal and business communities, seem to have contributed to the big bang theory. However, it does not account for the absence of lawyers from the CR developments between 1965 and 1976.

I therefore went back to the question of where the lawyers were in the interdisciplinary work of the mid-1960s? Chris Mitchell is one of the few people who was involved in the developments of the mid-1960s and from whom it is



still possible to get first-hand information. He, very kindly, responded to my question: Did John Burton and Roger Fisher meet? His response was that Roger Fisher was on sabbatical at LSE in the mid-60s (he thinks it was the academic year 1965-1966). John Burton was working on one of his first problem-solving workshops and invited Roger Fisher to get involved as one of the 'panel of experts'. Fisher accepted the invitation and was involved in initial meetings. However, both had extremely strong and contrasting ideas about how things should be done. Fisher did not participate in any of Burton's subsequent Problem-Solving workshops (Mitchell 2017).

The animosity that both sides took from this is hard to judge conclusively, but there does seem to be circumstantial evidence that it was powerful. Aside from the clues in the Burton texts relating to ADR, Chris recalled a couple of other incidents which hint that the impact was a profound personal split. One situation, which must have happened in the mid-late 1980s or 1990s, occurred when he tried to tell Burton how much Ronald J Fisher respected Burton's work. Burton indicated that he didn't want to hear anything about someone who had taken his ideas uncredited. Chris had to clarify that he was referring to Ronald J Fisher and not Roger Fisher.

From the other side, Chris Mitchell interviewed a range of people, including Roger Fisher, for the George Mason university series 'Parents of the Field'. The first question they asked all the interviewees was "how they got involved in the Conflict Resolution field". Chris was surprised by Roger's response as it was along the lines of "there isn't one" (Mitchell 2017).

Burton's invitation to Roger Fisher does provide evidence that Burton did try to get at least one lawyer involved in his interdisciplinary project. This seems to be far more congruent with his approach and beliefs, than the possibility that not involving any lawyers was an oversight, or a deliberate exclusion. It also highlights the degree to which, with Fisher's founding of the Program on Negotiation at Harvard there seems to have been the reinforcement of an

already present split, not just on a personal level, but on a cultural level in the way that CR and ADR would develop from there on in.

This is reinforced by Mitchell's interview, both in relation to the academic fields, but also in relation to naming or connecting 'influencers'. The description below the interview mentions Fisher's involvement with Burton's problem-solving workshop, but Fisher does not mention this himself. The only people he credits as having 'useful ideas' are Schelling and Kenneth Boulding and he doesn't expand on why or how.

When prompted on Kelman his response is fascinating: "He had his own seminar and I visited it once I think, and talked to his students and they combined research and doing it, and they seemed kind of embarrassed about doing it...[Kelman thought] I'm just an academic, I must study about conflict...and I should just incidentally talk to middle-easterners...I've much more thought of myself not as in the academic field; but as trying to develop ideas of use to people in dealing with their differences." This is a fascinating representation of research and practice done by CR researchers as somehow not being about developing ideas that are of use to people in dealing with their differences, as well as a suggestion that to develop theory and suggestions on how to deal with difference empirical research is not needed.

Maybe the marketing approach of PON was a clever ploy thought up by someone else, but even if it was it seems to have been an approach that fitted perfectly with Fisher's priorities. These seem to have been the absolute primacy of action (whether or not the 'action' had been tested') and access (to a wide audience) over testing (of ideas before making claims for them) and referencing (of sources).

## **Conclusion**

The detailed analysis and interlocking of the literatures of the two fields, combined with the analysis of the data from the questionnaires demonstrate not only that there is a divide between these fields and that it has impacted on the

way that knowledge and information has (or hasn't) flowed between the two fields.

The divide is evidenced in different patterns of knowledge of literature, different identification of influencers in theory and practice, different ways of self-identifying and different conceptualisations of mediation. The CR field shows patterns of more diversity and diffusion of ideas, influencers and intellectual 'origin' of the respondents. The ADR field is much more homogenous with a predominance of lawyers and noticeable domination by authors and publications connected with Harvard.

The choice of the term 'divide' is deliberate; there is evidence of boundary crossing between these fields, suggesting a divide rather than a completely discrete split. Those crossing boundaries, both questionnaire respondents and authors they identify are mainly from social science and social psychology backgrounds. This is particularly true of publications relating directly to the how-to of mediation, where CDR Associates stand out in being recognised in both fields.

Research around the literature and questionnaire responses has led to the conclusion that this divide is not just a result of the logic of specialisation, but that personal conflicts and institutional marketing strategies have also influenced the way that this divide has developed, in particular the divergence of two of the "Parents of the Fields"; Roger Fisher and John Burton.

In terms of the transfer of knowledge between these fields, these divides have resulted in an ADR field that is unaware of the provenance of some of its core ideas, and little connection to authors and ideas that many of the CR scholar-practitioners considered profoundly important. Both fields view of themselves are at variance with the way they are presented by the other field.

This is unfortunate given that the ADR context has a quantity and type of information on practical work in formalised mediation that is simply not

accessible or available in the CR context. Given that the CR context is just as concerned with the interaction of individuals (with varying levels of status, power and organisational responsibility) this all points to the value of working on ways to allow information to cross the boundary between these two fields about both practice and theory.

This presents challenges, not least in methodological terms. However, the results of this questionnaire and literature analysis back the idea that this challenge is one worth taking on. Whilst this questionnaire was applied to a small-n sample and the number of questions limited, it does suggest that my experience of these two fields as divided, despite the fact that they have things to contribute to each other, is not based just on literature analysis and my perception and experience, but also by the perception and knowledge of the sampled practitioners.

The results of this questionnaire impact on the interpretation of the autoethnographic work in chapters 5-7. The ethnographic work has value as qualitative, personal and unique accounts of my experience. However, the empirical data that this divide exists for other practitioners, and that it influences their knowledge and self-identification, at least within the contexts in which I have operated suggests that elements of this experience may be shared by those who have crossed this boundary. Therefore, the following autoethnographic work aims to contribute something to the field on both levels: Specific, personal, (more) holistic experiences that connect and trigger both the cognitive and the emotional knowledge levels in the reader. Examples of information and experience being transferred across the ADR/CR divide.

## **Conflict Roles**

The findings presented in this chapter demonstrate that useful learning can be achieved by crossing the ADR/CR boundary. This chapter is concerned with conflict roles, their practical impact and the practical relational impact of congruence, or lack of it, between the conflict role claimed overtly and the role actually occupied. It takes the principle of complementarity (Fisher and Keashley 1991) and demonstrates its profound impact on the relational interaction between conflict parties and third parties. This is done through a combination of autoethnographic episodes and the analysis and connection of autoethnography with the literature and theoretical constructs of ADR and CR.

Alongside the central ideas of Fisher and Keashley (1991) and their contrasting application in ADR and CR a number of other theoretical and practical concepts are problematized. The concept of the ‘third-sider’ (Ury 2000a) is explored for its benefits and limitations in practical terms, particularly in view of the observations of the impact of congruence (or lack of it) between action and claimed role. The uncomfortable practical implications of the conjunction of the principles of empowerment (Bush and Folger 2005) and practicalities of party self-determination in relation to the different conflict roles are analysed. The evidence on the impact of emotions, heuristics and bias in the application of these different roles is explored through the conjunction of autoethnography and the work of Kahneman (2013) and Haidt (2012).

In order to do this, a categorisation of conflict roles is presented. Within this overall categorisation, general category of ‘third-party’ is then broken down into different types of third-party role. Three types of third-party are identified and the practical implications of theoretical constructs and philosophical underpinnings of ADR or CR in relation to these roles are presented through interlocking analysis and autoethnographic episodes.

The autoethnographic episodes present particular epiphanies in relation to the practical implications of conflict roles, as explained in the methodology chapter, provide both a more complete insight into the learning by including the (usually

excluded) emotional and experiential information that underpins the analytical findings. They highlight how practical experiences in ADR and CR interact with the theoretical conceptualisation of roles and therefore impact directly on what is actually done (and not done) by practitioners and how they are perceived. It brings together practice episodes with theories drawn from ADR and CR, and results from the experimental psychology context to illustrate why role definition and the presence or absence of coercive ability makes an actual relational difference to the efficacy to their application.

The episodes are drawn from situations in which I occupied a range of different roles. Where I am in roles other than that of mediator, the episode has been included because of its specific and profound influence in relation to the issue of conflict role differentiation. These episodes are not profoundly influential because they are isolated or unique. They are significant because they encapsulate the evidence, from my practitioner perspective, of an idea relevant to the transfer of theory into practice or vice versa. Some episodes describe moments whose significance became clearer, even epiphanic, as I became more experienced. In others, they encapsulate the evidence for certain elements of theory and/or practice particularly well.

The idea that third-party intervention in conflict situations is a relational process that involves real people, who are far from the '*homo economicus*' model used in mid-20<sup>th</sup> century economics, should be far from contentious. However, the tendency to focus primarily on context in mediation research (both in ADR and CR) may have hampered the recognition of consistent underlying patterns to human interaction in third-party intervention in conflict. It is the application of autoethnography that assists in surfacing the degree to which this is a problem of the research in both fields that needs to be addressed by both fields.

In ADR, the work of Kahneman (2013) on cognitive errors and neuroscience in relation to the positive role of emotions in decision-making (Damasio 2010) have had some limited impact. CR, as a field, has produced a huge amount of work, rooted primarily in social psychology, on how to address the cognitive-

emotive disconnect; challenging the idea that conflict is an interaction between purely rational actors. This includes the work of Burton on second-order learning (Ramsbotham et al. 2011) and the work of Fisher and Kelman on interactive problem-solving (Kelman 2010). However, the level of research of what actually happens relationally within mediation is still minimal.

The comparative of ADR and CR in this chapter brings together questions about conceptualisation of conflict roles at a social-psychological level and the operationalization of these ideas at the individual interactional level in order to make a contribution to both fields. In order to do this, it is necessary to start with definition and differentiation of different roles.

### **Conflict Roles**

The autoethnographic process of writing on epiphanic experiences and the analysis of these episodes repeatedly brought out the finding that the failure to differentiate conflict roles clearly is actively problematic for all those involved within a conflict system. This is true in relation to conflict roles including, but not limited to, those originally used by Fisher and Keashley, who differentiated 'mediator' and 'consulting'. This finding therefore speaks directly to the research question of how the compartmentalisation of ADR and CR has impacted on knowledge transfer in theory and practice between these fields.

For this finding to be transferred back into the CR context it is helpful to draw out the difference between the two fields in relation to the concepts of contingency and complementarity (Fisher and Keashley 1991).

Complementarity captures the idea of multiple different types of intervention can be applied in different sequences or combinations. Contingency captures the idea that the timing of different interventions will influence the impact of the intervention.

Contingency was picked up in the CR (and IR) discourse with aplomb (Bercovitch and Rubin 1992) with plenty of quantitative work attempting to connect the 'success' of mediation with the timing of the mediation intervention.

Complementarity has received far less attention and has become ever more difficult to apply due to the terminological confusion around mediation. This definitional diversity is illustrated in both chapters 2 and 4 both in theory and in practice in terms of self-identification of mediators.

In contrast, complementarity lies at the heart of ADR. The legal context now tends to take a fairly pragmatic view of different processes, and lawyers in the UK are duty-bound to explain these different options to their clients. Therefore, different processes applied in different orders and different combinations at different times in order to work towards preferred outcomes is fairly standard. Contingency, whilst present in arguments about whether mediation is best used pre- or post-issue of proceedings, is not as central to ADR as it is in CR. This may be because the philosophical pragmatism of ADR and the demand that lawyers consider cases individually means there isn't the same aspiration to externally identify 'the best moment' within a generalised theoretical model of conflict escalation (e.g. Glasl (1980) and Galtung (2000)) for mediation to take place.

In order to understand the importance of this finding, in relation to the mediator role, it is necessary to provide further clarification of conflict roles more generally. The division of roles use in this chapter picks up and extends the idea of complementarity beyond just third-parties. The division of conflict roles used here has been developed through working with conflict parties who are not 'conflict specialists'. When working with students (both university and professionals) and them to describe and discuss which of these roles they take on informally in conflict situations and what they expect from themselves and others the following categorisation seems to provide conceptual and relational clarity:

- Parties: Complainant(s)/Respondent(s); Claimant(s)/Defendant(s); Offender(s)/Victim(s)
- Partisan Allies (of all sides): Friends/Supporters/Media/Lobbyists
- Professional Representatives: Advocate/Barrister/Solicitor/McKenzie Friend



- Commentators: With their own agenda (rather than those allied with one of the parties)
- Bystanders: Those who have no direct interest, but watch with interest (and may enter or exit the other roles depending on changes in context)
- Third parties: Judge/Arbitrator/Umpire/Third Sider/Ombudsman/Conciliator/Mediator

Whilst in 'normal' life these roles are seldom named, people seem to find using these rather legally-based terms easy to conceptualise and work with. It is unsurprising that occupying these different roles comes with the expectation (though not usually expressed directly in this form) that people adhere to Cialdini's principle of commitment and consistency (Cialdini 2009) in their occupation of a particular role and that breaching these expectations comes at considerable cost to all concerned. There will be a number of illustrations of the implications of role-switching in the later autoethnographic episodes.

### **Parties, Partisan Allies and Professional Representatives**

Conflict parties are involved in a system where they are, or perceive themselves to be, in opposition to someone else in some way. They usually seek supporters, allies and/or advocates. Professional Representatives and Allies may have their own set of interests but are primarily involved on behalf of those who have recruited them; the level of 'professional' discipline of representatives/advocates will impact on their relationship with the party and the course of the conflict.

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The Diplomatic Service of a European Power

"So, you are interested in conflict and mediation. Do your diplomats mediate?"

“Heavens no! We have to negotiate all the time, and we try to use principled negotiation, but we always have to do so with the best interests of the country in mind, so we are never neutral; we can’t ever mediate.”

I am surprised and try not to show it. I hadn’t expected this level of role differentiation in this context.

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This conversation with a senior diplomat illustrates a high level of clarity by this individual on the nature of the different roles in conflict. It is also interesting because it is closer to the ADR understanding of the different conflict roles (which will be explained in further detail later in the chapter), than that common in the CR context.

The range of different ‘types of mediation’ that in effect have the ‘mediator’ taking very different roles means that I was actively surprised by this interaction. I have included it as an exceptional event where I had expected a much looser role definition<sup>71</sup>. However, given that diplomatic services tend to have close connections with law and to recruit from a legal background, this highlights the divide both between IR and CR and the connections of ADR with its much stricter role definitions with the track I diplomatic context.

Transparency on what role is being taken by whom has consequences for all those involved in conflict. The diplomat in the vignette conveys the belief that they could not ‘mediate’ a conflict to which they were party because of the

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<sup>71</sup> In casual conversation with solicitors, barristers, HR professionals, will still sometimes talk about how they ‘mediated’ a situation on behalf of their client. Further exploration invariably leads to a description of a successful direct negotiation with the other sides representatives, or how they exercised their role in a less competitive way than usual – maybe referring to Fisher and Ury’s ‘principled negotiation’. Representatives who genuinely ceases to ‘represent’ their client seldom are at risk of professional negligence claims. Even collaborative law (which aims to prevent clients from having to go to court) is based on the concept of representing people more effectively rather than vacating the representative role for a third-party role.

difficulties it would create for all concerned, because: “we can’t be neutral”. However, just because this role is precluded, it does not preclude the use of the skills associated with mediation. The use of ‘principled negotiation’ indicates the implementation of particular skills and strategy, not a change of role.

### **Bystanders and Commentators**

In most conflicts, there are also bystanders to the situation who are either disinterested, feign disinterest, or want to observe but not to be directly involved. This observer position may change over time. Similarly, commentators may claim active interest but non-partisanship. Whether the parties accept these commentators as non-partisan raises some of the same issues discussed in the section on third-parties.

### **Third Parties**

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The Political and the Diplomatic

There is a polished wooden table in the middle of the spacious room. There are bookshelves, pictures, shields and woven, commemorative pennants of the sort that dignitaries give and receive.

The owner of the office (a very senior official in an IGO) is obviously busy and indicates that I should sit at the table. I am slightly tense; this is an important conversation. After only a few seconds he switches his focus very deliberately, stands up and walks over to the table.

“So how can I help you?” he sits; personable, relaxed and engaged.

“Well, as I think you know, the commissioning team I have been asked to design something on ‘political and diplomatic negotiations’? He nods. “The aim is that staff work effectively in a range of conflict roles including being stuck ‘in the middle’, or ‘mediator’. The commissioning team said you have lots of

experience and would be able to help me on the type of work done and the strengths and weaknesses of the senior staff.”

“Well I’m not sure what you mean by ‘political and diplomatic?’” he says.

“Hmm. That is one of my problems.”

I am positively animated; he has immediately spotted the problem. I continue:

“That commissioning group chose the title. I asked them what they meant, but didn’t get a clear answer. They talked vaguely about politicians and diplomats and then basically said I should ask you. So, what does political and diplomatic mean to you?”

“I spend a lot of time talking with people, but I don’t think there is anything special about them whether they are in politics, or diplomacy. The main thing is that I can’t do things by force; longer term force is counter-productive.”

I try to dig a little further: “Counter-productive?”

“We constantly have to balance different views to get overall agreement between agencies; our structure mean we can’t afford to alienate people. We have to be hyper-aware of others’ interests in order to find ways to meet ours; we have to get consensus and that takes a lot of time. That means we aren’t neutral; we are stuck in the middle of difficult situations, but we aren’t ever ‘mediator’.”

“Uh-huh.”

I am intrigued and don’t want to break his flow.

He pauses. Looking reflective he says:

“The real challenges are organisation-internal.”

“What do you mean?” I ask.

“People don’t share information internally. They don’t know how to prepare and manage a process. They avoid engaging with difficult situations until they escalate. Then they become highly competitive and forget the relationships.”

As we talk it strikes me how conversationally skilled this man is. He listens carefully and, despite his seniority and self-assurance, he conveys humility and openness.

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This episode highlights the awareness of the boundaries this senior person believes he can occupy. As with the diplomat in the previous episode, he is extremely clear that he cannot be *neutral* because he must work for and protect the *interests* of his organisation. His remit is to negotiate with other parties. He drew a clear difference between the terms negotiation and mediation, whereas the commissioning group used them interchangeably. This episode hints at an apparent divergence: those without practice experience seem to tend to ascribe the mediator role and an undefined set of skills needed in the ‘political and diplomatic’ context (however this is defined) to these practitioners, whereas those in practice differentiated the role and the skills. The skills being described as more universal.<sup>72</sup>

As highlighted in chapters 2 and 4, the imprecision of the definition of mediation in the CR context, combined with the alternate position of writing it off as something that is dysfunctional, anywhere but in the superficial context of ‘disputes’ (Burton 1996), has really not helped in the development of anything close to an acceptance of what constitutes ‘mediator skills’. The result is little

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<sup>72</sup> A good example of this appears in the account of the mediation in Sudan reported by Martin, where both the US and Norway, who were in terms of status described as ‘observers’ Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum. p. 148: “pressure from the US and the Norwegians to ‘guarantee Garang a Shari’a-free Khartoum...The observers’[US and Norway] drive to meet the demands of their own political constitutencies back home” yet, looking at other sources on the same process there are references to them as ‘mediators’ Kelleher, A., Taulbee, J. L. and Grosvenor, P. C. *Norway’s peace policy : soft power in a turbulent world.* , chapter 4. It is clear from this quote that they had interests that they were negotiating for within this context that were their own, not those of the other parties and was a dissonance between the role claimed and the role occupied.

space for the development of skills-definition and role-definition as two discrete things.

This tendency is one that I have encountered repeatedly in international contexts of the type that are the academic domain of CR rather than ADR. However, the same type of loose application of the term mediator was common in the civil-commercial context until the 1990's and 2000's<sup>73</sup>. With the institutionalisation of mediation in the legal context there are now reasonably clearly defined mediator skills and competencies<sup>74</sup>. Organisations such as CEDR, in the UK and elsewhere, specifically sell the idea of learning to use mediator skills *outside* the mediator role in order to improve outcomes in roles such as conflict party or advocate.

This highlights a boundary I am placing on the definition of third-party roles. Being a third-party excludes 'additional' conflict parties who have their own set of interests, but attempt to control the negotiations by asserting (contrary to the evidence of their own interests and the behaviour they present) that they are a third-party/mediator/neutral<sup>75</sup>. In this situation, the 'additional' conflict party is just another party in a multi-party situation. This is exactly the role the man in the previous vignette ascribed to himself.

Self-awareness is crucial to the appraisal of what you can and can't achieve in any given role; something that the main characters in both vignettes seem to be acutely aware of. Whilst self-characterisation of a (supposed) third-party may impact on the start of a process, it is the perception of the parties on whether the self-description and behaviour are consistent that will determine subsequent

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<sup>73</sup> Public literature from the last 15 years highlight just how much the understanding and usage of the term has changed. Early in this period it was normal for lawyers to describe their negotiations as being 'mediation', this is no longer the case.

<sup>74</sup> See CEDR, ADRg, CIArb, AA and others.

<sup>75</sup> Media reporting and casual conversation

events<sup>76</sup>. This will be dictated by what they have internalised about what these roles should look like.

Whilst there is a lot of research and writing about the importance of commitment and consistency in behavioural psychology (Cialdini 2009), the implications of this for conflict roles doesn't emerge clearly from the literature. The characters in the last two vignettes infer that there is an association between mediation and neutrality and a dissonance between working for your own interests and being neutral. It is not possible to infer a more exact definition of mediation from these conversations, but the suggestion seems clear that having your own set of interests rules out taking the mediator role, and that 'mediator' and 'neutral' are closely linked. The concept of neutrality is highly contentious in academic writing, but its salience in people's image of what a 'mediator' 'is' makes it a crucial relational factor in the context of practice.

Finally, there are some interesting issues alluded to in this episode about the skills needed in negotiation and conflict situations. These points will be picked up in the next chapter on the mediator in role.

The experience of practicing and studying both ADR and CR has led me to divide third-parties into three relationally distinct roles: Judge; Third-sider; Mediator. Each of the three roles, and the resulting logic for the division, will be defined and the relational dynamics explored through analysis of autoethnographic episodes and relevant literature.

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⁷⁶ The episode "The Arbitrator and the Animation" below provides an example of how this change can take place and its immediate implications. The de Soto mediation in Cyprus, and the reference in Martin of his transition from mediator to arbitrator and the response hints at the sort of difficulties created Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum..

Diary Note 15.01.16

Why do people accept other's judgement of them or their course of action?

Because...

1. It corresponds to what they think already.
2. They don't agree but hope to be rewarded in some way for doing so.
3. They don't agree but fear the consequences of not doing so.
4. The judgement prompts a reappraisal of the way they see things.

When was the last time that 4. happened to me? Hmmm. Not so recently. Am I really so different from others?

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This diary note is contemporaneous with my first group of autoethnographic episodes. These episodes cover a range of experiences in conflict management and mediation in ADR and CR contexts. The relational implications of the different roles taken by third-parties emerged out of the autoethnographic process. In particular the implications of telling conflict parties that their position was/is right or wrong were brought into focus. This is connected to the work of Damasio, specifically: "*people's emotional evaluation of outcomes, and the bodily states and the approach and avoidance tendencies associated with them all play a central role in guiding decision making*" (Damasio in: Kahneman 2013: p.139).

I have split the roles involving the application of judgement into two types. One judge on the basis of formalised sets of rules or laws, the other on the basis of their own professional, personal and organisational metrics. The second type of role, third-sider, is covered in the subsequent section, but first to the role of Judge.

### **Judge as Conflict Role**

The definition of judge I am applying is one who examines the actions of conflict parties against an external standard, from a starting point of neutrality. The external codified standard may be moral, legal, or religious. Judgement



determining the outcome of the situation is delivered on the basis of evidence presented by the parties (and/or often by advocates representing the parties). On the basis of the evidence presented judgement is passed and the outcome of the situation ‘determined’<sup>77</sup>. Penalties and/or rewards are awarded on the basis of this judgement in order to ‘resolve’ or ‘settle’ the situation. The judgement may be on the basis of win/lose, or more right/more wrong.

The parties may ‘submit’ voluntarily, or be forced by others (by social pressure, or specific enforcement authorities), to submit to judgement. A scaffold of rules that dictate behaviour, entry and exit of the role surround the judge. Voluntary or involuntary submission to judgement may change the view of the outcome but doesn’t change the underlying relational dynamics between parties and judge. The relational dynamic is superior-expert Judge vs. inferior-deficient Parties; decision-making is completely handed over.

Within this role, I am including the traditional legal ‘Judge’ along with arbitrators, adjudicators, adjudicative-ombudsmen<sup>78</sup>, and expert determination. This is at odds with the common application of the term in both the ADR and CR contexts. In legally dominated ADR, judge is normally applied only to the court-based litigation context.

In the CR field, there is a variance at different societal levels. At the Track I level of interstate diplomacy and international governmental organisations there are formal institutions such as the International Court of Arbitration, International

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<sup>77</sup> ‘Determine’ is a term used for the definitive decision and conclusion of a situation – to determine a contract means that all those involved are clear/told what it ‘means’, act accordingly and the contract completed. In the legal field in relation to ADR it is common to subdivide adjudicative roles into those that produce binding and non-binding findings. However, as this section is focused on the role exercised by the third-party, rather than on whether the outcome, in process terms, is binding or not.

<sup>78</sup> Ombudsman is a hugely problematic term, even in ADR, as it is one where in practice both the process and the role vary wildly, from essentially a paper-based exercise in adjudication, to a partially facilitative process based on elements of mediation practice.

Criminal Courts and Tribunals where the terms arbitrator and judge are used on a strict basis similar to the commercial context. In the practice context at the grass-roots and track II levels, I have experienced the interchangeable use of the terms arbitrator, arbiter, ombudsman usually for adjudicative-evaluative roles culminating in a decision by the third-party.

By uniting these adjudicative-evaluative roles under one name, judge, their relational similarities are thrown into relief. The underlying theory of change is also highlighted; namely that people will cease conflicting if a judge tells what to do. The comparative of the application of mediation in the CR or ADR contexts allows the dynamics of these roles to be brought into sharper focus. In the ADR context, mediation happens in conjunction with formal adjudicative processes as the fall-back position if the situation is not resolved through mediation. In the CR context, this is much less common, so the constant reminder of the difference in dynamics between evaluative-adjudicative judge-led processes and facilitative processes are less obvious.

A crucial question is why people enter judge-based processes? In my experience in ADR, it is common for the parties to have elected to use mediation because it is cheaper and quicker than the courts, and because there are penalties for not doing so<sup>79</sup>; were it not for these factors they would often prefer to go to court. For conflict parties the view is often: ‘I am right, they are wrong, so why would I want a win-win? (It doesn’t exist anyway!)’

In addition, judge-led processes provide a psychological insurance policy that is connected with the well demonstrated cognitive issue of loss aversion (Kahneman 2013) as well as the principle of commitment and consistency (Cialdini 2009). As a party, if I lose the case, it is due to the judges

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<sup>79</sup> This often includes risks to getting your legal costs back if you have not conducted the litigation in a ‘proportional’ way and made genuine attempts to settle. There is a raft of case law on this subject. See chapter 2 and [www.cedr.com/library/edr\\_law](http://www.cedr.com/library/edr_law) for case summaries such as Dunnett & Railtrack, Halsey and Burchell & Bullard. Last accessed 12 December 2017.

(poor) decision; I lose not because of something I have done (loss by commission), but rather through the failure of someone else (loss by omission) (Kahneman et al. 1991).

In other words, as party if I lose I suffer a material loss, but through a judge-led process I don't have to give up my position and therefore don't lose face in the same way, *because I have maintained my positional commitment and have remained consistent with my previous position (Cialdini 2009)*. This provides me as party with the justification for rejecting, or disowning the outcome. It even provides the justification for complying with the outcome without agreeing with it.

If optimism bias, confirmation bias, loss aversion, and the wish for vindication (social proof that I am right) are accounted for, the wish for a judge-led process is highly logical at the start of the process. Unfortunately, a process that reinforces these cognitive biases that will impact on how they prepare the case and, maybe even more importantly, on the way the judgement will be received.

This leads to the question of what happens during judge-based processes and why they aren't persuasive for the losers? Parties try and 'persuade' the judge that their view is right. They do so through the selection and presentation of evidence. 'Trying to persuade' powers the dynamic of selecting, concealing, and even falsification (often just through being selective) of information.

Confirmation bias is the dynamic of someone noticing, selecting and presenting only information that confirms what they already think. In combination with optimism bias (the overestimation of the chances of success) confirmation bias creates a dangerous mix of clearly demonstrated experimentally cognitive errors (Kahneman 2013). A conflict process that demands that parties select evidence purely on the basis that it supports their view cannot help but reinforce both biases.

As confirmation bias builds through the judge-led process it will reinforce optimism bias, with each party<sup>80</sup> believing their case and their person to be more persuasive, rational, authoritative etc. than they actually are (Kahneman 2013). The net result is likely to be an overestimation by each side that they will persuade the judge that they are right. An illustration of this dynamic are the percentage figures given to me confidentially by mediation parties' lawyers on the likelihood of succeeding at court. In two-party situations, the two figures given by the two sides will almost invariably give a total of well over 100% - not infrequently between 130 and 160%. This is very simple indicator that either, or both, are being over-optimistic about their chances of success (otherwise the figure would come to a maximum of 100%).

If external judgement reinforces confirmation and optimism bias it also sets up a constant threat dynamic (I might lose) and encourages behaviours aimed at averting loss. My impression is that actually, however belligerent, parties are constantly and naggingly aware of this and fight to block it out.

Information that undermines the conflict parties view, becomes directly connected with threat triggering and stress. The resultant fight/flight response impacts on the efficacy of decision-making. This is certainly logical as threat triggers the amygdala and that once the amygdala is triggered it reduces the efficacy of the frontal cortex – the area of the brain responsible for complex decision making. (Damasio 1994) (Kahneman 2013).

Once judgement is pronounced the implications of the relational dynamics of the judge-led process rapidly become clear. The winner will rarely complain about the judge, whilst the 'loser' may accuse the judge of being partisan, prejudiced, incompetent, or stupid. Those on the 'losing' side are often not persuaded that they are wrong. One of the crasser examples of this was

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<sup>80</sup> And their lawyers – whilst legal training works hard to educate lawyers to look at the evidence against their case, rather than just for it, as humans they will manage to do this with variable results – particularly in situations where their clients will not countenance the idea that they could be wrong.

provided by the response in the Brexit-supporting press, to the High Court judgement requiring a parliamentary vote on invoking article 50 (Slack 2016).

Systems using a judge-type role usually involve contingency arrangements such as escalation through different instances to manage the fall-out of the refusal accept the judgement. Once all instances have been exhausted the opinion of the loser is irrelevant; unless they fail to comply with the judgement.

Failure to comply with judgement is common in the litigation context. As a result, after all instances are exhausted, there are 'enforcement' processes. These processes take time and money and the figures<sup>81</sup> demonstrate that even in the UK (in international terms, a relatively respected court system) enforcement proceedings are around 40% of civil cases.<sup>82</sup> Anecdotal evidence from lawyers who combine both ADR and litigation practice suggest that the figures may be much higher in some contexts as much as 70-80%. Aside from precise figures, it seems clear that, where the 'loser' is implacably non-compliant, enforcement procedures will either fail (leaving the winner with an

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<sup>81</sup> There are major criticisms of the court system in England and Wales. However, if compared to other domestic courts internationally they don't fare too badly; with massive delays (<https://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf>) and jurisdictions endemic corruption hobbling many jurisdictions. <http://www.thetidenewsonline.com/2015/11/09/nigerias-legal-system-and-its-challenges/>

<sup>82</sup> In small claims, low levels of compliance and extremely high enforcement rates are; something that I have picked up through working with solicitors who will often work hard to manage expectations of recovery of debt through judgement. Solicitors therefore often recommend negotiation; only about 3% of cases that are lodged with the courts actually go to trial. HMRC figures on enforcement are opaque. However, as a sample I have taken the second quarter of 2015 where there is publicly available data. There were 194,261 judgements and 74,599 enforcement orders. These enforcement orders will not necessarily correspond to the judgements due to time-lags between judgement and enforcement. However, as the two rates do not seem to fluctuate too wildly it is possible to infer a rough figure of 38% of cases requiring enforcement orders. Even allowing an extremely generous margin for error of 10% this puts the rate at somewhere between 30% and 50%. Biggs, H. (2015) *Civil Justice Statistics Quarterly, England and Wales*. Justice, M. O. London: Ministry of Justice. Accessed 31 August 2016. p.11

‘empty judgement’<sup>83</sup>) or may end up causing ripple effects that are disproportionate to the original issue<sup>84</sup>.

The other common dynamic is that in advance of judgement, where one or more parties feel there is absolutely no chance of getting a ‘fair’ process and/or judgement, or they believe that a fair process will find against them, leads either to a refusal to engage, and/or the party contesting the legitimacy of the entire process<sup>85</sup>. This type of situation is common in the international legal context of the ICC/ICTY etc., not just in the commercial context. The result is either that proceedings have to be done ‘on behalf of’, or once a judgement is received the ‘winner’ is forced to launch into enforcement proceedings – if any are available.

A good recent example is the recent ruling by the Permanent Court of Arbitration on the dispute between China and the Philippines in relation to territorial waters in the South China Sea. China employed both the refusal to engage and the rejection of the court’s legitimacy. The result is a ruling in favour of the Philippines by a court that has little ability to enforce its decision against a country that rejects its jurisdiction. The result is that there are now disputes between the two countries (and the other parties involved) not just about the South China Sea, but about the legitimacy of a particular international court.

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<sup>83</sup> To take the point of enforcement out of the statistical try forcing your 15 year old to comply with your judgement; alternatively try to force a struggling construction company to hand over the court-award and watch it declare bankruptcy.

<sup>84</sup> Sometimes the ‘loser’ might be persuaded, but can’t comply. In such contexts proportionality of outcome and claim mean that natural justice and fairness can muddy the waters in outcome acceptance; for instance, stripping a person’s home of possessions can impact on children who have no responsibility for the legal situation.

<sup>85</sup> This is particularly common where the adjudicative system lacks the ability to enforce its judgements and/or where there is a lack of consensus of those who are theoretically under its jurisdiction about its credibility; this tends to be in the international environment, or in countries where there is a complete loss of faith in the justice system, often due to corruption.

It is this lack of persuasive power of judge-decided situations that is particularly interesting and relevant to the potential for learning in relation to mediation theory and practice for both the fields of ADR and CR. The accusation from Burton that mediation would only address superficial disputes, not underlying conflict, is valid for judge-led processes: the focus is on the judgement of the extent to which the material evidence supports one or other legal position, not on addressing underlying issues of basic human needs, or structural problems. This is easy to lose sight of in a context where the 'losing side's' opinion is irrelevant and/or where the focus is on forcing 'compliance'.

So, why aren't the losers in judge-led processes persuaded? The beginning of this section provided four possible reasons why someone might change their view as a result of judgement. The winner receives a judgement that confirms what they already think. For the loser, picking up the diary note earlier the options are:

1. They don't agree but hope to be rewarded in some way for complying.
2. They don't agree but fear the consequences of not doing so.
3. The judgement prompts a reappraisal of the way they see things.

It is rare to be rewarded for losing an adjudicative process. The efficacy of restorative justice (previously known as victim/offender mediation) and the parallel with 'total victory' in war, suggests that development and reintegration is much more effective where the losing side is 'rewarded' rather than punished (Wallensteen 2015: p.64). However, in the legal context reward in judge-led processes is almost unheard of.

The second option is common in the commercial context; the risks of not complying with a judgement may outstrip the benefits of contesting it further, or refusing compliance. However, the frequency of enforcement proceedings already mentioned indicate that this may be less frequent even in the commercial context than may be commonly assumed, and in the international context the dependence of many of the adjudicative mechanisms on individual

partisan countries and/or organisations to enforce judgements makes this an extremely hit and miss option.

The comparative of the CR and ADR contexts challenges the notion that the difficulty in the international option is a lack of hegemonic institutions that can enforce rules. The comparative with the ADR context provides little support for the idea that 'fear of consequences' alone produces consistent compliance with judgemental outcomes. In other words, bringing ADR experience into the CR context makes it much harder to blame the weakness of the adjudicative systems in the CR context for their failure. It highlights the underlying problem of the efficacy of a role that fails to actually change the opinion of losers and disregards them after judgement.

The third option was that the judgement process leads to a fundamental reappraisal of the way the parties see the situation. The theory of change behind the judgement process is, put simply, that if someone with sufficient authority is in the role of judge, and can build a logically reasoned argument on who is right and wrong, that the loser will be persuaded. The analysis of adjudicative processes (litigation, arbitration and adjudication) in the ADR context indicate that the theory of change is deficient. A highly respected judge can make a decision that it is well reasoned, articulated and evidence-based and still fail to persuade the loser that they are wrong.

My observation from the mediation context is that people modify their opinions when they feel secure enough to take into account the information that they have been ignoring, in a context that allows them to do so without either party losing face; without breaching the rule of commitment and consistency by being able to change their position whilst being able to present it in a way that is reconcilable with what they have said or done previously<sup>86</sup>. This is illustrated

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<sup>86</sup> That is that their change of position is in some way reconcilable with what they have said previously.



both by process of change observed within the episodes below that illustrate the impact of judgemental interventions and exploratory intervention combined with process management.

Finally, the judge-led process generally involves a one-way stream of attempts to influence and this is from party to judge; characterised by the choice of representatives and the framing of arguments. In the other direction, persuasion is based only on the influencing principle of authority. The development of a relationship between 'judge' and 'party' is seen as inappropriate because of the principles of authority and neutrality. The result is that any application of other principles of influence as put forward by Cialdini (2009) from the judge to the parties is unlikely to be successful.

If someone 'loses' in this type of process, they receive the news from someone (the judge) who is at their least persuasive, because they have no direct relationship with them. Their amygdala will be triggered due to the 'threat' of being told they are wrong, and doubly so because it is an unexpected threat; unexpected because of the impact of confirmation and optimism bias on what I have and haven't taken into account up to this point. All this is done in a context which maximises the emotional and social risks of any admission due to the fear of being seen as inconsistent with their previous position.

*What are the implications of not being persuaded by the judge?*

Is it therefore surprising that in such instances people fight to the last and still proclaim their rightness? When (and if) they finally stop fighting overtly, they retreat into glowering silence. A state all too often confused with acceptance that the winner is right because the winner has also been suffering from exactly the same cognitive biases as the loser, but have won their case meaning that their biases remain unchallenged to the last.

I am not suggesting that judge-led processes are always ineffective or should not ever be used. The awareness that however much status and authority a judge has 'losers' are not always persuaded that they are wrong is already clear

to courts, from domestic magistrates to the international court of arbitration, and is an issue which is an ongoing challenge. The result is often demands for more coercive bodies and judges, with ever bigger sticks in the attempt to force compliance.

Unconvinced losers mean forced compliance has limited success and serious costs and side effects even where a court's jurisdiction is broadly accepted, they have overwhelming power and embedded and independent enforcement procedures. It therefore seems over optimistic to expect such a system to work where none of these things are present. As already highlighted, adjudicative systems do not always seem to take into account of the basic principles of persuasion as highlighted by Cialdini (2009), or of the operation of cognitive and emotional errors of human decision-making (Kahneman 2013). It might therefore be worth considering what could be done to make judge-led procedures more competent at encouraging all parties involved to look at information other than that which confirms what they already think.

However, this point is secondary<sup>87</sup>. Much more important to this work are the lessons that can be drawn from the judge role for the application of alternative roles. Crossing the boundary from CR to ADR highlights the limitations of judge-led processes even in contexts where many of the elements missing from its application in CR contexts are present. Likewise, crossing from ADR into CR can lead to the whitewashing of the issues and limitations present in even the best functioning legal systems. The result is over-optimism in what adjudicative processes can promise and a failure to appreciate both the positive differences in non-adjudicative processes and the limitations of both types of process can offer. In other words, when things aren't going well there is the temptation to

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<sup>87</sup> If the underlying philosophical principle is retribution for being wrong, then wrong-doers being persuaded is superficially irrelevant. However, even where extreme retribution is ordered, where there is no remorse/admission of guilt in the 'wrong-doer', the retribution also seems to often come as cold comfort even to those most affected and demanding retribution.

suggest that the alternate type of process would be the answer, where in fact both have their limitations.

The flaws highlighted in relation to the analysis and implementation of the judge-role are also sometimes transferred to third-sider and mediator roles. Moving from formal to informal adjudicative-evaluative roles it would seem sensible to ensure that, if a role is focussed on persuading people, empirically demonstrated principles of persuasion are actually applied. Where these principles are irreconcilable with other principles (such as where authority and independence from the parties are considered paramount) the expectation of how persuasive judgement is, will need to be revised accordingly.

It therefore follows that if the aim is to improve decision-making capacity then reducing the threat posed by the third-party, and with it reducing the risk of amygdalic triggering, will be more effective than focussing on increasing power and authority of the third-party. If the aim is for the parties to take into account information they have previously been 'blind' to, due to optimism and confirmation bias, then triggering the fight/flight mechanism (the amygdala) through the weighing in of a threatening third-party seems short-sighted. Informal third-party conflict-roles and processes that are applied and structured in such a way that they mitigate, rather than reinforce, amygdalic triggering and cognitive biases seems to be an obvious choice.

In addition, decision-making seems to be heavily influenced by how people *feel* about their situation and the options they perceive as being available. In other words, the impact of the affect heuristic (Kahneman 2013: p.103)<sup>88</sup> has a major impact on risk-benefit analysis by 'normal' individuals, so it is implausible that it doesn't affect those in conflict at least as much, if not more than 'normal' individuals (Kahneman 2013: p.139). If a judge is making a decision for someone about what they should do, as long as compliance can be forced, this

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<sup>88</sup> The affect heuristic is the pre-verbal *intuitive* process of associating things you *dislike* with high risks and few benefits and things you *like* with low risks and many benefits.

heuristic is irrelevant. However, if the conflict party has any level of choice about the implementation of the decision, then the impact of the role and relational interaction of how the conflict party *feels* about the situation should not be ignored. This is illustrated by the substitution of an ‘easy’ question ‘How do I feel about this?’ for the difficult question of ‘What do I think about it?’<sup>89</sup>

As highlighted at the start of this section “*people’s emotional evaluation of outcomes, and the bodily states and the approach and avoidance tendencies associated with them all play a central role in guiding decision making*” (Kahneman 2013: p.139). These issues will be discussed further in the next two sections, firstly in relation to the roles that Ury classifies as ‘Third-siders’ (though I have excluded ‘mediator’ from the third-sider roles) and then in relation to the specific role of the outcome-neutral mediator.

This section demonstrates the divide between ADR and CR clearly. Furthermore, it indicates that information drawn from the ADR context when applied to the CR context calls into question some of the consistent criticisms and proffered solutions to mediation in conflict situations. Particularly the evidence that the assumption that more authority and coercion means more persuasion and compliance is often misplaced even where there is a central authority with enforcement powers. Extended to the lax definition of mediator in the CR context and it undermines the likelihood of the ‘mediator’ who behaves like a judge (but without the backing of a coercive system) being persuasive or producing workable and sustainable outcomes.

### **Third Sider as Conflict Role**

Despite the tighter definition of mediation that is common in ADR, it is not uncommon for experienced professional experts (in law, construction, intellectual property, or some other specialism where mediation (ADR context) is used regularly) to start mediator skills training course with an extremely

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<sup>89</sup> This is known as the availability heuristic. See Kahneman p.129

vague notion of what a mediator actually does. This means a mixture of believing that they are going to be neutral and to ‘come up with a solution for the parties’, that the mediator ‘persuades people’ to do something more sensible but that this is done in a ‘clever’ way so that the parties ‘won’t notice’ (a manifestation of overconfidence and optimism bias (Kahneman 2013: p.255-265)) and yet is also neutral.

The autoethnographic episode below, Train(ing) Mediators, makes the impact clear of understanding what it ‘sounds like’ when someone believes they have a superior view of the parties’ situation than the parties themselves. The relational implications of believing you have the overview in a way the parties don’t (a common assertion about the mediator role) becomes much more obvious. The result is a far cry from the image of a non-judgemental, neutral conjured by the use of the term mediator. This begins the process of clarifying why I am separating the mediator role from that of the third-side expert.

The definition in this volume, of a third-sider expert is a person, or group of people, who use their personal and/or professional judgement and expertise to provide advice and recommendations on what all parties (rather than just one side) should do. I am adopting an element of Ury’s definition, of the third-sider works *“from a perspective of common ground. While most issues in contention are presented as having just two sides, pro and con, there usually exists a third. From this third perspective, the truth of each competing point of view can be appreciated.”* (Ury 2000a). Ury’s ten roles are: Peace-keeper; Referee; Witness; Healer; Equalizer; Arbiter; Mediator; Bridge-builder; Teacher. I am excluding three roles that Ury includes in his conception of the third-sider; in this relationally-based division of roles, arbiter and referee belong with ‘judge’, whilst mediator receives its own category.

The superiority of the third-siders’ perceptual position is implicit; their ability to appreciate ‘the truth’ in each competing point of view sets it above the perceptual position of the parties who can only appreciate ‘the truth’ of their own point of view. The relational dynamic is based on (usually unarticulated)

inequality due to the third-siders perceptual superiority, and potentially also superior expertise/advice, resources and solutions that address the parties' deficiencies. As with the judge-role, the underlying logic is that the conflict parties are deficient in ways that can be addressed through outside intervention. The logic is often also that people will be empowered in the future to deal better with their situation through the knowledge gained through the contribution made by the expert.

The theory of change seems to be that people will be influenced through the input/contradiction of their stance by the third-sider, because of the superior perceptual position and expertise of the third-sider. The expected result is changes in opinion and/or behaviour.

The following vignette is from an ADR mediator training course, the role-play is a straightforward commercial case, and it clearly illustrates the relational impact of a 'mediator' moving into an 'expert' role. It is an example of the repeated experience of the clash between trainee mediators' expectation of the mediator role and the impact of the relational dynamics triggered by the impact of the role of 'expert' on the parties.

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Train(ing) mediators

I am coaching. The trainee mediator is in private session with a company that has put a legal claim to end a lease contract on train carriages. The trainee mediator has been receiving confusing verbal and non-verbal signals from the party and continues the conversation with a question:

“But you want to resolve the conflict so you can work together?”

The role-player responds vehemently: “No I don't. Their carriages are a complete nightmare, loads more maintenance than the old ones, really bad suspension, and they are charging us a fortune!”

The trainee counters: “But you signed the contract, and they gave you the specifications, and your engineers tested the carriages, so you don’t have grounds to rescind the contract.”

The role-player looks irritated, the trainee’s voice has modulated and the body language of each of them is now tense. I decide to intervene:

“OK, time-out. Role-player, staying in character, would you share your internal thoughts and how you are feeling right now?”

She looks at me and says: “I’m annoyed. The mediator is telling me what to do and has completely taken the other parties side.” As she says it her body language changes, the penny has suddenly dropped and she quickly adds:

“This is exactly what I was doing when I was mediator, it is really annoying!”

The mediator interjects: “I haven’t taken the other side, I just don’t think objectively that they have got a hope of succeeding in their claim.”

I nod: “Ok, you have a judgement based on your experience and you might be right. You have received two pages of briefing and have worked with them for 20 minutes. How much do you know about the situation in comparison to the parties?” I raise an eyebrow and pause.

The trainee looks a little defensive and confused. “But they are being really inconsistent, so what should I do?” he says.

“Sure there are mixed messages, exploring them? Shelve your judgement and be open to both options; after all they will be deciding which option to go with. Let’s rewind a couple of minutes. Start by paraphrasing what you’ve understood, then ask an open question.”

The mediator turns back to the party:

“So you have mentioned that you don’t want to work with them just now, but something earlier gave me the impression that this wasn’t absolute. Can tell me more about the options?”

The role-player responds: “Well of course the ideal would be that they take the carriages back, pay us our claim and then we could get carriages from someone else that were better and cheaper. But if that isn’t possible, then we need a renegotiation of the contract.”

“So ideally contract termination or, failing that, renegotiation of the contract?” paraphrases the mediator.

“Yes.” Affirms the role-player.

“Can you tell me what that might look like?”

I intervene again: “Great! So, you have just got some really important information about the party’s own preferences of the options available. They have made it really clear, though not through saying it explicitly, that they recognise that their best option is unlikely to happen and that they have begun to think about the boundaries of other options.”

I reflect as I leave the session 30mins later, that the person on the receiving end of being ‘told’ by others, and its weakness as a persuasive strategy was suddenly crashingly obvious to her.

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Situations where this third-side expert role is applied, and the parties don’t change their opinion or stance lead to a number of issues: de-legitimisation of the process or the third-side individual; non-compliance with the agreements or terms that have been recommended; disowning of the process, or the third-side expert, or both<sup>90</sup>. The context of mediator training, particularly the combination of coaching (where the coach intervenes to assist) and assessing (where the assessor cannot intervene) is being in the observer seat watching the dynamics

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<sup>90</sup> These issues can be preceded by the refusal to engage in the first place, and the difficulty of finding a third-sider that all parties are willing to engage with can be an obstacle. The refusal at the outset to accept the legitimacy or jurisdiction of a judge has already been mentioned; so it is not a problem that can be wholly ‘solved’ by moving to formal court based systems. It is also the place where in order to get engagement, unrealistic expectations of the third-party can be set.



change when the trainee moves from the mediator role into that of advisory expert. Despite the role-play context, those taking part are not actors and therefore generally behave very naturally to the impulses they are given.

The judge role applies a formalised external legal, or social code; an iterated set of rules. These codes are created out of the cultural and moral matrix of a particular context. They exist independently of the specific individual taking the judge-role. This means that it is possible to separate rules and judge. The third side expert is applying a code based on an opaque composite of their personal and professional views, combined with the moral matrix of the organisation/group to which their third-side intervention is attached (whether that is a country, NGO, IGO or INGO). Even where this matrix has transparent elements, for instance organisational rules and ethical codes, these are created externally to the conflict parties' context and are seldom transparent to the parties, let alone appealable.<sup>91</sup>

With the judge-role it is possible to take issue with the person, the 'rules', or both. With the third-side expert it is extremely difficult for the parties to separate the two. Disagreement between parties and third-side expert therefore is likely to spell the complete breakdown of role and process. Whilst the training scenario above wasn't allowed to go as far as breakdown, and the change of mediator in the next scenario doesn't demonstrate the extreme end of this process, they both illustrate the ease with which this can happen. It is a pattern that I have observed repeatedly.

In the practice context, third-side expert roles often include the use of explicit and implicit ground rules. These usually cover what the third-sider considers acceptable party behaviour and the boundaries of what the third-side considers ethically, morally and logistically 'sound' options for resolution. Parties may initially be allowed to freely explore options, only to discover that once options

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<sup>91</sup> The matrix of each of the mediators mentioned here is either opaque or intensely personal. Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum.

and solutions are generated, these are vetted by the third-sider on the basis of the third-siders' own implicit (and explicit) ground-rules/standards and then deemed as appropriate/ acceptable (or not).

Curle describes the explanation of the Quaker mediator agenda of being solely about avoiding physical violence and reducing suffering (Woodhouse and Lederach 2016). This might sound minimal and straightforward. In my practical experience, it is anything but, as there are all too often terrible decisions to be made about whose or who is? suffering and for how long. Differences in the judgement and views of such issues are often at the heart of the different parties' views.

Unsurprisingly, given the mismanagement of expectations and the resulting perception by the parties of third-sider inconsistency<sup>92</sup> there is a risk that the parties may not only disagree with the expert opinion, but also disagree on principle because of the lack of consistency demonstrated by the expert because of them 'changing the rules' part way through the 'game'.

Due to the power imbalance between parties and third sider and the frequent tendency to avoid engaging in direct conflict with the 'expert opinion' of the third-sider. This dynamic will not always be clear as the nature and process of self-censorship (Hameiri et al. 2016)<sup>93</sup> means that once the parties understand the power dynamic there will be a tendency to tell a third-sider what they think the third-sider wants to hear, rather than what they actually think. The account given by of one of Curle's colleagues is characteristic of my experience of the operation of third-party expert role: "*We were most disappointed. We thought that we had got it all tied up; they accepted our arguments completely. But then emotion took over and everything unravelled.*" (Curle 1995: p.90)

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<sup>92</sup> In the sense of the term used by Cialdini – that the third-party has been inconsistent and is therefore not to be trusted and lacks credibility: Cialdini, R. B. (2009) *Influence : science and practice*. 5th ed., international edition. Harlow ; London: Pearson Education.

<sup>93</sup> This article provides empirical evidence of the results of self-censorship in intractable conflict.

Giving advice means using your own judgement. Judging means that it is extremely unlikely that the parties will see the third-side expert as neutral. Even multi-partial is hopeful. The gap between the preferred outcome of the party and that recommended by a third-side expert can result in the parties perceiving the third-side expert as another party to the conflict (with their own set of interests and positions). This situation is almost pre-programmed in situations of the type described by Ramsbotham 'radical disagreement'(2011) where the conflict is defined by the either/or (not both, a mixture or anything else) logic. There being high chance that both sides will view the situation from a 'if you aren't with me, you are against me' perspective. The result can be the breakdown of the process and the disowning and or de-legitimation of the third-side expert.

Where the third-side expert has substantial power and resources of their own, or powerful backers, the outcomes defined by the third-side expert may be foisted on the parties and compliance wrung out of them by force. Probably perceived as an additional conflict party, or a judge, the result of this approach is likely to be a severely compounded version of the enforcement problems experienced with the application of the judge-role. Compounded because of the presentation of the role as third-party 'neutral', rather than judge.

So why isn't the logic that people will change their behaviour if a third-party expert tells them to persuasive? My observation of people in conflict is that having asked for support and advice, they do not take kindly to being told (even implicitly) that they are incompetent, deficient, or wrong (even if they feel and fear that they might be all those things). They hope that those external to the situation, whether judge, expert, or friend will be able to provide a 'magic bullet'; a way out that does not contradict their view of the situation.

Third-siders experts may be able to spot inconsistencies, problems or difficulties in relation to what a conflict party is saying or doing. This must be set against the reality that however strong their ability to empathise, they cannot see the world through the eyes of that particular conflict party. This means the third-side

expert can't create a holistic, workable and emotionally viable route to the perfect outcome for the conflict parties; they simply don't have the information and the perceptual position to do so.

As a result, where external perception of conflict situations is held up as superior, objective and more holistic than the perception of the parties, the third-party expert is in danger of being led into a psychological space of superiority. Self-determination relies on the logic that no-one else's view of the world is superior to that of the person themselves. Therefore whilst external views and external expertise can be helpful to parties, it can be received as emasculating, or patronising or both. The net result can either be disempowerment and abdication of responsibility by the part(ies), or an oppositional and competitive dynamic between the third-side expert and the part(ies)<sup>94</sup>.

Neo-liberal international interventionism explicitly views conflict parties as unenlightened and in need of the knowledge, skills or material goods provided by experts in order to resolve their conflict and/or exercise self-determination wisely (Autesserre 2014). In the field of CR criticising neo-liberalism has become something of a sport. However, in the practice context this often masks the underlying combination of a material ontology and foundational epistemology that carries with it a subconscious belief in the superiority of the expert, whilst disavowing it on the conscious level. In my practical experience, all too often in relational terms giving an opinion is perceived as a loss of neutrality and a statement of superiority, not a statement of area expertise.

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⁹⁴ There are people who enjoy a dynamic of this type and believe that this will assist them in working through their problems; in the ADR context, the very male-dominated world of senior litigators is notorious for processing conflict in exactly this way. However, as a mediator picking up cases that have gone nowhere for years on this basis, and seem to be characterised by a grotesque lack of understanding on all sides of even the most basic information, it doesn't seem to lead to the expansion of knowledge.

The arbitrator and the animation

I am in an identikit as provided all over the world: Public space with push button “coffee” machines, carpets that nobody would put in their own house, bland pictures and high tables to ‘encourage’ social mixing. The rooms have laminate furniture, blinds and uncomfortable chairs. It is as if it has been put together to prevent anyone from remembering where they are.

I am assisting the successful arbitrator/mediator, Karioshi, in one of his mediation cases. We have a brief conversation before the start. He seems happy to have someone experienced assisting him. I am pleased, as this is not always the case; insecurity can make such situations awkward.

The mediation progresses through exploratory phases into the rougher waters of shaping up the likely direction of possible solutions. Gradually I begin to see signs of irritation in the body language of the mediator. He thinks Robert (one of the parties) is being intransigent and foolish. We take a break and Karioshi tells me he thinks Robert is unrealistic in his expectations.

I am concerned. I recognise the challenge of separating the frustration with people displaying self-defeating behaviour and the temptation to tell them to stop being ridiculous. Sometimes I am patient enough. They may have perfectly sensible reasons for their behaviour that I don’t know about. They are the experts on their own situation. Holding onto being a sceptic about my own knowledge of the situation and therefore managing to hold my judgement at arms-length is a constant challenge. When I manage it, they carry on explaining their view of the world. If I judge they shut down.

We go back in to see Robert and after a brief conversation Karioshi says: “Robert, if I were arbitrating this case, I would not find for you on this point. It just wouldn’t fly.”

I think I notice an immediate change in atmosphere and body language, much more powerful than the words spoken. Ally McBeal style a cartoon bird took

flight elegantly. It rose gently, circled once and left the room by the window. Both the change and the cartoon might have been the work of my imagination?

Shortly afterwards Karioshi and I leave the room. He turns to me:

“I lost it with him. I don’t think I have much rapport left with him, but you do. Could you work with him from now on?”

I feel awkward.

My cartoon bird was their rapport and I had seen fly out of the window. I didn’t know at that moment for definite if that is what they were experiencing, perceptual positions make a huge difference. However, this moment (in my experience) is almost completely predictable. The act of judgement of someone, even if it isn’t agreeing with the other sides view, shifts the mediators’ relationship (and thus the possible role) within a nano-second. This is just as much the case if the judgement is about the advisability of the different possible routes. The moment as mediator that you become too attached to a particular outcome you begin to get in your own way in the role. Karioshi, arbitrator and mediator, ‘feels’ the difference in these roles.

I reassure him:

“Sure. I’m happy to work with him if you think that would be helpful.”

The rest of the mediation takes place with me leading the conversation with Robert and the mediator leading in the other room. The parties reach an agreement some time later. The mediator and I bring the draft settlement agreement into Robert. He signs it and then says to the mediator: “Thank you.” He turns to me: “Thanks so much. All the very best.” He shakes my hand and leaves the room.

I watch him go and can’t shake the feeling that he carries with him a sense of coercion; knowing what the Mediator thought (due, in this case, to his specialist knowledge). Was this necessary in order for him to let go of his hoped-for

outcome and to settle for something more realistic? Would he have got there anyway? Does this matter?

The mediator and I have a conversation about the events of the day. He is frustrated; stepping into the evaluative role took from, rather than added to the situation. He didn't believe the evaluation was necessary for them to get where they wanted to be.

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The role of the third-party expert is a difficult one. The challenge is illustrated by both episodes above; the trainee mediator who accidentally switches to the role of third-sider expert and tells the party what to do; the experienced mediator and arbitrator who does the same. In theory he has the status and expertise to be able to give third-side expert advice and yet it isn't welcome. This is not about the quality of the advice of the expert above, but rather because of the ownership of outcomes and the power dynamic between third-party and party.

In practice both CR and ADR seem to struggle with the necessity of advice and expertise and the relational impact of the role in terms of self-determination and empowerment. The philosophical contradiction in the incorporation of ADR into a legal system based on positivism has been discussed at length in the early part of the PhD. Yet landmark judgements and the Civil Procedure Rules (CPR) in England and Wales advocate the use of mediation due to its ability to create solutions that could not have been created through a traditional judgement process (Ward and Rix 2005; Ward et al. [2004] ECWA Civ 576).

The result builds on the principle of complementarity suggested by Fisher and Keashley (1991), but applies it to conflict roles in a much more comprehensive way. This is a system of precisely defined roles and processes that form a stable of dispute resolution options that are used in varying sequences and combinations by parties (and their advisors). The third-party intervener, such as the mediator in the episode above, must therefore be clear-sighted and

transparent with the parties for it to be a relationship based on consent and awareness of all those involved and sensitivity to the consequences of departing from their agreed role.

Whilst the underlying philosophy in CR should be amenable to the concept of the transparent application of a variety of conflict roles, the degree to which different roles will determine dynamics and outcome does not seem as clear in the CR context<sup>95</sup>. It is understandable that the philosophical opposition to judgement and legal structures resulting in, at best, ‘dispute’ rather than ‘conflict’ resolution. However, as already highlighted in chapters 2 and 4, the work of Lederach, Burton and Curle have all directly and indirectly somewhat discouraged the development of complementarity through the combination of writing mediation off as irrelevant, or of defining it so widely the result has, maybe accidentally, led to a lack of clarity about relational similarities between third-sider expert roles and with the role of the judge.

The incongruence of viewing the third-sider as empowering, whilst emphasising the superiority of the third-sider’s perceptual position, was made painfully obvious to me in the context of grass-roots work in ‘the field’. The emphasis on ‘problem-solving’, maybe partly due to the legacy of Burton’s terminology, leads in the practice context to the tendency to understand the mediator role as expert problem-solver. With the status that the label mediator seems to confer, the expert claims neutrality and status, but in relational terms is an evaluative expert (a judge) and produces solutions through the application of their

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<sup>95</sup> A good example is the work of de Soto in Cyprus, where the transition from Mediator to Arbitrator is explicitly mentioned by Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum.(p.61). The dabbling with Med-Arb in the ADR context, and its general failure to catch on seems to give some insight into the dangers of this approach: The impression is that people will play to the med-arbitrator primarily as an arbitrator and then hang out for the arbitration in the hope that they have been convincing enough that the arbitration will go in their favour Doe, J., Kratochvilova, E. and Gilmore, D. (2012) *Med-Arb - An Alternative Dispute Resolution Practice*. London, Herbert Smith Freehills..



expertise albeit in a more participative process than that which is usual with a judge role.

Burton implicitly highlights this ambivalence: “*In the final analysis the parties to a conflict are the real experts. The conflict is theirs and they must determine its nature by their own analysis of it. The data, facts and interpretation must come from the perceptions and experiences of the opposing parties, not from the panel.*” In the same section he goes on in the same section to exclude “so called expert knowledge of local conditions” it seems that this is due to the risk of it impairing their ability to stand back from the situation. (Burton 1996: p.60; p.34)

This ironically reinforces the superiority of the ‘outsider’ perception, in that it suggests that those with local knowledge can no longer access ‘truth’ because their view is sullied by attachment to their local knowledge. An interesting viewpoint given the insight on ‘local’ knowledge in ‘Peaceland’ (Autesserre 2014).

Concerns with the limitations of adjudicative court-based systems in CR context seem to be almost taken as read. Burton specifically criticises ADR, in one of the written moments either field addresses the other directly, for only being capable (at best) of addressing disputes. He also implies that the use of mediation (for which he gives no clear *relational* role definition) is not just inadequate, but produces “*dysfunctional*” outcomes if used in conflict (rather than ‘disputes’)(Burton 1996).

Curle seems ultimately to concur with Burton in the view that mediation does not address underlying issues. Both his definition of mediation and response to this inadequacy were slightly different; rather than problem-solving workshops shepherded by external experts he focussed on indigenous peace-building from the grass roots(Curle 1999). Nonetheless there is little explicit encouragement in either of their work to an approach of complementarity.

Despite the implicit concerns of both Burton and Curle about the limitations of adjudicative processes and external experts, both ended up advocating roles and processes that focussed on third-party expert roles either external, or indigenous<sup>96</sup>. These are experts in process and conflict analysis or in peace pedagogy who ensure that parties are working on what the expert deems to be the underlying conflict.

This makes the theory of change somewhat ambivalent. The process Burton advocates is very much focussed on taking into account more information than has previously been considered, and to do so on a deeper level. However, the role of expert is based on their judgement and experience. Curle's late work focused indigenisation has the potential to change some of the dynamics of interventions, such as power-distance differentials (Hofstede 2001), which can be heightened by the asymmetry of parties interacting with a third-sider from a superordinate group (such as a Harvard Academic).

However, I am arguing that even if there is exact parity in social status and insider status, the behaviour of the parties will still be conditioned by the relational dynamic of advice, evaluation and judgement given by a third-sider expert who is 'problem-solving' for 'deficient' conflict parties. I am therefore arguing that indigenisation does not address the underlying dynamic created by an expert-evaluative third-sider conflict role.

I am not however suggesting that these third-sider roles are unhelpful, or that formal legal processes are the solution. Instead applying different roles effectively depends on clarity about the underlying power dynamics, and on transparency with the conflict parties on the role the third-sider is taking. In

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<sup>96</sup> The lack of ownership of outcomes identified and advocated by external, usually western, experts encouraged the move to the indigenisation of conflict intervention during the late 1990's. Ury's book on Third-siders in 2000 is therefore hardly a coincidence. Valuing indigenous expertise and 'empowering' conflict parties to solve their own problems are illustrated by other examples such as Curle's work with the Centar za Mir in Osijek, Croatia.

order for third-side expert roles to be used effectively, their boundaries need to be acknowledged so that parties can engage on a consensual basis.

Haidt (2012) demonstrates that there is a big difference between pre-verbal decision making (the elephant) and what people will say about their decisions (the rider) particularly when the aim is to seem 'rational' and 'reasonable'. As a result, it seems likely that parties may agree verbally with the idea that elements of the other sides' views that are legitimate, in order to seem reasonable, but that this may not be felt. The result will be a lack of actual engagement in practice.

Whilst it is possible to explain why such parties could engage with such a third-sider, if the parties' view of the conflict does not allow for the concept of common ground, or of the legitimacy of a 'different other', it is extremely unlikely that they will do so. Seen from this perspective it is highly unsurprising that there is a gap between the belief in the wisdom of the approach by its advocates and the frequently reluctant take-up of third-sider services that do not rest on judgement role (which holds out the prospect that the 'judge' might find in their favour) and yet are likely to disengage and disown a judgemental process as soon as they feel judged.

Empowerment must be based on consent, otherwise it runs the risk of being neo-colonial patriarchal power play that has been soft-soaped. The pressures of giving advice and opinion (judgement) mean that an expert third-sider who calls themselves 'mediator' will transgress the role-boundaries and relational contract expected of them irrelevant of their level of expertise and status.

### **Mediator as Conflict Role**

By separating out judge and third-sider roles it is possible to narrow the definition of mediator considerably. The mediator facilitates the exploration of 'each competing point of view'. It is to separate your own view of the world from that of the parties and to attempt to see the world through the eyes of each of the parties whilst never losing sight of the fact that you are doomed to fail in this

attempt and therefore are duty-bound to remain outcome-neutral. The result of this conduct is the non-judgemental eliciting and sharing information (with permission) on a multi-partial basis. It is a role that relies on the ability of the mediator to build and maintain rapport with all those involved, whilst also managing the process and bargaining to enable the parties to get to where they want to get to.

Outcome-neutrality makes the role of mediator relationally different from third-sider or judge roles. The impact of not having the solutions (and actively putting aside the urge to offer your 'solutions'), not 'getting/persuading/pushing the parties' to what you see as a 'sensible' outcome, and judging that both sides do or don't have 'truth' changes the underlying dynamic. In particular the mediator attempts to hold the space where the parties determine the direction of travel and terms of settlement. It seems to change the balance of fast/slow thinking by the parties (Kahneman 2013), creates space for them to explore their own view of the situation, and leaves ownership of any outcomes or solutions that are generated with the parties.

This is a philosophically radical position because it leaves people who are stuck in conflict in the expert, decision-making roles, rather than side-lining them either through a narrative of their incompetence, or the belief of the superiority of the expertise of a third party. It demands that those mediating really believe that people in conflict are competent to generate and evaluate ideas, options themselves as well as being able to process the implications and consequences of different courses of action.

In this conceptualisation, the mediator is doing their best, as someone blind, to see and understand the world as the parties see it, knowing that their understanding of the situation will always be deficient and never close to the depth and complexity of the view of the parties. The point at which I believe I am better qualified to solve your problems because I understand you better than you understand yourself, I have taken the expert, or third side expert role.

This demands that the mediator recognise and make deliberate repeated choices to shelve their 'inner expert' in order not to tell the parties what they should do (explicitly or implicitly) and to avoid advocating a particular route to 'settlement'. In circumstances where both parties are articulating the wish to find an agreement their primary focus may be on settlement, but this is due to the preference of the parties, not mediator judgement that the parties 'should settle'. Put another way, the application of the mediator role (as with other roles) is independent of outcome. Just because the conflict continues, that doesn't mean that the role has not been used.

This definition of mediator has a good deal in common with the ADR conception of the 'facilitative mediator'. However facilitative mediators in the ADR context generally see non-settlement as a reasonable option, whilst evaluating the mediation as a failure if it does not settle.

This highlights dissonance with Burton's ideas on the distinction between conflicts and disputes; implicitly (maybe even explicitly) it is for the conflict resolution specialist to diagnose whether it is the one, or the other, and to prescribe the appropriate intervention accordingly. As previously mentioned, he describes ADR as lacking any analytical process and if something '*turns out to be a conflict...mediation [can be] dysfunctional in these circumstances.*' (Burton 1996: p.15; p.34). The suggestion is that within mediation, particularly in the ADR context, there is the attempt to make the non-negotiable negotiable, without any understanding of the systemic context within which the events are taking place.

However, what I am suggesting is that it is possible for the parties to determine the level on which they feel the situation needs to be addressed, rather than that being the domain of an external 'expert'. The result may be that the parties wish to address issues on a deep systemic level or a superficial level; they may wish to 'trade' their way out of situations, but it is through the process of exploration that they identify themselves what is or isn't negotiable and on what

level<sup>97</sup>. Indeed, the suggestion that the implied incompetence of the parties to make such decisions runs the definite risk of fundamentally negating self-determination.

In the context of CR there are similarities with the suggested view of mediation and Curle's ideas on befriending and his philosophical outlook on the importance of indigenous peace work. Indeed, drawing on Curle's definition it is a role grounded on the philosophical idea that *"we are all of the same nature, though our experiences may have shaped it differently; therefore it is not for us to put ourselves above or below other human beings, but to love and cherish them as ourselves"*. (Curle 1995: p.135) The same sort of idea can be found in the work of solution focused brief therapy, drawing on radical constructivism, in the work of De Shazer (1988).

There is however, an important difference to Curle's view that mediation ends before negotiation, that the two things are mutually exclusive. My experience from the field of ADR suggests that withdrawing after an initial process of developing understanding and communication expecting the parties to then negotiate/bargain directly, is to leave people at the point at which they are most acutely in need of the assistance of this active, non-judgemental mediator role. Frequently relationships have deteriorated because of the failure of effective direct negotiation. Therefore, the idea that good relationships are sufficient for any combination of people to negotiate effectively seems, at best, naïve. Of course, the mediator role being used in negotiation raises much more difficult issues than those if the role is limited to re-establishing channels of negotiation, not least because of the risks, challenges ethical issues that arise when people start bargaining; a reality that will be picked up again in the next two chapters.

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<sup>97</sup> It is unsurprising that Burton has come in for stiff criticism. Whilst the idea of non-negotiable Basic Human Needs (BHN) is ideal, in order to survive people do have to negotiate the non-negotiable all the time; and it is simply patronizing to suggest that they are somehow bad, wrong, or unenlightened for doing so.

The following episode illustrates a number of issues in the use of such a model of mediation: It highlights how unpersuasive assertion of expert opinion often is once a conflict has escalated. In this episode, the clash of expert opinion happens through the intellectual duel of two barristers. Therefore the episode illustrates the possibility of an active, but non-judgemental role in an escalated situations (there were millions of pounds at stake in this situation). It highlights the potential, in pragmatic terms, for accepting radical disagreement and working on its practical implications.

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Multi-defendant ADR: Radical Disagreement

The mediation has been going on for several hours already. I am concerned and start thinking about process. We have a time limit and whilst they clearly don't want to be in their current situation there is no obvious way out. There is an awful lot of money involved and as the case has been running for years and the legal costs are enormous.

The claimant is being patient, as is his lawyer. This is unsurprising as this mediation is their best hope of finally getting an outcome: the defendants aren't even arguing that money is owed. They can't agree on who should pay what though; so, no-one has paid anything.

I spend time shuttling between two groups of defendants. There are four people in each room. The dynamics are completely different in the corridor, I reflect that I am different parts of me with each team. One group do not appear to know each other terribly well. They have a newly appointed barrister. He is personable, probably in his late thirties and very passionate about his subject; there is a new piece of case-law that he believes will vindicate his view.

The other side are utterly unconvinced. They know each other well. Their barrister believes that the new case-law demonstrates the exact opposite of

what the other defendants are saying. I suggest a joint meeting, just barristers and solicitors.

“So, what I am suggesting is a meeting where both barristers have 10mins each to put their case for their interpretation of the landmark case and what it means in relation to this dispute. The solicitors will be audience, not participants. There will then be a chance for questions from the barristers to each other and we will wrap it up after 30mins – 40 tops. Are you happy with that?”

“Sure”

“Assuming that the other side are also happy (I will go and check with them now) Would you like some time to prepare?”

“10 mins would be good.”

“No problem, so I’ll pop back to let you know whether they have agreed in about 5 or 10mins time. That means there might be a time lag, if they want prep time too.”

“That’s fine.”

I repeat the same conversation and then bring them together. What follows is a real demonstration of how to pull apart a case from two different angles. Both utterly persuasive and done with real intellectual rigour. There are some questions and I adjourn the session, happy that they have got a really clear picture of how strongly they disagree and the intellectual and legal reasons as to why.

I go and see each of them:

“How was that?” I say.

“I can’t believe it! How can he possibly think that?! There is no way that argument is going to fly in court!”

“You certainly seem to be taking diametrically opposing views.”

“Well I can’t see how we are going to get a resolution on that basis. He is just wrong!”

I explore and acknowledge their views. After this it is time to move on, I test my understanding of their current view of their legal options:

“So one option is clearly that you go forward to court and a judge will decide who of you is right, and it sounds like it would be a great test for this precedent...”

I see no solution, but am also simultaneously surprised by the predictability of the resignation that seems to set in once people recognise difference; the resignation that the choices are fight or flight. And yet, I know that in my own conflicts I am no different most of the time; and the determination to apply the stuff I do as mediator demands a level of persistence and self-control that feels utterly herculean.

“Well, but I don’t understand why they won’t contribute.” Says the solicitor. Her body language conveys the fact that she understands completely, but she doesn’t want to believe it. It’s one of those really unhelpful words used to convey a different message than a direct definition of the words involved would render.

I spend some time with them and then go to see the other defendants.

“Well they are ridiculous.”

“So, you are certainly clear how little you agree on how that would pan out at court.”

“Yes, and in this situation, they are liable.”

“So, given that you don’t want to go to court and you don’t think this is your liability, is there something they have, for which you would be willing to pay?”

It is already dark outside. They have taken their ties off and the atmosphere is akin to a London gentleman’s club; all the men present feel comfortable ‘taking space’ they are physically spread out, some with arms folded, in one case with feet up on a table. I am tolerated and yet clearly don’t fit. I sense a level of earned trust, but it is fragile; what I have done so far makes sense to them, but there is no swift trust of the sort I might enjoy if I belonged to ‘their kind’.

A ripple of incredulity runs around the room. From the back of the group comes a somewhat sarcastic voice:

“Well, we’d pay them for an indemnity clause [this would mean we could never be drawn into legal proceedings again in relation to this case]!”

This is followed by chortling and somewhat derisory, amused looks.

I raise my eyebrows and say:

“Have you tried asking for one?”

The most vehement Defender bristles a little:

“Of course not. They would never be so foolish!” As he speaks I notice a shift in the body language from the most senior solicitor present, with the same change gradually rippling across the room.

“Would you like me to float the idea?”

“Well I don’t see that they are going to take that seriously!” Says The Defender.

I shrug, but maintain eye contact. A response comes from the principle commercial negotiator:

“I guess there is nothing lost – they might say no, but it is hardly going to come as a surprise that we don’t want to be involved with these proceedings. So, go for it.”

There was more negotiation to be done, but the response to this proposal was the pivot point; from this point, it all felt different...

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There are a range of other implications and learning to be drawn from this episode, that will be taken up in later sections. At this point it is worth noting the way it illustrates the potential for using specific conflict roles in a complementary, non-competitive way. It was immensely helpful for the parties to have a range of different ‘experts’ and roles occupied in order for them to find a workable outcome.

Despite the exhortations of Fisher and Ury to ‘separate person from problem’ in ‘Getting to Yes’ (2008) there is evidence that third-party assistance can be helpful precisely because this is psychologically close to impossible (Menkel-Meadow 2006). In institutionalising and de-personalising conflict roles, it seems that legal systems provide a ‘work round’ for the limitations of humans.<sup>98</sup> Legal systems in most nation states around the world embed the idea of codified, professionalised conflict roles, in order to ensure that different roles that demand the psychological space to ‘separate person and problem’ are taken by people who are professionally rather than personally involved.

In the last 20 years in the civil-commercial context in the UK the professionalization and role-clarity used in relation to judges, lawyers and arbitrators has been extended to mediators with considerable success. ‘Mediator’ is a professional role that is exercised through a set of skills and processes<sup>99</sup>, rather than a role taken by individuals on the basis of personal identity. This has meant an arduous process of finding common standards, definitions and processes for the selection of mediators; clarity on what constitutes a mediation; how mediators should be trained, which skills should be used in what way and in which context.

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<sup>98</sup> In the criminal context in England and Wales there is no institutionalised role of ‘victim’, with the intention of preventing escalating cycles of retribution. The perpetrator’s crime is against ‘The Crown’ or ‘The People’. In victim-offender mediation/Restorative Justice this role is formalised alongside ‘offender’ and ‘mediator’. In this context the use of the term ‘mediator’ is contentious; the process is contingent on the offender accepting responsibility, so there is explicit recognition that the parties are not equal. The mediator is not neutral in the way they may in other contexts. Noll, D. (2011) *Elusive peace : how modern diplomatic strategies could better resolve world conflicts*. Amherst, New York: Prometheus Books.p.216-217

<sup>99</sup> The EU directive on mediation is an example of this. Within many EU jurisdictions there are rules professional education and registration required of mediators. Even in very laissez-faire jurisdictions such as England & Wales there is a tendency for ‘market self-regulation’ with those appointing mediators looking for badges of legitimacy, such as accreditation by organisations such as CEDR or the Civil Mediation Council.

In other words, crossing the boundary between ADR and CR has already demonstrated considerable differences in the attitude to complementarity and the practical implications of taking it seriously. It has begun to illustrate the limitations of adjudicative and advisory roles and the inherent difficulty relationally in a theory of change in conflict that relies either on power-based coercion, or rationally-based ‘expert’ opinion. The autoethnographic episodes have also illustrated the different levels of awareness in different contexts, as well as the failure of the expert advice model even in a situation where the identity of the advisor is congruent with the role.

The next episode opens the questions both of mediator identity and the degree to which the assumptions and prejudices of users of mediation can or can’t be addressed:

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First Commercial Mediation: You’re the mediator?

“Hello. My name is Isabel Phillips. I am your mediator.”

I stand there holding out my hand...

The two men look down at me very slowly. I am a lot younger, a lot more female and much, much shorter than them. When their eyes reach my head they slow and I am inspected – head to toe and back again. Their expressions gradually change from slightly anxious (they are late) to one of disapproving repulsion.

The world goes into slow motion. After what feels like about 3 minutes, but is no more than a couple of seconds, one of them says, his voice brittle and irritated:

“You’re *the mediator?*!”

“Yes. We spoke yesterday.” We are in a public place and I am giving them no choice; they both shake my hand.

I feel sick. This is my first ‘solo flight’ in the commercial context and they have had my CV. I am dressed in business attire. The men where I work talk about it being useful to ‘have a few grey hairs’ as it gives you credibility with the parties.

What they don't seem to realise is that whether they have them or not they always have the benefit of a grace period – of swift trust giving them a fighting chance. Assisting others, I have watched this happen and suddenly realise that their respect for me has insulated me from the crassest prejudices of the world I am operating in. I am used to a brief period of tolerance in which I have time to demonstrate competence – a kind of mini-trust-probation. I'm not used to instantly being written off. It is deeply shocking.

“This is my assistant Cayla”

They look at her and shake her hand, but only because she also gives them no choice. I realise in that moment that the only way to go down in their eyes, from my status is to be from an ethnic minority. They don't acknowledge Cayla for the rest of the mediation.

“The defendants are here already, let's go to the rooms.”

We leave the dingy, grubby reception area that is characteristic of many public buildings with this function and built in this era. They seem to be maintained on a shoe string by poorly paid staff and frequented by people who don't want to be in them. We go down the stairs to the even dingier meeting rooms with cheap furniture and bars on the windows. It is a place where hope survives despite the surroundings rather than because of them.

I work hard for three hours with them. Due to sickness, the lawyer for the men has sent a substitute who knows nothing about the case and doesn't know the men either. They ignore her. They explain repeatedly how strong their case is, they talk to me in an increasingly patronising way as their approach yields no progress.

The other side aren't contesting the claim; their problem is that they have a subsequent claim against the same men of more than double the value. They are therefore saying the two cases should be put together and the money should flow the other way.

The men won't even discuss this issue, and their lawyer seems to have decided that there is little point in her even attempting to guide them. The case goes nowhere.

Eventually I call it a day. I climb the stairs, walk through the dingy reception area and out onto the street. I feel despondent, bruised and yet also relieved. I have survived and I will never have to meet these men again. They have made their choices and their path once again diverges from mine.

This relief is tempered by my own self-criticism: Should I have known how to deal with this situation? What should I have done differently? Should I have withdrawn at the very beginning? Should I have been more confrontational? Should I have accepted from the beginning that if you are not a white male and over forty you shouldn't have the audacity to think you can do this work?

Is it inappropriate to challenge peoples' expectations by just being a young, female mediator, or doctor, or director? Should you only be a mediator if you 'look' like the right person, so that you have swift trust and don't risk the 'reputation' of the process by allowing people to mix their prejudices with their judgement of the process? If you choose to flout these expectations by just being the person you are, should you accept the reality that in challenging these expectations you will be the person to get bruised? You had it coming...

In time I reflect not just on myself but on these men: What will they take from this experience? Because they didn't get what they wanted, will they blame me, or will they blame mediation, or both? Will it, not because of anything I did or didn't do, but just because they didn't get what they wanted, simply reconfirm their prejudices about women in certain roles? Or was no outcome the best they were hoping for under the circumstances? Was it just a delaying tactic?

The mediation, in my mind, had become focussed on my identity and appearance. I did not have the self-confidence and self-assurance to deal with

this situation adequately. Or maybe I did? Maybe they knew that this was the best they could hope for. Counterfactual isn't possible.

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As the mediator in this situation, I was confronted with the reality of the conflation of identity and role. I came out of this experience 'older and wiser' (the usual euphemism for 'bruised'). However, to this day (due to other details of this case) I am not sure that someone with an identity that fitted the expectations of the party would have got a different outcome; the arbitrator and the animation suggests not.

It would be easy to blame this situation on identity; that as an individual without the type of social status they were expecting the mediation was 'doomed to failure'. However, this form of mediation process is based on consent, not on the advice/judgement nexus. If they choose to walk away, not to take the possible routes out of the situation that might minimise the damage to themselves then that is their choice; after all it is possible that there are other levels of 'damage' about which you know nothing. This is the nature of outcome-neutrality.

What is important to note and will be picked up in chapters 6 and 7, are the ethical issues and potential damage for those operating in a context that, through the absence of a clear picture of what constitutes skills competence, substitutes identity for competence. You must have at least two of the three: 1. Being male. 2. Being over 50 (preferably with 'a few grey hairs') 3. Being white.

In the 1990's during the bedding of ADR into the legal system of England and Wales there was a good deal of debate about how much judgement (and about what) a mediator should use. There was also no consensus about how the skill and experience level of mediators could be evaluated. One of the results of this, were 'celebrity' mediators with credibility based on their legal reputation rather

than their mediation skills<sup>100</sup>. Some of these were/are known for highly evaluative approaches and even advertise their services on the basis of the ability to ‘bang heads together’<sup>101</sup>.

The market-place nature of ADR also means that if a mediators’ style is deemed too evaluative they are likely to acquire a reputation (in the network/reputation context) of doing Early Neutral Evaluation rather than mediation. Mediation users will therefore choose a ‘head banging’ mediator if that is what they want. In my experience, this seems to happen when the lawyers for both sides are in the grip of optimism and confirmation bias, believing “the other side is going to get their heads ‘banged’ because they are deluded fools; we have a water-tight case”<sup>102</sup>.

In the CR context whilst there are moves to professionalisation, the lack of clear differentiation of what the ‘mediator’ role is in relational terms means this is much more challenging than in the ADR context. The ‘Name’ (or put another way; reputation) is an obvious selection method in the absence of clarity of what the role, skills and process of mediation actually are. As already highlighted the CR literature and practice context contend with a confused relational mixture of roles being described as ‘mediator’ from advisor to solution-generator, manipulator, diplomat, moral police, facilitator and advocate. In the face of impossible demands the solution has to be ‘Superman’ and the celebrity

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<sup>100</sup> I am not suggesting that they were or weren’t skilled mediators, but rather that parties/representatives were unaware and unable to evaluate whether they did, or didn’t have appropriate skills, so legal status and the knowledge that they had mediated was used as a substitute.

<sup>101</sup> This is demonstrated by a wide range of conversations I have had with experienced mediation users in the ADR field, who will criticize names like Tony Willis and David Shapiro for being way too evaluative and overstepping the mark, but will only do this in confidence as in the case of Tony is, and in the case of David was, too influential to openly criticize. Both derived considerable status and credibility from their status as partners in ‘magic circle’ law firms – Managing Partner at Clifford Chance in the case of Tony Willis.

<sup>102</sup> Where this happens, it tends not to get repeated once in confidential meetings with clients who are doing serious risk analysis; looking at things that disconfirm as well as confirm a view tend to make it sound hubristic and the grounds for a professional negligence claim from the client if they lose the case.



(usually an Eminence Gris) put forward because of their ‘name’ (their individual identity), is an obvious answer who, will initially have status and credibility with the parties; thereby avoiding the horrible initial situation of the vignette.

Both the EU and the UN now have institutionalised mediation support teams. In the case of the UN, set up in 2008 so that “mediation experts that can be rapidly deployed to provide technical advice to United Nation’s officials and others leading mediation and conflict prevention efforts”<sup>103</sup>. These teams, with experts in areas such as constitution writing, security and diversity aim to their own agencies and others in mediation processes. These mediation support teams are dispensing expert advice to the mediators. However, who these mediators actually are and how their role is conceived is entirely unclear from the publicly available information provided by the IGOs<sup>104</sup>. With the evidence that the emphasis is on providing advice to mediators, it does support the deduction that the mediators must then need this advice either because they are advising the parties and/or because they are producing proposals on solutions.

The preference for ‘mediator’ appointment primarily on the basis of political and diplomatic status is very clear from a whole range of news reporting on different international conflicts. For example, a series of ‘celebrity mediators’ have been brought into try and find solutions to an extremely difficult situation in Syria. Each one is expected, through a combination of cunning and charisma, to find a solution which the parties will agree to. Annan is followed by Brahimi, who is followed by Mistura. Each one resigns with a cloud of criticism of what they did or didn’t do<sup>105</sup>.

Noll (2011) suggests that many of these problems arise due to the lack of practical mediation skills of this type of individual. He describes the

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<sup>103</sup> <http://peacemaker.un.org/mediation-support/stand-by-team> last accessed 13 June 2016

<sup>104</sup> Both websites explain the role of the mediation support teams, but are unforthcoming on who actually mediates in these situations.

<sup>105</sup> See <https://www.theguardian.com/world/2015/jul/30/staffan-de-mistura-man-with-toughest-job-in-world-syria> last accessed 11 June 2016

'International Community' as having "a fascination with mediators who are political "Names"...They want to control and direct the process, telling everyone what to do...EU Special Representatives are a case in point. They are chosen because of political interests, not because they are qualified as mediators." (Noll 2011: , pp.44-45)

The lack of data, or agreed criteria on which one might judge competence in mediation in this type of context, makes it challenging to pass judgement on their mediation skills.<sup>106</sup> What is clear from the experience of the ADR context is that this emphasis of "Name" or reputation will tend to lead to the success or failure of outcome being pinned to the mediator personally and focuses on personality rather than professional role and expertise (Martin 2006)<sup>107</sup>. This results in a whole range of practical challenges exacerbated by this conflation of role and identity. In such circumstances the skill and qualification of the mediator are irrelevant; they are not being asked for mediation, but rather for miracles.

When there is no miracle the parties respond predictably to solutions they didn't come up with; they didn't generate them and the person who did, didn't come up with something good enough. They have been sold inferiority as their position, meaning that the *eminence gris* is superior and if he fails, then that is his problem.

I am arguing that the tendency to see celebrity/name recognition as an advantage and source of credibility must be set against its Achilles heel. The

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<sup>106</sup> Credibility, status and eminence tend to be cited as reasons why mediators have, or haven't been successful in the mediator in the context of 'power mediation'. See the work of: Bercovitch, J. and Rubin, J. Z. (1992) *Mediation in international relations : multiple approaches to conflict management*. New York: St. Martin's Press in association with the Society for the Psychological Study of Social Issues., and: Touval, S. and Zartman, I. W. (1985) *International mediation in theory and practice*. SAIS papers in international affairs. Washington, D.C.: Westview Press.

<sup>107</sup> There is interesting discussion and comment from Brahimi in relation (p.25) to some of these issues.

conflation of ‘Name’, personality and professional role reproduce all the problems of judge and third-party expert based systems (lack of ownership of solutions, abdication of responsibility and lack of creative investment in solution generation, relationships built on authority rather than rapport) without the supporting enforcement and policing structures that *force* losers/parties to comply with decisions/solutions provided by the judge/arbitrator/problem-solver.

### **Conclusion**

Since the 1990’s the discourse in relation to mediation has been dominated by the inconsistency of demanding empowerment and self-determination for the parties in conflict, whilst at the same time enforcing normative liberal standards of ‘universal human rights’ and state sovereignty as the boundaries of what is permissible for parties in conflict to work with.

The episodes in this chapter provide insight into the impact and limitations of the different roles both emotionally and cognitively. Recognition of the inability to take a ‘mediator’ role by those involved at the highest levels is illustrated by the first two episodes. It is possible to be an advocate for a particular agenda, or an outcome-neutral mediator. Mix your own agenda, or normative project, with a role that triggers an expectation of neutrality, and relies on the idea of self-determination, and the result will be dissonance between the role occupied and the role claimed. The result relationally is a loss of credibility.

This chapter provides considerable relational evidence about why the expectation that the application of the third-party expert role will be effective in creating change in the opinions of the parties is not always fulfilled; particularly when brought together with the data on the level of enforcement required in the legal context, because the application of these roles doesn’t actually lead to people agreeing.

The data from both fields also undermines the suggestion that the concern with ‘Names’ is justified. This relates both to the tendency for ‘names’ to be appointed due to the expectation that their *authority over* the parties will

somehow be persuasive and to the fact that this is again to confuse the arbitrator/judge role with that of mediator; if the aim is to take notice because of the implicit 'threat' power held by the third party then the relational dynamic will have the (dis)advantages of the judge role, not that of the mediator role.

The 'pure' mediator, or outcome-neutral role is possible, and the boundaries in CR are nothing to do with whether it can be used effectively in managing, or resolving, conflict. They are much more to do with the wish and/or need to protect the moral matrix and the normative agenda of those intervening. The wish to resolve conflict always raises issues about how to create change. The CR field has never adequately dealt with the question of how to deal with conflict roles which may have a fundamentally important role in managing, resolving, maybe even transforming, conflict, but which are not normatively judgmental.

The experience of crossing the boundaries between these two fields and experiencing the practical interaction has highlighted the fundamental importance of complementarity in the effective management, resolution and transformation of conflict.

In the ADR context outcome-neutral mediation is used and accepted as one of a range of roles; the principle of complementarity of different roles is enshrined within the field. Given the precise context of Fisher and Keashley's argument, this is unlikely to be due to them. However, the implications of complementarity as a core principle, with non-adjudicative and adjudicative processes available at various points within the escalation process has a variety of implications that will be discussed in the next two chapters.

Curle and Burton were both concerned with how to effect fundamental change in conflict and with the concern about how to reduce violence and oppression in all senses. Their concerns about mediation, and for Burton specifically about ADR, were focused on its perceived inability to achieve such ends and implicitly

the risk that it might result in the negotiation of ways to maintain the status quo violence and oppression, rather than assisting in the change of such structures.

Insofar as the mediator draws their mandate, not from their own aims, but from the combined aims of all parties, this is a legitimate concern. However, this is to write off a specific conflict role, instead of appreciating the limitations and complementarity of diverse conflict roles in addressing conflict. If there is a fundamental issue for the third-party with the aim of one or more of the parties, they have a choice to enter the conflict as an additional party and advocate for change, or to attempt the difficult act of suppressing their opinion in a way that is sufficient to meet the parties' expectation of 'neutrality'.

Therefore, the divide between ADR and CR has slowed the process of knowledge and skills on the limits of the mediator role in addressing underlying structural conflict and inequality, but also on the risks of throwing out elicitive roles and the use of elicitive skills when occupying adjudicative roles.

The divide has obscured the possibility of transferring knowledge from ADR to CR about the impact of the proactive use of complementarity, as opposed to a quest for one single process as a panacea in conflict. Judge, third-party expert and mediator are relationally different roles and they all have their risks and benefits. Trying to make life more tolerable in the short, or long term, requires a whole range of roles to be exercised transparently and skillfully. The outcome neutral mediator is the only one that explicitly, transparently and consistently hands self-determination back to the parties and this comes with great risks as well as great benefits.

## **The Mediator in Role**

The comparative of in chapter 5 highlighted the challenges of both fields in conceptualising and applying different conflict roles highlights opportunities to manage the expectations of what is likely to emerge from their application. It reinforced the practical relational importance of taking complementarity seriously; rather than looking for one panacea, recognise and apply different roles on the basis of their different strengths and weaknesses. This chapter picks up and explores the mediator role and the potential for learning across the ADR/CR boundary in relation to its practice and conceptualisation in more depth.

As has already emerged in chapters 2, 4 and 5, the different conceptualisations and definitions of mediation in the two fields have led to different emphases in terms of the person of the practitioner and what is categorised as mediation. CR has focused on the catch-all term ‘mediative capacity’ or its dismissal of the role of the ‘mediator’, combined with an emphasis on the personal qualities rather than practical skills. ADR has focused on highly specific conceptual definitions of mediation and competence-based practitioner skills.

This chapter brings these two conceptualisations together with autoethnographic episodes and draws out both the reduction of skills and knowledge and a framework to allow the transfer of knowledge in relation to both the theory and practice of mediation and what can be learned by crossing this boundary for the theory and practice of mediation.

The result are four areas of learning in relation to the mediator in role. The first is the risks attached to dogmatic and dichotomous practice; both are much more apparent through the act of crossing the boundary between the fields. The second is the impact of structures for reflective practice on the practitioner; the very different expectations of the two fields place on those practicing. The third encompasses the learning derived from the application of this reflective structure of relationship, process and future-creation to the experience of mediating. The fourth area is the expectations and mandate of the parties and

the impact of role-switching; who chooses the focus of the mediation and who is in control of the outcome?

### **Self-reflection and mediator competence**

Self-reflection is viewed as central to practice in CR (Dietrich 2014), whilst skills, tools and techniques are viewed as central in ADR (Allen 2015). The divergent emphases and discourse in the two fields has led to a lack of transfer, despite there being plenty of potential for fruitful exchange.

Given the diversity of roles to which the term mediator is applied in CR clarity on what the relevant and appropriate skills, qualifications and knowledge of the mediator should be is made incredibly difficult. As discussed in chapter 2, CR developed out of criticism of realist theory and practice ‘technique and tools’ associated with traditional power politics and diplomacy. The attitude and personal qualities of ‘peacemakers’ were brought to the fore, and action to create a more just and peaceful world came to be the centre of the academic and practical project of CR.

This has arisen in part due to inter-generational miscommunication and a lack of awareness of the impact of privilege. The development of CR as an academic discipline, and an area of practice, was dominated by people like Curle and Burton who had a huge amount of direct practical experience in people management, hot war and its aftermath, as well as interstate diplomacy, by the time they were in there early to mid 30s. All had private or grammar education, social status through their academic and social connections.

Social privilege may have meant that the ‘Parents of the Field’<sup>108</sup> didn’t realise how many skills they took for granted and transferred laterally and certainly as far as I am aware there is no explicit recognition or acknowledgement of the impact of this by these early scholar-practitioners. Not every one of these

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<sup>108</sup> George Mason University collection of interviews with influential people in the CR field. See for instance: de Reuck, A. (2006) *Parents of the Field*. George Mason University Website, SCAR, George Mason.

people will have had all these skills, but the type of skills being highlighted include: social skills in (white, male-dominated, middle and upper class) elite environments; meeting and diplomatic protocol; etiquette in formal and informal environments; language skills; agenda setting, meeting and process management, presentation skills, negotiation and bargaining skills; as well as teaching and assessment skills.

In very different ways, Burton and Curle both sought congruence in their behaviour and felt personal ethical responsibility in their 'private' peacemaking (Burton?2000) (Woodhouse 2010). Burton responded by conveying the 'how to' of practice through tightly defined terms and a dizzying number of process 'rules'. Both approaches convey the complexity of the 'how' in the context of the huge range of conscious and unconscious competencies demanded from conflict intervention.

The core of Adam Curle's engagement may not have been technique and he didn't provide rules of the Burtonian type. "*At the core of Adam's engagement was not technique but rather his vocational impulse of seeking mutual humanity.*" (Woodhouse and Lederach 2016). However, had he not had a multitude of skills he would still no doubt have been a remarkable person, but may not have been such a remarkable practitioner.

This background culture of intense focus on the personal qualities and attitude of the mediator, combined with a tendency for practical skills (other than analytical models) to be neglected. For instance, self-reflection is the only area of mediator competence that emerges clearly from "A *guide to mediation*" published by The Centre for Humanitarian Dialogue: "a) *The mediator must be appropriately qualified and competent in mediation techniques. S/he should also directly possess, or have immediate access to, the particular knowledge and skills necessary to the peace process in which s/he is engaged or offering a service. Such qualifications and competence must come from sufficient and relevant experience and/or appropriate professional education and must be represented across the whole mediation team. b) Integral to a mediator's*



*competence must be an ability to evaluate – consciously, self-critically and regularly – their own performance and to learn from and apply the lessons of previous experience within current and previous mediations.”* (Slim 2007: 21-22)

The same clarity on the importance of being a reflective practitioner and scepticism about technical skill is made clear on the website of the Innsbruck project: “*Skilful mediators in our understanding are reflective practitioners rather than rote technicians. And this is what we want to educate [sic] in our program: reflective practitioners of elicitive methods of conflict transformation with the awareness of transrational peaces.*”<sup>109</sup> Dietrich provides further clarification of and emphasis on the attitudinal and personal qualities, rather than technical competence in his list: “20 Central Virtues of Conflict Workers” (Dietrich 2014).

There is some evidence of work on a transformative mediator competence framework, with clear differentiation of observable actions and skills Research on competence framework for Bush and Folgers’ ‘transformative mediation’. Its overall aims are given as being to ‘enable empowerment and recognition’ and the assessment framework is based on the implementation of ‘strategies’ that are assessed as being used supportively, or non-supportively including: Orienting parties to: constructive conversation; their own agency; each other. Supporting parties: conflict talk; decision-making process (Della Noce et al. 2004). However, the results of the mediator questionnaire suggest that this form of transformative practice may be better known in ADR than CR. This suggests that not only is this competence framework unlikely to have been picked up widely in the CR field.

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<sup>109</sup> Peace Building curriculum of Innsbruck University: <https://www.uibk.ac.at/peacestudies/ma-program/curriculum/objectives.html> last accessed 21 Nov. 16. Also: Akademie for Konfliktttransformation in Cologne<sup>109</sup>. These include training on communication, conflict analysis, mediation, intercultural communication, project management and self-reflection.

My initial training in the CR context focussed heavily on self-reflective practice<sup>110</sup> and I did find this helpful once mediating as well as being involved with other roles and conflict intervention work. However, the risks and disadvantages of this ambivalence towards technical skill and tools only really became clear to me once I had trained in the ADR context.

The ambivalence puts practitioners at a technical disadvantage because it bypasses an analytical and structured understanding of broader mediator competencies, with the exception of self-reflection. The lack of technical knowledge as to what you are doing and why actually reduces the ability to be truly self-reflective. This puts those going into practice who have not had a previous career that happens to kit them out with a huge range of transferable skills, at a huge disadvantage.

Once I moved into the field of ADR, I discovered that self-reflective practice was still mentioned thanks to two boundary crossers, Frances Maynard and Heather Allen. They developed a mediation competence framework for CEDR in the late 1990's that put together a coherent set of competencies and competence indicators for the first time and included self-reflection. Professional qualifications for vocational roles, for instance the British NVQ system used competence frameworks as standard by the late 1990s.

Heather Allen was involved with the group that developed the competencies for a cross-sector level 4 NVQ in mediation for CAMPAG between 1994 and 1996.<sup>111</sup> This qualification proved to be unpopular with practitioners, and the

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<sup>110</sup> AGQ Ziviler Konfliktbearbeitung/Ziviler Friedensdienst (Successor organisation Akademie fuer Ziviler Friedensdienst). Innsbrueck, who have took over from Stadt Schlaining also do CR context training in Austria. In the UK context, since Responding to Conflict shut down, CR practical training is minimal and dominated by a handful of applied courses in the context of university programmes on peace and conflict, for instance at Strathclyde, Bradford and Kent.

<sup>111</sup> Counselling, Advice, Mediation, Psychotherapy and Guidance. Historical Documentation provided for review and sequence of events as recorded by Heather Allen. Private Records.

level and length of detail required stretches to 21 pages of close type, making this perhaps unsurprising. This highlights the complexity of what is required, but also that capturing this in this highly detailed and complex form is not necessarily helpful for practitioners. Nonetheless it provided important information and experience for the development of the CEDR assessment competencies.

These were put together with input from Terry Jones who had worked with competence frameworks in the commercial context of Barclays Bank, and Frances Maynard who was extremely experienced pedagogue and secondary school teacher in a practical subject<sup>112</sup> before becoming a mediator.<sup>113</sup> It is worth noting the similarity of this group working in the ADR context to the early scholar-practitioners in CR with their transferable experience and skills.

The areas of competence and labels chosen were relationship, process and content, self-reflection and settlement-agreement writing.<sup>114</sup> These are all terms common in the literature of problem-solving, interested based approaches to negotiation and mediation, and in themselves not particularly remarkable. The other major commercial mediation training bodies choose variants, such as ADRg who have chosen the following headings for their competence framework: planning and organisation; process management; communication skills; facilitation and problem solving<sup>115</sup>.

IMI (International Mediator Institute) attempted to set up a world-wide approval process for mediators and mediator training standards. Their criteria for skills that need to be covered are communication, preparation and process

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<sup>112</sup> Frances pedagogic experience with mixed ability groups, varied learning styles, assessment processes, managing energy cycle of learners and teaching of practical skills created an exceptional training.

<sup>113</sup> Conversations and written correspondence with Frances Maynard in 2016.

<sup>114</sup> These are available in full at:

[https://www.cedr.com/library/documents/Training\\_assessment\\_competencies.pdf](https://www.cedr.com/library/documents/Training_assessment_competencies.pdf) last accessed 03.11.16

<sup>115</sup> <http://www.adrgroup.co.uk/page/Workplace-to-Civil-and-Commercial-Mediator-Conversion-Course-621724491> Last accessed 21.11.16

management. Everything else proved to be too controversial, and instead of being framed as skills, are included in a shopping list of 'Cultural Focus Areas'<sup>116</sup>.

Like CEDR, most of the other providers include some element of self-reflection, but unlike the other areas of competence this receives no actual training time. It is often an area of some resistance from those with a more 'realist' outlook who complain about having to do something 'touchy-feely'. Given this attitude some of the CR critiques of ADR as lacking in relation to attitude and self-reflection are unsurprising; lack of self-awareness and a mechanistic and limited understanding of the implications of the application of tools and techniques are definite risks.

At its best, a competence framework provides a structure, rather than a straightjacket, that allows users to develop practical skills and to reflect on practice. The innovation of this framework was to take these competences and identify a range of observable actions (skills, tools and attitude) that indicated in a context sensitive way that the competence was being demonstrated. The resulting framework allows evaluation and analysis by both observers and the mediator themselves of what is and isn't happening in the mediation. This is profoundly different from a set of steps, or rules, that cannot be easily adapted to the needs and dynamics of different parties and contexts.

My personal learning journey was influenced by the CEDR assessment competencies (CEDR 2017). This framework was developed for the assessment of mediators rather than for reflection. However, the competency framework gave me ideas on a more structured way to reflect on practice, in

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<sup>116</sup> <http://www.imimediation.org/practitioners/inter-cultural-certification/certification-criteria/> last accessed 7 December 2017. After extensive consultation in 2012 they abandoned the attempt: "*Because of the wide variety of mediation processes and styles, and to allow for innovation and creativity in the field, Program criteria will vary and consequently the ISC is not establishing fixed competency benchmarks.*" Instead they opted to assess and 'approve' the programmes, in return for payment of a membership fee, of local training providers in different countries.

terms of attitude, skills and knowledge. This has been useful, whether operating in 'pure' commercial ADR context cases, or the cases that are closer to, or fully within the CR context. I have selected three terms to encapsulate and analyse learning across the CR/ADR boundary. These are 'Relationship, Process and Future Skills'. These sections are preceded by a discussion of the impact of dogma on practice and a relevant autoethnographic episode.

### **Dogma and Practice**

I am using the term dogma deliberately. I am defining it as a belief put forward by an authority without adequate evidence. Combined with binary thinking it appears in many professional contexts. Mediation practice is no exception. The episode that follows illustrates why the issue of dogma is fundamental in the theory/practice disconnection and in hindering exchange.

The next episode requires some contextualisation in order for the episode to be seen in relation to my learning journey. My initial mediation training was with a transformative trainer. The trainer's firm belief that mediation was only mediation if all those involved in the conflict were present and that it was emphatically not about settlement or outcome. It was a process that was complete once transformation had taken place. This involved the mediator chairing non-directional discussion.

Despite the group already being convinced of the validity of the CR agenda some of training group were sceptical and/or conflictual in their behaviour. The result was the rapid breakdown of the practical exercises; engaging with a process with no form and no aim was impossible for the teleological characters in the room.

This form of mediation was structured in a way that would *if* all those involved believed from the start that it was both possible and desirable to re-establish a relationship *and* were also willing to engage with a mediator determined 'transformation': Mediator determined *because* it wasn't defined and because it was the only acceptable 'outcome' in the mediators' eyes. Even I, as a

convinced advocate of peace and conflict transformation, was incapable of working out how this would work. I was pretty sure I wouldn't want to engage with such a process if I was in escalated conflict with others, and I hadn't even experienced the violence, deprivation and trauma of those living in the post-conflict environment I was going to work in.

After my practical training, I went into 'the field'. What I was involved with was largely untried and untested. The mediation process I had been exposed to simply didn't seem to take into account of my mentality, let alone the trauma, mentality and concerns of the people I was living and working with.

The vocational training I had had, combined with the work of Mary Anderson to listen and 'do no harm', was helpful but gave little clarity of what a 'peacebuilder' might do, other than listen, without doing harm. This could have been written off as poor training. However, having any training is still a luxury that many do not receive. As Autesserre (2014) makes clear, emphasis on thematic expertise such as 'Conflict Analysis' can be problematic. In this case it is that practical skills are assumed, or underrated in a context where academic qualifications and connections are the primary calling card.

Initially spent a good deal time listening to all sorts of people, including lots of very 'normal' people (rather than just people from other international organisations, or self-proclaimed 'community leaders') to try and understand the context I had entered<sup>117</sup>. A place with massive unemployment, a lack of any recreational activities, high rates of drug addiction, right-wing radicalism, poverty and PTSD and a rotating door of international agencies. The atmosphere was one of cynicism and apathy.

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<sup>117</sup> I was embedded in the local context in an unusual way with freedom from many of the routines and expectations discussed in the work of Autesserre, S. v. (2014) *Peaceland : conflict resolution and the everyday politics of international intervention*. New York: Cambridge University Press..

The pattern that was described to me repeatedly in this ‘field context’ was an individual starting an initiative that would quickly get mired in conflict. The whole initiative would then fall apart. The lack of social trust (amongst other things) meant that disagreement would either terminate communication, or would lead to feud-like levels of psychological, or physical violence.

It gradually became clear to me how many simple logistical questions were unanswered. There was also no answer to the question of what the motivation for people to engage in a process of ‘transformation’ would be, if they don’t believe transformation is possible, or desirable? External ideas and initiatives of ‘improved community relations’ triggered cynicism, polite approval and a lack of engagement, or cynical engagement if financially incentivised; common patterns that led to a wave of recognition for me reading ‘Peaceland’ (Autesserre 2014).

The people I met were interested in doing things that would obviously and concretely change their life circumstances; not in terms of financial gain, but rather more broadly in terms of quality of life. The following episode concerns a group that I was invited to work with over an extended period. They wanted to ‘make something happen’ in their hometown due to their view that there was a complete lack of leisure activities. I worked with the group as a project-mediator. In other words, I was asked to work with them to keep the communication from breaking down and to facilitate their negotiations in order to actually *do* something.

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The NGO: Dogma in practice

The room is at the back of a run-down communist era block with tiled steps and bars on the windows. The door is open and a fan stirs the hot, smoky, soup-like air. We sit on beige, synthetic sofas. The mix of class A drugs, personal relationships, boredom and PTSD are not making things any easier. I read the atmosphere as one of anxiety, expectation and excitement. The subject is what

should be done in the next few months; they want to do something; they want to make something happen.

The group tried to sort it themselves and have got stuck. They have asked me to work with them to find a way forward; we don't call it mediation, because (like everyone else) they don't have conflicts and don't need mediation. They talk fast and listen little.

I try and create space; I try to slow it down, so that I understand what they are trying to tell to each other. My logic is that if I have understood, then they might have 'heard' and understood each other too. I think they accept my presence in this situation because I treat them as equals; competent adults, not because I am an authority that they must obey, or who gives them permission to do things. I can ask, and I can ask difficult questions, but if I tell, the atmosphere will change.

I cringe at the thought of the impact with these people of the little speeches I have been told mediators give "I want to give you permission to do something different. You need to listen to each other and not interrupt." Who am I to tell them how to behave; to tell them that they should speak to others differently? The formula doesn't seem to fit.

It is late evening when they disappear into the night. They have made progress; there is a plan on the table, and still much to do. The relationships are so fragile. I turn the lights out, climb in the car and drive the couple of miles up the hill.

I don't turn the lights in the flat (that just attracts the mosquitos). Instead I go to the kitchen window and look at the hills in the distance. What should I do next? Mediation is supposed to happen with everyone in the room...I decide to spend some time with each of them individually in the following week; the theory does not seem to fit my *feeling* for what these people need now.

...

A digger has taken out all the power lines to the town. It is cold. Not cold like it is in Canada. More like Camden in December. Everything feels damp; my body is chilled to the core and has no physical memory of ever being warm.

Somehow it is almost as bad psychologically as it is physically; knowing there is no way of getting warm. The days are short and made shorter by the lack of electric light.

Despite the cold, the atmosphere tingles with excitement. We try and hang the pictures with hands that are numb. There is nervous laughter and palpable excitement. The cold and the damp and the dull light are irrelevant. The group are so proud of having done something.

I have spent time with them as a group and as individuals. They have worked so hard to get here. Together. To do this has demanded that they go against all their instincts – of disengaging and running away, or of escalating to a point of catastrophic melt down.

I am anxious for them and wonder how they will react to the success, or the failure of the exhibition. How will they react to the reactions of the public? How will they deal with each other?

I know that this is their journey. I know that they have set the goals, that they will decide what happens by what they do and don't do; what they avoid, what they address. I feel invisible and irrelevant. The left over catalyst after the reaction...except that I am changed by the process. I am not the same as I was before. I have learnt from this process. I am told that the mediator treads lightly; does no harm; leaves no footprints. Does this mean I have failed? There seems to be too many riddles in the theory to make head or tail of navigating practice.

People begin to arrive. Lots of people. Everyone is excited that something has happened. Here in *this* town, where nothing ever happens.

They have made something happen together. Even though they all have the same ethnicity.

...

We sit in their group room. It is next to the studio, put together with plastic sheeting, old plastic buckets and pieces of wood. It is the result of a labour of love and impressive DIY skills. I am happy to be here and feel energised.

The group have a decision to make that they feel is important. With my upcoming exit from the situation they want me to appoint a group leader who can deadlock-break in cases of disagreements. I don't want to appoint anyone. It would set a precedent and I won't be here the next time they need a new leader.

We are sitting in a rough circle on an odd assortment of old chairs. Everyone smokes, with the exception of a visitor from Abroad. We talk about the previous few months; the workshops they have run, the new people involved and their upcoming plans. At some point, it feels like the right point to move to the question of leadership. I say:

“So, I think it would be helpful if we go once round the circle and everyone will have two minutes to say why they shouldn't, on any account, become group leader.”

The reaction is amused laughter, and one of them says:

“OK, I'll start. I'm good at putting stuff into action, but I'm not great at making decisions. And anyway, I tend to get irritated!”

One by one, they provide extraordinarily honest character assassinations of themselves. I reflect on how much they now seem to trust each other, how carefully they listen to each other... and how much things have changed.

“Great. So you have all made your best case for not being group leader. So now for step two. Going clockwise round the circle, could each person say why the person on their right should become group leader? Be the best advocate you can be.”

Each of them provides an insightful, generous and positive plaidoyer of why this person would, could and should be leader. They verbalise strengths and public acknowledgement of each person. After this process, it is clear who will be group leader by consensus. Not because of superiority, power or because the person making the case was particularly eloquent. The new group leader assents with humility.

There was a sense of genuine happiness, but also relief.

I leave on a high. Not quite sure why it had worked, but happy that it had.

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This episode is an example of transgressing the boundaries of what I had been taught; namely that mediation happened only with all parties present and that any divergence from this destroys ‘neutrality’ if the facilitation process (Burton 1996: p.19). Intuitively I decided that what the parties needed from me diverged from what I had been taught, and by following them (on this occasion) I discovered that whilst there are risks to caucusing/private sessions, the parties did not respond in any way that suggested they believed that I was no longer ‘neutral’; was no break-down of the process.

Complex and unpredictable systems demand that practical knowledge, skills and knowledge are conveyed in such a way that the underlying principles and logic are clear enough to allow for flexibility and adaption by the mediator of these tools. This relies on the underlying attitude of the mediator to the parties, the mediator’s own self-knowledge, and their grasp of a variety of tools and skills.

Using private and joint session led both to changes in the relationships and assisted the development of the outcomes they wanted to achieve. It was also the first of many occasions where I have worked with parties who do not see caucusing as a sign of partisanship. However, using caucus demands specific skills (not just attitude) related to management of information exchange and confidentiality. Both issues will be explored later in the chapter.

Dogmatic assertions that this process, or that process, always does, or doesn't do this, or that are not supported by the evidence. Similarly, dogmatic attachment to a normative project for mediation risks the conflation of normative project with mediation outcome. In other words, the normative project of the mediator becomes the only 'allowed' outcome for the parties; even though in theory it is their mediation.

As I understand self-determination and empowerment if I, as the mediator, decide what the objective of the parties should have then I am removing self-determination not supporting it; whether their objective is settlement, relational transformation, a combination of both, or something else.

Unlike training in many therapy approaches, mediation training does not usually require trainees to actually request and use a mediator in relation to some real-life situation they are involved with. At most it requires trainees to role-playing parties, but this does not provide the direct, personal, emotional experience of going through such a process.

Having actually been a mediation party, gave me a different relational understanding of what it actually means to go through a mediation process. This is unfortunate, as both in theory and in practice, actually experiencing the process as a party provides a relational understanding of mediation that cannot be conveyed through theory or role-play. An element of this experience and its impact appears later in this chapter in *'To Love and To Lose'*.

The next three sections explore the potential for learning by applying a competence framework across the ADR/CR boundary and drawing out examples of these competencies in practice from across the divide. The first two areas of competence are 'Relationship Skills' and 'Process Skills'. These competence terms are commonly used in ADR in the assessment of mediators.<sup>118</sup> The third skill-set draws on Solution Focused Brief Therapy, ADR and CR and is labelled 'Future Creation Skills'.

This generates reflective and analytic structure of interconnected skills, rather than a facsimile of reality: working on the future will take a toll on relationships in a range of different ways; (mis-)managing process will influence the relationships; effective use of relational skills will impact on the process. Focusing in on each of these areas provides insight into practice and this reflective structure has assisted practice.

The logic and meaning of these terms will be explained at the start of each section. Each section also has an episode of particular relevance to that competence embedded in it. Due to the nature of autoethnography all the episodes illustrate points on all the areas of competence and many will be referenced in all sections.

### **Relationship Skills**

Choices about how to attend to the relationships between all those present over time, are integral to mediation. 'Relationship skills' captures the complex of skills that encompass: communication as signals sent and received (verbal and non-verbal); the relational impact of attitudinal, identity, presence and authority of self (the mediator); awareness and use of physical space; awareness and ability to choose how to respond to interaction between others. Relationship

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<sup>118</sup> Including for example those of CIArb, CEDR, IMI and the RI

skills are much more complex than being lucky enough to have quick trust (Lewicki et al. 2006) and chance instant ‘rapport’<sup>119</sup>.

In terms of my practice and learning development, I found the focus of ‘relationship skills’ rather than the rather intangible ‘rapport’ more helpful for reflection. CEDR divides their competencies into ‘Creating an atmosphere conducive to mediation’ and ‘Develops communication and interaction with each of the parties’ (Allen 2015). Indicators of competence operate at both the conscious and subconscious levels.

Individuals representing the interests of others (their government, their clan etc.) have to take into account the decision-making structures of those they represent. This is something that mediators have to be aware of and include in considering process management decisions. Someone who represents others never ceases to be human, replete with emotions, cognitive biases and their own moral matrix (Haidt 2012).

If parties are there as individuals (representing only themselves), they are almost always situated within a network of relationships that play into their decision-making and hold them as individuals accountable in myriad ways. If the relationship between the mediator and the parties doesn’t function well, or the parties’ relationship is poorly managed then the chances of the mediation functioning well are minimal (see the autoethnographic episode in the previous chapter ‘*You’re the Mediator*’ and later in this chapter ‘*Sacrificing the Self*’.

‘*You’re the mediator?*’ also provides an excellent example of the impact of preconscious judgements on relationships. An aversion was triggered by my age/gender/appearance. In the next episode ‘*Sacrificing the self*’ the same theme is illustrated in more differentiated terms; one party has an affinity to my assistant and aversion to me whereas the other party has the reverse affinity

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<sup>119</sup> Rapport is a positive connection that if present seems almost instantaneous, but can also be built deliberately through the use of verbal and non-verbal skills, leading to increased communicative exchange.

and aversion, with me favoured (Cialdini 2009). These unconscious judgements can work positively and negatively, so to try and play them just for their positive effects (for instance by mediator selection on the basis that “‘a few grey hairs’ = authority”) is a dangerous game in practice, as already highlighted in the previous chapter in relation to the appointment of ‘Names’ and in *The Wig and the MD* later in this chapter.

These preconscious reactions do seem sometimes to be susceptible to change through conscious actions. The next episode *Sacrificing the Self* illustrates some of the subconscious and conscious skills demanded of the mediator if relationships are to be built and maintained. The need for patience, persistence and perseverance in this type of scenario is demanded at a level that, for me, has to be exercised at a very conscious level. Patience demands in practice both the shelving of judgement of the other, and a willingness to allow them the time that they require.

Patience is mentioned amongst my practitioner-colleagues but is not visible in the ADR literature and in the CR literature Curle is the exception, though his work has been picked up by Lederach (Woodhouse and Lederach 2016). He focussed in one talk not on Curle’s academic writing, but rather on his person. My notes from this talk: *‘Three radical elements of Curle: 1. The way he chose to listen; 2. His ability to embody reflective practice; 3. His radical patience. The Quality of holding the earth in a way that seeds could sprout...his awareness of self, other, context and of complexity and radical patience: that is not slow, but rather committed emotional patience, persistence and love.’*<sup>120</sup>

The invisibility of the emotional and embodied experience of the mediator may have helped to hide the importance of patience; something that is not so easy to capture through external methodologies, such as participant observation<sup>121</sup>.

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<sup>120</sup> Notes taken at the 50<sup>th</sup> Anniversary conference at the University of Bradford, 4&5 September 2016. John Paul Lederach’s keynote speech.

<sup>121</sup> It gets some mentions by some of the mediators in Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum., but is not presented as a core ‘skill’.

The following episode highlights the emotional and relational interplay of all those involved with the mediation. The nature of these two parties is that they could not have stayed in the same room for any length of time. The asymmetry of their communication styles, the powerful judgement (of the type described by Ramsbotham as ‘radical disagreement’ (Ramsbotham 2011)) and the experience of the failed negotiations up to this point.

The emotional involvement of Tilman (one of the parties) *with* the ‘mission’ of the organisation is obvious. What may be less obvious is the extent to which the whole way he saw himself (his identity) was connected with his work. Francois (the lawyer for the organisation) made it clear that the situation was a professional difference about organisational priorities and that the Tilman’s views and behaviour were unacceptable and unprofessional. His language was highly judgemental (‘unacceptable’; ‘unprofessional’) and his tone was congruent with frustration, anger and impatience.

The legalisation and monetisation of such differences in the commercial context often mask the personal responsibilities and identity issues involved, leading to a tendency to deny their existence. The result is challenging. This dissonance between seeing yourself as someone who is unemotional and yet experiencing and displaying high levels of emotions often is an even bigger challenge than overtly admitted emotionality for the other parties and the mediator.

Trying to pretend you aren’t emotional when you are, or being aware only on the subconscious level of your feelings, is a big challenge for the party and the mediator. It demands either confrontation of the dissonance between the person’s view of themselves and how others see them, or an exhausting conversation in face-saving double-speak. Finally, it means emotional-loading for the person experiencing high-emotionality whilst either trying to hide it (usually with abjectly poor results), or to deny it.



The challenge of recognising and dealing with ones' own emotional reactions to the emotional situation of others in mediation is one of the foremost difficulties for the mediator: the boredom of having to listen to the dull; the frustration of listening to the repetitive, self-congratulatory, or self-punishing; the sadness of listening to the angry or traumatised. The emotional and relational damage of extended exposure to this is considerable. It is exhausting.

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The INGO: Sacrificing the Self

The call comes in late in the afternoon: Would I be willing to mediate tomorrow?

There is a telephone conversation with the team from The Organisation to see if they are happy for me to be the mediator. They ask me a little about myself and my approach. They then ring off, have a conversation and call the admin back to say they are happy to go ahead.

There is a man who is putting himself in mortal danger due to his conflict with The Organisation and they would like to try mediation. He is called Tilman and has said he is willing to participate.

I feel sick. Am I up to this? Do I trust myself? Do others ask themselves these questions?

How do you *know* that you are ready to do something like this? This is, after all, life-or-death. I know the bare bones of the situation and nothing else. Still, I think, maybe that is good? Tomorrow will tell.

I arrive at the organisation, meet my assistant Kenzo, and find Tilman waiting.

“Hello, my name is Isabel. I understand that you and The Organisation have agreed to try mediation, and they contacted me to ask if I would mediate.”

Tilman demurs: “They have mentioned it, but I don’t know what it means, or what it is all about.”

“OK. Well, would you be happy for me to explain what it will and won’t involve. You can then decide whether or not you want to participate.”

“OK”.

Kenzo and I walk into a building that might have been the Sistine chapel or a non-descript office block, I’m focused on other things. Inside we meet the HR director, Dorje. He is friendly and shows us the rooms; two private rooms and a joint room.

He introduces Kenzo and me to the Head of Legal, Francois. He is cold but polite. He is aware that a mediation agreement needs to be signed, so I will spend time with Tilman first.

I then go and talk in private with Tilman. Or rather, mainly, he talks. He repeats himself a lot. He is highly emotional. It is exhausting. I listen, explore, paraphrase and summarise. This goes on for about two hours. Thankfully he has brought a ‘mediation friend’, Peter, who acts as a supporter and sounding board for him.

Eventually Tilman decides he is happy to sign the mediation agreement. The mediation agreement is standard and covers confidentiality, without prejudice and so on.

I bring the parties together for a joint session. I give a short opening statement, which is about role, process and principles; I don’t talk about content at all. I have asked them to prepare opening statements on their own, so I now invite them to share them.

This session lays bare the differences. Francois is polite and direct, though his barely contained irritation is palpable. Dorje is kind and demonstrates confusion as to why the situation is as it is. Tilman talks passionately and at length about

the wrongs of the situation, about his expertise and The Organisation's dereliction of duty.

"Thank you for your opening statements. Is there anything anyone would like to add?" I say.

"No" says Tilman.

"No" says Francois.

"Is there anything at this stage that any of you would like clarification on from each other, in terms of facts or anything else?"

Both sides demur.

"OK, well I will now have private sessions with you. I won't promise to spend equal time with you, as this is rarely the case – as you are all well aware [this has come up in the previous few minutes], different people are different in terms of the time needed."

Their communication styles are radically different.

Tilman expounds at length, often in a circular fashion; his position, his views on the organisation and what they are and aren't doing. He believes that their current decisions will cost people their lives and is willing to put his life on the line in order to try and protect others. He is apoplectic about the suggestion from Francois in the joint meeting that he wants money. I listen, ask questions, paraphrase, summarise; I explore his view of the world. It feels like it could go on forever, but I also have to spend time with Francois and Dorje too.

Francois talks in a forceful, direct, passionate and emotional way about Tilman's emotional behaviour and how unprofessional it is. Dorje is more conciliatory, but feels that The Organisation have already tried to be understanding. They want an indication that Tilman is going to drop his demands, and soon. They seem to be trying to persuade themselves that this is realistic. I wonder if they think they have misread and think that I am magician.

By late afternoon everyone is too tired and agrees that the mediation should be adjourned. A second session is fixed for two days time.

I spend much the morning sitting on the carpet-tiled floor. I lean against a table leg, the rough nylon of the floor against my hands. Tilman is lying on the floor next to where I am sitting, and talks.

The length of each session with Tilman, leads Kenzo and I to a change in strategy. We have separate concurrent sessions. Kenzo will work with Francois and Dorje, and I will work with Tilman and Peter.

My session is long; Tilman restates everything he has already said. He clearly knows he has said much of this, and that I have understood what he thinks and feels. He therefore allows me to explore with him how he imagines his demands could be put into practice. It is a difficult conversation. His demands are extreme and from outside sound pretty impossible. I have to remember it is not my job to decide; it is a question of whether Tilman, Dorje and Francois can make some version of this situation work. As we talk about his ideas, Tilman doesn't seem to be able to create for himself a workable way of implementing his demands. This leads to reversion and repetition of his original views and ideas.

Kenzo appears, and I suggest that we catch up privately:

"The Organisation are sure that this is just about money and that the rest of this stuff is just blackmail. I have got an offer of a sum of money and a joint statement." Says Kenzo.

"Hmm." I respond. "I'm quite sure that they're wrong. I think his issues of principle are far too important for him to be 'bought off' and I think he will take any suggestion in that direction, at this stage, as a mortal insult."

"Well there does need to be some movement."

"Indeed, and Tilman is almost out of energy for today, I think we won't be able to continue for much longer. Well let's go back and see him."

We go back into Tilman's room. After some time Kenzo, unprompted, tells Tilman about the offer from the Organisation; a financial settlement and press statement must be the way forward.

Two things happen, with a time lag of milliseconds: My heart sinks. Tilman stands up shouting and storms out of the room.

Too much, too fast.

I know that from all he has told me. He needs to mourn both the future he had hoped for and the people he believes will die as a result of The Organisations decisions.

I am exhausted. I have been too trusting that Francois and Dorje will be willing to tolerate the complete a-synchronicity of the situation. It is not that he is wrong and they are right or vice versa. Tilman has seen people die, and he knows more people will die. Maybe Francois and Dorje know too, but maybe these people are not real, but rather abstract.

...and anyway they must hold onto this distance in order not to become like Tilman.

I have to go back to Dorje and Francois to tell them that the mediation is over for the day. Francois is angry. His body language says what his words don't. I'm clearly responsible for the 'failure'. I summarise the situation and say I will call them the following day to decide next steps.

I feel despondent. What else I could have done? Would this not have happened if Kenzo and I hadn't worked separately? Had this meant that the different speeds of the two parties meant that the gap got bigger rather than smaller? On the other hand the speeds were so different, had Dorje and Francois been kept waiting for that long without apparently anything 'happening', would they not have lost faith in the process anyway?

I conclude that as far as The Organisation is concerned the mediation was over.

I am right. I call the next day, they say they are continuing discussions through Peter, they will be in touch if they want further help.

A few weeks later the feedback is collected, but the mediation provider, not by me. The parties have come to an agreement. Peter says agreement in the direct discussions rested on the work done in the mediation; particularly due to exploration with Tilman about how to convert his demands into a workable outcome.

Dorje says his view was that the mediation was fundamental to the agreement, but that Francois doesn't agree. Francois believes it was a waste of time and money; they got agreement outside the mediation.

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The conjunction of the analysis and the autoethnographic episode *Sacrificing the Self* highlight that relationship skills are fundamental to mediation practice. The comparative of the ADR and CR contexts draws out the interconnection of reflexivity and skills with the ability to be able to cope with the relational demands within mediation and the impact of these interactions on the mediator.

The CR context helped me to recognise how acute some of the emotional issues in the ADR context are. This is precisely because of the tendency for emotionality to be denied, demonised, and feminised ('feminine' in this context often equating closely to 'unprofessional' and 'irrational'). The previous episode was an interesting case in terms of ADR/CR learning, as in terms of culture, the parties sat different sides of the divide. Dorje and the legal advisor Francois, were mentally firmly embedded in the legal frame of the ADR context, whilst Tilman was in the CR context.

The restrictions on the range of acceptable emotions for many in the commercial-legal ADR context makes relationship skills more, not less, crucial. It is continuing to assist people in a way that I could not do without conscious

skills, training and practice that help me both to recognise emotional, relationship and communication issues, but most importantly to recognise my own.

This includes self-awareness in physical, emotional and linguistic terms. It is recognising and adapting my own language and body language to manage relationships in a way that doesn't transgress the boundaries of others. It is the conversational skills that help me to adapt to the style of others and to use verbal interventions that actually support and deepen understanding. It is recognising my own power and status. All these skills have their partner in being able to recognise the verbal, non-verbal and emotional signals being sent by others.

All these skills link with qualities and the assumption of certain qualities will tend to follow from the display of these skills. However, congruence between intent and the use of these skills mean that the skills alone are insufficient. However, attitude and self-reflection will not necessarily equip someone to be able to fulfil this role effectively. CR and ADR need to recognise the need for structure for reflection and the need to reflect as well.

The previous episode illustrates the connection between these relationship skills and process skills. One side needed huge amounts of time to work through relationship and emotional issues in a verbal style that was convoluted and wordy. The other wanted to bargain in a pithy and direct fashion without acknowledgement of relationship and emotional level. There result was extreme asymmetry in terms of what was needed in terms of time, pace, as well as communication; both needed support but in very different ways. It is process that will be examined next.

### **Process Skills**

Process covers a complex set of skills that can be divided into three areas: Working through phases, that are characterised by particular tasks and modes of interaction; Tools that are applied to manage specific interactional elements,

such as flipcharts or coffee breaks; Principles, such as ‘neutrality’ that are expressed through the congruence (or lack of it) of the mediator’s behaviour with the parties’ view of what these principles should look like in practice.

All the episodes included in this work provide evidence that who does what, with whom, for how long, makes a difference to the futures of those involved. Both fields seem to agree implicitly or explicitly that this is the case, but draw different conclusions about the way that mediators should influence the process. Both fields are inconsistent and confused about whether parties are competent to make process decisions and about the connection between process and outcome.

In CR the dominance of transformative mediation suggests that parties not mediator should determine the process (Bush and Folger 2005). Yet this approach emphatically permits only joint sessions and rules-out the use of caucusing (a ‘process choice’). Therefore, the mediator is already pre-determining one of the most important choices for the parties. Aside from the influence on outcome, in concord with Burton’s principle relating to problem-solving workshops, caucusing is also rejected because it will destroy the mediator’s neutrality (Burton 1996: 19). This assertion is reinforced by the idea that only the parties can give each other ‘recognition’ (and presumably this can only happen in face-to-face verbal form).

The fact that this is a massive process intervention by the mediator, that is so powerful that it regularly leads to the outright rejection of mediation, seems to be inadequately addressed. This has been brought home to me repeatedly when working with people in the CR field who are in conflict. Where they have first-hand knowledge of transformative mediation, the rejection of mediation in their own conflict situations is absolute on the basis that: ‘it is past the stage of mediation where we can sit at the same table’. This seems unfortunate given that even the limited episodes of this PhD, including *Dogma and Practice*, *Sacrificing the Self* and *Building a Future*, illustrate both that whilst no panacea a process that uses both type of session is not necessarily perceived as



partisan and can lead to outcomes that the parties perceive to be better than not having addressed the situation.

Another process intervention is prescribing ground rules such as ‘no swearing’ and ‘speak respectfully’: what respectful language and swearing are, is not a constant. Therefore, for the mediator to privilege a particular form of restrained eloquence is to impose not just communicational boundaries, but to make a process choice.

Then the mediator must ‘*follow the parties around highlighting opportunities for recognition and empowerment*’ (Folger and Bush 2001: 14). This, in practice is akin to the loudest, largest, strongest and pushiest person in a room saying that everyone present is in a non-hierarchical situation and then having this assertion affirmed by an authority who sits and watches what is happening.

The ADR context considers process management to be fundamentally part of the mediators’ responsibility. The CEDR definition of mediation now explicitly includes the term ‘*flexible process*’ (Allen 2015), conveying the difference to litigation where there is a fixed sequence of events. However, whilst claiming flexibility, a fairly fixed process involving one joint session followed by private sessions is the norm. However, the expectation that mediators needed to understand a range of different tools their boundaries and their risks works to an extent against rigid dogmatism in practice.

The mediator idiom “*The right offer at the wrong time is the wrong offer*” demonstrates that mediators are aware of the process-outcome connection, but it is not explicitly admitted. The underlying assumption is that parties lack the ability or inclination to process manage. The mediator is expected to provide a consenting and flexible process, in order to meet the needs of the parties (Allen 2015: 28).

In summary, the mediator is influencing outcome by explicitly (commercial) or implicitly (transformative) managing process. In effect, both contexts are far

from a situation of ‘informed consent’ with those they are working with in relation to whether they are influencing the outcome and in what way. This is a good example of what De Girolamo describes as mediators using labels to mask their actions (2013: p.203). The fact that the aim of mediation generally is to manage or enable a process that assists the parties in reaching their goals or aims. In other words, the whole premise is that the application of the mediator role and process will create a *different outcome* than not mediating.

A common reason for entering mediation is the collapse of direct negotiations. This can be due to the substance, but it is also often due to the failure to run an effective process. Parties are often relatively clear that they are at a loss about what to ‘do’ (process) to get an outcome. In *Sacrificing the Self* and *To Love and To Lose* the communication styles of the different parties made working only joint session completely unfeasible and would have led to the rapid breakdown of the process; both the Man and Tilman talked in a way that meant the Woman and Francois couldn’t cope with interacting with them directly for any length of time. In both situations the parties would have flatly refused to engage in a process that only used joint sessions.

Parties have preferences and boundaries in terms of the process they are willing to engage with, but this is very different from having the process skills needed to maintain communication and negotiation in high escalation conflict situations. The fact is that anyone, including the conflict specialist (me), once in a situation of high escalation, is unlikely to be terribly competent in process management and could probably use some help!

It is extremely difficult to be reflective about process without an understanding and practical experience of the influence and practical implications of different options. Therefore, despite some dogmatism, the much broader attention to process skills in ADR, helped me to be more aware of the possibilities and impact of process. I have experienced respected mediators as colleagues, and as a mediation party (there is a reference to this in *To Love and To Lose*), from

both sides of the CR/ADR divide who use process flexibly and on the basis of informed consent.

This next section picks up will look at learning arising out of this boundary crossing between the two fields in relation the application of maps, tools and principles, in order to develop the structure for boundary crossing skills reflection framework.

### **Process Maps**

Phase maps, or models' are common in the ADR context (De Girolamo 2009). They vary in the number of phases suggested and in how prescriptive they are on time, the flexibility to move between phases, and how linear they consider the process to be. I found the CEDR model (Allen 2015)<sup>122</sup> helpful, because it has only five phases. It is an aide memoire rather than a straight-jacket in the complexity and confusion of real time interaction. The significance of this for me as practitioner is perhaps better understood through an explanation of the way I use this 'map'.

*Prepare:* This reminds that there are technical, logistical, process, substance and relational preparation that has to be done. It is also a helpful reminder of Fisher & Ury's important direction to negotiate on process before content (Fisher et al. 2008)<sup>123</sup>. Finally, it is a reminder to me that people don't like surprises unless they know what they are going to be in advance. In other words, if people are going to engage they want to know what they are getting themselves in to. Different people need different levels of process reassurance.

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<sup>122</sup> This phase model was developed during the 1990's and there have been a number of iterations.

<sup>123</sup> This direction made absolutely no sense to me until it was contextualized in practice. I understood its impact because it is built into the formal ADR mediation context where the principle is effectively formalized in mediation agreements and practice conventions. Applying it in my own conflict situations, clarified for me that practice conventions are a way of circumventing the need for some of this negotiation as people make a decision up front on whether to engage with the process as offered.

Different cases need different amounts of time, numbers of meetings, combinations of people etc..

*Explore:* This is a reminder to consciously hold back on bargaining and problem-solving, in order to actually draw out interests, feelings, needs and underlying data sets rather than the normal focus on positions, conclusions and judgements (Fisher et al. 2008)<sup>124</sup>. Bringing in an outcome-neutral mediator can help the parties to take the time and space to look at, and share, a broader spread of information than they have done previously. This happens through the mediator not setting their own agenda and pushing the parties, but rather (as the transformative field would put it) ‘following the parties around’. This does seem to actually do in practice what Fisher and Ury propose; it sometimes opens the possibility of ‘creating value’ before trying to problem-solve. With some parties this happens in caucus, with others in joint meetings, with still others a combination of the two, and in all cases information flow is important.

An example of this was the amount of time and work Tilman needed (creating a considerable challenge as the organisation didn’t need or want to do this in the same way). In this situation the attempt to exert force from the outside (the attempt by Kenzo to speed his decision), didn’t work. Even if it hadn’t led to a walk out, the side-effects would almost certainly have been an even more oppositional and antagonistic dynamic between Kenzo and Tilman. Therefore, this case seems to underline the need for parties to go through their own psychological process in their own timeframe. Reinforcing the practitioner adage: ‘The right offer at the wrong time is the wrong offer’<sup>125</sup>.

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<sup>124</sup> Beal caricatures interest-based mediation as gathering information before “*substitut[ing] the mediator’s judgement for that of the parties*”. Folger, J. P. and Bush, R. A. B. (2001) *Designing mediation : approaches to training and practice within a transformative framework*. New York: Institute for the Study of Conflict Transformation. At the time this book was written there was a good deal of highly evaluative mediation practice in the USA. Whilst this style is still relatively common amongst judge-mediators in the US, in the UK this would generally be considered to be confusing role and process; such an approach would be considered Early Neutral Evaluation not mediation.

<sup>125</sup> This is an adage that I have heard again and again in the ADR context and in the compressed mediation processes of something between a few hours and

*Bargain /Problem-solve:* Whether about money, personal relations, or international boundaries the shadow of the future is present in mediation. Focusing exclusively on the pathology of the past, comparative power, and dialectical/ oppositional division all tend to make this even more difficult than it would be otherwise. The demonization of ‘horse-trading’ and an almost religious conviction that ‘win-win’ can always be achieved can now be added to the challenges. The bargaining phase is a reminder to the mediator to accompany the parties in their difficult and often painful process of option evaluation and, if necessary, in dividing/trading value.

This phase is heavily influenced by the level of acceptance by the mediator of difference and that difference is likely to continue. Practical mediation training, with emphasis on the idea of conflict parties mutual interests, combined with the wish of those attending to contribute to *conflict resolution*, can lead to attempts to minimise, or squash difference, where difference can both be a source of solutions (*Radical Disagreement; Why bother asking?*) and that whether or not it provides solutions this difference often necessarily persists. Mayer has written about this reality in detail in *Staying with Conflict (Mayer 2009). To Love and To Lose* illustrates this situation of continuing difference clearly.

*Conclude:* This is a reminder to consider what process steps and relational agreements need to be put in place in order to ensure that whatever has occurred in the previous time, has not been done in vain. In other words, if there is an agreement that it is clear what has been agreed, that it has been recorded effectively and how it is going to be followed up. If there is no formal agreement, then what are the outstanding differences? What are the next steps going to be?

Much of the focus of the academic debate around these models has focussed on how well they correspond to reality (De Girolamo 2009). Crossing

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one working day, is very much born out by experience; what is utterly unacceptable at 10am, may well be accepted at 4pm.)

boundaries between different fields and different approaches to mediation has highlighted two key learning points for me as a practitioner.

The first is that discussion of the accuracy or veracity of such ‘maps’ misunderstands their role for the practitioner. Their function is to be a simple guide to remind the practitioner of key things that are difficult to remember in the confusion of actual, practical, relational interaction; not least that a sense of movement through time is important and directly linked to having a sense of ‘progress’ away from a situation that the parties don’t like.

Following from this, the second is that what is included in my process ‘map’ will influence my attitude to outcome. If there is a ‘concluding phase’ does it imply a time-bound end point, that is tied to a specific outcome such as ‘settlement’? or something else? This is where the tools link back to the underlying attitude and normative project of the mediator.

### **Process tools**

Aside from phase models, or maps, there are a whole range of other process skills and tools: Set-up and management of different sorts of meetings, involving different combinations of people; Facilitating sessions on specific topics, or between specific people, (for instance between experts to produce information to be shared with decision makers); brainstorming on solutions to specific problems; horse-trading or bargaining on value; Time- and energy-management (in relation to your own time and energy, as well as that of the parties); Appropriate use of recording tools such as note-taking, flipcharts, digital recording of notes, or pictures<sup>126</sup>. Many of the tools are shared with other conflict and or are transferable from other negotiation or professional roles.

However, there are two principles, sometimes described as tools, that are particularly relevant to process management. Their practical application and impact goes to the core of how the mediator role is perceived and crossing the

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<sup>126</sup> A good proportion of the mediation support teams at the UN and EU are listed as being process design experts.

CR/ADR boundary has profoundly influenced my practice and perception in relation to these principles. These are confidentiality and neutrality.

### *Confidentiality*

People instinctively make decisions about what to share and what to keep confidential. Selecting information and timing the sharing of it are at the core of effective communication. In 'normal life' having shared information in everyday conversation with others, people rarely explicitly check what information exchanged during that interaction can be shared, with whom and when. The result is much more rapid communication than would be the case if all these things were checked, but leaves a lot of space for misunderstanding and the mismatch of expectations. Proactively talking about confidentiality might therefore be fairly unnatural, and it can be blown into a 'big deal' and become an obstacle.

This was another context in which the transformative mediation that left me feeling ill-prepared to cope with the complexities of confidentiality in the real-life context. In theory, mediation practiced as a process where all the parties are present at all times renders confidentiality a minor issue once consent and process have been established. However, *Dogma in Practice* illustrates the practical difficulties I encountered with this 'get out clause': What happens if you have to set up mediation yourself? What happens if people do tell you things privately? What happens to those connected with the conflict parties who aren't present but need to be taken into account?

The ADR convention of explicitly agreeing confidentiality at two levels provided me with a simple, clear working way of dealing with confidentiality explicitly without blowing it into a 'big deal'. These two levels are: Overarching confidentiality in relation to all those present (and how to deal with exceptions); Individual confidentiality i.e. that conversations between the mediator and individuals, or groups within the mediation are confidential and will only be shared with others at the mediation on the basis of permission. Both levels have to be agreed prior to the mediation and, whether or not private sessions are

used, confidentiality needs consistent checking at the end of sessions/conversations to keep the process safe.

Confidentiality should not be about blocking exchange (as is often supposed by those who advocate only joint-meetings), but about enabling it. However, the combination of confidentiality and heavy use of private sessions can produce the risk that the mediator gathers information for themselves, rather than proactively using confidentiality checks to encourage and enable the sharing of information. The result can be that the mediator feels like there is progress and movement, whilst the parties feel like they are in an echo chamber. However, from my observation the core of this issue may be poor management of private meetings, but is often actually caused by role confusion. As illustrated in *Train(ing) Mediators*, the mediator is gathering information for their own 'solution' for the parties, or to 'show' the parties where they are wrong. This creates all sorts of problems discussed in the previous chapter.

Respecting the parties' ability to make their own decisions about the level of direct interaction that they can and can't cope with is a basic element of self-determination, as illustrated by the choices made by the parties in *To love and to lose* and *Sacrificing the Self*. The difficulty of the transformative assumption is that some people will consider mediation because they want to disengage from their relationship, not to transform it or to reconcile. In other words, they want to find a way of not having to interact with people, or situations they have found harmful, costly, traumatic. This situation makes the normative assumption and the joint session only model difficult, and a common reason why mediation doesn't happen. Joint sessions can be extremely helpful in such mediations, but they need to be a matter of consent not of force.

Some people enter mediation at the point where there is enough trust and respect to explore the situation, views, needs, feelings, and information-base only in joint session. Many people do not. The result is generally avoidance; rather than explicit rejection of mediation they simply don't use it. The less



extreme version is a willingness to engage in mediation but not in joint-session only mediation.

In such situations, there are often varying degrees of concern about sharing too much information; the wrong information; making 'things' worse; looking stupid/weak/etc; 'leaving value on the table'. By the time people are willing to get a mediator involved in situations they have usually received lots of advice; sometimes this advice has even been actively sought by the parties. However, what they often haven't had is someone who is willing to listen, and ask, and listen, without advising, so that they can work their own ideas through. Confidentiality and private sessions can be used to create space for this.

People sometimes need and want to share things that are profoundly important, and the act of telling another human is pivotal to their own emotional state. They don't want answers, advice, or therapy. They need to talk to someone who they feel will not judge, or advise, or sympathise, but will actively listen<sup>127</sup>. *Building a Future* in the next chapter provides an eminently good example of this. This relates directly to Curle's concern with listening (Curle 1995).

Crossing the boundary between CR and ADR highlights the similarity of the human need to be 'heard' and the appreciation in both fields of the importance of this. However, it also highlights differences. The ADR context, with its philosophical fit with a realist-pragmatic epistemology emphasises listening, but balances this against the need for momentum, with something of a tendency to minimise the importance of listening done for its own sake, or rather for the psychological impact of being heard. The CR context 'listening projects' (Anderson 1999) have emphasised and demonstrated the importance of listening for its own sake.

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<sup>127</sup> This is one of the key relationship skills relevant to many conflict roles; listening, giving back what you have understood and exploring without your own agenda for doing so.

Moving from the CR context to the ADR context demonstrated for me both the importance of listening for its own sake *and* the need of conflict parties to have a sense of momentum and a sense of desperation of (in process terms) having ‘tried everything’. The problem with the divide between ADR and CR in this context, ironically is dichotomous thinking and the risk of presenting the issue as being an ‘*either* listening, *or* momentum’ rather than the combination of these needed and wanted by *these* parties.

### *Neutrality*

I use this term because it is what parties generally expect, and it seems to send a clear signal to the parties and triggers a set of expectations that, if disappointed, will lead to an instant loss of trust. However, de Girolamo’s critique of neutrality is worth noting as it is based on a rigorous ethnographic study of a large number of commercial mediations involving analysis of party-mediator interactions: “*The moniker of neutral...third party intervener has no place in the mediator’s lexicon...these labels are ways to say something which to mediators and parties alike may seem unpalatable...the impact of the mediator’s action is to depersonalise the negotiation...parties hear from a mediator that which they are not willing to hear from the other participants.*”(De Girolamo 2009: p.266) The practical observation is that there are observable signs of a shift in the relationship between mediator and parties, if the parties perceive the mediator to have ‘lost neutrality’. But given De Girolamo’s observations what is meant by this?

It is easy to focus on measurable signs of this shift in the form of ‘unequal’ application of process or relationship skills e.g. private sessions of different lengths with different parties, or looking at one side more than another in joint session. Being self-aware and conscious of such pitfalls is undoubtedly helpful, as they can happen by accident<sup>128</sup>. However, if these happen by accident people are often remarkably forgiving; they are not the main story.

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<sup>128</sup> People are actually generally reasonably unconsciously aware that exactly ‘equal’ treatment of parties (such as length of eye contact, or length of private sessions) is unnatural and appears weird and false rather than neutral.

The big difference arises when parties sense that differences in treatment are a sign of a shift of the subconscious attitude. These are signals that indicate that the mediator has become: more attached to one party or person than to the others; attached to an outcome of their own choosing or design; judgemental of the behaviour of one party or individual; convinced that the favoured outcome is of one of the parties is wrong. Some of the previous episodes, including “*The arbitrator and the animation*” illustrate that it is attitudinal shifts (that may or may not be expressed in different types of ‘process error’) that have an immediate and substantive impact on the perception of the neutrality of the mediator.

One of the many challenges of the outcome-neutral mediator role is that it demands the use of the critical analytical skills used in evaluative roles, without presenting a conclusive view, judgement, or recommendation. In other words, the critical skills of identifying possible inconsistencies, gaps, opportunities in the ‘story’ being told, without tying this identification process to an assumption of the superiority of your insight. Once again providing an illustration of how critical thinking and practical skills are intimately linked to underlying attitude.

This process demands both self-control and a reflectiveness that allows me to be aware, at least to an extent, of my judgements. I have to be sufficiently sceptical of my own judgements in order to either shelve them, or to use them as an impulse to explore the views of the other *in order to understand them better*. This is very different from exploration in order to come to my own conclusion, or to persuade them that I am right – both look and feel very different. This process is difficult and takes practice and external feedback in order to do it even some of the time.

The next episode provides insights into my experience in relation to process management in mediation both as mediator and mediated. Both situations

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Becoming over self-conscious can result in relationships being compromised (because the mediator is being odd) and ineffective in terms of process because such exact ‘equal’ treatment makes it impossible to meet the differing needs of different people (e.g. time to communicate/reflect/style of speech/physical space).

involved the attempt, at the request of the parties involved, to rebuild working relationships.

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The IGO: “Radical Disagreement” or “To love and to lose”

His body sags. His eyes sink. I know he is gone. I am sad. I feel helpless. Could I have done more? Should I have pushed harder for the mediation to continue? What will become of them?

In a voice that is both plaintiff and yet also an exclamation:

“But we haven’t gone through my list in any detail!”

I have brought him back during the last three hours to their time constraints and the reality that if he spends all the time on his questions about her list, there won’t be time to do anything else, including going through his list. I am lost for a way to reinforce that this situation is the result of his choices, but then maybe his protestation is the disappointment of the arrival of a point he has been hoping he could put off, hoping that he would be able to avert the loss.

I am momentarily distracted by a memory:

I am sitting in a café with my colleague. We are having a careful conversation, treading carefully and trying to avoid each other’s toes. We finish our conversation and there is a guarded but positive atmosphere; it has actually been useful. A few months earlier we had spent the better part of two working days with a mediator; we had been struggling for months with a radical disagreement. We had worked things through. Talked about how we felt. Put into place a schedule of very carefully worked out principles and practices we were both going to stick to. I have immense respect for what she did; what she helped us do was lay the groundwork and we have managed to build something from there.

I bring myself back from my memory with the reminder that what they make of it from here is their responsibility. I still feel sad though and can’t help wondering if

there was something else I could have done. I wonder, not for the first time, about whether the difference between empathy and sympathy: is there any actual empirical basis for it? I think I can see the difference, but what is it I see? I look across at the man who is looking at the table. I feel sad for him.

“I’m sorry that we didn’t go through your list.” I say.

“She didn’t ask any questions about it.” His tone is downcast.

“It’s true. She just said she would do the things you listed.” I speak calmly.

I know that the woman is at the end of her tether. I realise that she has called time on the process because she thinks he has come to see it as a good way of being able to continue being in the same room as her and having her attention focussed on him. If she is right, then conflict resolution is a catastrophic outcome for him; it would mean they would no longer have a reason to be in such regular contact. It is heartrending.

“Yes, but you see this isn’t important to her.” His voice rises again.

I see him moving back into the cycle I have watched again and again.

“Well, we have spent two working days working things through and you will continue to have support and access to Connie [who has been assisting]. I am sure that you also have an awful lot of things to do?”

“Of course. But it is about her priorities.”

I have to withdraw. I know my patience has been stretched to a thread, like bluetack or chewing gum. He has talked and talked and talked and talked. I have listened for dozens of hours over a period of several weeks. I have had to use patience and persistence in quantities I didn’t know I possessed.

I decide that I have to push back; there is truly nothing more I can do at this point. I try and keep my tone even and very matter-of-fact:

“Indeed and it is a voluntary process. That means there are limits from both parties and from your organisation in terms of time.”

I then change tone slightly; with a little more encouragement and energy:
“You have discussed at length some of the previous incidents and what you would like to happen differently. I guess it is a question of going and trying it out now and seeing how it goes. Do keep in touch with Connie about it, and I will let her know that I have told both of you that I am more than happy to work with you again if it is agreed by everyone.”

His expression retreats again. I read a ‘so this is it’ on his face. I can only do so much, and yet it doesn’t stop me reflecting on what I could, or should have done, or not done.

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Subconscious attitude plays a big role in how the application of process management tools actually pans out. Incongruence between the mediators’ actions and their verbalised views on mediation principles and process management tools is generally quickly spotted by the parties. *To Love and To Lose* gives some insight into my struggle to stay congruent and of the struggle to compartmentalise my own experience and emotions in a case I found challenging.

Incongruence often manifests itself in the mediator saying that outcome (and in the case of transformative, process) decisions lie with the parties, and then losing their ability to depersonalise (implicitly, or explicitly) and pushing their preferred outcome. Using non-judgemental language is almost impossible once the mediator is convinced of their own ‘rightness’; tools and techniques follow attitude rather than the other way round. This is illustrated well in the episode in the previous chapter *Train(ing) Mediators*, where the trainee’s body language is the first thing to give away the shift into a judgemental, problem-solving frame. It is illustrated again in the *Arbitrator and the Animation*.

In relational terms the mediator’s normative project, whether ‘settlement’ (the CR stereotype of mediation in the ADR context), or ‘transformation’ (the ADR

stereotype of mediation in the CR context) impacts on the boundaries of the degree to which the parties can be permitted to self-determine. If the mediators' normative project is in conflict with the parties', the idea that the parties know best unravels and a contest between the normative project of the mediator and the aims of the parties ensues.

This seems to suggest three possibilities for mediation:

The first is that it can only be used with parties and mediator who all explicitly, implicitly and honestly share a normative project. So in the transformative style those who wish to increase their recognition of the other parties and believe they are disempowered and believe that the mediator has the power to change this. In the settlement style those who believe they need assistance in negotiation and are happy for to accept the interference of a mediator in both process and outcome in order to get an agreement. If there turns out to be divergence of normative project during the process, problems and ethical issues will arise. These will be discussed further in chapter 7.

The second is that it can be used with parties and mediator who do not share these aims because the mediator knows better than the parties; they are the expert on the parties' relationship, process decision maker, and pre-ordains the acceptable outcome for the parties to 'achieve'. This is the antithesis of self-determination, and suspiciously similar to the judge role.

The third is that to apply the principle of actually allowing others to self-determine does demand befriending as captured by Curle and later reframed by Lederach as "*compassionate presence*" in the most difficult of circumstances. It demands that you take people, together with their own aims, objectives and normative assumptions seriously, however ridiculous, foolish or unethical they seem to be.<sup>129</sup>

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<sup>129</sup> The ethical implications of this will be explored in the next chapter.

It demands huge patience without being disingenuous, as the examples in the episodes *Sacrificing the Self* and *To Love and To Lose* illustrate.

Compassionate presence has to be reinforced by a good deal of conscious self-control and determination (at least for me!). So, whilst allowing the parties to self-determine might be a process management skill, but it is underpinned by an attitudinal space that arises from the belief that parties are competent.

### **Future Creation Skills**

The choice of 'Future Creation' as a term is derived from connecting practice and theory in ADR, CR, and solution-focused brief therapy<sup>130</sup>. It shifts the focus of mediator assistance to working with the parties as they try and develop alternative, acceptable, workable futures for themselves. It conveys the reality that people in mediation want a future other than that which they see approaching through the trajectory up to that point. Future creation can involve a wide variety of elements: value may need to be divided; problems may need to be solved; relationships to financial mechanisms may need to be transformed.

This idea opens the way for forward-looking exploration in a way that creates space for the future as a function of a solution-based past as well as the problem-based past (De Shazer 1988). Most importantly it does not suggest mediator-generated solutions or assume that solutions are purely found in the history of the problem. As with other mediator skills, these skills are not applied at only one point in time, but rather in different forms at different times during mediation.

*To love and to lose* is an illustration of the latter part of a mediation where two people had very different and incompatible futures. One wanted a closely

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<sup>130</sup> This is a therapy approach based on the idea that preferred futures do not necessarily emerge from focusing on problems and their genesis, but rather on the identification of where you want to go to and what resources you already have that you can mobilise to get there. See the work of de Shazer Sacks, O. (2012) *Hallucinations*. London: Picador.



connected future with high levels of interaction, the other wanting disengagement. The outcome wasn't a win-win, it was the much more common lose-lose; a compromise that both of them could just about live with. They wanted things from each other that neither was psychologically, emotionally or physically prepared to give the other.

Through the mediation they each created their own future. The deeper understanding of the intersection of their own and the others' wants, needs and views meant bereavement for one party (in the sense of the loss of a relationship). This type of situation is incredibly sad, nobody's 'fault' and a much more common outcome in mediation than the 'win-win' myth would have it.

Contrary to the transformative assertion on commercial mediation<sup>131</sup>, the idea of 'following people around' in the process of exploration, rather than driving a problem-solving agenda, actually captures part of the process as I was taught in the commercial context well. The impact on rapport, neutrality and ownership of moving into the evaluative, advisory role has already been demonstrated in previous episodes; and pushing an agenda can be perceived in exactly this way.

This 'non-directional' discussion is party-directed exploration; by not setting and following a pre-set agenda it allows a lot more space for the connections between different elements of the situation, and a much broader spread of different types of information (including the emotional) to emerge.

When explaining this process to trainee mediators, I use the analogy of the experience of a sighted person's experience of the world having led someone

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<sup>131</sup> In order to do this without stepping into the judge or expert role is difficult "a mediator [cannot] simultaneously support autonomous party decision-making and substitute the mediator's judgement for that of the parties." Della Noce, D. J., Antes, J. R. and Saul, J. A. (2004) *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*. *Ohio State Journal on Dispute Resolution* 19 (3), 53. I agree with this wholeheartedly, but it is a false assumption that role-switching is automatically what interest-based mediators do 'when the going gets tough'.

blind: As the mediator, you are blind. The inability to see the world through the parties' eyes, combined with curiosity of what they are seeing can help the parties (those with sight in this situation) to see and notice things they hadn't noticed before. Precisely because the blind person perceives the world differently asks questions, is sensitive to, and curious about things that appear differently to the sighted person as a result of having to describe them to another. The result can be challenging and informative.

It is also critical to maintain the awareness that you are 'blind' and do not feel or experience the situation as someone else does. In the next episode, *The Wig and the MD*, this is illustrated by one of the lawyers, whose focus on the legal means that he loses sight of his clients' commercial priority. If the blind person (the mediator), forgets their inability to see, and comes to the conclusion that they can see better than the parties, the parties rightly begin to see them as dangerous. In this role 'broadening of perspectives' doesn't come through the mediator contributing their view, but through their admitted inability to see exactly what the parties see and therefore asking questions. This is not 'reality-testing' through superior perception, but rather through a lack of fear and confirmation bias because it is not your own reality.

Stepping back from the need to resolve the problems of others demands huge amounts of patience curiosity, and tolerance of ambiguity. It depends on the mediator striking a difficult balance by using of all three sets of skills at the same time. It demands the tightrope walk of asking 'stupid questions' that are helpful rather than questions that demonstrate ignorance of the matter in hand, or culture of those involved.

Relationships have often fallen apart before mediation because of failed bargaining; failure to create acceptable, workable futures. Of course, if relationships are rebuilt, then it is more likely that ways out of conflict about what or how may be resolved. However, if the relationship has broken down because of failed negotiations, improved trust and relationships are often linked to making progress in the direction of a preferred future.

On rare occasions, everybody at mediation gets everything they want because they want the same compatible future, or they discover that they want completely different but compatible futures (allowing them to ‘go their separate ways’). Yet the vast majority of situations have elements of either of the above, *as well as* the need to engage in a process of give and take in order to get out of or at least to change an unpleasant physical, financial and relational situation.

The emotional impact of what bargaining actually means (different and powerful from the mediator and party perspectives<sup>132</sup>) kicks in, as illustrated in *To Love and To Lose*. Cognitive errors such as loss aversion play their role, with the fundamental problem of having to bargain on the indivisible, and/or everyone getting less of something than they think should be theirs. In the moment where a demand is put forward and a position taken, there is almost always a powerful reaction that is congruent with amygdalic triggering<sup>133</sup>.

Party responses have a good deal in common with bereavement with its gamut of emotions and responses that arise out of letting go of something (or some part of something) that you really, really want. The result of this is a massive challenge for the mediator because such responses trigger emotional responses in return: sympathy; contempt; frustration amongst others. Many of these emotions will drive a wish in the mediator to change role.

Maintaining the outcome-neutral mediator role at this stage is a real challenge. Remaining sceptical of your own view and ‘asking, not telling’; exploring the wider context and/or detail is much more effective, but much more difficult than just switching into expert mode and informing the parties of their ‘errors’. Furthermore, if this ‘exploration’ is actually an ‘on the sly’ or ‘clever tricks’

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<sup>132</sup> I say this from the perspective of a person who has participated in mediation as a party rather than as one who has observed those in mediation.

<sup>133</sup> Verbal and non-verbal responses are congruent with a flight/fight response. This is particularly easy to observe in situations where offers are conveyed in private and the people receiving do not have to try and hide their response in the same way they might were the other side present.

version of trying to convey a mediator opinion the move into leading questions and/or pushing testing questions way past the needs and rapport boundaries of the party seems almost inevitable.

This all throws up an issue with the logic of Curle (1995), that mediation precedes negotiation, which takes place once relationships have been re-established, and of Burton (1996: 15) that mediation is a superficial process involving compromise. Particularly the boundary crossing mediations that I have been involved with since gaining experience in the ADR context helped me to understand how to take this outcome-neutral role into the later stages of the development of alternative futures. This is the point where parties may need and want to bargain either to re-establish their relationship, or to end it.

The idea of assisting the decision-making, option-testing and workability-testing of alternative futures without substituting your own judgement (positive or negative) for that of the decision makers seems to be discounted as a possibility by Della Noce (in:Folger and Bush 2001: 53) and does not fit completely with the work of Burton or Curle in relation to mediation. However, the next episode briefly illustrates a number of these ideas around testing and exploring options for the future. It also illustrates the tight-rope walk of knowing enough about the context to ask 'stupid questions' that aren't stupid, but create opportunities to look at the situation from different angles.

Of course, by asking questions about how different options are going to work, what they are going to look like, how they are going to persuade the other side to engage in a particular option conveys the fact that you don't understand how something will work. However, contrary to much of the shorthand, my experience suggests that the underlying attitude in such a process *is* picked up by the parties. They do know the difference between genuine enquiry and enquiry done to try and persuade them that they are wrong.

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The Ltd Companies: The Wig and the MD

I walk into the sub-contractors' mediation room. There are three men and a woman seated round the table. I have read up on specialist glazing. I am all too aware both that I am not to be able to out-specialise them, but that I also don't want to make a fool of myself. I shake hands with everyone. The woman seems somewhat disconcerted in a positive way and shakes my hand warmly.

In a later session, she tells me quietly that she was so relieved when I came in: "You weren't wearing a wig! You were a real person not like one of those judges in a wig!"

I had a flash of what it would feel like to enter this process with no experience of legal process, or commercial mediation.

The mediation progresses over several hours. As information and offers begin to flow I feel reasonably comfortable. I am used to the process. It is hard work, but there is a sense of momentum.

I am fairly confident that they will get to wherever it is they want to get to by the end of the process. I explore their logic and the consequences:

"We are never going to work with them again. The way they have behaved is outrageous." Says the MD of Specialist Glazing. I paraphrase:

"So the way they have dealt with the situation was unacceptable from your perspective and you don't want to have to work with them again?"

"Absolutely!" The affirmation comes from the lawyer.

I look at both of them and then turn to the MD: "Well I'm certainly not here to try and persuade you to work with anyone. You've talked about how specialist your work in [a very specialist area of building material supply and fitting] is. So I'm just curious about the industry. Can you tell me a bit more about it?"

“It’s highly specialised. There are only a handful of suppliers and fitters in the whole country. It’s highly technical and highly skilled.”

“Ok. Sounds like it’s ‘niche’?”

“Yup. Everyone knows everyone.” Both the people from the firm affirm this reality verbally, or non-verbally.

“Everyone knows everyone?” I raise an eyebrow and then stay silent.

There is a pause.

“It makes situations like this difficult...” Says the MD.

The tone has shifted from one of externally focussed defensiveness, to pensiveness about the long-term implications and consequences of how this situation plays out.

I genuinely don’t know what they should decide, and I am not asking these questions to persuade them to take a particular course of action. It just seems that taking into account different time frames and consequences in their decision-making, and I know that I don’t know what these are, I can only ask. This is definitely interference; their subsequent discussion amongst themselves illustrates that the impact of falling out terminally with these people just hadn’t been taken into account, and commercially it needed to be according to their appraisal.

The mediation progresses and number of offers are exchanged. The last offer is given to me by the defendant. I go through to Specialist Glazing and ask:

“How are you doing?”

“Pretty tired of this.”

“That’s normal.” I say.

“So what are they saying?”

“Well, I think this is probably pretty much the last offer: They are willing to drop hands.” I say. In legalese, ‘drop hands’ means both sides let go of claim and counter-claim. In other words neither side pays or receives any money. There is a pause. The SFO and MD look serious and are occupied briefly with their own thoughts. However, colour is rising in their lawyer’s face and he suddenly explodes:

“B..b.but we haven’t even had an answer about their view on...”

“Oh shut up!” says the MD. He barely looks at him and speaks in a low, assertive tone.

He turns to me:

“Agreed.”

The lawyer is unhappy. I am concerned for him on a personal level he seems to have miscalculated something, but I can’t know what. Further intervention from me will not help him; he is an ‘external’ lawyer (that is from a law firm, as opposed to an ‘in-house’ lawyer). Mediation within mediation does happen, but in this situation, I feel it is only appropriate to do so if invited. They need time to speak confidentially and get their PR job in relation to their change in position in place. Saving face.

“Shall I give you some time? Would you like to discuss your final position, or would you like me to tell them that it’s a deal?” I say.

“Tell them it is a deal.” Says the SFO.

I check the details of what I have the authority to say and leave the room.

Their lawyers estimate that they will spend three times the original amount claimed in taking the claim to court. They might have got an answer to the furious lawyer’s question had they done so, but it would have compromised them financially and made no difference to what happened in future similar cases. I leave, exhausted, pensive, but just a little bit happy.

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In *To love and to lose* the man wanted continued intense interaction. As a result there were all sorts of things he needed to test because he was desperate to get this outcome before he would settle for anything less. Some of this testing happened through direct communication between the parties. Much of it happened through talking through the information that had been shared, and its implications in private. I didn't evaluate these options, I didn't tell him whether I thought options were workable or not. The same thing applies to the interactions with Tilman in *Sacrificing the Self*.

Parties creating an acceptable future generally seem to need integrative and distributive bargaining (to create and claim value) in order to create a workable future. Sometimes they decide that their best future is neither; it is to disengage and to walk away. The prevalence of conflict avoidance is a completely normal and very effective conflict and dispute strategy<sup>134</sup>. However, this strategy is either impossible or plagued by the costs of walking away from a situation in which a party is heavily invested. This is clearly demonstrated by the lawyer in *The Wig and the MD*. He had a very different agenda than the commercial people in the room and their commercial bargaining on value in order to disengage didn't connect with his needs in terms of what was needed to be able to disengage from a legal perspective. In this example, this essentially didn't matter; as a paid external advisor, he could not be a 'spoiler' to the course of action chosen. If this had been different it would have demanded a different approach and further negotiation.

The possibilities for CR/ADR exchange in terms of future creation skills can be summarised as follows:

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<sup>134</sup> Research on conflict avoidance Callanan and Perri and Kilmann – in particular social acceptability of use of modes. Kilmann, R. H. T., Kenneth W. (1977) Developing a Forced-Choice Measure of Conflict-Handling Behavior: The "MODE" Instrument. *Educational and Psychological Measurement* 37 (2), 309-325.



The idea conveyed respectively as exploring (ADR) or following the parties around (CR) is a fundamental element in enabling the flow of information between the parties on all levels. This could be described as the most fundamental level of creating alternative futures. The skills involved in this demonstrated and/or highlighted in a number of the episodes are primarily all the micro elements of listening skills.

These fundamental skills link with awareness of negotiation dynamics and ways of creating and claiming value so that it is possible to assist the parties cope with each other. This is illustrated in questions that probe assertions that seem to be inconsistent or indicative of confirmation bias (for instance) as in *The wig and the MD* in relation to the impact of relationships within their context.

Future creation skills will pan out rather differently depending on the underlying attitude. Recognition that parties often need to make hard and horrible decisions needs to be moderated by optimism that perfect outcomes do, very occasionally happen. Not considering yourself to be their problem-solver, but also not deserting the parties when they often most need support; remembering you are blind. Finally: Radical patience. If you have it as a natural quality. Otherwise you have to work at it.

## **Conclusion**

This chapter conveys something of the reality of taking the outcome-neutral mediator role, it's challenges, opportunities and examples of failure and success in the attempt to remain 'in role'. The interaction of autoethnography and analysis of the literature of the two fields helps to connect cognitive/logical mediation theory and the experiential world of practice. It highlights issues arising out of the practical application of theoretical constructs. It also highlights further areas of division between ADR and CR, as well as opportunities for the transfer across the divide and the potential for elements of a joint framework for transfer.

The false opposition between skills and knowledge vs. attitude and self-reflexivity has been created by both fields in different ways. CR based scholar-practitioners (such as Curle) are taken as evidence that self-awareness is more important than technical skills; skills produce “rote technicians”. In ADR, the emphasis on skills and knowledge as measurable competencies has obscured the reality that attitude and self-reflexivity has a huge impact on the implementation of practical skills, rather than being the optional ‘touchy-feely’.

CR and ADR need to take their own advice to conflicting parties: This is not ‘it is either about this, or about that’ but rather it is about *both* self-reflexivity/underlying attitude *and* about technical/practical skills. The messy complexity of practice rests on the application of both and to present it otherwise, as highlighted in chapter 7, has ethical implications in relation to existing and aspiring practitioners.

The divide has also been deepened by the tendency of practitioners and theorists alike to be dogmatic about particular mediation approaches. Becoming highly invested in a conceptual model (Brown 2015), leaves the practitioner susceptible to portraying models as a facsimile of ‘objective reality’ on the basis of flimsy evidence. The result is that the model becomes a blinder to new information that the model is in some way deficient (De Girolamo 2013), and can also exacerbate confirmation bias (Kahneman 2013). In practice mediators who avoid this adhere to and transgress their own guidelines to very good effect.

The issue of dogma, beliefs put forward without adequate evidence, is maybe natural in the development of new practice. Developing practice, with little pre-existing empirical evidence, involves massive personal investment. Research highlighting the gap between your models and your practice is therefore unlikely to be met with much enthusiasm. Indeed, dogmatic responses to evidence that there might be other ways are understandable. The difficulty is that if this is persistent, then the result can be the shutting down of the practice-research link

and feeding research back into practice is crucial to the improvement of practice.

Observational research suggests that there are considerable gaps between observational research and mediator reports (Roberts and Palmer 2005) (Boulle and Nesic 2001) (De Girolamo 2009); this would no doubt be true of my view of my practice and an external view. However, one of the the difficulties with such research is both that it doesn't access the relational, nor does it solve the problem of what *should* be done. By De Girolamo's own admission, the parties' judgement of what they label neutrality, is different from her own. This suggests at the very least, observational research cannot tell the whole story. It is here that autoethnographic episodes of this chapter aim to provide a different type of data on the understanding of skills and qualities on mediation and their impact.

This chapter has also demonstrated a number of important opportunities for both the transfer of skills and knowledge across the ADR/CR divide. It has also outlined frameworks that could provide a basis for cross-field analysis. It offers a simple frame for self-reflection working as a mediator, that draws on my experience of crossing the divide between ADR and CR. This is the simple division of Relationship, Process and Future Creation.

There are specific possibilities for potential learning across the ADR/CR divide in the area of relationship skills. The myth of homo economicus is still not banished entirely from the ADR context. This means that the importance of self-reflection per se and emotional skills, particularly in relation to one's own emotional state as mediator is something that should be given more attention, as tends to be the case in the CR context. Likewise supporting the attitudinal with technical communication and emotional skills that are taught in the ADR context can both be helpful and supportive of the ability to self-reflect.

Process dogmatism (an issue in both CR and ADR) has been discussed at length as have the opportunities for crossing boundaries in this area. A range of technical skills have also been discussed without which the mediator is

hampered; attitude simply does not necessarily provide answers in terms of the different process tools, such as confidentiality, that can be used to assist the parties if you are aware of them.

Conceptual models and process maps are highlighted in their practitioner use, not as facsimiles of reality, but rather as aide-memoires and learning tools, that are useful in the messy reality of practice. However how they are used and what they contain will influence the mediators' thinking on outcomes and how much space they are able to give the parties to self-determine.

Neutrality is also discussed and notwithstanding De Girolamo's objections, it (however you define it, but most importantly as it is perceived relationally by mediator and parties) has a relational impact if it is maintained that allows the parties to engage with things that would otherwise contradict their position. This demands a twinning of practical skills of exploration and of attitude of not considering yourself to have a superior view to the parties. This provides practical evidence of a way of being that crosses the divide on whether mediators can or can't be involved in negotiation.

The interlocking nature of process and outcome is highlighted in relation to process management as well as Future Creation skills. This section provides insight into the understanding of a mediator role, that does allow for the involvement in the negotiation of the parties. Whilst de Girolamo's argument about fugitive identities of the mediator is acknowledged (2013: p.210), it is posited that it is possible that this role is nonetheless tenable because of the different way it is experienced relationally between mediator and parties.

This section highlights the importance of both bereavement and workability as crucial and necessary elements in future creation in the, often impossible, situations that parties find themselves in. I concur with Lederach and Curle (Woodhouse and Lederach 2016), that mediation demands radical patience; each one is a complex journey over time that is reliant on difference, as well as similarity, and shifting, interactional, and individual preferred futures.

That means that self-reflection, attitude and role understanding have a profound impact on the application of skills and techniques. *“A...type of failure is, I believe, caused by psychological insensitivity. Strangely enough even experienced mediators and skilled psychologists sometimes fail to understand the psychological difficulties of mediation. They seem to be so certain of the power of logic that they fail to realise that feeling is even stronger.”* (1995: 90)

However, the episode *Radical Disagreement* highlights that engaging in mediation as an actual party is crucial to understanding relationally what you are engaging in as mediator. This might just help to prevent the sort of situation mentioned above by Curle. Being a mediation party means showing willingness to address a difficult situation rather than to abdicate responsibility. It is, the diametric opposite of the mediator role, which is a studied effort in avoiding connecting with your own conflict-party role and skills. If there is a divide between those who want to mediate and those willing to engage with mediation in their own conflicts, it seems likely that practice development will be seriously stunted. This issue is in urgent need of investigation as it is central to the efficacy of self-reflection.

The issue of the practical implications of ‘empowerment’ and self-determination are also explored in relation to practice. Both ADR and CR, in effect, accuse each other of overriding the parties by pushing an agenda, with ADR characterised as pushing ‘settlement’ and the CR having an agenda of ‘empowerment and recognition’. Both risk their normative project becoming analogous with what is considered to be legitimate mediation outcomes. Both talk about party choice, but both struggle to deal with a role that in a sense needs to be occupied without a normative agenda in terms of outcome.

Lederach’s description of Curle’s approach to befriending goes to the core of the potential for ‘ulterior purposes’ to be problematic: *“Care, concern, honesty and commitment...never taken up for purposes of instrumental engagement to achieve ulterior purposes, even if those are noble...his vocational impulse of seeking mutual humanity leading to what I would today refer to as a*

*compassionate presence. He consistently focused on the discipline of re-humanizing the person he accompanied.” Sacrificing the self* begins to illustrate some of the extreme implications of actually sticking to an outcome-neutral role. The ethical questions that are raised will be dealt with in the next chapter.

## **The Ethics of Outcome Neutral Mediation**

Chapter 5 suggested that, if the idea of complementarity is taken seriously, outcome neutral mediation has a role to play. Chapter 6 put forward the evidence and the argument that the outcome-neutral mediator role is a difficult role that demands the implementation of a range of skills, but that it is nonetheless possible. It also reinforced the issues arising from someone taking this role and trying to maintain their own agenda whilst exercising it. This chapter turns attention on the question of the ethical implications of using this role.

Is remaining in the role of outcome-neutral mediator, rather than withdrawing completely, or pushing externally selected outcomes, part of a more ethically sound way of dealing with conflict? Does this depend on the outcomes that the parties want and how they are 'behaving', or on other more complex factors? Is it possible to respond to the accusation that outcome-neutral mediation gives the parties free reign and 'anything goes'? Given that those occupying the role are human and therefore have their own values and moral matrix, what is the impact of actually occupying this role and shelving your own agenda?

Answering this question demands consideration of its use in really difficult circumstances. As with the other chapters the episodes selected all deal with my interaction with parties represented by real human beings. This is a really important factor to bear in mind; all too often such ethical issues are discussed on the macro level of 'the Russians in Syria' or 'the Israelis in the West Bank'. That is important, but a very different level discussion as it abstracts both the discussion and responsibility for discussions and actions in specific situations.

### **Who is in control?**

To consider the ethical ramifications of this it is necessary to get to the heart of the moral quandary posed by leaving responsibility for outcome with the parties in conflict. Consider the two statements:

1. If the mediator resigns from a mediation because the parties are doing things they consider ethically unsound, when remaining might bring a swifter end to these things, absolve the mediator for responsibility for the outcome?
2. If the mediator resigns from a mediation because the parties are doing things they consider ethically questionable, when remaining involved might lead to the prolongation/acceptance of these things, absolve the mediator of responsibility for the outcome?

It is hard to say yes to the first, hard to say no to the second.

If the parties are in control of the outcome, as a mediator you never know in advance whether an agreement/mutually acceptable outcome will emerge, *because* the parties choose *their* outcome; some type of agreement, or to walk away without. The juxtaposition of these statements highlights the difficulty of judging mediators after the event. However, even if the mediator has no ‘power over’ the parties, if it is accepted that the mediator influences outcome, even if only indirectly through process management (see chapter 6 discussion of process and outcome), then does it not follow that the mediator must carry at least a share of the responsibility for outcome?

In the ADR context mediators are, in effect, not held responsible for outcome, even if they are evaluative in their approach. This seems partly due to the direct comparison with legal principles that are enshrined in order to enable adjudicative processes. Fundamental to the picture is the legal concepts of judicial authority, competence and consent. Unless someone is willing to bring a legal case to prove that someone else cannot exercise consent (because they have capacity), it is assumed that adults have capacity (Allen 2013). The concept of capacity is combined with the legal principles that underpin the use of mediation including it being voluntary (can be terminated by either party at any point), non-binding, confidential and without prejudice.



The result is that in legal terms the parties are viewed as being protected by these legal principles and cannot be forced to do anything. This doesn't balance power differentials, but it does create a context in which the belief of party A, or of the mediator, that party B is not capable of exercising consent is entirely insufficient to withdraw B's ability to self-determine<sup>135</sup>. If A and B fail to find a mutual acceptable way forward then, if they choose to go forward to court, they cede control of outcome (they consent to handing over their decision-making power) to the legal authority of the judge<sup>136</sup>. This is combined with clear contractual rights for the mediator to unilaterally withdraw without giving a reason, and for confidentiality to be lifted if the mediator becomes aware of illegal activity, or the risk of serious harm to persons.

For mediators in all contexts the ideal of self-determination actually creates very real, practical issues. As a mediator, and as an individual I carry both my own personal moral matrix and normative assumptions that are only shared by some people. If you leave parties in charge of their own outcomes, you will sometimes see them moving towards outcomes that look ill-advised, questionable, unfair or even unacceptable, or deplorable. If I am unaware of either or both of these factors, at some point I will be presented with situations that will be overwhelming. If I am aware of either or both, I may be better prepared, but also constantly aware of the demands I have presented myself with.

Because of the clear legal definitions of the roles and responsibilities of mediator and parties, and concepts such as capacity, these sort of eventualities are made very clear in mediator training in the ADR context; to the point that it is made very clear that mediators are responsible for doing what they can to

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<sup>135</sup> See Allen on *Ferster v Ferster* [2016] EWCA (Civ) 717 Allen, T. (2013) *Mediation law and civil practice*. Bloomsbury Professional.

<sup>136</sup> The challenges of getting parties to comply with the judgement are discussed in chapter 5. That means that even where there is control of the outcome by a 'powerful' judge (who is making decisions not on the basis of legally binding normative order) parties retain so much control that they often find ways not to comply if they don't agree with the judgment. It is hard not to consider that pragmatism in the legal field has influenced the acceptance of mediation on this basis.

test and check workability of outcomes, but that they are not responsible for the ‘fairness’ of any outcome as such a judgement demands that they exit the mediator role and move into advisor/adjudicator, or umpire roles<sup>137</sup>.

In contrast, the CR context is much more ambivalent about mediator responsibility (Ramsbotham et al. 2011). Deeper analysis and a more complex view of power and consent combines with a normative project of empowerment, emancipation and creation of a more just world. These normative aims combine with general approval of the idea of mediation as a process that is less violent and creates better outcomes than adjudicative processes. However, this relationship is profoundly ambiguous.

This is partly because of the lack of clarity of what is actually meant by ‘mediation’. However, it is also a result of the reality that much of the discourse of emancipation and empowerment infers, sometimes explicitly, that people who are not empowered, in effect, don’t have the power to consent (Cobb 1993)<sup>138</sup>. In role as mediator the result can be the risk of the role-switch, as impugning the capacity to consent<sup>139</sup> of those who do not share their normative project by viewing people as those who have not yet been ‘empowered’ or ‘emancipated’ is automatically viewing your perceptual position as superior to that of the parties.

Empowerment is constantly referenced as something that the mediation context enables or provides. However, the lack of clarity of what is meant by this is really problematic in practice. Is it the provision of the support (in terms of holding the space, walking alongside and the processes described in Chapter 6) that people need to make their own decisions? Is it the provision of advice

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<sup>137</sup> See: CEDR Handbook, Allen

<sup>138</sup> Cobb discusses the ambiguity of the concept of empowerment in mediation at length in 1993 and problematizes it extensively. Subsequent writing on the subject doesn’t really seem to address these concerns.

<sup>139</sup> ‘Capacity’ here is used in the legal sense of the ability to give informed consent when making decisions about that will affect both themselves and others.

and guidance to people who are considered to effectively lack capacity (due to their inability to see the world in the ‘empowered’ way that the mediator sees it)?

A lack of honesty and clarity (both in relation to oneself and with those involved) about this leads to confusion in dealing with situations where parties are advocating routes out of their current situation that seem unethical, inadvisable or unfair. I experience this urge to persuade, to rate my perception as superior to that of the parties on a regular basis. To put this to one side is an act of will and an emergent property arising out of the conviction that to carry on listening and to try and understand more deeply why they see as they do is a valid approach.

Developing the working assumption that parties will not necessarily share my values provides me with the poise to try and remain standing on constantly shifting ground. A lack of clarity about the reality that clashes (though not necessarily overt) will arise between the values of the mediator and those of the parties, may be the source of confusion about the mediator’s choices in challenging situations. Understanding and coming to terms with this lies at the heart of the question as to whether you are willing, as a human being, to take on this role in conflict or not. I think it is important that the decision of whether or not to take this role is not judged. Clarity and honesty with oneself about this decision lies at the heart of actually exercising the role at all<sup>140</sup>.

### **Should I stay, or should I go?**

The conflict of the normative project of the mediator and the intentions of the parties present the mediator with three unattractive options<sup>141</sup>:

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<sup>140</sup> I think therefore it does demand both a particular attitude to humanity, that links with Curle and drawing a difference between capacity and not being ‘skilled at living’; optimistic and hopeful view of humanity in the face of terrible things.

<sup>141</sup> It is important to distinguish between observation of and involvement in practice and relational interactions; these approaches can also be associated at

1. Question the parties' competence, or ability to give consent and therefore switch role to that of adjudicator, or advisor. (Role-switch)
2. Withdraw and leave the parties to go 'Gemeinsam in den Abgrund', whether alone, or if available through alternative adjudicative processes. (Withdraw)
3. Stay in the mediator role. (Stay)

The impact and implications of the outcome-neutral mediator role have been discussed at length in chapter 5 with examples of the impact of the option 1 role-switch and the resulting rejection of adjudication and advice given by 'mediators'<sup>142</sup>. The behaviours and challenges of staying in this role have been discussed at length in chapter 6. This section looks at the implications of choosing option 3 over options 1 and 2 in difficult circumstances.

In commercial mediation, it is not uncommon for people in the heat of a situation to accuse each other of fraud and other criminal actions. However, in the legal context accusation alone is insufficient to justify action<sup>143</sup>. If a mediator resigns in the ADR context there may be a duty to report (e.g. safeguarding, money laundering), and the working assumption is that adjudicative processes will uncover and deal adequately with the ethical issues that have arisen. However,

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the macro level with particular politico-philosophical approaches to conflict; neo-liberalism, isolationism and realism.

<sup>142</sup> At the highest level in the international context Martin, H. (2006) *Kings of peace, pawns of war : the untold story of peace-making*. London: Continuum.<sup>142</sup>, it seems that when option 1 fails, option 2 is the default route. The evidence from the early attempts to 'mediate' the dissolution of Yugoslavia seem to follow a clear pattern of international diplomats (initially Carrington/Cutileiro) talking to the different parties, producing a plan on the basis of this, but also their expertise and of course the one put forward in 1991 was rejected. By 1995 thousands of people had died in a war to achieve a not dissimilar outcome. Would facilitating a process where the parties involved negotiated and got to an agreement of this type, but without war, and without thousands of deaths, have been morally reprehensible?

<sup>143</sup> In many contexts it does not even justify investigation, and even in the most serious situations (such as rape) the level of cases registered but not pursued due to the challenges of evidence highlight the degree to which the legal context differentiates itself from the informal courts of philosophical-ethical debates in the social science context, or the truly loose context of the media.

the limits of the efficacy of judicial systems have already discussed in chapter 5. Therefore, just because something is reported it does not mean it will be possible to pursue in a way that stops the action, prevents it in future or brings those involved to 'justice'<sup>144</sup>. This is the case even in 'well-functioning' jurisdictions, let alone in more problematic ones.

In the context of international or intra-national conflicts, where adjudicative options either do not exist, lack legitimacy, or don't have the capacity to enforce judgments, it is easy to see more perfectly functioning adjudicative processes as the solution. This view of adjudicative systems as the solution to the problems of negotiated outcomes, when the experience of mediation in the context of ADR is taken into account, has to be viewed somewhat sceptically.

The following episode highlights some of these issues in a practical context. This episode is based on a case that was technically a neighbourhood situation, but set up with the normal contractual arrangements of commercial ADR-context mediations. In the ADR context mediation agreements usually allow for unilateral withdrawal by the mediator and the lifting of confidentiality if the mediator becomes aware of illegal activity, or of serious danger to any individual<sup>145</sup>.

This recognises that it is a human being who is the mediator, and there may be a myriad of reasons why they might both need to withdraw and not be forced to give a reason. The other reason is that withdrawal in the case of danger to life, or illegal activity, are both situations where legal principles bind both parties and

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<sup>144</sup> If the statistics for serious crime, such as rape, paint an even darker picture with many complaints not even taken to prosecution due to lack of evidence. For investigation of civil cases, that might lead to investigation for criminal activity it seems a fair inference that the proportion of cases reported and pursued must be even lower. See Chapter 5 on legal cases lodged, pursued and enforced.

<sup>145</sup> See for instance Clause 7 of the code of conduct and Clause 8 of the model mediation procedure [https://www.cedr.com/about\\_us/modeldocs/](https://www.cedr.com/about_us/modeldocs/) last accessed 12 December 2017.

the mediator; it is not a question of the moral judgement of the mediator, but rather of compliance with an external normative legal system.

But what if mediation is taking place because of the admitted failure of adjudicative and advisory processes have failed? Where does that leave the mediator in terms of ethical decisions about continuing and withdrawing? The realisation in practical terms of the capacity in the role of mediator that you have to make judgements, the faith you have in the alternative processes and the limits to the information available, were all thrown into sharp relief.

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Street Walking and Window Gazing

The man has an awkward and intense manner. I do not feel at ease in his company. After some time, I notice that the caseworker has periodically come and looked at us through the glass pane in the door. I am initially not sure why. The man repeats himself again and again and again and again. I have a sense of my own emotional disquiet as we talk, or rather as he talks; I speak little. He tells me, in between his repetitions, how unacceptable her behaviour is and how things have got worse. His demand is that she must not walk past his window.

At some point the caseworker comes and asks how I am getting on; she is included in the confidentiality clause in so far as the parties have agreed that she will be informed about any potential outcomes due to the legal obligations of her organisation. I summarise the situation; he has not ceased to demand that the woman not walk past his house, she seems willing to agree to anything that will get him off her back.

The caseworker says we must speak with the man. She informs him clearly and directly that, as he is already aware, his demands are illegal and unenforceable. The police have already made this clear; even if the woman were willing to agree to this, it would be completely unacceptable.

He is not happy. I listen to him as he obsessively repeats himself again and again. I have to concentrate; managing my own discomfort and staying with him is really hard.

I leave with a feeling I have been somewhere very, very dark. The questions only crystallize with time. They remain long after the memory of the details of what was said and how the situation was concluded at the mediation:

The outcome he wanted was illegal and unenforceable, but what would the woman do and what would the consequences be?

Would she stay away? Would she restrict her own freedoms due to her fear of the consequences of not doing so? Would she continue to walk by his house because she had a right to do so? Would she maintain her freedom and become a victim of some other violence at his hands?

Would she continue to walk by his house, maybe making obscene gestures and shouting abuse at him? Would he buckle under the strain and turn on himself? Would he buckle under the strain and turn on her? Would she 'mess-up' and would there be evidence against her?

None of the judgement-based authorities had worked out a 'solution', despite all the resources and power of judgement available to them.

What was the 'truth'? What had actually happened? What would happen? I can only accompany, and can see only that which they share; everything else is my own creation. I cannot know.

The questions remain.

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The presence of adjudicative alternatives in the ADR context, combined with reassurances that civil-commercial mediation is a context where such dilemmas are rarely encountered, could lead mediation practitioners in this context to being unexpectedly confronted with very difficult dilemmas. The absence of adjudicative alternatives in the CR context could lead practitioners to have unrealistic expectations and naivety about what *could* be expected from alternative processes *if* they existed.

*Street Walking* and the episode *Sacrificing the Self* in Chapter 6 clearly illustrate the ethical dilemmas facing the mediator in dealing with situations that involve physical danger to one or more of the parties either through their own actions, or the actions of others. Both situations could be described as boundary crossing in that they had both elements of traditional CR contexts and yet direct connections to the ADR context. As the next episode *Building a Future* illustrates, such situations do arise in ‘pure’ ADR contexts too. Whilst the presence of the ‘rule of law’ sometimes makes exit a possible and appropriate route, this is by no means always the case. Whilst negotiations that might cause serious harm, or even death, might be relatively rare in the commercial field within the EU, in a less regulated environment with weaker rule of law, such issues arise much more regularly for mediators<sup>146</sup>.

Obvious physical violence/danger is more immediately noticeable than other types of violence that have consequences that are no less horrific. In *Sacrificing the Self* Tilman believed that it was worth sacrificing his own life (direct violence to the self) in order to save the life of others (prevent structural violence to others). The shift came because he decided that his sacrifice would ultimately be in vain<sup>147</sup>. I don’t know exactly what led to this shift. However, as lots of people had already told him either that he was right, or wrong and that had not changed his opinion. I think that had I repeated this approach and taken a

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<sup>146</sup> Informal conversations with local people whilst I was involved in mediator training in Nigeria and Moldova highlighted these concerns.

<sup>147</sup> It seems to be at the core of this situation is that the decision of which the greater violence was lay purely in the hands of Tilman.



‘moral stance’ in either direction it would not only have compromised the role, it would not have changed anything.

Both from the feedback and my sense of the situation is that what worked was that I stayed ‘in role’. However, the effort of doing so is evoked in the episode. The satisfactory maintenance of the chameleon appearance, shifting as needed by the parties, is a huge strain, particularly given the challenging situation of working with such a high level of emotionality.

These episodes across the ADR and CR contexts raise some serious questions both about the logic of using physical violence (towards the self or another) as a primary ethical warning signal in mediation, and also of perceiving adjudicative systems as the answer to the ethical dilemmas of the mediator. If the mediator is immediately triggered by physical violence, without recognising wider structural violence, the result could be quick-fire judgements leading to the decision to exit, or a switch in role to advisor or judge, that could be anything but helpful.

Decisions about whether to withdraw or remain involved also, necessarily, link with the expectations of what sort of order can realistically be expected to emerge from the process. The high level of complexity often involved in international CR contexts seems sometimes to obfuscate the fact that, even where there are all sorts of legal boundaries, restrictions and interests involved (just as there are in the ADR context) the outcomes are essentially the creation of a negotiated order, not normative order and this does change the ethical terrain, particularly in situations where there is no way of exiting mediation in order to cede the ground for the imposition of normative order.

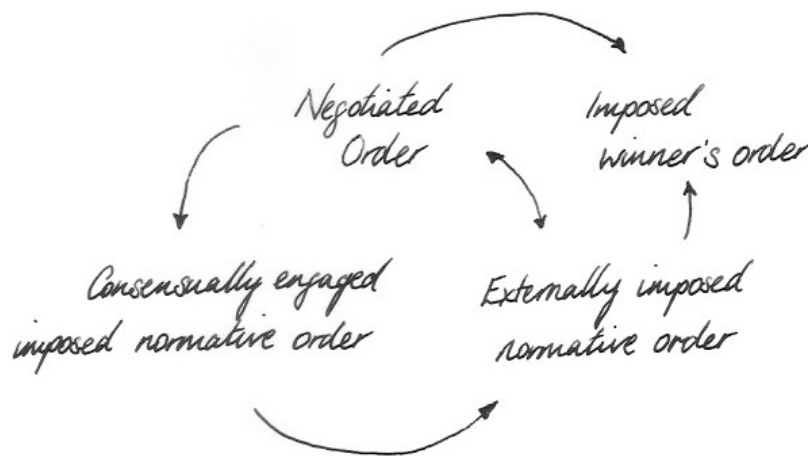
### **New Order: Negotiated or Normative?**

Mediation is a form of facilitated negotiation and therefore produces negotiated order. Picking up from De Girolamo (2009), it is therefore unrealistic to expect mediation to produce normative order, or revolution. If the parties involved have the power to change normative ordering, then the negotiation may involve

decisions *about* legislation or processes that might ultimately lead to change in the normative order. However, this means that the negotiation has produced an agreement to change normative structures; whether this then happens, or not, is a question of implementation (for instance legislation on a local, national, or international level).

As a general rule negotiated order happens in the shadow of normative order. The following figure illustrates that parties are going through the process of working out the balance of risks involved in negotiating, or having an outcome imposed; whether from victor or from external authorities. Failure to negotiate order, may lead to the joint engagement of processes leading to imposed normative order (going to court), but as has already been illustrated, the imposed outcome is often rejected by one or both of the parties. The result may be tantamount to imposed winner's order, or reversion to attempts at negotiated order.

Fig. 23: Forms of ordering



Normative order is commonly created through legislation (and/or executive order depending on the context), whilst the courts determine how normative order should be interpreted and implemented. This is not a wholly clear line. Some jurisdictions, particularly common law, create legal precedent and normative order through decisions made about specific cases. There is also a form of feedback loop (or lack of it) between legal statute/normative order and customary practice/normative enforcement. Courts are effectively the primary

official interface between general theory and specific practice in relation to normative ordering.

The creation of normative order often involves the slow and involved process of converting interests, needs and the social-moral consensus on a local, regional, national, or international level into legislation. It often entrenches rules that deliberately and explicitly go against the interests of certain people, groups or organisations and towards the interests of others. It is perfectly possible that parties in mediation might negotiate and develop an agreement to change normative order in some way, but this seldom represents the normative change in itself. Even at the highest level, such as in the recent Columbian peace process, such negotiated order then has to be converted into normative order.

On this basis it seems therefore strange to critique mediation and the ethics of decisions made in the CR context for not enforcing or producing normative order. The comparison of the experience in the ADR and CR contexts seems to suggest that particularly amongst onlookers and commentators there is a tendency to confuse different levels of ordering and to confuse general principle with specific situation.

The failure to recognize these differences creates analytical and practical difficulties. Not differentiating between processes that create or enforce normative order, and those that create negotiated order is to make the decision-making process and the ethical framework of the parties involved much more difficult to follow. It also leads to the risk of attributing outcomes in mediation to the mediator in a similar way that decisions in court can be attributed to judges. For parties in mediation, confusion over the type of order they are creating can create all sorts of difficulties in terms of implementation, workability. In highly authoritarian contexts, where those at mediation superficially have 'total' authority to make decisions and to impose 'normative order' on their return from creating 'negotiated order', confusion of the type of order that has been created in the mediation context, typically creates sustainability problems.

If there is a functioning adjudicative system present, then critiques need to take account of the vagaries and practical limitations of such systems. Even if a comparison is made with an idealised legal system, then the inability of adjudicative processes to generate creative, innovative, workable solutions to problems<sup>148</sup> may be seen as one of the only obvious downsides. However, once the limitations of most actual adjudicative systems are taken into account (such as the ability to produce outcomes that are both ethically sound, and enforceable) the comparison the downsides make it look like a profoundly problematic option in practice. If there is no judicial system available in practice, then the mediated outcome should be compared to direct negotiation and not an ideal-type adjudicative system.

The organisation in *Sacrificing the Self* (Chapter 6) had made a decision that was going to mean people dying who, had the decision gone the other way would have survived. They argued that this decision meant that other people would survive that who would otherwise die. Tilman disagreed so strongly that he was willing to put his own life at risk to force the discussion. Who was right? Would an imposed normative decision have resolved the ethical dilemma? An imposed normative decision could have decided how to implement legal norms, as far as they existed and were relevant to this specific situation, which would depend on how the parties put forward their pleaded cases and were able to evidence them, in this situation. In my understanding, this would have completely failed to address the core of the real ethical dilemma.

In practical terms, mediation often seems to be the last resort in situations where it is on some level obvious that both direct negotiation and adjudicative processes struggle to produce adequate outcomes in ethically impossible situations. It seems therefore profoundly problematic to criticise mediation on the basis that it does not ‘balance power’ or ‘prevent ethical transgressions’

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<sup>148</sup> See chapter 6; skills including flexible process management, the facilitation of integrative negotiation and reality testing done through open questioning rather than closed interrogation and evaluative input.

when the alternative processes so flagrantly and frequently fail to do either of these things.

Part of the efficacy of the analysis of mediation and its outcomes rests on the appreciation of the parties' dynamic decision-making processes in relation to the probable outcomes of the different types of process available to them at any given point. Due to the susceptibility of people in conflict to suffer magnified negative impacts from the operation of heuristics (such as confirmation bias), their perception and the advice available to them on what their options and expected outcomes will be in different types of process, can have a major impact on decision making within processes.

This highlights the massive strain (and frequent impossibility) of trying to take on multiple different roles within one context. In general mediators in the ADR context welcome conflict parties bringing (often desperately needed) advocates and advisors to support them. Whilst the episode *Building a Future* doesn't feature advisors, their presence and advice pre-mediation was instrumental in allowing the parties to make effective decisions for themselves in terms of the realistic appraisal of what the adjudicative alternatives were and what they could expect from them.

Rather than trying to conflate roles, or to expect third parties to move between roles, recognition of this would be hugely beneficial in dealing with some of the most difficult ethical dilemmas in other contexts. The presence of Tilman's 'mediation friend' was hugely important in his appraisal of how best to satisfy his interests. This is of course an example at the mid-level of the interaction of individual and organisation. However, the same factor seems to be beginning to be recognised at the higher levels with the range of different functions within the mediation support teams at the EU and the UN<sup>149</sup>.

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<sup>149</sup> However, the fact that these teams also seem to be involved in providing mediators there is a serious question about whether this is again replicating the difficulties of the mixing of roles.

**‘Fair and advisable’**

Perhaps the most common type of ethical dilemma for the mediator in both fields is where the decisions of the parties’ jar with your private sense either of what is ‘fair’, or of what is ‘advisable’. Maybe it is fundamentally linked to what is, in a sense, a hugely abnormal process<sup>150</sup> of trying to make yourself aware of your judgements, and then to view them as only one possible perspective on a situation.<sup>151</sup>

Sticking to this role, however abnormal, matched by the deliberate and conscious focus on building relationships with everybody involved in the mediation, can produce some interesting results even in really difficult circumstances (see chapter 5 ‘Dogma in Practice’). It can mean that you sometimes get more insight into the logic behind the acceptance of apparently ‘unfair’ terms, or equally the rejection of ‘fair’ terms. *Building a Future* is an example of the pressures that lead to superficially ‘unfair’ outcomes that arise in commercial situations. This experience highlights both the danger of trying to solve the problems of others in conflict and of having too much confidence in adjudicative alternatives that might deliver a superficially ‘fair’ outcome.

With respect to civil war and complex socio-political contexts, a great deal of the legitimization practices around intervention draws on the idea that participants in civil wars are not rational actors and therefore that liberal concepts of sovereign autonomy etc. don’t apply, paving the way for paternalistic interventions.

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<sup>150</sup> At least in a cultural context that rates binary, polar and positional disputing with majority/minority win/lose over the process of exploring and probing different views of situations, before generating options and actions that integrate different views and ideas into account.

<sup>151</sup> A process that doesn’t mean being able to ‘switch off’ judgement, but rather to recognize it and to put it to one side as far as is possible. This is a profoundly difficult thing to do and something that I am sure I only manage to do some of the time. However, with the awareness that my judgement is based on information selected by the parties it is possible most of the time, as already mentioned in Chapter 6, to remind myself that I am, in effect, blind. Asking questions about what is not making sense to me, offers an opportunity to the parties to test apparent inconsistencies and gaps, but this is *for them* not for me, and an offer that they are free to take or reject.

The justification for external advice and judgement on the basis that parties are not 'rational' and are displaying self-defeating behaviour, is highly problematic. The episodes in this PhD provide myriad examples of motivations and logical decisions on the basis of criteria that would be entirely invisible from the outside. What might seem unfair from outside, once considered in light of the possible alternative routes, may be not only rational, but also wise.

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Building a future

The man and the woman have been embroiled in a commercial, legal dispute for some time. They have chosen to try mediation. After an initial joint meeting, I have spent several hours working alternately with each of them in private.

They loathe each other; the result is they're pretty unlikeable – though perfectly pleasant to me, their venom about each other makes me sad. I would much prefer not to have to talk with them. But this is my job. I'm probably no different when I'm in conflict, but I have to remind myself of this. In due course they each make a couple of offers. The woman is exasperated; she believes that the man simply didn't do his job properly and owes her a good deal of money.

The man is now talking with me about what his next step should be. He's really unhappy; he has evidence that the woman's claim is inflated and whilst she has some evidence to support her claim, there are big questions about how much a court would actually award. He says he could go to court, and privately I know from the evidence on both sides that he seems to have a better case. He pauses. He looks up and a torrent of words hit me:

"The money's not a problem; I can pay. The problem is that this woman is a complete bitch! She's vile! She's taking the piss! So it wasn't my best job ever, but this is fucking outrageous! But you know what? I'm not going to give her the satisfaction of dragging this out!"

"I've been told I've got four months to live! I am not going to waste that time on

her and a bunch of idiots in a court! That's not justice! She can have money so I never have to see her again and so that I actually do the stuff I want to with the time I have left!"

I swallow. A comment to me when I first moved into the commercial field, made by a senior, male, lawyer-mediator, fleet across my consciousness: "Of course commercial mediation is completely different from the stuff you have done; people aren't emotionally involved their disputes in the commercial context."

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This episode highlights the challenge of defining 'rational'. In the ADR context, common advice is that mediators are not in any way responsible for considering the 'fairness' of the outcome but rather that they are responsible for doing everything they can to ensure that the parties are comfortable with the outcome being workable. This highlights that the 'informed view' of the mediator will only be partial and heavily limited both by what they choose to share and what they are able to articulate; this makes it much more obvious that making any call on 'fairness' is hard to substantiate<sup>152</sup>.

In order to try and ensure workability, mediators have to take into account their own informed and pragmatic view of a number of things. These include: what other processes are available to the parties and what these alternatives do and don't offer in practice; and the shadow of the future in systems where the parties are unable to wholly sever the connection with each other; how serious

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<sup>152</sup> Another example of this logic is provided by research on gender differences in pay negotiations. The initial results suggested that women were not anchoring high enough (at the same level as male counterparts) and therefore obtaining lower outcomes; the recommendation that women should anchor higher being obvious. Subsequent research showed that anchoring at the same level as male counterparts had such high social costs that this strategy would be self-defeating Babcock, L. and Laschever, S. (2003) *Women don't ask : negotiation and the gender divide*. Princeton, N.J.: Princeton University Press.. This doesn't make the decision to aim lower 'rational' (as it happens largely subconsciously) but does make it eminently sensible and demonstrates that the outside 'expert' view is blind to many of the factors that need to be taken into account.



imbalances (for instance in terms of control or fairness) are likely to play out after the mediation. This cannot result in the mediator switching role in order to do something about it, but rather to ask questions about how the parties think things will pan out. This is when, if information such as that that came out in *Building a future* does not appear, it can become very taxing in ethical terms. Sadly, this is often because the options in mediation often do not include the elusive 'win-win', and maybe on a range from the awful to the terrible<sup>153</sup>.

Mayer highlights the realities for mediators in relation to the enduring nature of conflict: *Mediators are forced to walk a line between ensuring that a process offers an adequate perspective on the enduring conflict and maintaining their commitment to neutrality. To walk this line effectively, mediators have to face the enduring aspect of the challenge and articulate it, at least for themselves.* (Mayer 2009: 246)

The point about workability is that it takes testing away from the judgemental/advisory space of whether something is 'advisable' into the exploratory space of asking parties how something is going to work out in practice. Particularly in hypercompetitive patterns, parties put forward ideas that when tested they back away from because they don't want to create longer-term problems for themselves. In other situations this process leads to a 'no deal' situation. There have been a few examples of this in my experience of the ADR environment, where this outcome-neutrality (it being ok not to settle) has been crucial in the decision of the parties not to reach an agreement; staying in conflict is sometimes the best option available at the end of mediation.

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<sup>153</sup> It is reasonably common that there are opportunities to create value and uncover joint interests and non-competitive interests in order to ease the process of claiming value (to the point that it will need to happen but may be possible in a largely uncontentious form). However, the 'orange story' illustrates a point Fisher, R., Ury, W. and Patton, B. (2008) *Getting to yes : negotiating agreement without giving in*. 2nd edition. London: Penguin., in practical terms it is a unicorn (it doesn't exist).

This doesn't make it a failure if the parties have a clearer idea of where and how they disagree and what the options are. As with the division between cases that do and don't involve physical violence, it seems that the superficial contextual differences of ADR and CR obfuscate some of the cross-cutting similarities in practical dilemmas for mediators in ethical terms. There are times, however heart-breaking it might feel, that parties don't find a better way of dealing with the situation and need to continue their conflict.

### **Love the Bastards**

*"We have all read enough about the horrors of war, maldevelopment and bad schooling to be able to handle one more book about it. True, but we haven't been asked to love the bastards we read about. Whether we work in protest and social change movements or in the safer professional fields of peace studies and conflict resolution, we have learned to arm ourselves with righteous indignation about the malfeasance we continually observe. When you are travelling with Adam you can't do that, because you are with a mediator."* Elise Boulding in the forward to (Curle 1990)

Existing research on the impact of particular job roles on those fulfilling them seems to be mainly focussed on roles that lead to repeated exposure to trauma, for example paramedics (Minnie et al. 2015) and child soldiers (Schauer in (Martz 2010)). These may be extreme examples and can clearly lead to those exercising the roles being directly traumatised by what they do. There is however some qualitative work on psychotherapists (Rabu et al. 2016) which, whilst being very different from the mediation role, is more similar than many of the other comparators.

The fact that different job roles emphasise particular types of interaction, demand repeated exposure to similar situations and remaining for extended periods in one particular interactional role all suggest there may be patterns in the personal fall-out (positive and negative) of the professional role. If this is the case then it is important not just in relation to the impact of mediating on mediators, but also in relation to other professionalised conflict roles such as

Judge, Arbitrator or Advisor. Each of these roles, as already described, demand different types of connection with those in conflict and permit different levels and sequences of the judgement/advisor/enquirer roles.

Using autoethnography has demanded that I engage with the experience of mediation in a much more holistic way. Specifically I have had to engage with the memory (as far as that is possible) of how I experienced myself, not just how I experienced other people and the situation, when occupying this role. The autoethnographic episodes are a data set that raises some difficult questions about the impact of mediation on me. This has prompted me to seek out data from other mediators about their view of the impact of the role on themselves. The overwhelming result was a lack of data. However, there were a few comments that raise some interesting similarities in views of what as mediator you have to do, personally, in order to occupy the role:

*“If you accept these kinds of jobs, you go and mediate between warlords, faction leader, bandits, all sorts of people, people whom the human rights purists want to see hang. What I tell them is ‘Let me finish, and then go ahead and hang them.’”* Brahim in (Martin 2006)

Whether Brahim or any other mediator manages to maintain outcome-neutrality at all times, this element of the role-understanding seems to be clear; it is one of standing alongside and connecting on a human level with *all* those involved. Frances Maynard, a hugely respected commercial mediator and former CEDR Director used to say to trainee mediators<sup>154</sup> *“You have to find something you like about everyone in a mediation, even if it is only their tie-pin.”* In effect this is the demand of oneself that you find ways of connecting/liking/not judging those involved in the usual way.

*The Fighter and the Mediator* episode that follows provides a brief insight into the experience of working in an environment where truly awful things have

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<sup>154</sup> I heard Frances say this in a mediator training sometime in the mid-2000s and have heard it repeated by others in talks and trainings ever since.

happened<sup>155</sup>. This episode illustrates the foolishness of believing that you can carry the simplicity of good guy/bad guy thinking into the arena of working with combatants. However, maybe more importantly in terms of areas of neglect in relation to mediation, it highlights some of the impacts of going from the theoretical environment of academic and practical training in CR, into the real world practitioner context.

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The Fighter and The Mediator

I am ill at ease. I am in a new place and my understanding of the language isn't great. I am in a hot, dusty courtyard at a party. There is bread and wine. The air is laced with the smell of meat and cigarettes. I am trying to blend in, knowing the chances are slim; you don't end up here by accident. It's not on the tourist trail.

As the light fades, a man joins the group I am standing with. He is lean and hard and he doesn't introduce himself – I never learn his name. This is his home turf. He is used to people listening to him; and to taking action if they don't. I don't remember the words, only the images that his words conjure.

People killed; his soldiers, his comrades, his people. The horrors he has experienced. He is angry and righteous. I have never met someone quite like this before. I stand there listening; is it because of what he is saying, or because of how he 'is'? Or the combination? I don't know, but I feel like I have looked into someone who has been burnt away inside. Now there is nothing but

¹⁵⁵ As with all the episodes, contextual details have been omitted or amended to maintain the anonymity of all involved but myself. Even if it is possible to work out deductively from my biography which region I was in at the time of this episode although this was a specific interaction that was particularly important for me, it was by no means unique in terms of its content, characters, or context.

fire and ash...I am scared, not for myself but for what he is capable of. Given the right, or the wrong, circumstances what might I do?

He describes in graphic detail what he and his unit did in return to 'those dogs'. I stand rooted to the spot. I don't know if I speak. I have no idea what impression I give. I experience the memory as a film of what my mind conjured in relation to the experience he described; fire, fear, pain, anger, mutual terror. I could describe the film; maybe I should, but I will never repeat what I have heard. I will not be responsible for putting images like this into someone else's mind. This is not a video game. It is real. Much too real.

At some point he leaves. I go back to the house, and I sit awhile with a friend drinking weak tea. I go to bed.

The images and terror are embedded in my mind and appear before me when I close my eyes. The film runs and though I fall asleep my subconscious doesn't let go of it.

I wake from my night horrors as the sun comes up. The mattress underneath me is wet. I am humiliated. I strip the bed and stand the mattress on its side; hopefully in this heat it will dry quickly so no one will know.

I leave brooding on what it means to be a mediator. Human rights officers, Judges, Police and military. There are hundreds of people around me in all these roles; the roles of judging others by written standards, laws and bills of rights. Suddenly I see the place of personal and emotional safety that these structures of judgement provide, and some of the implications of not making that place my residence.

What does this mean for me? I am changed by it. I don't speak about it.

Until now. But should I be this honest? I will be judged.

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What I often seem to be working with as a mediator, is not the excitement of creative, integrative options, though this does happen, but rather the sadness and grey areas of people in awful situations that they cannot find a way out of. I have had rare encounters, in both fields, with people who I find it hard not to label evil. However, the vast majority of the time find myself, even with those who others find hard to find any redeeming feature, feeling a profound sense of sadness for the journey and process that has led them to the point of what Adam Curle described as being '*not skilled at living*'. Maybe this sounds patronising, but it is at least a situation that allows an openness and curiosity to try and understand, to listen, that writing-off as 'evil' simply doesn't allow.

Elise Boulding in the foreword to 'Tools for Transformation' wrote: "*We have all read enough about the horrors of war, maldevelopment and bad schooling to be able to handle one more book about it. True, but we haven't been asked to love the bastards we read about.*" (Curle 1990). I wouldn't have been able to quote Curle, Maynard, or Brahimmi at the time of the experience described in *The Fighter and The Mediator* but there is, for me, a direct emotional connection with all three of these mediators in terms of the realisation that the role effectively rules out the luxury of picking and choosing who you connect with. All three quotes, in very different forms, capture something very profound.

Singer and Klimeki's research (2014) provides interesting insights, that just might explain part of the challenge of this process in ethically challenging situations: "*an empathic response to suffering can result in two kinds of reactions: empathic distress, which is also referred to as personal distress; and compassion, which is also referred to as empathic concern or sympathy.*" My autoethnographic work and reflection suggests that it is much more difficult to maintain compassion and not slip into empathic distress, in situations where a party's reported actions, or behaviours are in direct conflict with my views of ethically sound conduct.

It seems likely that there are psychological distress signals at the point that I allow myself to ‘finding something I like’ about someone who I believe is behaving in ways contradictory to my moral matrix (Haidt 2012), whether this is evading tax, or committing war crimes. It seems that the psychological mechanism is likely to be consistent and dependent on the level of cognitive dissonance experienced by the mediator, not on some sort of ‘objective’ measure of the awfulness of the actions of the party. This is reinforced by the implications of the apparent ability to ‘train’ compassion (rather than empathic distress) demonstrated in the results of Singer’s study.

So in effect in mediation, as a mediator I am putting myself consciously (or if too naïve of what this role involves, unconsciously) in a situation of navigating a course between empathic distress and compassion. A navigation made even more challenging by a role that demands that my compassion is expressed in a way that is far from the standard mode of ‘helping through problem-solving for the object of my compassion’. Mediators in the ADR context might generally experience less extreme situations, but my observation of others mediating in this environment (see *Train(ing) Mediators*) suggests that the extreme cognitive dissonance experienced from parties taking positions that seem nonsensical to a mediator-expert from a specific field has a similar physiological-psychological impact.

It is worth noting the neurological evidence on sympathetic pain (Singer and Klimeki 2014) and the functioning of mirror neurons. On the basis of this information it seems fairly safe to say that situations where people are talking about what they have physically done to others may trigger a different level of neuro-physiological experience for the mediator. This possibility is raised on the basis of my experience, some of it shared through some these episodes. Of course, considerable interrogation would need to be done in order to test this on the individual level, let alone to test sufficient data to make any generalisation. However, such an investigation would be worth considering as there seems to be a potential connection in terms of why immediate and extreme

condemnation of physical violence is likely, whilst other types of psychological and structural violence seem to provoke less of a reaction.

The extreme nature of CR contexts makes this type of ethical dilemma more obvious than the relatively 'comfortable' world of commercial ADR. What are the implications of trying to see the world through someone else's eyes? To try to see through the eyes of someone who has done terrible things? Whether in the CR or ADR environment, I often experience this as a profoundly challenging and exhausting process. In my experience in extreme environments it is an act of will, self-control and suppression of the fight or flight response, and also suppression of other self-protective mechanisms such as 'othering'. The results for me, as inferred in the episodes, include both a level of traumatisation and an ability to shelve judgement and connect with a huge range of different people, who are often in very difficult places (literally and metaphorically).

Does this mean that it is a role that should not be exercised? My answer is that I do not know of another way of building the sort of trust that is necessary for people to work through the gaps and inconsistencies that seem to become apparent to them (whether they are apparent to me is, is largely irrelevant) as a result of the use of this conflict role. It seems to sometimes lead both to re-evaluations and to the sharing of new information with the others in the situation. It is a way of creating enough understanding in a third party for them to be able to convey information across the communicative barriers in a form that parties can 'hear' (see the contrasting examples of *Dogma in Practice* and *Building a Future*).

If conflicting parties are to make effective decisions about what to do about a situation, they need information about themselves and about the other(s). This is the case however terrible and extreme the methods being used to conduct the conflict are. It seems therefore to be foolhardy to dismiss this mediator role out of hand, either because it is hard, because it doesn't work all the time, or because it has consequences on those who occupy it. However, it is a role that is ripe for a reappraisal in what it demands from those who occupy it; it is not



the ‘above the fray’, ‘objective’, ‘solving the problem by having the bigger picture’<sup>156</sup>. These are the apparent internal pictures that so many of those coming into mediation training start out with; an internal picture which generally seems to be thrown out of the window as they try the role in practice.

### **Me, and Me, the Mediator**

Years after the events of ‘*The fighter and the mediator*’, the following quote reflects my fears of the impact of the role generally and also its impact on me:

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Diary Note 19.12.13

Is the ‘neutral space’ by its nature morally bankrupt?

“To become a mediator is to become morally bankrupt.” Discuss.

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The world becomes a very difficult place to navigate when you see endless distress, of people seeking to destroy the other (metaphorically or literally) in a vain attempt to save themselves, and yet are in a neutral role.

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The War Crimes Tribunal and The Mediator

It is a grand building adopted for the purpose of tribunal. Originally the headquarters of an insurance company, it was clearly built to impress; to be elegant and yet modern. I have seen pictures of it before, but never had any

¹⁵⁶ These are all phrases that are used repeatedly when I ask students of mediation both in practical and academic training about what mediators are and what they are doing.

idea that I would come here. I feel very strange. I can't articulate my feelings even to myself. I stay silent. I go into the security annex and my bag is scanned.

On the other side of the annex are the grand entrance doors. I walk through these and into the lobby. Here there is another security desk next to an elegant two-way staircase, now compromised by barriers, scanners and x-ray machines. It is now the access point to the courtrooms. In front of it there are some chairs and coffee tables of the sort that seem to be designed to make you as uncomfortable as possible. I sit. I am mute. I feel slightly sick.

To the right of the security desk I notice a metal stand. It is the used for marketing material at trade shows. Each shelf is stacked with photocopied prosecution summaries of cases that have concluded with war crimes convictions.

A lady appears on the other side of the security screens and smiles at my colleagues and me. She swipes her ID card and comes through the rotating gate, greeting us in a friendly and enthusiastic manner.

I am saved from my thoughts and switch into 'professional' mode. I exchange social pleasantries as I am led to the rooms I will be working in. I allow myself to be swept up in the job I am here to do: Concentrating on the people I am working with; blocking out the connections and the context.

For the rest of the week I come and go through the reception area. Each day I sense that stand of case summaries in my peripheral vision and don't look up.

One day in the lunch break I am taken to see one of the trials in progress. My colleagues are lawyers. They are excited. The man on trial is one of the 'Big Fish'. It seems to me that for my colleagues this is the news come to life. These are the big-time criminals. I feel queasy and disassociated. This is the public face that shows so little of the private reality of where this man has come from. Of how the things we do and the things we witness change us. Forever.

I compartmentalise. I have become ever more skilled at this, but here I feel the strain of this coping mechanism. I constantly have to force the compartment of 'me, endogenous; the person and my feelings and my memories' closed, in order for it not to contaminate the open compartment of 'me exogenous; the professional and the people I am working with'. It is a lame attempt. As soon as I am not 'on show' my mind goes back to the indeterminate terrain between 'thought' and 'felt'. It is obvious that this was going to be difficult, but I still can't place exactly what is so hard about it.

I am coaching one of the tribunal lawyers. We are talking about the difference between solutions generated by the parties and those generated by the mediator. He has just been mediating (a role-play) and trying not to propose solutions. He is engaged on an experiential level because the interactional, relational difference between these two approaches has really struck him. He talks animatedly about the testimony of one of the International Mediators at one of the trials; the International Mediator was convinced that the plan he had put forward was workable. It has now finally struck him how different a generated by the parties' is to one (however clever) that is generated by the mediator.

He had suddenly experienced the psychological difference of providing solutions and facilitating people developing their own. As an experienced negotiator he was suddenly linking this with his experience as party and as advocate. I reflect on the symmetry: Just as with parties in mediation, participants in this training, it is not telling people what they should do that is persuasive. When they feel on their own skin what it is like being a conflict party and being 'told' by other students what they should do, the weakness of 'telling' as a persuasion strategy is laid bare.

This moment is one I have seen so often. The moment when the theoretical, or cognitive suddenly link with something 'other' in the brain. It is the moment when intellectual knowledge suddenly links with self-knowledge, and this

connection seems to somehow enable insight into ‘the other’ possible. The Lawyer is trying to describe the psychological blocks that I have observed as mediators start to push in a direction that they think the parties should go. These blocks are the difficulties both of ‘ownership’ of anything not self-generated by the parties, and the immediate reactive devaluation (and/or appearance of partisanship) of the proposals of others. The devaluation might not be as massive for mediator suggestions as it is for suggestions from the other party, but it is still present.

The Lawyer has suddenly both recognised the possibilities of the approach, and the challenge of finding sufficient patience and compartmentalisation to shelve one’s own judgement without becoming passive. He is fascinated and deeply affected. It is a wonderful moment and yet I have to force myself to stay present in this conversation; the walls of the compartments are so fragile. In this context the implications of judgement and application of mediation keen against my skin like knives.

The next day I walk up to the metal marketing stand in the reception area. I feel like I am shaking. I think I am woefully inadequate at hiding what I feel. I remind myself that those who know me well tell me that this really isn’t the case, so maybe no-one notices. I take a specific case summary and walk away. The compartments break down; the sides collapse, and lids slide off. I am lost.

My normally steady hands are shaking as I flip through the pages of the case summary. I find what I know will be there.

It is the written confirmation of what I read between the lines of what people did and didn’t say in one of the places I lived years earlier. Confirmation of the centrality of the questions I had wrestled with since I began to try and understand ‘mediator’ and ‘mediation’ from the practical, relational, interactive perspective, rather than just the theoretical.

What does it mean for me, and for the parties, if I...

...ask, rather than tell?
...accept people as they are?
...do not take sides?
...walk alongside them while they work out where *they* want to go?
...trust that there are enough other people, judging, taking sides?

These are utterly practical questions. They are not ‘academic’. Maybe because I have listened, because I have tried to understand, because I have tried to shelve my judgement, people have shared all this pain, misery, death, anger, sadness, heartbreak, frustration, with me.

But at what cost to me? It takes huge energy, effort, patience and self-control. I find it hard physically and emotionally. It has changed me: changed what I see, what I notice; created memories that influence what I can and can’t cope with privately; changed the way I interact with people and what I do in my free time. Will I be damned because those who I walk alongside may be damned?

Surely it would be so much easier to judge, to prosecute? But these people, here, in this place, have been changed by what they do too.

There are no easy answers. Particularly not in this place. I tell myself that these reflections don’t belong here, now. I have to put them away. I have to rebuild the compartments. I have to keep it together. I have a job to do. I have to force down the fuzzy nausea and clear my head.

I stuff the papers into my bag. I walk up the stairs and back down the corridor. I focus on my physical state and body language so that I have shifted my shoulders down and head up as I walk into the room.

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The interaction with the lawyer in this episode was powerful for me because it illustrated the impact and potential of this role, seen through the eyes of

someone who was deeply absorbed in an adjudicative context of ADR, but with the ethical and moral considerations of the CR context. The confrontation of the interaction between the adjudicative judgemental processes of the tribunal with the realities of post-conflict conditions I had experienced years earlier, brought some really difficult questions into sharp focus.

The easier of these difficult questions is what am I, Isabel Phillips, trying to do as mediator? This is summarised in a note I wrote in 2016: *Through my blindness, I attempt to be a safe companion for others on their journey in their search to understand the boundaries and connections they have with others. I do so in order that they can make decisions that, whether they regret them or not, they feel that they did so on the basis of the best possible information available at the time. That means that they have looked at the face of the 'awful things' that they knew were there, but hadn't dared to contemplate previously because no-one would stand alongside them and ask them what they saw, rather than telling them what they should see.*

The more difficult question raised by *The War Crimes Tribunal* is what do I do as a private individual with my own feelings, beliefs, identity? What are my values? Why do I do what I do? What has the impact been on me of being in practice for the last 17 years? How has crossing the CR/ADR boundary affected me?

Crossing into the ADR context, having experienced the CR context, allowed me to experience, understand, and test the outcome-neutral mediator role in a relatively safe environment. In the ADR context, mediators tell me repeatedly how much they love mediating, but also more or less everyone (including me) seems to have had family members respond to them with the irate comment: 'stop mediating me!'. A number of events in the last few years led me to enquire of friends, family and colleagues on how they perceived me. The response was interesting as it was unexpected. Most said it was very difficult to know how I was doing, what I was feeling, or what I actually think. In some cases, this was to the extent that they had given up asking me what *I think* about things, due to

getting back all sorts of views of different sides of a situation without ever getting to the bottom of what *I actually think*. This is hinted at in the *Diary Note*; the risk of struggling with a world of infinite muddy grey complexity, where good and evil constantly shift in a bewildering Escher-like reality<sup>157</sup>.

I realise now that being a mediator for the whole of my professional career has coloured all sorts of decisions: Never joining a political party; not being part of a religious organisation; not being 'out'; fearing that this autoethnographic journey might end my career because I have revealed something of myself! Struggling with any of these decisions is perfectly normal. However, the logic behind my struggle is maybe unusual in that it is not about fear of what people might think of me, but rather the fear that this would align me with someone, or something, that might make it impossible for me to take the mediator role.

The other major risk is the fear of ever being in conflict yourself: of seeing being in conflict yourself as something that undermines your professional credibility as mediator; of gagging yourself because of your professional role. Conflict is utterly ubiquitous in human interactions and, as with other professions (education, nutrition, health) there is huge internal and actual, or perceived external pressure, for the mediator to always demonstrate exemplary behaviour in relation to their area of expertise. For mediators, this tends to be the expectation that you will not 'take sides'. Living effectively depends on doctors recognising when they need to be patients, teachers recognising when they need to be pupils, mediators recognising when they need to be conflict parties.

How do I square the professional role of outcome-neutral mediator with the need to be an advocate for the values and outcomes that I believe in? This raises all sorts of questions, which I have attempted to answer through the last three chapters. However, the question it doesn't answer is what does it mean to work with parties who express and fight for things that would mean that they would not just disagree with my values, but who would in pursuit of their values

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<sup>157</sup> The side effects can include watching 'Buffy the Vampire Slayer' because there are goodies and baddies, and the goodies win in the end!

and beliefs deny my fundamental existence? What do I give up in putting my aim of trying to make a contribution, however small, to reducing the suffering caused by poorly handled conflict and communication, above all else?

My reflection on the impact of this role on me, is that privately and professionally I have become something of a chameleon (De Girolamo 2009). This has its upsides (being able to connect with very diverse people) and its downsides (it being challenging to allow yourself to just be yourself). I also think De Girolamo's description of the mediator engaging in negotiation combat with the parties is close to the mark.

However, I think it is a ritualistic and consenting combat that parties engage with willingly only for as long as there is trust between parties and mediator that it is safe both because it is ritualised, and because whilst painful it is not as dangerous as the alternative of 'real' combat. Working through the parties' identification and (often tacit) acceptance of their weaknesses enables them to find a way out of their current situation through, without someone else telling them what to do. The depersonalised shifting quintet of 'identities' combined with the acceptance of working to the parties mandate (in De Girolamo's study, that is the parties the wish to 'find a settlement') makes this a better option than the others that are available. (De Girolamo 2013)

Lederach skewers a whole range of the weaknesses of both CR and ADR in a description of those who don't seem particularly to suffer from them. *"It is not so much what they do as who they are that makes a difference. They listen in a way that their own agenda does not seem to be in the way. They respond more from love than fear. They laugh at themselves. They cry with others' pain, but never take over their journey. They know when to say no and have the courage to do it. They work hard but are rarely too busy. Their life speaks."* (Lederach 2005: 168)

The difficulty I would like to bring to the fore is that of the ability and courage to say no. Maybe an important answer to my questions about the impact of this



role, leads to the extension of my own logic in relation to roles: In order to take the mediator role, I have to trust that others are willing and able to take all the other important conflict roles of advocate, judge, advisor etc.. I also have to trust that others are willing to take the mediator role in situations and context in which, because my identity and the protection of this identity, I recognise the need to say 'no' to the role and have the courage to do so. To take this role when I can, but not to lose myself in the process. This confidence depends on the awareness of others of this role, its difference, dangers and limitations.

This final question of how the role has affected me personally connects directly with a whole range of poorly understood questions about conflict systems and the impact of conflict roles on those who occupy them and the resulting impacts on these complex adaptive systems. In attempting to interrogate this question so publicly, I am aiming to illustrate the importance of the questions of how you step in and out of this specific role? What are its costs and its benefits? What are the similarities and differences with entering and exiting other professional conflict roles? How effectively do people whose professional life depends on taking one conflict role (solicitor, judge, probation officer etc.) manage to transition between their single-sided professional role and the demands of the myriad roles demanded of you in private life? What impact does the failure to do so have? Are there ways of doing this effectively? These seem to be areas worthy of exploration in order to have a better understanding of how conflict works and how the individual connects with the systemic.

## **Conclusion**

This chapter has explored a set of interlocking ethical concerns in relation to the practice and theory of outcome-neutral mediation.

As already highlighted in chapter 6, mixing your own normative agenda with a mediator role that demands neutrality and relies on the idea of self-determination will undermine credibility of both role and the process, and ultimately to undermine the credibility of whatever agenda is being (c)overly

promoted. I can either become an advocate for a particular agenda, or I can become a mediator. Trying to do both will lead to the ultimate failure of both.

In this chapter in *Who's in control?* I argue that the discourse in CR on mediation has been dominated by demanding empowerment and self-determination for the parties in conflict. It argues that discourse around mediation has become anchored in a web of normative standards which set externally imposed boundaries on what is considered permissible levels and types of empowerment and self-determination.

However, there are ethical implications to taking the parties ability to self-determine in mediation seriously. Conflict between the normative project of the mediator and the parties can be expected and will sometimes force the mediator to choose between shelving their own normative project and allowing the parties to self-determine, to exit the process, or to switch role in the hope that by adjudicating or advising the parties will become complicit with the mediator's normative project. It highlights that neither this PhD nor other sources provide substantive evidence that this is a particularly strong strategy.

*Should I stay, or should I go?* explores ethical issues that might lead the mediator to withdraw from mediation and does so by repeatedly crossing the ADR/CR boundary in analysis and episodes. It provides examples of the practical reality of the limitations of legal processes in both civil-commercial and international socio-political contexts to access information, and to create workable and enforceable outcomes that deal with ethical difficulties. This highlights the need for mediators to take an informed and pragmatic view of the alternative processes available to the parties before deciding that ending mediation and passing the situation back to the courts is the most ethically tenable option. Not least as courts often either do not exist, struggle to discharge their allotted function, or are limited in their jurisdiction.

This section also challenges the wisdom of using physical violence as the primary metric for alerting mediators to ethical difficulties. *Streetwalking*

highlights that mediation provides insight into situations that often make simplistic judgement good/bad judgement on situations very difficult. The evidence and analysis from the practice context that challenges the critique that mediation allows the continuance of status quo and power imbalance, where adjudicative options protect the vulnerable and challenge power imbalance.

Clarity on what type of order is created by mediation explored in *New Order: Normative or Negotiated*. This highlights that it is helpful both in managing the expectations both of what it is possible to create in a process that is, in essence, negotiated order and the ethical implications of the outcomes. This section explores the way that parties in mediation weigh up the options available in terms of negotiated order (the type of order produced by mediation) winners' order, imposed normative order and consensually engaged normative order.

Normative order, often in the form of legislation backed up by legal systems, is where the systems that are to be applied 'as a general rule' in order to privilege some interests over others. How these general rules should be applied in contentious situations is the responsibility of the courts. In other words, normative order is created by the executive and legislature, and enforced (and sometimes amended to an extent) by the judiciary. Negotiated order, of which mediation is one type, therefore is not a place where normative order is created. It may be somewhere proposals, wishes and agreements on how normative order should be amended may be worked out, but these agreements then have to be converted to normative order. This is something that has emerged from research in the ADR context and which provides helpful clarification about what should and shouldn't be expected from mediation in the CR context.

*'Fair and Advisable'* uses evidence from the ADR context to suggest that adjudicative/court-based processes regularly fail to deal with ethically impossible situations. Therefore, to blame failure to deal with such situations on mediation as a process is a false attribution. This is particularly relevant if actual mediation is compared to an 'ideal-type' adjudicative process (a risk in the CR

context where there is often an absence of adjudicative alternatives) that suffers from none of the structural, practical and specific problems of court systems in practice.

The issue of fairness as a source of anxiety and ethical concern in mediation is discussed. The common ADR guidance to be concerned with workability, rather than fairness, is used to highlight the risks of believing that you are able to judge 'fairness' as an external person in conflict situations. The episode *Building a Future* provides an illustration both of the limits of adjudicative processes to be responsive enough to provide 'fair' outcomes, and also a good example of the drivers that lead to decisions that may seem apparently 'unfair' but are acceptable and workable for the parties in a specific situation.

Testing workability can lead to decisions by the parties to continue their conflict (something that is fundamental to the practice of outcome-neutral mediation), which will be difficult if the mediator has become attached to the idea of settlement, but it may be the right thing for those parties at that time. This should not therefore be viewed as 'failed mediation' as this suggests either that mediation at the same point in time done differently might have worked; of course, in some situations this might be true, but it is also perfectly possible that the mediation was successful in the parties gaining clarity on the need to continue contending.

The last two sections of the chapter look at the lived experience of occupying the mediator role. *'Love the bastards'* draws together an episode *'The mediator and the fighter'* and some views from other mediators about the demands of this role that hint at the challenge of building relationships with people who are doing things that you may privately think are awful or unethical. It discusses the psychological impact both positive in terms of the ability to connect with a huge range of people and also the trauma that is created in the process.

*'Me and Me, The Mediator'* draws on the ethnographic observations of mediators in the ADR context conducted by De Girolamo suggesting that

mediators take on the characteristics of the chameleon. It provides some insight into how I believe taking the role of mediator has changed me not just professionally, but also personally. It also draws on insights from Lederach to suggest that selecting where and when one should engage as mediator is an important part of exercising the role responsibly; that is without destroying oneself. Finally, it suggests that there is a dearth of information available on how professional conflict roles of all types impact on those who exercise them regularly and that this is an area worthy of further research.

## **Conclusion**

The aim of this PhD was to provide a significant and original contribution to the theory and practice of mediation in the fields of Conflict Resolution and Alternative Dispute Resolution. This has been done by generating original data through the innovative application of autoethnography; a methodology that is largely unknown in both ADR and CR. Through this I brought together the inner and outer worlds of conflict practice generally and the mediator role specifically.

This has been complemented by original historical and literature research, as well as analysis to trace the interlinking histories of CR and ADR in terms of their concern with mediation. The knowledge and views of other mediators from both fields has been gathered through a questionnaire, and a small number of interviews. This data has been used to complement and triangulate data gathered through the other methods used. It also provides an original contribution to the understanding of how mediators from the two fields view themselves, what their reading patterns are and who they acknowledge as influencers.

The findings will now be reviewed in relation to the four research questions that were set out in the introduction. This will be followed by a summary of potential areas of further research.

## **The ADR/CR Divide**

*Is there an ADR/CR divide in relation to mediation theory and practice?*

Reviewing the evidence from the previous chapters provides evidence that the divide goes rather wider than just theory and practice of mediation. It extends into the storying of their origins, their philosophical underpinnings, their normative projects and their appraisal of different forms of social order.

This level of underlying difference of the two fields has some profound influences on the theory and practice of mediation specifically. They have rather different normative projects, and each views the other as in some way rather

inferior; CR viewing ADR as being rather superficial and ADR viewing CR as divorced from the realities of practice; hardly a prepossessing basis on which to exchange information.

Considerable evidence on the substantive differences in the theory surrounding mediation, emerges through the exploring the way that the ideas of contingency and complementarity have been applied. In CR contingency has been explored extensively both theoretically and empirically in the form of quantitative studies of the timing of mediation intervention. In contrast, clarity on different roles in conflict has become if anything fuzzier rather than clearer, with little real attention to the discrete identification, or application of roles, and their relative benefits or risks.

This contrasts sharply with an ADR field that is built around the principle of a range of complementary conflict roles, of which mediation is one clearly defined option. Contingency, particularly in the form of strict ideas about when (or trying to identify exactly when) the 'right' time to use mediation has faded into a general acceptance that this can vary.

This difference has far reaching consequences on the theory surrounding mediation. It impacts, as already mentioned, on whether or not a clear definition for mediation is considered necessary. This in turn impacts on how and what research is done on mediation. This in turn feeds into theorising mediation and what is considered to be fundamental in terms of skills or attitude. Most importantly perhaps, it impacts on when it is considered appropriate, what outcomes can be achieved through its application and the appraisal of the process, those participating and the outcome.

It also impacts on how practitioners view and identify themselves. It impacts on how people are prepared and assessed in order to take on the role of mediator. The one area on which both fields are silent is about the impact of the role on the mediator themselves. In fact, there is relatively little evidence about the

inner world of those involved in mediation in any capacity from either field. Adam Curle is one of the few exceptions, but even his work on this subject gives relatively little insight into what it is like emotionally and experientially to occupy this role and the impact that this has.

### **Skill and Transfer Impact**

*Has this divide reduced the transfer of skills and knowledge in relation to the theory and practice of mediation?*

There is a good deal of substantive research about the application of mediation that could be usefully shared across this divide. This may not happen because of the belief that the contexts are so different the information could not possibly be useful. However, the results of the mediator questionnaire and the autoethnographic data both suggest that it may be more to do with the fact that the two fields are too unaware of each other in terms of literature and research to take advantage of such information. This is almost certainly to do with the division between the academic fields involved, Law and Business in the case of ADR, Social and political science (and interdisciplinary work from most other fields with law and business being rare).

The irony that this division may have been fostered through interpersonal conflict between two of the most important academics of the two fields should not be passed over. The writing, interviews of Roger Fisher at Harvard and John Burton at CARC and later George Mason, as leading lights in ADR and CR have all helped to discourage the flow of information. The anti-academic, anti-empirical research approach of Fisher and his belittling of Kelman and denial of there being a field of 'Conflict Resolution' is striking. Equally Burton's sharp tongued put down of ADR is one of the places where this mutual lack of connection between these two fields is put down clearly and explicitly.

Given their influence on most of their successors and the evidence of a high level of personal animosity between them it is hard not to draw the conclusion



that this may have had quite a substantive impact on the way the two fields diverged from each other and the lack of information sharing between them.

Pioneers in taking different and unconventional practical ways of dealing with conflict and disputes do so at considerable personal risk. It is therefore unsurprising that many of those who have done so are heavily invested in the approach that they have developed. There is also considerable evidence that many were very big and charismatic personalities, and not without ego. The likelihood of those developing and practicing these methods to be both fragile in the face of criticism and dogmatic in relation to tenets of their practice that differentiate them from those of others seems unsurprising; the history of medicine in the 19<sup>th</sup> Century displays similar characteristics!

The difficulty is that all these elements put together mean that the actual development of practice is hindered by the turf wars and sensitivities around actually having what you do and how you do it examined. In the CR context, the approach of broadening the definition of mediation, or writing it off as a discrete process has a similar effect; in doing so it is difficult to analyse what people are doing in a mediative capacity and what impact it is having.

In the ADR context, there is a very specific example of the work of Debbie De Girolamo. Her study of mediators in the ADR context was highly original and actually done with the support of an ADR provider who are therefore aware of her results. However, instead of its findings being picked up, debated, followed-up and at least in part responded to in practical terms it seems to have been quietly ignored; an assertion based both on my experience of the context and supported by her complete absence from the results of the mediator questionnaire. Having what you do examined by someone from outside is uncomfortable. Viewed relationally it is unsurprising that the connection between researchers and practitioners is far from straight forward.

## **Sharing Skills and Knowledge**

*What skills and knowledge could be helpfully transferred between these fields?*

The literature analysis and the mediator responses about authors that have influenced their practice provide rich seams of knowledge, both practical and theoretical that could be helpfully exchanged.

The autoethnographic episodes repeatedly underline the importance of bringing together skills, attitude and conceptual underlying understanding. The depth of understanding of why and how concepts work, that are pithily conveyed in works such as getting to yes, but explored and much more deeply analysed in the work of authors such as Parker-Follett (1973), Burton (1990b), Kelman (2010) and Curle (1990) could provide practitioners and researchers in the ADR field with a fruitful complementary perspective to the work of PON.

Equally the concern of practitioners in the ADR context with evidence on psychological mechanisms of interaction and negotiation and understanding highlights a rich stream of literature apparently untapped by the CR practitioners. This includes the work of the very famous, such as Kahneman (2013), Mnookin (2000) and Cialdini (2009), to less known researchers such as Stokoe (2017) and Heffernan (2011).

As highlighted by Mayer (2004) mediation is only one way of assisting people in conflict and there are many other related processes and roles. Both fields have a wealth of literature that could be taken as complementary. Appreciation of the principle of complementarity would be a prerequisite for allowing the transfer of skills and knowledge. Whilst the different contexts of the application of the skills and knowledge might in places be an obstacle, this could be a source of challenge and enrichment to create a deeper understanding, rather than a justification for siloed thinking.

The autoethnographic episodes consistently demonstrate the limits of the judge and advisor roles in conflict. This repeatedly highlights the need, in both fields, to be clear when comparing and evaluating the use of the outcome-neutral

mediator role with judgement-based roles and processes what can be achieved. This is discussed in both chapters 5 and 7 at some length.

Crossing the boundary between the two contexts makes some of the criticisms and expectations of adjudicative and power-based processes more clearly misplaced; for instance, the data from the ADR context demonstrates clearly that powerful, institutionalised legal systems lead to people accepting judgements and solve problems of recidivism and enforcement is simply not the case. Likewise, to expect the creation of normative order as part of a mediation agreement, is to confuse the nature of what can or can't be done within a facilitated communication process.

The understanding and knowledge of such data in the CR context could make a big difference to the acuity with which different modes of intervention are analysed and critiqued. It could also make a difference to the design and execution of such interventions in practice.

The concerns of the CR context with self-reflexivity and attitude offers important conceptual and practical information that ADR would do well to take closer account of in the preparation of mediators. Whilst not entirely ignored, its impact and its embedding within the practice culture has actually become more superficial with the requirements of organisations such as the Civil Mediation Council in the UK requiring practice and professional development evidence, but not requiring reflective debriefing sessions or anything similar<sup>158</sup>.

Likewise, the ADR focus on the development of competence frameworks focussing on skills, tools and techniques, could provide a really important impulse for those working in the CR context. As discussed at length such competence frameworks both provide a structure for self-reflection in relation to actual action. They also provide a way of assessing actions and activities that aren't immediately conflated with the judgement of the practitioners' identity, or

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<sup>158</sup> See <http://www.civilmediation.org>. Last accessed 4 Dec. 17

person. Having to embody all the qualities listed in approaches such as those related to the transrational peace work (Dietrich 2014), in all aspects of life, is to put a huge psychological strain on those doing conflict intervention and mediation. Psychological disintegration, or of ceasing to be able to be honest about not always matching up to these standards, are risks that I have observed and experienced repeatedly in both fields; something evoked directly in the opening words of this PhD.

Finally, by both fields normative projects have a profound impact on what are considered acceptable outcomes in mediation. As highlighted in chapter 7 this circumscribes the self-determination of conflict parties and, unless by chance the parties are closely aligned with that normative project of the mediator, is likely to lead any attempt at mediation into something that looks more like third-party negotiation, or adjudication. This may be what is needed, but without the self-reflexivity of those involved (whether as researchers or practitioners) to recognise this shift in role the analysis of what happens will be confused.

### **Joint Frameworks**

*Is there a framework for analysis that allows the transfer of knowledge and skills between the two fields?*

Producing an overarching, comprehensive knowledge and skills transfer framework is beyond the scope of the data and analysis of this PhD.

Nonetheless some indications and directions for such a framework have begun to emerge, covering a range of aspects. These are:

### **Mapping theoretical and practical connections in the literatures**

To illuminate connections, interactions and opportunities for transfer of information across different areas of mediation practice.

This would help and encourage researchers and practitioners alike to have a wider sense of potential relevant information when considering issues in relation to mediation. It would also encourage the exchange, application and comparison of data generated by research using similar methods across

different contexts, generating valuable and interesting insights. For instance, if quantitative datasets were adapted (or analysed) using the norms of a different field would the result be garbage or gold?

### **Methodological innovation and exchange**

To enable the capturing and analysis of data that convey a more complete picture of relational conflict resolution processes, particularly mediation.

The potential of autoethnography to connect the internal and external worlds of the mediator has been demonstrated in this PhD and is an innovation that contributes to this need. No one methodology is a panacea, each one makes an important contribution to knowledge and this is the case for autoethnography. I hope that others will pick this up and produce autoethnographies on the experience of different conflict roles including mediator and party.

Many of the ‘parents of the CR field’, from Curle and Burton, to Fisher and Kelman described themselves, or are described as scholar-practitioners and their relational experience must therefore have been central to their views: All the experimental psychology points in the direction that the operation of our emotions (as well as our cognitive heuristics and biases, of which we are seldom aware) are fundamental in the operation of our thinking. Yet this relational experience was in written form, illegitimate knowledge, hidden away, or exclusively referred on the cognitive and disembodied level.

Curle was an exception and was seen as a radical, fringe, during his own time. Lederach has taken some of his ideas forward and uses first person speech in an unusual way in *The Moral Imagination*. However, it is hard not to feel that an exception is being made due to his status, rather than that being explicit about experience is somehow accepted. So, I can’t not ask the question: What if Lederach, if Dietrich, if Ury were to produce autoethnography?

**Setting up the Theory-Practice-Research Loop**

Methodological innovation is one part of the need for practice and research to be brought into closer connection with each other. As far as I am aware whilst there is research on how to encourage people linguistically to take up the offer of mediation, there is little experimental psychological research on what goes on in mediation. In other words, the ethnographic work that uncovers the gap between what mediators say they do, and what they are observed as doing only, uncovers this gap.

This is at least in part because the obsession with what constitutes an effective process, and turf war between different approaches about this, has led to a focus on this rather than on the relational. Many approaches recognise in practice that process flexibility is crucial to the adaption to the circumstances of the parties and that very different processes do *seem to* lead to effective outcomes. Given this, it seems that whilst process research is undoubtedly important, understanding the basic relational side of mediation (almost irrelevant of process) might be a more fruitful basis for subsequent research of what process decisions make what difference.

This leaves a huge gulf in understanding of what actually happens in this process. In order to bridge this gap effort needs to be put into working out how to do this in an ethically sound way. With the multiple constraints of analysing such a process this will not be easy. However, given both the challenge and necessity of medical experimentation meaning that ways have been found in order to experiment, whilst also remaining ethically sound, surely this should not be impossible for fields that pride themselves on encouraging others to come up with innovative and ethical ways of resolving conflicts!

Implementing this would mean getting over both pioneer practitioner fragility and the temptation of the observer/researcher to believe (even if contrary to their epistemology) that their view is superior to that of the participants. It would mean generating and structuring research agendas so there was an incentive to engage with change and learning rather than to advance the position of one

approach over another. All major challenges. However, given the ideals of recognising the opportunities for collaboration, underlying needs and mutual gain, is it really too much to ask that these and other fields of mediation practice start practicing this in relation to each other?

Mediation theory born out of inductive work makes *a priori* statements about what *should* happen in practice. The limitation of this in ontological terms, is that it is an ideal conceptualisation constructed out of analysis of material data recorded by someone external to an interactional, relational process. The extrapolation from the individual case to the general theoretical rule is fraught with difficulties. If theory doesn't sufficiently reflect the relational it results in 'practice' failing to match up to what theory expects from 'reality'.

Mediation practice arising out of the summation of trial and error by mediators of *seems to* 'work' or 'not work' is based on *a posteriori* knowledge. The result can be the failure to recognise underlying patterns. Such knowledge also tends to be gathered in a way that is not 'permitted' in the academic context. Of course, academic methodological strictures are there to ensure theory and practice are rigorously tested. However, the result can be the de-legitimation of material and ideal knowledge can result in the breakdown of the flow of practice information back into the academic context.

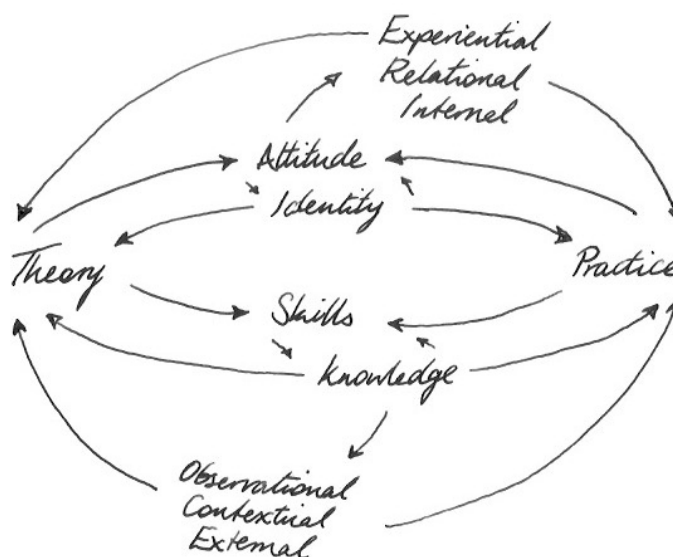
The exception to this transfer is where practice knowledge is legitimated by personal social, or political standing and preferably academic status. This is well represented by the work of the Harvard Program on Negotiation which is striking in the way its publications make foundational claims (in terms of *how to*) in popularised books, without a trace of the usual semiotics that indicate the use of academically legitimate methodology. It is an odd twist to claim status through connection with an academic institution, as Roger Fisher did, whilst simultaneously dismissing knowledge generated in an academic context as not being concerned with *providing practical advice to those in conflict* (Fisher 2005); In other words, de-legitimising both *a priori* knowledge arising out of the

academic context in relation to practice as well as the *a posteriori* work on conflict and mediation done by Burton, Curle, Boulding and others.

Tools and techniques, whether related to process or other skill sets, are not a panacea and can of course be used for ill. Therefore what actually happens in mediation practice depends heavily on the underlying attitude and ability of the mediator to be self-reflective, something strongly emphasised by Curle (1995). The boundary crossing between ADR and CR highlights that is not just a general issue of 'working on myself'. It is an intimately linked combination of attitude to the parties and conflict as *well as* having the practical, technical skills that give the practitioner the ability to adapt to what the parties want and need in situations that are hugely demanding both in relational and intellectual terms.

Building on the model presented in chapter 2, the following extension suggests that there are different extraction points for different types of information relating to theory and practice. The experiential, relational and internal information need different methodologies such as autoethnography than the observational, contextual and external. These types of information will of course interface in practice, but in order to foreground the different types information then complementarity is essential.

Fig. 24: Theory-Practice-Research Loop





### **Competence Frameworks**

Whilst common in the ADR context, the focus on personal qualities and attitude in the CR context combined with the tendency to portray skills and tools as secondary, or even manipulative means that they are uncommon. As has already been highlighted this is an area in which a flow of information between the two fields could lead to a more effective framework than either has generated on its own. Such a framework needs to be clear enough for the individual to use as a self-reflective tool and needs not to be turned into a wish-list of every socially desirable quality and skill.

Given the tendency to use the term mediator extremely broadly in the CR context, it might be wise to consider the development of competence frameworks for a range of different conflict roles that are relevant to peace and conflict work. In the ADR context whether there are also competence frameworks for other roles, as there are for mediators, is unlikely. Therefore, this would be a useful approach to test, develop and extend of the principle of complementarity. This would help the process of differentiating what the individual needs to do, or actively avoid doing, when occupying a specific role.

Dietrich puts forward a list of pre-requisites and virtues of conflict workers. Just the pre-requisites demand that those doing it have: *A-wareness of their own physical, emotional, mental and spiritual limits; B-alance between compassion and self-protection; and C-ongruent communication* (2014: p.53-54). No-one is all of these things all the time. As already highlighted this in/out approach to the identity of those doing such work seems both unrealistic and irresponsible in terms of the psychological strain of being all these things all the time (whether they are or not).

Competence frameworks allow for the possibility, both that one's competence may vary at different times, and accounts for the fact that competence can be displayed in different ways at different times. They also allow for a level of externalisation and permission to be human, to externalise a particular role and

not to be competent at all times in all situations, in a way that having ‘qualities’ as a person does not.

Chapter 6 put forward a basic reflective competence framework in terms of skills, tools and knowledge on Relationship, Process and Future Creation. This would need to be complemented by the iteration of self-reflection competence. In order to be truly reflective in relation to the mediator role, then the mediator needs to have experienced being a conflict party in mediation; they need to have the relational experience of being on the receiving end of a mediator’s attentions.

This is an area where further research is needed as different roles place involve different types and levels of relational feedback and therefore demand different types of self-reflection. For instance, a judge can physically sanction the party who speaks to them disrespectfully. The mediator cannot. In both cases there will be a need for self-reflection, but they are different. The autoethnography within this PhD also suggests that mediator’s must recognise when roles other than ‘mediator’ are needed and when role-switching (by the mediator) is or isn’t appropriate.

Self-reflection competencies need to retain the ability and necessity for the individual to occupy these roles at different times. It also needs to encourage recognition of an individuals’ own normative project and values. Finally, if I am regularly occupying one role professionally there should be some prompt to reflect on the impact that occupying this role is actually having on me as an individual and my identity.

### **Framework for complementarity**

As with the work in creating a map of the different authors of the two fields. A similar mapping process would be helpful to understand the framework for different processes, their boundaries and the type of order that they produce in different contexts. If applied across a range of different contexts this could begin

to produce a level of data on the interrelation of different roles and processes that could generate an interesting level of meta data.

Again, this relates back to the idea of complementarity as it would mean that the inter-relation of the application of different roles, not just in terms of the contingency of the application of the process but the interrelation of these processes with each other could be better understood. This type of data is available in raw form in the ADR context, however further quantitative and qualitative work would need to be done in order to process it in this way.

### **Future Research**

All the previous areas relate to the development of joint frameworks of theory, practice, research and analysis need further research and development. There is huge potential for gain for both sides of the divide to this information exchange both individually and jointly. It will however take open-mindedness, perseverance and maybe even a bit of the ‘radical patience’ of Lederach.

There are also a number of specific questions raised during the PhD that are worthy of consideration:

#### **Do people want mediation? If they do, what do they want from it?**

Until CR is clear what is meant by ‘mediation’ answering this is impossible. In the context of ADR mediation is considered a good idea, but there is no clear understanding (and if there is no one seems to be admitting it) as to why this great idea is not shared by parties and why they have to be pushed, chivvied and even sanctioned until they use it.

I have provided some answers to this question in chapter 5, but further research is needed in order to understand the mechanisms of why people do or don’t accept it. However, in order to understand whether their instinctive response is wise or not, more research is needed on exactly what does or doesn’t happen in mediation.

**How do people experience conflict roles?**

To understand conflict roles and complementarity better there is an urgent need to maintain the connection between relational, cognitive and external information; to maintain a connection between the level of information on the inner and outer worlds. Autoethnography from others occupying both the mediator and other conflict roles would be highly illuminating. This would enable learning and exchange about these roles on an emotional level, both by practitioners but also by those who are not going to occupy any, or all of them, professionally.

That also means that there is a need for this type of information from all levels of practitioner, not just from the senior-white-straight-middle-class-able-bodied-male or the junior-black-gay-working-class-disabled-female. The information on the mediator role, whether internal or external, still comes overwhelmingly from the former. However, because of the cultural conventions of this demographic, the inner world is largely missing. That means there is a challenge to those from this privileged demographic; because of their privilege they have experienced things that others will have little chance to experience and this inner information is important.

**Mediation and mediators**

The emancipatory normative project of CR puts it at risk of using mediation as a Trojan horse to try and impose this normative project on parties who simply do not agree with it; in exactly the same way that the pragmatic normative project of ADR can lead to the mediator pushing the parties into settlement (as the pragmatic option). So maybe mediation by others is needed to facilitate the flow of information between those advocating empowerment and emancipation and those advocating authoritarian stasis?

If this idea causes an emotional response of revulsion, then maybe this is a sign of the boundaries of the ability to mediate with parties whose normative project is too far from your own to allow you to exercise this role.

What is the impact of mediation on mediators?

This PhD has provided some insight into the impact of being a mediator on me. Much of this impact will have developed in a way that is unique and linked inextricably to me as an individual. However, it is a start.

~~~

I am a chameleon.

A shape-shifting translator
for the sounds, sights, emotions, fears and hopes
of others. Taking them on
in neural networks reflected in body and
words. Affected and affecting,
always changed and
always changing
and yet
Isabel

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## Appendix 1 – Questionnaire and Consent Form

### Questionnaire – Crossing Boundaries

Name :

Date:

Self-description (delete as appropriate): Academic/Practitioner/Scholar-practitioner/Other:

Please review the following list of authors who have written work relating to conflict. Please tick the box that feels you reflect your knowledge of the works of each author:

| Author                       | Read | Skimmed | Heard of | Not heard of |
|------------------------------|------|---------|----------|--------------|
| Roger Fisher & William Ury   |      |         |          |              |
| Miall, Woodhouse, Ramsbotham |      |         |          |              |
| Mackie, Miles, Marsh         |      |         |          |              |
| Boulle & Nestic              |      |         |          |              |
| Elise Boulding               |      |         |          |              |
| Bush & Folger                |      |         |          |              |
| Hope                         |      |         |          |              |
| Mayer                        |      |         |          |              |
| Lederach                     |      |         |          |              |
| Burton                       |      |         |          |              |
| Curle                        |      |         |          |              |
| Touval & Zartman             |      |         |          |              |
| Galtung                      |      |         |          |              |
| Richmond                     |      |         |          |              |
| Moffitt & Bordone            |      |         |          |              |
| Mitchell & Webb              |      |         |          |              |
| Rifkin                       |      |         |          |              |
| Mnookin                      |      |         |          |              |
| Rosenberg                    |      |         |          |              |
| Ronald J. Fisher             |      |         |          |              |

Authors I would cite add as being influential in my work on mediation:

|  |
|--|
|  |
|  |

Authors I would cite as having actually influenced my practice:

|  |
|--|
|  |
|  |

If you were to put mediation approaches on a spectrum, what would the ends be?

If mediation practice is part of what you do, where would you place yourself on this spectrum?

|  |  |  |
|--|--|--|
|  |  |  |
|--|--|--|



## **Written Consent Form: Crossing Boundaries Research Study**

I am conducting an analysis of the evidence for, and impact of, boundary crossing between the social science-dominated field of “Conflict Resolution” and the jurisprudence-dominated field of “Alternative Dispute Resolution”.

Much of the work is an auto-ethnographic study; that is a reflection on my own learning as a practitioner who has crossed between these fields. However, in the context of this study I was keen to seek the experience and opinions of other practitioners who have worked in one or both of these fields.

My focus is not on particular cases, and I do not wish you to disclose confidential data about people who have been involved in your practice. My focus is more on your own experience of particular issues.

If you agree to participate there will be two steps, that will take no more than 40mins in total:

1. I will give you a sheet with three questions which I would ask you to respond to in writing. This includes list of authors and ask you to tick the box in relation to them that you feels best reflects your level of familiarity with them and then to add any key authors at the bottom of the list that you feel have actually influenced your mediation practice. The final question I would like to discuss with you as you complete it.
2. I would then like to ask you a few questions about your reflections on your own practice.

As I wish to allow space for your reflections to contradict my own, my questions will not include my own views on particular issues. In other words, I will not share any of the conclusions from my autoethnographic work or from the analysis of writing on mediation theory with you.

In my reporting in relation to the information that you disclose to me, I will not disclose your name or any other identifier. I will check at the end of the interview

again whether you feel that you have disclosed anything which should either be omitted or where if it were relevant to the study you would like me to omit or change anything to ensure you are comfortable with the level of anonymity provided. I will not be sharing the data with any other researchers other than with my supervisors for the purpose of supervision (Prof Tom Woodhouse and Prof Caroline Hughes).

I do not anticipate that there are any particular risks to you as participant in participating, however my hope is that your participation may assist in generating indicators of where the two fields are already, or might in future learn from each other in terms of the theory and practice of managing and resolving conflict effectively.

It is completely up to you whether to participate. You may withdraw at any time and you may skip questions you would prefer not to answer.

I would like to take an audio recording of the interview and may also take some notes during the interview of your responses. I will do a transcript of the interview and send you a copy, which will have any personal identifiers edited out of it. Unless you request otherwise the audio recording will be destroyed once the PhD is completed. This will be stored on two separate non-internet connected hard-drives at two separate addresses.

Your signature indicates that you have read and understand the information provided above, that you willingly agree to participate, that you may withdraw your consent at any time and discontinue participation without penalty, that you will receive a copy of this form, and that you are not waiving any legal claims.

Signature

Date

## **Appendix 2 – Large Version Graphics**