Mediation of Employment Disputes: A Legal Assessment

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To my parents

Abstract

Mediation – a private and informal dispute resolution process, attended by the immediate disputants and facilitated by an impartial and neutral third person without power to impose a decision – is analyzed for its compatibility with the rationales and its effects on the functions of employment law.

The process is found to be conceptually compatible with a theoretical perspective on employment law that focuses on efficiency, but inconsistent with the perspectives that emphasize the importance of individual rights in employment or the social balance of diverging interests.

In practice, mediation fosters efficiency, but is not capable of ensuring individual rights and improving social justice.

Consequentially, mediation is suitable for the resolution of disputes under contractual employment law, but – without procedural safeguards – not suited to resolve disputes governed by employment regulations. Where disputes are governed by both contractual and regulatory elements, mediation's suitability depends on the relative importance of the different elements.

Résumé

La médiation – mode privé et informel de résolution des litiges par lequel les parties confient leur différend à une tierce personne neutre et impartiale sans pouvoir décisionnel – sera ici analysée sous l'angle de sa compatibilité avec les fonctions et objectifs poursuivis par le droit du travail.

Ce procédé est conceptuellement compatible avec une approche théorique du droit du travail basée sur l'efficacité, mais en contradiction avec les théories mettant en avant la protection des droits individuels ou l'équilibre d'intérêts sociaux divergents.

En pratique, la médiation est synonyme d'efficacité, cependant elle ne garantit pas la protection des droits individuels et l'amélioration de la justice sociale.

Elle est par conséquent adaptée à la résolution des litiges en matière de relations contractuelles du travail, mais ne convient pas aux différends liés aux règlementations du travail, faute de règles procédurales protectrices. Là où les litiges mettent en jeu à la fois des éléments contractuels et règlementaires, la pertinence du recours à la médiation dépendra du poids respectif de ces éléments.

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Mediation is not the cure-all that the hucksters, the cultists and the happy zealots among the learned professions would have us believe; but it is a worthwile idea.[1]

Introduction

The utilization of institutionalized employment mediation has significantly increased in the past decades.[2] Many of North-America's leading companies have installed internal dispute resolution procedures with mediative elements.[3] Others use the services of external mediators for the resolution of their employment disputes.[4] Virtually all reports –

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[1] Richard Crouch, "The Dark Side of Mediation: Still Unexplored" in: American Bar Association (ed.), *Alternative Means of Family Dispute Resolution* (Washington, D.C.: American Bar Association, 1982) at 357 [hereinafter Crouch].

[2] A historic overview over the development of the use of alternative dispute resolution (ADR) methods in employment disputes in the United States since the 1960's is provided by R. Gaull Silberman, S. Murphy & S. Adams, "Alternative Dispute Resolution of Employment Discrimination Claims" (1994) 54 Louisiana L. Rev. 1533 at 1534 [hereinafter Silberman *et al.*]. John Thomas Dunlop & Arnold M. Zack, *Mediation and Arbitration of Employment Disputes* (San Francisco: Jossey-Bass, 1997) [hereinafter Dunlop & Zack] at 15 trace the use of employment mediation back into the 1940's; at 153 - 158 they review the growth of employment mediation since the 1980's and the factors encouraging this development.

[3] Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* (Boulder *et al.*: Westview Press, 1990) [hereinafter Singer, *Settling*] at 100 – 101 reports that "more than one-third of all nonunionized employees in the United States now have at least one company-run dispute resolution procedure open to them for dealing with any type of complaint. Others have access to ways of resolving certain types of complaints, usually those involving discrimination. Still other employers make complaint processes available only to employees paid by the hour, excluding higher-level, salaried employees." David W. Ewing, *Justice on the Job* (Boston, Mass.: Harvard Business School Press, 1989) [hereinafter Ewing] describes various corporate programs for the resolution of grievances in the non-union workplace, internally installed by leading North-American companies; each of these procedures contains to some extent mediative elements. Another report of corporate employment dispute resolution programs is provided by Alan F. Westin & Alfred G. Feliu, *Resolving Employment Disputes Without Litigation* (Washington, D.C.: Bureau of National Affairs, 1988) [hereinafter Westin & Feliu] at 43 - 216. See also the survey of internal dispute resolution procedures in E. Patrick McDermott, "Survey: Using ADR to Settle Employment Disputes" (1994-1995) 49:4 Disp. Res. J. 8, 50:1 Disp. Res. J. 8.

[4] Mediation services are provided by dispute resolution associations, like, *e.g.*, the American Arbitration Association (AAA), the Center for Public Resources (CPR) Institute for Dispute Resolution, or the *Centre d'arbitrage commercial national et international du Québec* (*CACNIQ*). The AAA and the CPR have developed experience with the mediation of employment disputes.
The AAA, founded in 1926, is a not-for-profit, public service organization dedicated to the resolution of disputes through mediation, arbitration, elections, and other voluntary dispute resolution procedures. The association offers employment disputants assistance in the selection of an external mediator or administers internal dispute resolution programs of corporations. Over 4,000,000 workers are now covered by employment ADR plans administered by the AAA. American Arbitration Association, "National Rules for the Resolution of Employment Disputes" (1999), http://www.adr.org/rules/employment_rules.html (date accessed: March 6th, 1999). This number has increased from

from the employer perspective – about experiences with mediation programs portray employment mediation as highly successful, rendering satisfactory results for both employers and employees.[5] In the business literature employment mediation is recommended for various kinds of employment disputes.[6] At the same time, mediation

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3,000,000 in 1997. See American Arbitration Association, "Resolving Employment Disputes: A Practical Guide" (June 16th, 1997) http://www.adr.org/guides/resolving_employment_disputes.html (date accessed: March 6th, 1999) [hereinafter AAA "Practical Guide"].
The Center for Public Resources (CPR) is a U.S.-based international nonprofit alliance of 500 global corporations, law firms and legal academics, founded in 1979 "to build alternative dispute resolution, or ADR, into the mainstream of the law department and firm practice". Center for Public Resources (CPR), "About the CPR Institute", http://www.cpradr.org/aboutcpr.htm (date accessed: March 6th, 1999). The CPR assists employers in the development of internal dispute resolution procedures, including a mediation component. It also provides assistance to employment disputants in the selection of a mediator. Cf. Center for Public Resources, "CPR Program to Resolve Employment Disputes: CPR Employment Dispute Mediation Procedures", http://www.cpradr.org/empdispu.htm (date accessed: March 6th, 1999) [hereinafter "CPR Procedures"]:

> "*(c) Selecting the Mediator.* Once the parties or their representatives have agreed in principle to mediation, or at least seriously to consider mediation, they will discuss the selection of the mediator. Unless the parties agree otherwise, the mediator will be selected from the CPR Employment Disputes Panel. Unless the parties promptly agree on a mediator, they will seek the assistance of CPR in selecting a mediator. The parties may inform CPR of their preferences regarding mediator style and locale. ... CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate, ... CPR will break any tie."

5 See, *e.g.*, House, Nancy, "Grievance Mediation: AT&T's Experience" (1992) 43 Labor L. J. 491; Ewing, *supra* note 3; Westin and Feliu, *supra* note 3; Peter J. Bishop, *Winning in the Workplace* (Scarborough, Ont.: Carswell, 1995) [hereinafter Bishop].

6 See, *e.g.*, for the promotion of employment mediation in general: Donald B. Reder, "Mediation as a Settlement Tool for Employment Disputes" (1992) 43 Labor L. J. 602; Robert B. Fitzpatrick, "Nonbinding Mediation of Employment Disputes" (1994) 30:6 Trial 40; H.A. Simon and Y. Sochynsky, "In-House Mediation of Employment Disputes: ADR for the 1990s" (1995) 21 Empl. Rel. L. J. 29; Westin and Feliu, *supra* note 3; Dunlop and Zack, *supra* note 2; Bishop, *supra* note 5. Mediation of employment discrimination claims is recommended by Peter D. Blanck, Jill H. Andersen, Eric J. Wallach, & James P. Tenney, "Using ADR to Resolve ADA Disputes: A White Collar Case Study" (1997) 3:3 Disp. Res. Mag. 20; Daus, Matthew W., "Mediating Claims of Employment Discrimination" (1995) 50:4 Disp. Res. J. 51; Daus, Matthew D., "Mediating Disability Employment Claims" (1997) 52:1 Disp. Res. J. 16; Samuel H. DeShazer & Judy Cohen, "Mediating Employment Disputes Under the Disabilities Act" (1998) 53:1 Disp. Res. J. 28; Eve L. Hill, "Mediation of Disputes Under the Americans With Disabilities Act" (1997) 3:3 Disp. Res. Mag. 16; Craig A. McEwen, "Mediation in Equal Employment Cases" (1996) 2:1 Disp. Res. Mag. 16; Mike Perry, "Beyond Disputes: A Comment on ADR and Human Rights" (1998) 53:2 Disp. Res. J. 50; C. R. Singletary & R. A. Shearer, "Mediation of Employment Discrimination Claims: The Win-Win ADR Option" (1994) 45 Lab. L. J. 338; Arnold M. Zack & Michael T. Duffy, "ADR and Employment Discrimination" (1996) 51:4 Disp. Res. J. 28. For the use of mediation in workplace violence cases see Tia Schneider Denenberg, Richard V. Denenberg, Mark Braverman, & Susan Braverman, "Dispute Resolution and Workplace Violence" (1996) 51:1 Disp. Res. J. 6, and in sexual harassment cases see Carrie Bond, "Resolving Sexual Harassment Disputes in the Workplace" (1997) 52:2 Disp. Res. J. 14 [hereinafter Bond]. The AAA promotes the installation of a sexual harassment complaint procedure including a mediation step. American Arbitration Association (AAA), "A Model Sexual Harassment Claim Resolution Process" (August 1st, 1994) http://www.adr.org/rules/ sexual_harassment_claim_resolution.html (date accessed: March 6th, 1999)

gains more and more acceptance in the legal community.[7] Therefore, the utilization of employment mediation is likely to flourish in the foreseeable future.

This growth of employment mediation, like the rise of ADR in general,[8] comes mainly as a reaction to the perceived drawbacks of court adjudication as the traditional process to resolve disputes.[9] Traditional adjudication is alleged to consume too much of the material and emotional resources of the employment parties,[10] and to become increasingly inaccessible.[11] Mediation, in contrast, advertises with quick, low-cost, and efficient

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[7] Dunlop and Zack, *supra* note 2 at 158 conclude their analysis of recent legal developments in the U.S. with the statement that the current situation "is encouraging resort to mediation and arbitration in employment law disputes."

[8] The growth of the ADR movement is outlined by Stephen B. Goldberg, Frank E.A. Sander & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, 2nd ed. (Aspen Law & Business, 1992) at 7 - 11 [hereinafter Goldberg, *Dispute Resolution* 2nd ed.]. For the use of dispute resolution methods other than litigation before the emergence of the ADR movement, see Jerold S. Auerbach, *Justice Without Law?* (New York and Oxford: Oxford University Press, 1983). See also Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco *et al.*: Jossey-Bass, 1984) at 1 - 7 [hereinafter Folberg & Taylor]; Nancy A. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice* (Rochester, N.Y.: Lawyers Cooperative, 1989) at 31 – 33 [hereinafter Rogers & McEwen, *Mediation*]. A brief overview is given by Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* at 6.

[9] Silberman *et al.*, *supra* note 2 at 1534 relates the growth of employment ADR to the creation of new statutory rights and remedies for employees. Leonard L. Riskin, "The Special Place of Mediation in Alternative Dispute Processing" (1985) 37 U. Fla. L. Rev. 19 at 19 [hereinafter Riskin] explains the rise of ADR in general with three motives: "1. Saving time and money, and possibly rescuing the judicial system from its overload; 2. Having 'better' processes – less formal, more responsive to the unique needs of the participants and to human values (This motive is often connected with negative feelings toward law and lawyers and with positive feelings about enhancing community involvement and broadening access to courts.); and 3. Protecting turf." Rogers & McEwen, *Mediation*, *supra* note 8 at 33 – 39 outline the different policy objectives underlying the development of ADR.

[10] For an analysis of the expenditures of time and money on processing disputes through litigation, see David M. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, "The Costs of Ordinary Litigation" (1983) 31 UCLA L. Rev. 72.

[11] Derek C. Bok, "A Flawed System of Law Practice and Training" (1983) 33 J. Legal Educ. 570 at 570 [hereinafter Bok] notes that "most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures, and the long, frustrating delays involved in brining proceedings to a conclusion" and concludes at 571 that "the legal system looks grossly inequitable and inefficient." In the view of some commentators, the accessibility of traditional adjudication is declining because of a "legal explosion". Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 F.R.D. 111 at 111 [hereinafter Sander, "Varieties"], referring to John Barton, "Behind the Legal Explosion" (1975) 24 Stanf. L. Rev. 567. Others have challenged the idea that there is a "'hyperlexis' explosion". Galanter, Marc, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L. Rev. 4; see also Bok, *supra* at 571. In the context of discrimination, Laurence Lustgarten, "Racial Inequality and the Limit of Law" (1986) 49 Modern L. Rev. 68 at 71 detects "problems of mobilisation of the legal process that are severe, indeed debilitating".

dispute resolution in an amicable setting.[12] These qualities are perceived as especially important in the resolution of workplace disputes: first, those disputes pose a significant material burden on both employer and employee;[13] second, the maintenance of amicable employment relations enhances the productivity of the workplace as well as the psychological well-being of the employment parties.[14] Because mediation promises to cut down cost and delay in the resolution of disputes and at the same time to sustain an amenable relationship between the disputants, it has almost become a truism in the business community that efficient employment dispute resolution means employment mediation.[15]

The academic debate has, belatedly, accompanied the growing use of employment mediation.[16] The arguments of those who have scholarly underpinned the utilitarian praise of mediation have not remained unchallenged.

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[12] Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, *Dispute Resolution* (Boston, Mass., and Toronto, Ont.: Little, Brown and Company, 1985) at 92 [hereinafter Goldberg *et al.*, *Dispute Resolution* 1st ed.] note that "[m]ediation is said to be faster, less expensive, and better suited to tailoring outcomes to the needs of parties." Jethro K. Lieberman & James F. Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 U. Chi. L. Rev. 424 at 429 – 431 discuss considerations that suggest that "the results of ADR are often superior to court judgments – and even more clearly superior to conventional settlements" (*ibid.* at 429). Menkel-Meadow, Carrie, "When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals" (1997) 44 UCLA L. Rev. 1871 at 1871 – 1872 [hereinafter Menkel-Meadow, "When Disputes"] points out that there are two strands within the ADR movement: the "quantitative" strand that claims that "ADR will ensure speedy, less costly, and therefore more efficient case processing" (at 1871), and the "qualitative" strand that contends that "both dispute processes and their outcomes can be improved with alternatives to full-scale trial" (at 1872). See also Riskin, *supra* note 9 at 19. Pointing to the prevalence of the quantity argument in the debate over public encouragement of mediation, Rogers & McEwen, *Mediation*, *supra* note 8 at 232 – 233 report that lawmakers support the use of mediation "when they perceive that this encouragement will result in savings for the courts or the parties."
This thesis will focus on the quality of the outcomes of mediation; thus the argument addresses rather the second strand. However, quantitative issues are a part of the quality discussion, and will therefore be addressed (to a limited extent) in this exposition.

[13] Bishop, *supra* note 5 at 26.

[14] Folberg and Taylor, *supra* note 8 at 208; Bishop, *supra* note 5 at 26.

[15] See, *e.g.*, Bishop, *supra* note 5 at 5.

[16] See, *e.g.*, Marjorie A. Silver, "The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement" (1987) 55 Geo. Wash. L. Rev. 482 [hereinafter Silver]; Lauren B. Edelman, Howard S. Erlanger & John Lande, "Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace" (1993) 27 Law & Society Rev. 497 [hereinafter Edelman *et al.*]; Jacques Desmarais, "Les modes alternatifs de règlement des conflits en droit du travail" [1997]:2 Revue Internationale de Droit Comparé 409 [hereinafter Desmarais]; Hon. Frank Evans & Shadow Sloan, "Selected Topics on Employment and Labor Law: Resolving Employment Disputes Through ADR Processes" (1996) 37 S.

In the view of its proponents, mediation has freed dispute resolution from the shackles of law. The pro-mediation commentators consider workplace conflicts dominated by interest-oriented and psychological dimensions. Assuming a (partial) dichotomy between the rights of employees and employers and their needs or interests, they see rights-focused dispute resolution as irresponsive to the actual (material and psychological) needs of workplace disputants and therefore incapable of dealing sufficiently with workplace conflicts. They prefer workplace mediation because it provides a structure to deal with these non-legal issues.

On the other hand, there are voices who warn against the (uncritical) use of mediation in settings like employment. They emphasize the density and importance of legal rights regulating employment.[17] Mediation, in their view, lacks procedural safeguards to ensure the realization of the protection that legal rules envisage for the weaker members of society,[18] and is ill-equipped to pursue the social goals promoted by these rules.[19] Therefore, it is considered structurally incompetent to further the purposes of employment law.[20] The exponents of the latter view ground their argument on general assumptions about the mediation process and about the purpose of employment law. However, so far the theoretical scrutiny of these assumptions has been neglected.

In this thesis, I will examine the assumptions underlying the debate about the impact of mediation on employment law. I will do this through a structural analysis of the mediation

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Texas L. Rev. 745; George H. Singer, "Employing Alternative Dispute Resolution: Working at Finding Better Ways to Resolve Employer-Employee Strife" (1996) 72 North Dakota L. Rev. 299. For a general account of the development of ADR scholarship, see Carrie Menkel-Meadow, "Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR" (1997) 44 UCLA L. Rev. 1613.

[17] Desmarais, *supra* note 16 at 418 points to the importance of the "*ordre public social*" in employment laws.

[18] Lon Luvois Fuller, "Mediation – Its Forms and Functions" (1971) 44 Southern Calif. L. Rev. 305 at 328 [hereinafter Fuller].

[19] Owen M. Fiss, "Against Settlement" (1984) 93 Yale L. J. 1073 [hereinafter Fiss, "Against Settlement"] argues that settlement of disputes deprives the society of the interpretation and enforcement of the social values and goals that are embodies in legal provisions. Since mediation is facilitated settlement, Fiss' critique extends to mediation.

[20] Peter Adler, Karen Lovaas & Neal Milner, "The Ideologies of Mediation: The Movement's Own Story" (1988) 10 Law and Policy 317 argue that legal rights are important – especially where they protect people who do not enjoy political and social power – and that ADR may seriously undermine those rights by ignoring them.

process and of the rationales of employment law. In doing so, I hope to contribute to the development of a systematic basis for a debate that has until now widely relied on intuitive arguments.

It is clear that an examination of the relationship of mediation and law can not capture all aspects of mediation.[21] Much has been written about the economical,[22] psychological,[23] and political[24] advantages of mediation,[25] and it remains beyond the scope of this study to discuss these arguments. Nevertheless, the consideration of mediation from a legal perspective is an important contribution to the comprehensive assessment of the process.[26] The finding that mediation is capable of fostering the achievement of the social goals

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[21] Indeed, not even the relationship between mediation and law can be discussed in full width in this treatise. The scope of this thesis requires to confine the discussion to the intention of substantive law, and not to extend it to the totality of its consequences, *i.e.*, to the "macrojustice" provided by the substantive legal provisions. See Conard, Alfred F., "Macrojustice: A Systematic Approach to Conflict Resolution" (1971) 5 Georgia L. Rev. 415 at 420. Therefore, the discussion in this exposition is just one facet of a comprehensive legal assessment of mediation in employment.

[22] See, *e.g.*, Jennifer G. Brown & Ian Ayres, "Economic Rationales for Mediation" (1993) 80 Va. U. L. Rev. 83 [hereinafter Brown]; Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis" (1995) 24 The Journal of Legal Studies 1 [hereinafter Shavell].

[23] Folberg and Taylor, *supra* note 8 at 10 emphasize the capability of mediation of educating and empowering participants, to respond to their needs, and to reduce hostility between the disputants. See also Robert A. Baruch Bush, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) [hereinafter Bush, *Promise*]. For sexual harassment disputes, this argument is brought forward by Barbara J. Gazeley, "Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases" (1997) 33 Willamette L. Rev. 605, at 613.

[24] See, *e.g.*, Lawrence Susskind & Jeffrey Cruikshank, *Breaking The Impasse* (New York: Basic Books, 1987) [hereinafter Susskind & Cruikshank]; Jay W. Stein, "Mediation and the Constitution" (1998) 53:2 Disp. Res. J. 22.

[25] Stephan Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung im Konflikt* (Köln: Dr. Otto Schmidt, 1995) at 115 [hereinafter Breidenbach, *Mediation*] points out that "in the field of dispute resolution, there is hardly an advantage that is not attributed to mediation" (translation mine).

[26] To apply a legal view to mediation is not to say that "the only legitimate measure of principle in settlement is law". Carrie Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Georgetown L. J. 2663 at 2677 [hereinafter Menkel-Meadow, "Whose Dispute"]. She recognizes that "people and entities in disputes may have a wide variety of interests (of which legal principles may be one class) and may decide that, in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their disputes" (*ibid.*). The focus on the legal implications sheds light on only one piece of the mosaic of the total situation in which mediation functions; but the mosaic is only complete with this piece – this is what makes the legal perspective valuable and necessary.
In the mediation debate, the importance of the legal perspective is often neglected. Sally Engle Merry, "Disputing Without Culture" (1987) 100 Harv. L. Rev. 2057 at 2061 [hereinafter Merry] criticizes that "[i]n their enthusiasm over the discovery that law is only one mode among many for dealing with disputes, proponents of ADR tend to ignore the important role that law and legal consciousness play in

pursued by employment law would support the argument to use mediation in employment disputes. On the other hand, a finding that mediation thwarts the purpose of employment law would clarify the trade-off that the utilization of employment mediation involves. Thus, the impact of mediation on employment law goals is part of the overall balance of what is gained and lost through the use of employment mediation.

American culture" and points to the "highly developed cultural awareness of legal rights, equality, or the rights to legal participation" in modern western societies.

Methodology

The thesis will analyze the potential of mediation to foster the values and goals underlying the legal rules governing the employment relationship.

An analytical assessment of a dispute resolution process requires a definition of the process. This study will set out to identify the point where mediation enters a dispute situation, and the process characteristics of mediation.[27] As a private and potentially highly customized process, mediation is found in immensely wide variations.[28] The discussion will draw on the elements that characterize the mediation process in general; these features will be illustrated by procedural provisions of actual mediation programs[29] and by documents dealing with legal and ethical issues of mediation.[30]

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[27] See Chapter 1, below.

[28] Rogers & McEwen, *Mediation*, *supra* note 8 at 12. They also point out that the variety of programs and services may necessitate an over-simplification in a general exposition of the process. See also Folberg and Taylor, *supra* note 8 at 258.

[29] In analyzing the characteristics of mediation, I will mainly refer to the American Arbitration Association's "National Rules for the Resolution of Employment Disputes: Employment Mediation Rules" (1999), http://www.adr.org/rules/employment_rules.html (date accessed: March 6th, 1999) [hereinafter "AAA Rules"], and to the "CPR Procedures", *supra* note 4.
On June 1, 1996, the American Arbitration Association issued "National Rules for the Resolution of Employment Disputes". The rules were developed for employers and employees who wish to use a private alternative to resolve their disputes. They provide for different methods to resolve employment disputes, including mediation. The second part of the "National Rules for the Resolution of Employment Disputes" provides "Employment Mediation Rules" which apply to the mediation programs administered by the AAA.
In its "CPR Program to Resolve Employment Disputes", the Employment Disputes Committee of the Center for Public Resources Institute for Dispute Resolution offers employers several options for developing an ADR program for the resolution of employment disputes where an informal internal procedure is not available or has failed to resolve the dispute. This program urges that mediation be offered as a step in a formal dispute resolution program. In mediation programs conducted by CPR panelists, the "CPR Procedures" in Section 2. b. of the "CPR Program to Resolve Employment Disputes" will be applied.

[30] In the discussion of these issues, I will refer to the Joint Committee's "Model Standards of Conduct for Mediators", http://www.adr.org/ethics (date accessed: March 6th, 1999) [hereinafter "Committee Standards"], the Society of Professionals in Dispute Resolution (SPIDR) Ethics Committee's "Ethical Standards of Professional Responsibility", http://www.spidr.org/ethic.htm (date accessed: March 6th, 1999) [hereinafter "SPIDR Ethics"], the "Colorado Council of Mediation Organizations Code of Professional Conduct" (1982) in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 475 [hereinafter "Colorado Code"], the Task Force on Alternative Dispute Resolution in Employment's "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" (1995), 50:4 Disp. Res. J. 37 [hereinafter "Due Process Protocol"], and the Society of Professionals in Dispute Resolution (SPIDR) Law and Public Policy Committee's "Guidelines

The study will then proceed to identify the social values and goals that underlie employment law through an analysis of the rationales of employment law in general and typical employment regulations in particular.[31] Employment law will be discussed as far as it governs the individual relationship between employer and employee.[32] The

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for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights", http://www.spidr.org/work.htm (date accessed: March 6th, 1999) [hereinafter "SPIDR Guidelines"].
The "Committee Standards", *supra*, were prepared from 1992 through 1994 by a joint committee composed of delegates from the American Arbitration Association, the American Bar Association, and from the Society of Professionals in Dispute Resolution. They have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution. The "Committee Standards" are intended to serve as a guide for the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation as a process for resolving disputes.
The purpose of the "SPIDR Ethics", *supra*, is to promote among SPIDR Members and Associates ethical conduct and a high level of competency, including honesty, integrity, impartiality and the exercise of good judgment in their dispute resolution efforts. Adherence to these standards is considered as basic to professional responsibility; SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards.
The "Colorado Code", *supra*, is a personal code of conduct for individual mediators and is intended to establish principles applicable to all professional mediators employed by private or public agencies.
The "*Due Process Protocol*", *supra*, was developed in the United States in 1995 by a special task force composed of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the AAA. See Arnold M. Zack, "Evolution of the Employment Protocol" (1995), 50:4 Disp. Res. J. 36. It was introduced to ensure fairness and equity in resolving workplace disputes. The "*Due Process Protocol*" encourages mediation of statutory disputes, provided there are due process safeguards. It has been endorsed by organizations representing a broad range of constituencies, including the AAA, the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution. It has been incorporated into the ADR procedures of the Massachusetts Commission Against Discrimination (MCAD) and into the Report of the United States Secretary of Labor's Task Force in Excellence in State and Local Government.
The "SPIDR Guidelines", *supra*, emerged from the recognition of a "critical need to develop consensus on essential elements of fairness for agency mediation programs" (*ibid.*) and address essential and recommended elements of mediation programs instituted by agencies charged with investigating and adjudicating statutory workplace claims.

[31] See Chapter 2, below.

[32] Because of the nature of the parties and of the claims and interests involved, issues of industrial conflict are fundamentally distinct from individual workplace conflict and must therefore remain out of the scope of this thesis. That does not mean, however, that industrial conflict and the legal rules governing it are of no importance in individual employment disputes. The legal rules governing the individual employment relationship are often established by the parties in collective agreements; in some legislations provisions of collective agreements can be extended to employment relationships to which the collective agreement is originally not applicable. This possibility exists, *e.g.*, in Germany with the "Declaration of General Binding Character" (translation mine) in Section 5 of the *Tarifvertragsgesetz* (Collective Agreement Act); see Günter Schaub, *Arbeitsrechts-Handbuch*, 8th ed. (München: C.H. Beck, 1996) at 1730 – 1736 [hereinafter Schaub]; and in Quebec with the "Collective Agreement Decree" in *An Act Respecting Collective Agreement Decrees*; see Harry William Arthurs, Donald D. Carter, Judy Fudge, Harry J.

exposition will not focus on a particular legislation. The legal and economic structure of the employment relationship, as well as the forms and purposes of employment regulations, are sufficiently similar in virtually all modern western economies to justify waiving such a differentiation for the purposes of the undertaken theoretical discussion.[33]

Drawing on the analysis of mediation, the thesis will then examine the potential of the process to foster the identified employment law rationales.[34] The effects of different mediation characteristics on the achievement of the various social goals, as they are represented in these rationales, will be examined. This discussion of the impact of the process elements will differentiate the various and possibly conflicting goals of employment law in general and of particular employment regulations, and, according to the relative importance of the various goals in the different elements of employment law, assess the characteristics of mediation as to their capability of supporting the achievement of these social goals.[35]

Glasbeek & Gilles Trudeau, *Labour Law and Industrial Relations in Canada*, 4th ed. (Markham, Ont.: Butterworths; Deventer, NL: Kluwer, 1993) at 115 – 117.

[33] Where appropriate, examples or references to legal rules governing the employment relationship will be drawn from North-American or from European employment law.
Employment mediation has its roots and its widest use in the United States. Consequentially, the academic debate about the legal situation of mediation of employment disputes focuses widely on the legal system in the United States. In building on this debate, it will be inevitable to refer to the legal system that has determined the discussion so far. However, this thesis will go beyond the U.S. perspective on employment law. Drawing on my legal education that I received mainly in Germany and in Canada, I will briefly refer to German and Canadian employment law provisions to illustrate the discussion; some references may also be made to the British legal perspective. In this context, the European legislations may provide an interesting contrast to the North-American legal systems because the European legislators have gone much further in strengthening the position of the worker in the employment relationship.

[34] See Chapter 3, below.

[35] A similar "goal-centered" approach is taken by Robert A. Baruch Bush, "Dispute Resolution Alternatives and the Goals of Social Justice: Jurisdictional Principles for Process Choice" (1984) 1984 Wisconsin L. Rev. 893 [hereinafter Bush, "Dispute Resolution"]. Bush transforms the different goals of civil justice into different sorts of costs, and then examines dispute resolution methods as to their potential to reduce costs. In his view, the advantage of the transformation of goals into costs is "that it emphasizes the multiplicity and interrelationship of civil justice goals and thus tends to prevent the common error in a multi-goal system – omission or nonconsideration ... of goals" (at 934). However, the failure to consider certain goals is not a structural flaw of a multi-goal system, but rather a question of the thoroughness of analysis. Moreover, the cost-minimization approach does not solve the problem of evaluating and weighing conflicting goals. Rather, the monetarization of goals tends to obstruct the true nature of the goals in question. Therefore, I will employ the "direct" goal-terminology in this thesis.
Silver, *supra* note 16 assesses mediation as to its capability of fostering the intent of employment statutes, with special focus on anti-discrimination laws. However, she does not analyze the rationale of

Concluding the analysis, the thesis will provide suggestions as to which elements of the law governing a dispute matter may favor mediation as the appropriate process, and for which dispute matters the use of mediation encounters reservations from a legal perspective.[36]

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the statutes in depth, but rather confines her discussion to the general statutory goal to eradicate discrimination.

[36] In a range of books and articles there are lists of criteria for the assessment of mediation for a particular kind of disputes. To give just one example, Judith L. Maute, "Public Values and Private Justice: A Case For Mediator Accountability" (1991) 4 Geo. J. Legal Ethics 503 at 527 [hereinafter Maute] proposes a list of factors that suggest that "a dispute is a good candidate for mediation:

1. Essentially private dispute between parties of relatively equal power.
2. Basic applicable law is settled and can be adequately explained to parties.
3. Internal affairs of the relationship unsuited for a system of act-oriented rules; polycentric disputes involving complex, multi-faceted problems.
4. All necessary parties are included, willing to deal fairly with each other in mediation and able to participate effectively in the process."

These factors are social rather than legal. They describe the situation in which a dispute takes place, but do not derive the suitability of mediation from considerations based in the applicable law. It is the starting point in the applicable law that distinguishes the approach taken here from previous contributions to the mediation debate.

Chapter 1: Mediation

Despite the vast variety of views and opinions in the debate about mediation, there is one statement probably all participants in this debate would subscribe to: Mediation can resolve disputes. Beyond this core, the tangle of voices praising, criticizing, describing, and analyzing mediation is almost Babylonian. There is lively, sometimes heated and often controversial argument about what a dispute actually is, what constitutes a mediation process, how it works, and what its goals beyond the resolution of the immediate dispute are.

I do not set out to disentangle the mediation discussion in this thesis. However, to achieve the objective of this thesis – to provide an assessment of mediation in employment disputes – it is necessary to determine the character of mediation in order to understand its functions and its impact on employment law.

The characterization as a dispute resolution process marks the object of mediation: the social phenomenon of dispute. Therefore, I will first determine of what a dispute is, and thus identify the point where mediation sets in in a conflict situation.[37] I will then define mediation and – according to this definition – analyze the characteristics of the process and their functions in dispute reality.[38] Dispute processes and their outcomes are heavily influenced by the relative power of their participants. Therefore, concluding this chapter, I will identify factors that determine the power relationship in a dispute.[39] This analysis of mediation will be the basis for the assessment of the process in the light of the rationales and functions of employment law,[40] which will be identified in the next chapter.[41]

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[37] Section A., below.
[38] Section B., below.
[39] Section C., below.
[40] See Chapter 3, below.
[41] Chapter 2, below.

A. The Place of Mediation in the Development of Conflict and Dispute

The object of mediation as a dispute resolution technique is the social phenomenon of dispute. The term "dispute resolution" marks the ending of a dispute with a settlement that is binding upon both disputants. Dispute resolution processes are methods to direct the handling of a dispute towards a resolution.[42]

In the terminology of conflict research, the term "dispute" stands for a claim – *i.e.*, the demand of an action – communicated by the claimant to the defendant[43], and rejected by the defendant.[44] Thus, it marks a particular stage in the transformation of a conflict.

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[42] See also William Ury, Jeanne M. Brett & Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988) at 6, who define a procedure as "a pattern of interactive behaviour directed toward resolving a dispute." At some places in the dispute resolution debate the term "dispute resolution" is replaced by the term "dispute handling". However, the term "dispute handling" is broader than "dispute resolution"; it comprises also strategies aimed at ending the dispute without a binding settlement, such as abandoning or "lumping" the dispute, or reaching a provisional settlement. For some scholars, the goal of mediation to resolve – *i.e.*, to end – a dispute is even supplemented or replaced by the goal to educate the disputants, to foster a moral development, or to teach "dispute handling" skills. See Frank E. A. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 U. Fla. L. Rev. 1 at 13 – 14. This "empowerment" goal is prominently promoted by Bush, *Promise*, *supra* note 23; Robert A. Baruch Bush, "Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation" (1989) 41 Fla. L. Rev. 253 [hereinafter Bush, "Efficiency"]. See also the discussion of goals and ideologies underlying mediation in Section B. e., below. However, mediation is in the first instance oriented towards a settlement of the dispute and is therefore – at least for the purpose of this thesis – more precisely characterized as a "dispute resolution process".

[43] In this section, the terms "claimant" and "defendant" are not invested with a technical legal meaning. Rather, they describe the positions of the disputants in the dispute: the claimant demands an action of the defendant; the defendant refuses to take the demanded action. These terms attribute opposition to the relation between the disputants only to the extent that opposition is logically a precondition for any dispute: only if persons have different – *i.e.*, opposite – conceptions about the appropriate action, there can be a dispute. However, the use of these terms is not intended to indicate a non-cooperative attitude or behaviour of the disputants in the process of the dispute.

[44] This dispute definition follows the use of the term in William L. F. Felstiner, Richard L. Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1980), 15 Law & Society Rev. 631 at 636 [hereinafter Felstiner *et al.*]; see also Richard E. Miller & Austin Sarat, "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980), 15 Law & Society Rev. 525 at 527 [hereinafter Miller & Sarat]: "A dispute exists when a claim based on a grievance is rejected either in whole or in part." Sander, "Varieties", *supra* note 11 defines dispute as "a matured controversy, as distinguished, for example, from a 'grievance' which may be inchoate and unexpressed." Specifically for the employment context, Bishop, *supra* note 5 at 7 gives the following definition: "An employment dispute is a communicated disagreement between an employer and one or more employees or between two or more employees about what is to be done in relation to a workplace conflict", workplace conflict meaning "the perception of incompatible interests between an employer and an employee or between two or more employees".

For a dispute to emerge, a conflict develops through different stages. A negative experience, like distress, a problem, personal or social inconvenience, is not tolerated, but rather perceived as an injury,[45] as a situation regarding the individual that calls for change or compensation.[46] The perceived injury is attributed to the fault of another individual or social entity,[47] and communicated to the person or entity believed to be responsible; this communication includes a demand to take an action.[48] A dispute emerges, when the addressed person or entity enters the defense, *i.e.*, refuses to take the action demanded.[49] At any stage, the development of a conflict can be interrupted: a negative experience can be tolerated;[50] a relationship burdened by an attributed and communicated injury can be continued without pursuit of change or compensation;[51] a communicated claim can be abandoned;[52] a claim can be accepted and fulfilled.[53] In all these cases, the conflict remains or is solved in another way, whereas a dispute does not emerge. Also, it is possible that only a part of a conflict develops into a dispute, whereas another part remains undeveloped.[54] Therefore, the term "dispute" describes only a part of the conflict as a social phenomenon.

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[45] Felstiner *et al.*, *supra* note 44 at 633.

[46] Breidenbach, *Mediation*, *supra* note 25 at 42.

[47] The injured person feels wronged and believes that something might be done in response to the injury. See Felstiner *et al.*, *supra* note 44 at 635, where this stage is called "grievance"; the perceived injury is "blamed" on another individual or entity. Miller and Sarat, *supra* note 44 at 527 also speak of "grievance", defined as "an individual's belief that he or she (or a group or organization) is entitled to a resource which someone else may grant or deny."

[48] Felstiner *et al.*, *supra* note 44 at 636, refer to the communication of a grievance as a "claim". However, the communication of a "blame", merely voices the perception of being wronged to the person allegedly causing the wrong, whereas the term "claim" rather indicates that something is demanded – claimed – from the other person. For this reason, the term "claim" in this thesis is defined as the demand for an action to change or compensate the injurious situation.

[49] This refusal can take different forms. The demand can be outright rejected; the fulfillment of the demand can be delayed and the delay construed by the claimant as resistance; or the response to the demand can be a partial rejection in form of a compromise offer. See Felstiner *et al.*, *supra* note 44 at 636; Miller and Sarat, *supra* note 44 at 527.

[50] Felstiner *et al.*, *supra* note 44 at 633. Breidenbach, *Mediation*, *supra* note 25 at 42 speaks of "Meidungsstrategie" ("avoidance strategy").

[51] Breidenbach, *Mediation*, *supra* note 25 at 44, refers to this conduct as "endurance", a conduct that counteracts the solution of the dispute. Miller and Sarat, *supra* note 44 at 527 say that people "'lump it' so as to avoid potential conflict."

[52] Breidenbach, *Mediation*, *supra* note 25 at 44, calls this strategy of abandoning a claim "lumping it".

[53] Miller and Sarat, *supra* note 44 at 527.

[54] Consider, *e.g.*, the cases where a particular occurrence serves as a peg to initiate a dispute, whereas the – much broader – essence of a conflict remains unarticulated.

Despite the incongruence between the terms "dispute" and "conflict", in a part of the literature, these terms are used interchangeably.[55] However, the differentiation is important, even in a work that does not in depth explore the relation between conflict and dispute. Calling only a particular stage of a conflict a "dispute" indicates that dispute handling, in the first place, deals only with the surface of the underlying conflict. The conflict may persist even where the dispute has been ended; in this sense, "dispute resolution" does not necessarily mean "conflict resolution".[56] It is, however, rather the social reality of conflict that interferes with social interactions than its expression in a dispute. To make these interactions productive, the goal must be conflict resolution rather than dispute ending; dispute processing is only one step towards this goal.

The discussion at hand focuses exclusively on mediation of legal[57] disputes[58], *i.e.*, disputes in which a claim based on an alleged injury for which the law provides a remedy that could be granted by a public adjudicator[59]. For disputes that contain legal as well as

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[55] See, *e.g.*, Ford Foundation, *New Approaches to Conflict Resolution. A Ford Foundation Report* (New York: Ford Foundation, 1978) at 1. Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 6 - 7, use the terms "claim", "conflict", "difference" and "dispute", without distinguishing them. Folberg and Taylor, *supra* note 8 at 19, refer to the terminological distinction between conflict and dispute – "[a] *dispute* is an interpersonal conflict that is communicated or manifested. A conflict may not become a dispute if it is not communicated to someone in the form of a perceived incompatibility or a contested claim." (emphasis in original) – but speak of mediation as a conflict resolution process, and thus equate dispute resolution and conflict resolution.

[56] Only where the perception of an injury completely – *i.e.*, including the full range of the perceived issues in their full perceived importance – transforms into an appropriate claim – *i.e.*, a demand for an action that can completely remedy the perceived injury –, which in turn completely transforms into a dispute, can the resolution of the dispute at the same time be the resolution of the conflict. If the transformation is incomplete at any stage, the part of the conflict that has not been transformed, persists.

[57] Miller and Sarat, *supra* note 44 at 527 define (civil) legal disputes as "disputes that involve rights or resources which could be granted or denied by a court." This definition focuses on the remedial aspects of the law, and may thus distract from the fact-determinative aspects of the legal provisions which are important for the ordering, monitoring and guiding functions of the law. The definition employed in this thesis – emphasizing both the fact-determinative and remedial aspects of the legal provisions in dispute – covers all disputes that rely on the law to support or reject the claim.

[58] Miller and Sarat, *supra* note 44 at 527 use the term "civil legal disputes". However, the characterization of a legal dispute as "civil" implies that there are no public aspects to the dispute in question, *i.e.*, that the law involved in the dispute is not intended (at least in part) to protect an interest of the public. As the discussion in this thesis will show for legal disputes in the employment context, however, a public interest is often involved even in laws that are commonly categorized as "civil". The characterization of such disputes as "civil" could be misleading and will therefore be avoided in this thesis.

[59] Often this will mean a court of law; however, the term "public adjudicator" is broader and includes, *e.g.*, publicly established and controlled tribunals, boards, commissions, or other administrative agencies that, according to their mandate, perform adjudicatory tasks.

non-legal elements, only the legal elements can be considered;[60] the non-legal dimensions of disputes remain conceptually beyond the scope of this study.[61]

Mediation as a communicative technique can only set in where a conflict is communicated, *i.e.*, where a dispute emerged. Therefore, it is preferable to characterize it as a dispute resolution rather than a conflict handling method.

B. Process Characteristics

Having identified the place of mediation in a dispute situation, or *what* mediation is supposed to do, it is now time to turn to the process itself, to *how* disputes are resolved in mediation. In this section, I will first give a definition of mediation, and then explore the process characteristics of mediation according to the elements of the definition.

Mediation is a private[62] and informal[63] dispute resolution process[64], designed by an agreement of the immediate participants in the dispute, in which these disputants[65] carry out negotiations – aimed at a settlement of the dispute[66] – under the facilitation of the mediator,[67] an appropriately qualified impartial and neutral person, who does not have the

[60] Breidenbach, *Mediation, supra* note 25 at 52 points out that disputes often contain legal and non-legal ("relational" or "social") elements; the categorization of a dispute as "legal" or "social", according to its predominant nature, poses the danger of inadequate definition of the dispute and the resolution of all its aspects according to – exclusively – either legal or social criteria without the necessary differentiation, resulting in inadequate resolution of the non-dominant dispute aspects. Adequate resolution of a dispute as a whole requires adequate solution of its particular elements. Often, therefore, the resolution of the legal aspects of a dispute will only be a part – although an important one – of a complete dispute resolution.

[61] The impact of the resolution of non-legal disputes on the achievement of the goals of employment law is too remote and dependent on particularities to be explored in a structural study like the one at hand.

[62] The private character of mediation is discussed in Section 1., below.

[63] The informality of mediation is discussed in Section 2., below.

[64] James Healy, "Problem Solving Through Mediation: What Can We Learn From Each Other?" in: Maria R. Volpe & Thomas F. Christian (eds.): *Problem Solving Through Mediation* (American Bar Association, Special Committee on Dispute Resolution, Public Services Division, 1984) at 22, however, calls mediation "a personality thing rather than a process", emphasizing the determinative influence the mediator's concept has on the operation of mediation, and depreciating the characteristics of the process.

[65] The participation of the immediate disputants and of outsiders to the dispute is discussed in Section 3., below.

[66] The importance of negotiation and the orientation of mediation towards a settlement are discussed in Section 4., below.

[67] The role of the mediator is discussed in Section 5., below.

power to impose a decision on the disputants.[68] This section will critically expound the elements of this definition.

1. Private Character of Mediation

Mediation operates largely in private.[69] Mediation services are often provided by private persons, corporations or associations.[70]

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[68] The definitions of mediation in the literature are manifold and vary from very general to quite detailed descriptions; all of them, however, are in agreement over the basic elements: 1. negotiations are carried out between the disputants, 2. negotiations between the disputants are facilitated by a third party, and 3. the facilitating party has no power to impose a decision on the disputants. However, the variations are in the detail; often they reflect the authors approach to the subject. Whereas many definitions (by academic scholars) confine themselves to neutrally analyze mediation, others (by mediation proponents and practitioners) are not free of evaluative or descriptive elements. Giving a very general scholarly definition, Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 103 characterize mediation neutrally as "negotiation carried out with the existence of a third party." More detailed, Breidenbach, *Mediation*, *supra* note 25 at 4 defines it as "the bringing in of a (mostly) neutral and impartial *third person* into a conflict who supports the parties with their negotiation and resolution attempts but *does not on his own have the authority to decide (the conflict)*" (translation mine; emphasis in original). Riskin, *supra* note 9 at 22 points out that mediation functions as a (past-oriented) dispute resolution process as well as a (future-oriented) process to design future relations or transaction. He characterizes mediation as "an informal process in which a neutral third party helps others resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution." Joseph B. Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981) 6 Vt. L. Rev. 85 at 88 [hereinafter Stulberg] defines it as "(1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to the issues (6) which are acceptable to the parties." Singer, *Settling, supra* note 3, at 5 views it as the principal characteristic of mediation that it "involves an outsider to the dispute, who lacks the power to make decisions for the parties. The mediator meets with the parties, often both separately and together, in order to help them to reach agreement." Rogers & McEwen, *Mediation*, *supra* note 8 at 1 approach the process from the role of the mediator: "Mediators are 'third parties,' not otherwise involved in a controversy, who assist disputing parties in their negotiations. ... [T]he mediator does not issue a decision which the parties must obey." As an example for a rather "agenda-oriented" definition, Folberg and Taylor's description emphasizes the "empowerment" goal of mediation; thus, it contains a programmatic element. In their view, mediation "can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs." Folberg and Taylor, *supra* note 8 at 7.

[69] Edward Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 Tulane L. Rev. 1 at 13 [hereinafter Brunet].

[70] Rogers & McEwen, *Mediation*, *supra* note 8 at 12 point to the variety of dispute resolution providers: "Mediation services are offered both by public employees and private contractors. Legally mandated mediation typically is handled by public employees but not invariably so. Where mediation is voluntarily pursued by the parties, private contractors are used more often, but public mediation is still available at times." See also Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 290 – 291.

The mediation process is initiated by one or both disputants; the participation in mediation is – in principle – voluntary throughout the process.[71] However, often disputants are subject to a legal obligation to participate in mediation.[72] Increasingly the use of mediation of designated contested issues is mandated by law.[73] Participation may also be required by a contract clause.[74] In addition to legal obligations, social or psychological factors may pressure disputants to begin and to continue participating in mediation. Disputants may also be required to participate in mediation in "good faith."[75]

The disputants design the process according to their preferences and needs;[76] often, however, they will adopt standard rules suggested by the mediator or provided by a

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[71] Stulberg, *supra* note 68 at 88 notes that "the mediation process is non-compulsory. There is no legal liability attached to any party refusing to participate in a mediation process." Hence, in principle no disputant can be compelled to submit the dispute to mediation, or to take part in a mediation initiated by his counterpart, and at any stage, each disputant is free to leave the process without legal sanctions. Bond, *supra* note 6 at 17 proposes the following clause for contractual provisions for mediation of sexual harassment disputes: "The mediation is voluntary and not binding. Any party may withdraw from the mediation at any time for any reason." For a pre-dispute mediation clause see also Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 550.

[72] Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 490 state that the disputants may be subject to pressure "both into mediation and in mediation".

[73] See Rogers & McEwen, *Mediation*, *supra* note 8 at 43 – 46. The advantages and drawbacks of compulsory participation in mediation are discussed in Society of Professionals in Dispute Resolution (SPIDR) – Law and Public Policy Committee, "Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts. " (1990) in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 262 – 268 [hereinafter SPIDR "Mandated Participation"]. Where mediation is ordered by a court or by a regulation, the participation is not voluntary. Depending on the consequences of unsuccessful mediation, the disputants may be subject to significant coercion to settle their case in mediation. Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'" (1991) 19 Fla. St. U. L. Rev. 1 at 18 – 25 [hereinafter Menkel-Meadow, "Pursuing"] discusses the issue of mandated participation in several recent cases. See also Riskin, *supra* note 9 at 25.

[74] Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 540 – 544. Rogers & McEwen, *Mediation*, *supra* note 8 at 61.

[75] James J. Alfini, "Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation'?" (1991) 19 Fla. St. U. L. Rev. 47 at 63 [hereinafter Alfini] discusses the problem and suggests that – in mandatory mediation – "the problem of the non-playing party is best addressed by imposing a mediation-in-good-faith requirement, with appropriate sanctions, on the recalcitrant party." Bond, *supra* note 6 at 18, suggests to include a good faith clause in contracts providing for the mediation of sexual harassment disputes. Nabil Antaki, *Les modes de règlement amiable des litiges* (Cowansville: Yvon Blais, 1998) at 193 – 199 [hereinafter Antaki] discusses the content of the obligation arising from a mediation contract and distinguishes a subjective obligation – to participate in good faith – and an objective obligation – to apply reasonable efforts to come to a settlement in mediation.

[76] In this designing process the disputants will be assisted by the mediator, building on his experience and expertise in the resolution of disputes. See Antaki, *supra* note 75 at 206.

mediation program.[77] During the mediation session, the mediator directs the process;[78] however, the disputants have the freedom to reject any particular action of the mediator.[79]

Mediation is marked by its confidentiality.[80] The mediation sessions are attended only by the disputants and the mediator.[81] Statements and positions taken by the disputants in the course of mediation remain by and large[82] confidential.[83] Mediation proceedings are not

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[77] Even established mediation rules, *e.g.*, the "AAA Rules", *supra* note 29 have to be implemented in the mediation agreement between the disputants to become effective. Cf. the "AAA Rules", *supra* note 29:

> "1. *Agreement of Parties.* Whenever, by provision in an employment dispute resolution program, or by separate submission, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (hereinafter AAA) or under these rules, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement."

[78] The procedural activities of the mediator and their influence on the dispute are discussed in Section 5. a., below.

[79] In practice, this veto-power of the disputants does not play a significant role. The mediator conducts the process with a certain degree of authority, derived from his (perceived) experience and expertise in the resolution of disputes.

[80] Folberg and Taylor, *supra* note 8 at 265 see confidentiality as a prerequisite of the success of mediation. See also Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 181; Antaki, *supra* note 75 at 210 – 213.

[81] The "AAA Rules", *supra* note 29 exclude the public from mediation sessions unless the disputants and the mediator agree otherwise:

> "11. *Privacy.* Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator."

Rogers & McEwen, *Mediation*, *supra* note 8 at 8 approve this privacy as a welcome absence of outside disturbance: "No robes, stenographers, court officers, news reporters, or public observers intrude upon the private session."

Cf. also the "AAA Rules", *supra* note 29:

> "11. *Privacy.* Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator."

For a discussion of the participation in mediation see Section 3., below.

[82] Rogers & McEwen, *Mediation*, *supra* note 8 at 139 discuss cases in which the public may have a right of access to a mediation session or to mediation documents. In principle, however, mediation between private parties remains inaccessible for the public.

[83] Cf. the "AAA Rules", *supra* note 29:

> "12. *Confidentiality.* Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.
>
> The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding
>
> a. views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
> b. admissions made by another party in the course of the mediation proceedings;

recorded,[84] and neither the outcomes nor the rationales leading to a settlement are generally communicated to the public.[85]

Increasingly, mediation is ordered or operated by public institutions.[86] The private character of such mandatory mediation is problematic. Mandatory mediation generally follows the principles of voluntary mediation;[87] differences follow from the public initiation and control of the process. Mandatory mediation is initiated by a public official,[88] who also establishes the procedural rules.[89] The mediation order or program

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c. proposals made or views expressed by the mediator; or
d. the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator."

Cf. also the "CPR Procedures", *supra* note 4:

"*(h) Confidentiality.* The entire mediation process is confidential, except for the fact that the process has taken place. Unless otherwise agreed among the parties or required by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding, except that settlement terms may be disclosed in an action to enforce compliance therewith."

Bond, *supra* note 6 at 18 suggests the following clause for a contract providing for the mediation of sexual harassment disputes: "The mediation sessions are entirely confidential. No information about or from the mediation process is to be disclosed by the mediator or any party to the mediation. Each party will sign a confidentiality agreement prior to the commencement of the first mediation session."

In the United States, the confidentiality of statements, positions, and documents produced in mediation is to a great extent legally protected. See the survey of mediation confidentiality laws in Rogers & McEwen, *Mediation*, *supra* note 8 at 243 (Appendix A).

[84] Cf. the "AAA Rules", *supra* note 29:

"13. *No Stenographic Record.* There shall be no stenographic record of the mediation process."

[85] Brunet, *supra* note 69 at 13. Silver, *supra* note 16 at 499 – 508 describes and discusses ADR procedures employed by federal agencies in the United States charged with the enforcement of civil rights, *inter alia*, in employment. Each of these procedures contains mediative elements. According to the categorization in Ellen A. Waldman, "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach" (1997) 48 Hastings L. J. 703 at 750 – 753 [hereinafter Waldman], these procedures employ a "norm-advocating" model of mediation. For a discussion of the role of norms in mediation see Section c., below.

[86] Mediation may be ordered by a court, or laws may require a claimant to participate in mediation conducted by public law enforcement agencies. See the account of how ADR "found its way into the legal system" in Menkel-Meadow, "Pursuing", *supra* note 73 at 13 – 17.

[87] Alfini, *supra* note 75 at 74 concludes from an empirical assessment that the styles of mandatory mediators "apparently are similar to those reported in the mediation literature", *i.e.*, to the styles in private mediation. However, he points out that the mandatory character of mediation impairs the general voluntariness of the process. G. Thomas Eisele, "The Case Against Mandatory Court-Annexed ADR Programs" (1991) 75 Judicature 34 at 36 finds that in court-annexed mediation "coerced settlement is the primary objective, ... despite protests to the contrary."

[88] In court-ordered mediation, the initiator is the ordering judge. Where mediation is mandated by law as a precondition to proceed with adjudication, the initiator of mediation is the legislator: the goal of the

may provide for a report of process and/or the settlement.[90] The outcome may be subject to some kind of judicial review.[91] Mandatory mediation offers the possibility to retain public control over the qualification of the mediator. Therefore, mandatory mediation is characterized by a potentially high degree of public involvement in its organization and operation.[92]

2. Informality

Informality of an institution is defined by the absence of obligatory elements – binding upon an actor through the force of an authoritarian regulation or of a convention or custom – for the proper organization and operation of the institution. An informal dispute resolution process is therefore characterized by a lack of organizational and procedural positive requirements; in other words, the structural (organizational) and procedural design of an informal dispute resolution process is free from regulatory, conventional, or

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disputant submitting his case to the process is to have his case adjudicated. It is the law – and therefore, in effect, the legislator – that compels him to participate in mediation.

[89] The influence of the public official on the mediation process varies in intensity. In order not to hinder a settlement of the case in mediation, the procedural rules remain generally informal, flexible and adjusted to the particular case. However, some administrative agencies have elaborate rules for the processing of complaints, including mediation. See Silver, *supra* note 16 at 514 – 519.

[90] Silver, *supra* note 16 at 514 – 515 reports civil rights enforcement agencies' procedures where mediation is distinct from an investigative process and matters discussed in mediation remain confidential, as well as procedures where mediation is integrated in the investigation and the information acquired in mediation is available for further proceedings.

[91] Rogers & McEwen, *Mediation*, *supra* note 8 at 13; Folberg and Taylor, *supra* note 8 at 245. Judicial control of court-annexed mediation is suggested by Brunet, *supra* note 69 at 53.

[92] However, the process is characterized by the same principles as voluntary mediation. Therefore, the discussion of the procedural features of mediation, although oriented on voluntary mediation, applies generally also to mandatory mediation; differences arising from the public character of mandatory mediation will be indicated.

customary restrictions.[93] Mediation is to a great extent a structurally and procedurally informal process.[94]

Mediation is virtually free from legal regulations of its organizational structure. Neither are there provisions for the institutional form in which a mediation provider can operate. Accordingly, mediation services are offered in a variety of structures, *e.g.*, by private professionals, corporations, or associations. Nor does the law provide internal structural requirements, like bureaucratic or hierarchic configurations.[95] Also, regulations of the organization or internal structure of mediation services on a private level are virtually non-existent.[96]

To a great extent, the operation of mediation is unregulated.[97] There are relatively few legal provisions applying to mediation or related matters.[98] In some areas, however, there

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[93] Richard L. Abel, "Introduction" in Richard L. Abel, ed., *The Politics of Informal Justice. Volume 1: The American Experience* (New York *et al.*: Academic Press, 1982) [hereinafter Abel ed., *Politics*] 1 at 2 describes the informality of legal institutions by "the extent that they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic." These description provides helpful examples for the detection of informality, and can support the rather analytical approach taken in this thesis.

[94] Brunet, *supra* note 69 at 12 describes informality as the "hallmark" of ADR procedures. Rogers & McEwen, *Mediation*, *supra* note 8 at 3 report that in the United States "most states have enacted statutes that encourage or limit mediation and regulate its relationship to litigation. federal statutes also govern mediation procedure. In addition, mediation is increasingly governed by rules of procedure, local rules, standing orders, and court rulings." This increase in formality refers in the first place to mandatory or publicly operated or controlled mediation. However, it may affect private mediation in defining mediation standards and thus generating expectations towards private mediation and influence the general perception of the process.

[95] The situation for mandatory mediation is often different. Frequently, mandatory mediation is operated by providers closely related to state authorities, or even structurally incorporated into them. In these settings, it is the state which designs the legal form and structure and the internal organization; hence, these mediation programs are structurally more formal than their voluntary equivalents. Within the range of mandatory mediation programs, the extent of formality can differ depending on the density and scope of structural requirements.

[96] Organizational regulations could be developed at a non-state level: private mediation associations might regulate the requirements for mediation programs administered by them. These regulations, although not formal in themselves because of the lack of authoritarian imposition, could gain a quasi-formal effect if they were rising to standards on the mediation sector. However, no structural regulation at this level has been reported.

[97] See the discussion of the desirability of regulation with regard to ethics and standards in the use of ADR in general in Menkel-Meadow, "When Disputes", *supra* note 12 at 1911 – 1922.

[98] The existing laws regulate mainly the accountability of mediators and the confidentiality of statements of the disputants made in mediation. See Rogers & McEwen, *Mediation*, *supra* note 8, Appendix B.

is a growing body of self-regulation by mediation providers that can potentially lead to some conventional formality.[99] Mediation providers, or their associations, have developed Codes (or Standards) of Conduct,[100] stating goals and regulating principles for the operation of mediation, advising ethical principles and rules of conduct for mediators, and defining their responsibilities.[101] Furthermore, some mediation associations support the development[102] or operate the administration of mediation programs,[103] supervising these programs as to their compliance with certain programmatic and procedural requirements.[104] However, there is no customary standard for the operation of mediation.[105]

One of the principal features of mediation is its freedom from procedural requirements.[106] There exists no legal or conventional regulation of the mediation process. The mediation process is characterized by general features and procedural phases;[107] these, however, are rooted in functional rather than in normative requirements and can not be considered as formal elements. Generally, the mediator and the disputants are free to design the process

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[99] Folberg and Taylor, *supra* note 8 at 259. Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 518. In my usage, the term "conventional" marks a widespread, or general acceptance of a standard or conduct among the persons involved in mediation.

[100] See, *e.g.*, "Colorado Code" *supra* note 30; "Committee Standards", *supra* note 30.

[101] However, compliance with these regulations is voluntary and not a precondition for providing mediation services; the self-regulations have not acquired conventional or customary force. They do not, therefore, provide a means for an effective control over mediators' conduct or over the result of mediations.

[102] As stated in the AAA "Practical Guide", *supra* note 4 "the American Arbitration Association ... offer[s] guidance in this area in support of efforts by employers to responsibly develop ADR programs to address workplace disputes."

[103] The AAA informs in AAA "Practical Guide", *supra* note 4 that "the Association administers dispute resolution programs which meet the due process standards as outlined in its National Rules for the Resolution of Employment Disputes and the Due Process Protocol. If the Association determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards of the National Rules for the Resolution of Employment Disputes and the Due Process Protocol, the Association will decline to administer cases under that program."

[104] Program supervision provides the association with a certain degree of control over programmatic features, procedural elements, mediator qualification, and potentially even over the quality of mediated settlements. Compliance with these requirements is induced by the desire to benefit from the administrative and reputational advantages of an association-administered mediation program.

[105] For the operation of mandatory mediation, it is its affiliation with the authority of the state that can provide it with a higher level of formality. Mediation goals and principles, mediator conduct and responsibilities may be defined and required by the state. Thus, mandatory mediation programs have to comply with these requirements, and are therefore more formal than voluntary programs.

[106] This is generally promoted as the principal advantage of mediation over other dispute resolution processes. See, *e.g.*, Menkel-Meadow, "When Disputes", *supra* note 12 at 1900.

according to the needs and characteristics of the particular dispute. Moreover, derivation from the procedural design is not disciplined, but rather encouraged because it is considered as supporting the achievement of the objective of mediation.[108] Mediation programs may restrict the range of the mediator's permissible activities[109] and thus establish negative requirements; however, these restrictions do not direct the actual process.[110] Therefore, the mediation process is characterized by virtually unrestricted informality.

The informality of mediation has significant effects on the process and the outcome of a dispute. In this section, I will explain these effects in the context of the determination of a factual basis of a dispute,[111] the representation of the disputants in the dispute by agents,[112] and the application of norms to the mediated agreement.[113]

a. Fact Determination

Most disputes emerge from actual occurrences, *i.e.*, from factual situations.[114] The determination of these facts is essential for the understanding of the dispute and, hence, for its resolution.

For fact determination, mediation structurally relies on the voluntary disclosure of the necessary and relevant information by the disputants.[115] Generally, the disputants are

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[107] For a description of the stages of the mediation process see, *e.g.*, Folberg and Taylor, *supra* note 8 at 38.

[108] As a dispute resolution process, mediation is oriented towards ending the dispute with a settlement. However, the way and the intensity of the pursuit of this goal are influenced by the underlying conceptual objectives of mediation. These different mediation concepts are discussed in Chapter 1, Section B. 4., below.

[109] The facilitative activities of the mediator and their impact on the process and the outcome of mediation are discussed in Chapter 1, Section B. 5. a., below.

[110] Formality is rather characterized by a set of positive requirements than by the prohibition of certain elements. Even where the conduct of the mediator is restricted by prohibitions, he is not required to conduct the mediation process in a certain manner. Therefore, the actual process remains informal.

[111] Section a., below.

[112] Section b., below.

[113] Section c., below.

[114] This is especially true for legal disputes: the remedies provided by the law are attached to (abstractly defined) factual situations. Therefore, to be remedial in law, a claim must be based on an (alleged) factual situation.

expected to take the initiative to provide the facts they perceive as "relevant" for the dispute.[116] No general standard is applied to determine which facts are relevant for the resolution of the dispute.[117] Therefore, the scope of the factual base of the dispute resolution depends on the experience[118] and the initiative[119] of the disputants and/or the mediator. The other side or the mediator may ask for additional fact presentations.[120] However, no disputant can be compelled to provide facts he does not want to present.[121]

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[115] This principle builds on the assumption that the disputants participate in mediation voluntarily and in good faith, or, as Singer, *Settling, supra* note 3 at 20 puts it, that "they trust one another." However, a disputant may use mediation strategically to avoid a trial. In this case the assumption of good faith participation rests on shaky ground, and the dependence on voluntary disclosure may result in incomplete and inadequate fact determination.

[116] Cf. the "AAA Rules", *supra* note 29:

> "9. *Identification of Matters in Dispute.* At least ten (10) days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties.
>
> At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information."

[117] Bond, *supra* note 6 at 17 considers this as the advantage of mediation in respect to fact determination: "The flexibility of the process also renders it especially capable of dealing with ... fact-sensitive disputes."

[118] Dispute experience can affect fact determination positively as well as negatively: Experience with the resolution of disputes similar to the one at hand may improve the adequate assessment of the completeness of the provided information or of the relevance of information to be demanded. On the other hand, disputing experience may also obstruct the adequate fact determination: a disputant may know – *e.g.* by previous involvement in similar disputes – that disclosure of a certain kind of information affects his case negatively, and may for this reason refuse to provide this information.

[119] Even if a disputant considers certain facts as relevant for the dispute, he may hesitate to require the other side to provide the necessary information. The reasons for such hesitation may be various; *e.g.*, a disputant may want to maintain an amiable mediation atmosphere, knowing that required disclosure would anger his opponent. Similarly, a mediator may not ask for full disclosure although he considers the information provided by the disputants as incomplete, in order not to spoil the mediation atmosphere, or even in order to quickly end the dispute.

[120] The "SPIDR Guidelines", *supra* note 30 (Section III) point to the potential importance of adequate representation in obtaining and assessing the necessary information to successfully mediate a dispute: "When disputants are represented, their counsel is responsible for assisting them in obtaining information necessary to make an informed decision. When disputants are unrepresented, however, they may lack access to basic information about their statutory rights, agency procedures, and the mediation process itself."

[121] Section 9. of the "AAA Rules", *supra* note 29 provides that the mediator may "require" the disputants to provide information. However, he does not have the power to compel the disclosure of any information. His only possibility to sanction a refusal by a disputant to disclose information required by the mediator seems to be his withdrawal from the mediation process, potentially resulting in a complete failure of the dispute resolution.

Often, the disputants and/or the mediator will want to resolve the dispute quick and at a low cost. Where the focus is on time and cost efficiency, the necessary thoroughness of factual investigation, required by the complexity of the dispute and the underlying factual situation, may be neglected.[122]

In mediation, the truth of the assertions provided by the disputants is generally assumed. There is neither a requirement to prove facts,[123] nor a standard of proof.[124] Similarly, no structure exists to resolve contradictions in the presentations provided by both sides.[125] Those disagreements remain unresolved;[126] contested assertions – even if they reflect the actual facts – do not enter the factual base on which the dispute will be resolved. Therefore, mediation may lack the mechanisms to assure adequate determination of facts.[127]

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[122] Often it is suggested to mediate disputes on the base of the "essential" facts.

[123] However, the disputants may voluntarily provide proof for their assertions. Tom Arnold, "Vocabulary of ADR Procedures" (1996) 51:1 Disp. Res. J. 60 at 60 (in Section VII d) states that fact determination in mediation is conducted "usually without 'evidence,' though commonly key documents like a contract clause or patent claims are referred to or quoted."

[124] Edelman *et al.*, *supra* note 16 at 520 report findings about the admission of evidence in internal mediation procedures: "Most complaint handlers reported that they generally accepted whatever evidence the parties and witnesses offered, including 'hearsay' evidence."

[125] Edelman *et al.*, *supra* note 16 at 520 – 521 report internal mediators' attitudes towards the burden of proof of facts and conclude that there is no general standard of who has to prove which facts in mediation.

[126] Rogers & McEwen, *Mediation*, *supra* note 8 at 30. The proof presented by one disputant for his assertions may persuade the other side to give up his denial of these assertions. However, where both sides insist on the truth of their contradicting assertions, the contradiction remains with the result that none of the respective assertions can be deemed as reflecting the factual situation.

[127] In contrast, Melvin Aron Eisenberg, "Private Ordering Through Negotiation: Dispute Settlement and Rule-Making" (1976) 89 Harvard L. Rev. 637 at 658 holds the modes of fact determination in informal dispute resolution processes more efficient and reliable, because they are not constrained by the necessity to establish and prove facts to the satisfaction of a "stranger". Moreover, he argues, informal processes offer the possibility to resolve disputes based on a "provisional" or "hypothetical" set of facts. This argumentation may not precisely reflect the reality of disputes. The first argument rests on the assumption that facts are not disputed, a situation that will not generally be found in disputes. The second argument tends to veil the problem. Where a solution is based on an unclear set of facts, a dispute may be ended by a settlement that only covers the conflict, but does not resolve it.

b. Representation

In principle, mediation emphasizes the direct participation of the immediate disputants.[128] However, disputants have the option to participate in mediation under the assistance of a representative.[129] The representative's activities can reach from passive participation as a preparatory advisor in advance of the actual mediation process, to advisory aid during (and possibly attending) the mediation sessions, to active participation – conducting the dispute in place of the actual disputant.[130] Although it is sometimes recommended that representatives are adequately qualified,[131] there are no qualitative requirements for representatives.

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[128] Brunet, *supra* note 69 at 12.

[129] This option is not a necessary element of the process design. However, many mediation programs provide that the disputants can choose to be represented. Cf. "AAA Rules", *supra* note 29:

> "7. *Representation.* Any party may be represented by a person of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA."

Cf. also the "CPR Procedures", *supra* note 4:

> "(b) Representation. Each party may be represented by another person, of whose identity the other party shall be informed promptly. The representative may, but need not be, an attorney. The employer will not be represented by a practicing attorney unless the employee is so represented."

The "Due Process Protocol", *supra* note 30 recommends optional representation for mediation programs:

> "B. *Right of Representation.* 1. *Choice of Representative.* Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc."

The "SPIDR Guidelines", *supra* note 30 (Section III), too, see it as essential to implement the possibility of representation in mediation programs: "Disputants may wish to be accompanied by an attorney, advocate, friend, or family member who can assist them in weighing alternatives and deciding. They should have this right. It will increase the opportunity for them to make informed, voluntary, uncoerced decisions in the mediation process." They recommend giving disputants the possibility of obtaining legal assistance in mediation (Section IV): "Ideally, disputants should have access to advice from legal counsel knowledgeable in employment discrimination law." For the mediation of sexual harassment disputes, Bond, *supra* note 6 at 18, proposes the following clause: "Each party to the mediation is both allowed and encouraged to bring counsel to the mediation sessions. Counsel shall function, however, as advisors rather than advocates."

[130] For a discussion of the ways in which a representative influences the dispute and the settlement see Rogers & McEwen, *Mediation*, *supra* note 8 at 29.

[131] The "Due Process Protocol", *supra* note 30 – implicitly – indicates qualifications which – in the view of the authors – appropriately prepare a person for the representation of others in mediation:

> "B. *Right of Representation.* 1. *Choice of Representative.* ... The mediation and arbitration procedure should ... include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc."

Representation places at the disputant's disposal an increased potential of substantial as well as procedural experience and skills; in addition, it often provides psychological security.[132] Thus it improves the disputant's ability to succeed in the pursuit of his interests – it increases the disputing power of the represented disputant.[133] Not only the fact of being represented directly influences disputing power, but also the kind[134] of representation and its quality[135], *i.e.*, the kind and degree of substantial and disputing experience of the representative. Depending on the original power proportion,[136] qualitative differences in the representation can establish a balance in the disputing power,[137] or disturb it,[138] or increase a power difference.[139] Mediator intervention to rebalance power depends on the mediator's ability to detect imbalances.[140] Because of his

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[132] This psychological aspect is especially important where the participation of the representative in the process is confined to advisory activities; in this setting, the representative serves a control function for the observance of the disputant's interests.

[133] In mediation, the disputing power directly influences the outcome of the dispute. The disputants themselves establish the terms of the settlement; no other person has a significant power to substantially intervene in the process or to control or confirm the settlement; the settlement does not have to be consistent with norms other than the disputants agree upon.

[134] Where representation is confined to advice outside the actual mediation process, the disputant has to rely on his own disputing experience and skills. However, where a representative conducts the dispute in place of the disputant, representation has a prevailing influence on the disputing process.

[135] The quality of representation will often have a significant impact on the cost of representation. Therefore, the disputant who disposes of more resources is likely to be better represented than his counterpart, putting the less wealthy disputant at a disadvantage in the disputing power relation.

[136] The disputants enter the dispute with a certain disputing power in relation to their counterpart. It is this original proportion that is changed by the arrival of representation.

[137] Where the disputing powers are out of balance, unilateral or qualitatively superior representation of the disadvantaged disputant may strengthen his position and thus balance the disputing powers. Brunet, *supra* note 69 at 46 points out that "[t]he introduction of an advocate for the less experienced dispute participant helps to equalize the power and ability distinctions that will inevitably exist."

[138] In cases where a power balance is already established, unilateral or qualitatively different representation will establish differences in disputing power.

[139] Unilateral or qualitatively superior representation of the already advantaged disputant will further strengthen his disputing position, thereby increasing the relative disadvantage of his counterpart.

[140] Even where the mediator detects a balance distortion of the disputing power, the kind and the direction of the his intervention depends on his perception of power imbalance. There are no standards according to which the existence of power inequality can be determined in mediation. The power relation could be assessed against the rules and standards that are applicable to the resolution of the dispute. However, since the disputants themselves create or shape these norms, any distortion of the power balance is likely to be reflected in the normative base of the settlement; these norms can not be a means of detecting imbalances. To detect disturbances of the balance, the mediator will therefore have to refer to other standards that are available to him, *i.e.*, the social norms that shape his thinking and observing. Consequently, the perception of power inequalities, as well as the kind and direction of any intervention to redress a perceived power inequality (*e.g.*, advice for representation), is influenced by the mediator's set of social values, which may or may not represent the values prevailing in the society at large.

restricted competence to intervene in the dispute,[141] the mediator's possibilities of pointing out – or even of balancing – power inequalities are limited.[142] This leaves mediation without strong safeguards against undesired influences of representation on the resolution of the dispute.[143]

c. Norm Orientation

In principle, there are no prescribed rules or criteria (*i.e.*, the norms)[144] with which a mediated agreement must comply.[145] Rather, it is said that the disputants themselves create the norms for their future behaviour,[146] or that they agree on mutually acceptable

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[141] The mediator does not have the power to require one or both disputants to acquire representation, or to prevent one or both disputants from utilizing assistance by a representative. His possibilities to influence the use of representatives are confined to persuading the disputants of his conception of the appropriate participation. If one or both disputants are unwilling to follow his conception, the mediator's last resort is his withdrawal from the dispute resolution. A withdrawal always holds the danger that the dispute eventually remains unresolved.

[142] In principle, differences in the quality of representation can to a certain extent be neutralized by the mediator's facilitation. The mediator may more freely express his own assessment of the dispute, relying on the controlling function of the representatives, or he may advise a disputant to try to find a better agent. But these interventions are likely to be perceived by the disputants or by the mediator himself as exceeding the neutrality and possibly even infringing the principle of impartiality. Therefore, the mediator is likely to refrain from any influence on the quality of the disputants' aids. On the contrary, he may tend to shift the responsibility for the substance of the mediated agreement to the representatives, restricting his substantial intervention more than in cases where the disputants are unaided.

[143] Rachel Yarkon, "Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment" (1997) 2 Harv. Negotiation L. Rev. 165 at 177 – 191 [hereinafter Yarkon] points out that the incentives of an agent to reach a settlement can be counterproductive to the interest of the represented disputant, and discusses factors that influence these incentives. These factors include professional experience and reputation, monetary interests, and client characteristics. Hon. Patricia M. Wald, "Introduction" (1983) 31 UCLA L. Rev. 1 at 3 holds professional interests for more important than monetary interests in influencing a lawyer's attitude towards a particular case.

[144] In contrast to the term "rules" which has a descriptive sense as well as a directive one, the term "norms" focuses on the directive, or guiding, character of principles. It is in this directive sense that George C. Christie, *Law, Norms and Authority* (London: Duckworth, 1982) at 2 states that "norms", in contrast to rules, are characterized by an exclusive "oughtness".

[145] For the role of norms in negotiation, see Roger Fisher, William Ury & Bruce Patton, *Getting To Yes. Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin Books, 1991) at 81 - 94 [hereinafter Fisher *et al.*, *Getting To Yes*].

[146] Fuller, *supra* note 18 at 308 says that "mediation is commonly directed, not towards achieving conformity to norms, but toward the creation of the relevant norms themselves." Waldman, *supra* note 85 at 710 – 723 describes this function as the "norm-generating" model of mediation.

norms according to which their dispute shall be resolved.[147] Accordingly, the nature of the norms that shape a mediated settlement depends mainly on the disputants knowledge,[148] qualification,[149] and disputing power;[150] these rules and standards can be legal or non-legal in nature.

Legal norms generally do not play a prominent role in mediation;[151] rather (if indeed at all), mediation proponents suggest the utilization of "social" or "community" norms, often, however, without further specifying them.[152] Legal standards are seen as merely one possible reference point.[153] Exercising their free choice of norms, the disputants are free to

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[147] Waldman, *supra* note 85 at 727 refers to this constellation as "norm-based mediation". She distinguishes two forms of norm-based mediation: the "norm-educating" (*ibid.* at 727 – 742) and the "norm-advocating" (*ibid.* at 742 – 756) models of mediation.

[148] To base their negotiations on norms, the disputants have be aware of the availability of norms that are applicable to their dispute. Breidenbach, *Mediation*, *supra* note 25 at 105. See also Maute, *supra* note 36 at 521. Waldman, *supra* note 85 at 727 – 731 points out that under the "norm-educating" model of mediation the process itself can be the instrument to inform the disputants of the norms available to apply to their dispute.

[149] The selection of the norms to be applied will also depend on the disputants' ability to work with these norms, *i.e.*, on their qualification in the field from which the norms emerge. *E.g.*, to shape an agreement according to legal norms, it is not only necessary to know that applicable legal norms are available, but the disputants must in most cases also be legally trained to be able to apply these norms correctly.

[150] Where different kinds of norms are available to be applied to a dispute, or where the disputants are also in disagreement as to whether existing norms shall be applied at all, the more powerful disputant will tend to use his power to impose those norms to the negotiations that will likely result in a solution favourable for him. See Breidenbach, *Mediation*, *supra* note 25 at 105.

[151] David M. Trubek, "Turning Away From Law?" (1984) 82 Mich. L. Rev. 824 at 825 goes so far to suggest that "informal justice seems to be the negation of the idea of the rule of law." Susan Silbey & Austin Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject" (1989) 66 Denver U. L. Rev. 437 at 479 point out that mediation "reconceptualize[s] the person from a carrier of rights to a subject with needs and problems". Jaqueline Nolan-Haley, "Court Mediation and the Search for Justice Through Law" (1996) 74 Wash. U. L. Q. 47 at 65 – 76 [hereinafter Nolan-Haley, "Court Mediation"] discusses the special role of law in court-ordered mediation. Here, she argues, "law is still connected very much to the enterprise. Law motivates the choice of court as the forum for resolving disputes; law prompts the claims that are asserted; law determines the legality and enforceability of the outcome" (*ibid.* at 65).

[152] Nolan-Haley, "Court Mediation", *supra* note 151 at 56 states that "instead of law, free-standing normative standards govern in mediation. ... The moral reference point is the self, and individualized notions of fairness, justice, morality, ethics, and culture may trump the values associated with any objective framework provided by law." Edelman *et al.*, *supra* note 16 at 504 – 505 report findings of a prevalence of "the language and logic of therapy and morality ... in the discourse of mediators".

[153] Jaqueline Nolan-Haley, *Alternative Dispute Resolution In A Nutshell* (St. Paul, Minn.: West, 1992) at 83 states that "[t]he primary concern of mediation, however, is not legal rights but shared interests and values; law is one among many choices of values. Legal rules exist simply as a reference point in the mediation process and are not dispositive of the outcome." See also Rogers & McEwen, *Mediation*, *supra* note 8 at 9.

choose to resolve their dispute according to the applicable legal provisions,[154] although it is not likely that they will do so.[155]

Even where the disputants choose a legal standard for the mediated settlement,[156] the application of the law can be problematic. The disputants themselves will often lack the competence to detect the relevant legal provisions and to apply them correctly to their situation. In some cases, the mediator will have the necessary legal skills[157] and experience to help the disputants to shape their agreement according to the law. However, mediator qualification is not necessarily oriented toward legal competence.[158] Legal

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[154] The reason for the selection of law as the guiding norms in mediation – an essentially non-legal process – could be that the disputants see the substance of legal solution as appropriate for their particular dispute, but choose mediation because of its perceived procedural advantages. Brunet, *supra* note 69 at 27 sees law even as a "regular tool of mediation" because "[m]ediators and parties participating in mediation rarely ignore laws that suggest appropriate solutions to their dispute. ... The disputants may be influenced by the obvious policies underlying the legal norms applicable to them or ... a result-oriented disputant may perceive the advantage of clinging to a clear legal norm that would unambiguously dictate a favorable result in traditional litigation."

[155] In mediation the emphasis is on the "needs" and "interests" of the disputants. See, *e.g.*, Craig A. McEwen, "Pursuing Problem-Solving Or Predictive Settlement" (1991) 19 Fla. St. U. L. Rev. 77 at 79. Often the solution of a dispute provided by the applicable law is painted as incompatible with the disputants' needs and interests. Thus a voluntary abandonment of law is promoted by the ideology of mediation. Brunet, *supra* note 69 at 3 points to an "emphasis on the substitution of ... procedures for substantive law." Janet Rifkin, "Mediation From a Feminist Perspective: Promise and Problems" (1984) 2 Law and Inequality 21 at 27 [hereinafter Rifkin] states that (legal) norms may be contradicting the purpose of mediation: "[P]recedents, rules, and a legalized conception of facts are not only irrelevant but constrain the mediator's job of helping the parties to reorient their perception of the problem to the extent that an agreement can be reached".

[156] In this case the disputants choose a "norm-advocating" model of mediation. See Waldman, *supra* note 85 at 742 – 756.

[157] Mediation is often conducted by lawyers or other dispute resolution professionals with legal expertise. *E.g.*, the CPR advertises the qualification of its mediators with their legal training: "The CPR Panels of Distinguished Neutrals are 700 nationally and internationally prominent attorneys, former judges, academics and legally-trained executives available to resolve business and public disputes." Center for Public Resources (CPR), "CPR Panels of Distinguished Neutrals", http://www.cpradr.org/panels.htm (date accessed: March 7th, 1999) [hereinafter CPR "Panels"]. See also Singer, *Settling, supra* note 3 at 22 who suggests that in legal disputes the mediator should have "some substantive knowledge about the subject in controversy."

[158] The "Due Process Protocol", *supra* note 30 recommends that mediators have a certain degree of legal expertise. However, its elaboration on the issue indicates that mediation is often conducted by mediators who lack the recommended degree of legal qualification:

> "C. *Mediator and Arbitrator Qualification*. 1. *Roster Membership*. Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. ... We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and

professionals aiding or representing the disputants can orient a settlement according to the law;[159] however, they may be tempted to do so in a partisan way. All this suggests that even where law compliance is intended, correct application of the law may not necessarily be secured.[160]

Where a non-legal standard is selected by the disputants, legal norms can have an indirect impact on the mediated settlement.[161] In many instances, the law will provide a solution similar to the one suggested by the standards selected by the disputants.[162] Moreover, disputants will often have an idea of what a settlement of the dispute according to legal

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employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise. ...

2. *Training*. The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists. Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process."

[159] The "SPIDR Guidelines", *supra* note 30 (Section IV) acknowledge the importance of legal advice in mediated employment disputes: "Advice from counsel enables claimants and respondents to assess realistically the merits of their complaints and the potential outcome of litigation. Availability of counsel therefore enables claimants and respondents to determine whether and on what terms to settle based on a full understanding of their rights and options. Availability of counsel is the single most important protection against uninformed abandonment of meritorious claims and unwarranted prosecution of meritless claims."

[160] This is especially true in cases where the law requires complicated interpretation; it is less problematic where the application of rules to a clear factual pattern is required.

[161] Because of this impact it is often said that disputants in mediation do not negotiate "in a vacuum; they bargain in the shadow of the law". Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L. J. 950 at 968.

[162] In a democracy, law is the result of a discourse of all social groups. See the discussion of the legitimacy of law *infra* note 273. Therefore, law seldom completely contradicts a majoritarian notion of common sense, custom, or a basic notion of justice.

standards would provide them with; since the claimant (believes that he) can use state compulsion to "get" this outcome, he will not likely agree to a settlement that gives him less that his "legal share". However, the defendant might offer something in exchange for a waiver of the claimant's legal right; in this case, the settlement will not result in law compliance.

3. Participation

A dispute can concern persons in different ways. A person can hold an immediate stake in the dispute: usually, the claimant is immediately interested in having the claimed action realized, whereas the defendant wants to maintain undisturbed control and determinative power over his conduct. The solution to the dispute immediately relates to the claim and to the defense; therefore, claimant and defendant are immediately affected by the dispute. Furthermore, persons can be indirectly involved in a dispute: the conduct of the dispute resolution process and/or the outcome of the dispute (as effective for the disputants) affect the relationship of one or both disputants to a third person, thereby touching this person's interests.[163] Such an affected person therefore holds a stake in the dispute without (necessarily) taking part in the debate.

Participation in mediation is usually confined to the claimant and the defendant (the immediate disputants), and the mediator. The identification of affected persons, the consideration of their interests, and their inclusion in the dispute resolution process depend on the disputants' agreement, and are influenced to a certain degree by the

[163] The relationship of a non-disputant to the defendant-disputant may be similar to the claimant's relation to the defendant; *e.g.*, both the non-disputant and the claimant may be similarly situated employees in the defendant's enterprise. They both may have a similar claim to the same resource controlled by the defendant. In this situation, the resource allocation in the settlement between the claimant and the defendant will affect the availability of the resource to the non-disputant, thereby affecting his interest in this resource.
Also, the defendant's dispute experience is influenced by the claimant (and by the mediator) in the dispute at hand. The defendant's experience with this dispute and the substance of the settlement are likely to affect the way in which the defendant procedurally handles and substantially resolves similar future disputes. Non-disputants in the dispute at hand will potentially be involved in those future disputes. Therefore, they have an interest to influence the behaviour and substantial positions of their opponent in future disputes as well as future outcomes.

mediator's advice.[164] However, the mediator can not compel the disputants to consider the interests of affected persons, or to have affected persons take some active part in the dispute resolution process.

The mediator may suggest the disputants to include affected persons in the mediation, or at least to consider the interests of those persons in the process and in the settlement.[165] However, a broadened range of interests to be considered widens the extent of issues to be resolved, and thus makes it more difficult to find an agreeable solution. Similarly, an increased number of disputants complicates the finding of a solution that is fair and agreeable to all participants in the mediation process.[166] These difficulties pose a disincentive for the mediator to urge the disputants to consider affected persons' interests, or to identify and include affected persons in the dispute resolution process.[167]

There is no requirement or structural device to inform affected persons of the existence and the subject matter of a dispute, or of the existence and the substance of a settlement.[168] Moreover, it is not open affected persons to demand and enforce the consideration of their concerns and interests, or their participation in mediation. Therefore, mediation poses the

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[164] The "AAA Rules", *supra* note 29 leave it to the disputants (and to the mediator, as far as his consent is required) to decide who is considered a stakeholder in the dispute and who will participate in the debate:

> "3. *Request for Mediation.* A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file two copies of the request with the AAA and one copy with every other party to the dispute." ...
>
> "11. *Privacy.* Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator."

[165] The "SPIDR Ethics", *supra* note 30 oblige the mediator to take the interests of affected persons into account. However, they do not provide guidance how to fulfill this obligation:

> "*Unrepresented Interests.* The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgement the needs of parties dictate, to assure that such interests have been considered by the principal parties."

[166] Fuller, *supra* note 18 at 313 explains his opinion that "[t]he dyadic relationship is ... eminently suited to mediation" with the hazards a dispute between more than two persons poses to the neutrality of the mediator. But even where the mediator maintains his neutrality, the difficulty of reaching a consensus grows with the number of persons who have to agree on a single solution. Therefore, the mediator is likely tempted to evade this difficulty in order to succeed with the mediation

[167] Rogers & McEwen, *Mediation*, *supra* note 8 at 183 – 184 report different standards for the mediator to urge the consideration of non-disputants' interests.

[168] Rogers & McEwen, *Mediation*, *supra* note 8 at 237.

danger that the interests of affected persons remain unconsidered in the dispute resolution process and in the final settlement.

4. Negotiation and Settlement Orientation

The mediation process aims to produce an agreement between the disputants that resolves the dispute. However, since the disputants are not obliged to resolve their dispute in mediation, one or both disputants or the mediator may break off the mediation without reaching a settlement.[169] The intensity with which a settlement is pursued depends on the goals that underlie the mediator's efforts or the mediation program.[170] These goals influence the process design and the conduct of the mediator.[171]

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[169] Rogers & McEwen, *Mediation*, *supra* note 8 at 8 state that a mediation session may "conclude with the recognition that further mediation would be unproductive". In contrast, in mandatory mediation the disputants may be subject to a requirement to participate in good faith; noncompliance with this requirement may be sanctioned. *Ibid.* at 50 – 53. The same principle applies where mediation participation is required by a clause in a contract. *Ibid.* at 61 – 65.

[170] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 104 note: "Mediators' strategies vary widely. Some mediators attempt to focus the negotiations on satisfying the vital interests of each party; others focus on legal rights, sometimes providing a neutral assessment of the outcome in court or arbitration. Some encourage the active participations of both lawyers and clients; others exclude either lawyers or clients from the sessions. Some mediators endeavour to maintain neutrality; others deliberately become advocates of a particular outcome or protectors of non-parties' interests." Antaki, *supra* note 75 at 158 – 164 distinguishes some mediator's "*approche limitée du litige*" – oriented mainly towards ending the immediate dispute – from others' "*approche élargie*" which opens the opportunity to foster personal fulfillment of the diputants and social development. *Ibid.* at 166 he identifies a value-conservative "individualist" mediation ideology, and an idealistic "reformist" one that is oriented towards an improvement of social relations. Breidenbach, *Mediation*, *supra* note 25 at 119 identifies 5 main projects of mediation:

- Service Delivery,
- Access To Justice,
- Individual Autonomy,
- Reconciliation,
- Social Transformation.

The following discussion draws on this categorization. It will, however, not deal with the "social transformation project"; this project is promotes mediation as a means for a community to retain social control of community matters. Its ideological concept does not, therefore, apply to mediation between individual disputants.

The discussed projects mark ideal types of mediation goals. In practice, mediation programs or mediators will pursue them in various combinations and to different extents. An analytic categorization is, however, essential to identify and analyze elements and aspects of mediation programs and practices.

[171] Breidenbach, *Mediation*, *supra* note 25 at 114. Merry, *supra* note 26 at 2064 states that "[i]n order to understand disputing or any other process, an observer must get 'inside the heads' of the actors to discover what they think they are doing and what it means to them." For a discussion of mediator conduct and its influence on the mediation see Section 5. a., below.

Where the prevailing purpose of mediation is to bring about a quick and efficient settlement of a specific dispute,[172] the mediator tends to employ strong interventionist techniques in order to bring the disputants to an agreement,[173] without showing a dominant concern for the substance of the settlement. In a mediation that is instituted to provide one or both disputants with "access to justice",[174] the mediator is inclined to insist on a just solution of the dispute.[175] Where the emphasis is on empowerment and autonomous self-determination of the disputants,[176] the mediator will rather exercise his (procedural) influence to enhance the participation of the disputants in the process,[177] and accentuate less the content of the settlement. Similarly, where mediation aims at mutual acknowledgment[178] or even reconciliation of the disputants,[179] the mediator tends to focus on the removal of psychological and communicative – *i.e.*, procedural – obstacles rather than on the substance of the outcome.[180] Consequentially, the intensity of the pressure to

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[172] For the community mediation context, Christine B. Harrington & Sally Engle Merry, "Ideological Production: The Making of Community Mediation" (1988) 22 Law & Society Rev. 709 at 710 [hereinafter Harrington & Merry] refer to the "service delivery" approach; they state as the purpose of a characterization of mediation ideologies "to highlight the fact that visions of community mediation are associated with differing organizational interests, models, and resources."

[173] Breidenbach, *Mediation*, *supra* note 25 at 121.

[174] Proponents of this approach consider mediation as a means to compensate disputants' lacking resources for the access to law; Breidenbach, *Mediation*, *supra* note 25 at 122. Craig A. McEwen, "Differing Visions of Alternative Dispute Resolution and Formal Law" (1986) 12 The Justice System J. 247 at 257 refers to "[t]he pragmatic access to justice vision".

[175] A mediator employing the "access to justice" approach will not promote a settlement if it neglects the substantial fairness of the solution.

[176] Harrington & Merry, *supra* note 172 at 715 and 720 speak of the "personal growth project".

[177] Breidenbach, *Mediation*, *supra* note 25 at 127 points out that the "individual autonomy project" in practice is marked by the attempt of the mediator to strengthen the (power) position of the weaker disputant in order to enable him to act self-determined in a (future) conflict situation. Where the procedural interventions can not establish a power balance, the mediator will consider breaking off the mediation; see Albie M. Davis & Richard A. Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes" (1984) 6 Mediation Q. 17 at 25.

[178] Breidenbach, *Mediation*, *supra* note 25 at 132 notes that the establishment of mutual respect and the acknowledgment of the other side's position and perspective is one step in the direction of reconciliation; he assigns this goal therefore to the reconciliation project.

[179] Fuller, *supra* note 18 at 325 sees in this objective "the main quality of mediation, namely, to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Andrew W. McThenia & Thomas L. Shaffer, "For Reconciliation" (1985) 94 Yale L. J. 1660 derive the legitimacy of the reconciliation goal from religious traditions.

[180] In this project, the purpose of mediation is fulfilled if the settlement indicates reconciliatory steps taken by the disputants. Where the mediator realizes that the differences between the disputants are

settle a dispute, as well as the mediator's concern with the substance of the settlement, depend on the underlying mediation purpose.

The mediator's influence on the negotiations between the disputants varies, according to his facilitative interventions. Intensive interventions can enhance the communication between the disputants; they can establish a power balance, or reinforce an existing power imbalance.[181] Moreover, they open the door for the mediator to substantially influence the settlement.[182] However, where the mediator only sparingly intervenes in the direct negotiations between the disputants, an existing power imbalance tends to be reinforced.[183]

A mediated settlement becomes binding upon the disputants by the force of their consent. In the mediation concept, this assures the fairness of the settlement and induces a high degree of compliance with the settlement terms.[184] However, consent is not a safe indicator for a disputant's free exercise of will; the disputant's agreement may be induced by manipulation,[185] or he may be subject to social pressure to settle.[186] Pressure may stem

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irreconcilable, he is more likely to break off the mediation than to push the disputants to a settlement nevertheless.

[181] The impact of the mediator's interventions on the outcome of mediation are analyzed in Section 5. a., below.

[182] The mediator's influence on the power relationship between the disputants is discussed in Section 5. b., below.

[183] In mandated or publicly controlled mediation, mediators are sometimes required by procedural rules or mediation standards to avoid bargaining imbalances. Rogers & McEwen, *Mediation*, *supra* note 8 at 181 – 183. Similar suggestions are posed for private mediation by non-binding standards of mediation organizations. *Ibid.* at 183.

[184] SPIDR "Mandated Participation", *supra* note 73 at 265: "A party's option to decline settlement provides the primary protection for the fairness of the process. In addition, the freely obtained consent by the parties makes it more likely that their interests will be served by the settlement and that they will voluntarily comply with it."

[185] Manipulation is the exercise of conscious and specific influence on people without their awareness. It is marked by the distortion of information by selections, additions and omissions. Manipulation in mediation can take various forms. A disputant may base his agreement on distorted information provided by his opponent. Or the mediator himself may only communicate information selected according to its potential to foster a mediated settlement. But also hiding the actual goals of the mediator – *e.g.*, to foster social change rather than to solve the individual dispute – manipulates the disputants (Breidenbach, *Mediation*, *supra* note 25 at 159).

[186] Craig A. McEwen, "Note on Mediation Research" in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8, 155 at 155 [hereinafter McEwen, "Note"]. Richard L. Abel, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice" (1981) 9 International Journal of the Sociology of Law 245 at 258 [hereinafter Abel, "Conservative"] notes that "[n]on-coercive procedures

from factors outside the mediation,[187] or it may be exercised in the mediation process itself.[188] Therefore, a disputant's consent to a mediated solution does not in all cases indicate that he perceives the settlement as fair.[189]

The disputants' satisfaction with the outcome is often employed as the measure for the fairness of a settlement.[190] Since the consent of the disputants may be pressured or

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are often backed by implicit coercion: ... The process may itself be the punishment, judging, stigmatizing, and thereby controlling the participants in the dispute".

[187] A disputant may agree to a settlement in order to avoid significant social or economic disadvantages. *E.g.*, an employee may (partly) surrender his claim against his employer because he fears that insistence on his claim could put his continued employment at risk. Herbert M. Kritzer, "Adjudication to Settlement: Shading in the Gray" (1986) 70 Judicature 161 at 165 points to the pressure to settle that stems from the potential of adjudication of the dispute. Rogers & McEwen, *Mediation*, *supra* note 8 at 77 – 79 discuss factors that may pressure disputants into a mediated settlement. These factors include financial risk, delay, public disclosure, disadvantages in post-mediation proceedings, and judicial pressure.

[188] Breidenbach, *Mediation*, *supra* note 25 at 162 points to the social pressure originating in an "ideology of *harmony*" (translation mine, emphasis in original). In Stephan Breidenbach, "Mediation – Komplementäre Konfliktbehandlung durch Vermittlung" in Stephan Breidenbach & Martin (eds.), *Mediation für Juristen* (Köln: Dr. Otto Schmidt, 1997) [hereinafter Breidenbach & Henssler eds.] 1 at 8 he states that "above all, mediation is susceptible to the idea of reconciliation or peacemaking. However, good will turns all too easily into a pressure to harmonize that covers problems and their cause and negates separations instead of including them. The conflict is not settled, but suppressed" (translation mine). In Breidenbach, *Mediation*, *supra* note 25 at 164 he reports an example of a mediation session where the intellectually and linguistically disadvantaged disputant surrendered her actual request under the "pressure of harmony and conformity" (translation mine).
This ideology of harmony tends to be underlined in situations where mediation aims (*inter alia*) at designing rules for the disputants' future relations with each other. Therefore, especially an (over-)emphasis on the preservation or design of an ongoing relationship between the disputants is likely to produce pressure to conform, to settle the dispute in mediation.
Within the mediation process, pressure originates also from the superior disputing power of one disputant. A disputant with little disputing power is likely to yield to this pressure and to (partly) surrender his claims. The mediator, too, can exercise pressure derived from his authority. Antaki, *supra* note 75 at 161 points out that the mediator's threat to withdraw from mediation can push the disputants into a settlement.

[189] Craig A. McEwen & Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent" (1984) 18 Law & Society Rev. 11 at 42 [hereinafter McEwen & Maiman] report disputants' statements about the reasons for agreeing to mediated settlements that they later characterized as unfair. Among these reasons are: expectation of a similarly disadvantageous result in adjudication; perceived bias of the mediator; tiredness of the dispute or desire to end the dispute; partial accomplishment of goals; time pressure to settle; fear of retaliation by subsequently involved judge for refusal to settle. Despite these doubts of the value of consent they find that "[t]he likelihood that mediation defendants would live up to the terms of their agreements was almost twice the likelihood that adjudication defendants would fully meet the obligations imposed on them by the court" (*ibid.*).

[190] See, *e.g.*, Rogers & McEwen, *Mediation*, *supra* note 8 at 234; McEwen & Maiman, *supra* note 189 at 40. Breidenbach, *Mediation*, *supra* note 25 at 190 criticizes this "easy solution" because it ignores the problems of an "objective" evaluation of mediated settlements and, hence, of the mediation process (translations mine).

manipulated, and therefore does not safely indicate their satisfaction, consent can not serve as an indicator of settlement fairness.

5. The Role of the Mediator

The mediator plays a determinative role in mediation. Because of the informality of the process, it is his task to organize and direct the process, to guide the negotiations between the disputants, and to use his influence to bring about a settlement of the dispute. His conception of mediation, his skills and experience, and his promotion of his role to the disputants will be decisive for the success of mediation and for the substance of the mediated settlement.

The mediator is defined as an appropriately qualified[191] impartial and neutral third person[192] who does not have the power to impose a decision on the disputants.[193] This section will explore the mediator's role by expounding on the elements of this definition.

a. Power and Facilitation

In principle, the mediator has no power to impose an outcome.[194] Rather, his task is to facilitate the negotiations between the disputants and to enable them to reach a settlement on their own.[195] However, his activities substantially influence the settlement of the

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[191] See Section c., below.
[192] See Section b., below.
[193] See Section a., below.
[194] Cf. the "AAA Rules", *supra* note 29:

> "10. *Authority of Mediator.* The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.
> The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties."

[195] See Bond, *supra* note 6 at 17 who states that "[t]he mediator's role is to facilitate agreement; ... [t]he power to resolve the dispute resides solely with the parties, not the mediator. ... The mediator will have complete control over the procedure used during the situations".

dispute.[196] Since the mediator does not have the authority to impose a settlement on the disputants, the disputants are under no obligation to adopt the mediator's proposal or to shape their settlement according to his ideas and assessments. However, the mediator's opinions derive a certain persuasive power from the (perceived) expertise and neutrality of the mediator.[197] Therefore, the disputants may be tempted to orient their settlement on the mediator's ideas.[198] This opens the door for the mediator's ideas and values to enter the substance of the dispute settlement.[199]

Mediator interventions vary in intensity.[200] The more intense the intervention, the greater is the mediator's substantial influence on the resolution of the dispute. Already the mere

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[196] John S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (Westbury, N.Y.: The Foundation Press, 1989) at 248 recognize that "the mediator may have an influence on the mediation by his role in helping to define the problem and to consider options for its solution." Breidenbach, *Mediation*, *supra* note 25 at 171 states: "If the mediator's activities had no impact, he would be unnecessary" (translation mine).

[197] Riskin, *supra* note 9 at 25 goes so far to suggest that some mediators "impose solutions ... by virtue of their techniques or ability to affect the disputants in other situations." Breidenbach, *Mediation*, *supra* note 25 at 145 – 148 identifies the sources of the mediator's authority. These include the mediator's general impartiality and neutrality, his personality and charisma, the promotion of his image as an expert, and – in publicly controlled mediation – the promotion of his official mandate.

[198] McEwen, "Note", *supra* note 186 at 155 refers to empirical research showing that disputants "may experience considerable pressure to settle or to follow the mediator's values in shaping the terms of a settlement."

[199] Nancy A. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice; Cumulative Supplement* (Rochester, N.Y.: Lawyers Cooperative, 1990) at 45 [hereinafter Rogers & McEwen, *Supplement*] report findings that mediators actually intervene in an effort to change the dynamics of the process and the result of mediation.

[200] Rogers & McEwen, *Mediation*, *supra* note 8 at 8. Riskin, *supra* note 9 at 26 lists mediator activities "in order, roughly, from the least to the most active:
- urging participants to agree to talk
- helping parties understand mediation process
- carrying messages between parties
- helping parties agree upon agenda
- setting an agenda
- providing a suitable environment for negotiation
- maintaining order
- helping participants understand the problem(s)
- defusing unrealistic expectations
- helping participants develop their own proposals
- helping participants negotiate
- suggesting solutions
- persuading participants to accept a particular solution".

Antaki, *supra* note 75 at 160 – 163 distinguishes "*les médiateurs évaluateurs*" who actively influence the disputants, and "*les médiateurs facilitateurs*" who confine themselves to procedural guidance but refrain from substantial influence.

presence of a mediator can have a catalytic effect[201] on the disputants' behaviour and can bring about a settlement.[202] This effect is increased where the mediator actively coordinates the discussion between the disputants, without, however, commenting on the substance of the dispute.[203] The mediator can refer to facts, rules, and norms, and thus broaden the informational basis of the disputants.[204] He may interpret and "reformulate"[205] statements and positions of the disputants and thus direct the discussion not only

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In this paragraph, I follow the analytical categorization of Breidenbach, *Mediation*, *supra* note 25 at 149, proceeding from the least to the most intensive kind of intervention. In practice, the different interventions may not be as clearly detectable and distinguishable as the categorization suggests. Moreover, the intensity of interventions within a particular level may differ, or an intervention on a lower level may in fact be more intense than one on a higher level (*ibid.* at 157). Nevertheless, the reflections on the intensity of mediator interventions are helpful to detect the mediator's influence on the outcome of the dispute.

[201] Stulberg, *supra* note 68 at 91 describes the effect of the mediator as a "catalyst" on the conduct of the disputants. Fuller, *supra* note 18 at 309 notes that "the mere presence of a third person tends to put the parties on their good behavior".

[202] Breidenbach, *Mediation*, *supra* note 25 at 150.

[203] Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, Mass.: Harvard University Press, 1982) at 218 describes the mediator in this situation as a "nonsubstantive, neutral discussion leader". Fuller, *supra* note 18 at 309 attributes this facilitative effect to the enhancement of communication: "[T]he mediator can direct their verbal exchanges away from recrimination and toward the issues that need to be faced, that by receiving separate and confidential communications from the parties he can gradually bring into the open issues so deep-cutting that the parties themselves had shared a tacit taboo against any discussion of them and that, finally, he can by his management of the interchange demonstrate to the parties that it is possible to discuss divisive issues without either rancor or evasion." Breidenbach, *Mediation*, *supra* note 25 at 151 says that a mediator in this situation merely "determines the procedural course" (translation mine). However, Brown, *supra* note 22 suggest that mediators can decrease the impact of power disparities by controlling the flow of information between the disputants. A change in the power balance is likely to affect the outcome. Thus, the mediator may exercise a substantial influence already at this level.

[204] With interventions of this kind, the mediator employs a "norm-educating" model of mediation. See Waldman, *supra* note 85 at 735 – 738. Breidenbach, *Mediation*, *supra* note 25 at 152 still sees this level of intervention as procedural. However, at this point, the mediator begins to have a significant substantial impact on the outcome of the dispute. The kind of information presented to the parties will be influenced by his own perceptions of relevance to the dispute, as well as by his conceptions of an appropriate solution to the dispute. Similarly, this level of intervention covers also the mediator's request for additional information, as provided, *e.g.*, by the "AAA Rules", *supra* note 29:

> "9. *Identification of Matters in Dispute.* ... At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information."

The mediator's assessment which information is "necessary" and his according quest for this information influences the scope of the facts on the basis of which mediation is conducted. Especially in highly fact-sensitive cases, factual determination may determine the outcome of the dispute. Although the mediator's interventions at this level may appear to be procedural in nature, it is misleading to deny their substantial impact on the settlement.

[205] Breidenbach, *Mediation*, *supra* note 25 at 152 (translation mine). Stulberg, *supra* note 68 at 92 speaks of the mediator as a "translator" of the disputants' proposals. A similar terminology is employed by Rogers & McEwen, *Mediation*, *supra* note 8 at 10.

procedurally, but also substantially.[206] The mediator's personal assessments and opinions may be requested by the parties, or he may provide them on his own initiative.[207] Finally, the mediator may bring forward his own settlement proposal.[208]

The mediator may exercise his substantial influence openly, thereby persuading the disputants of his point of view,[209] or he may hide it, thereby manipulating the

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[206] In his clarifications of the disputants' statements, the mediator emphasizes points that are promising for an agreement and suggests to neglect other issues. Although they might not be prominent at this level of intervention, the mediator's personal assessment of the dispute and his own values and ideas will direct his propositions. With his suggestions he influences the scope and the focus of the discussion. Focusing on one set of issues and neglecting others substantially influences the terms of the dispute settlement. However, Stulberg, *supra* note 68 at 93 denies the substantial influence of the mediator on the settlement even at this level of intervention intensity.

[207] At this intervention level, the mediator acts as an "evaluator" (Breidenbach, *Mediation*, *supra* note 25 at 153) of the disputants' positions. He may point out unrealistic expectations of the disputants and thus take on the role of an "agent of reality" (Folberg and Taylor, *supra* note 8 at 247; Antaki, *supra* note 75 at 160; Stulberg, *supra* note 68 at 93). The disputants are likely to adjust their expectations according to the mediator's assessment of their positions, relying on his (perceived) expertise and neutrality. Thus, the mediator's evaluative actions may narrow gaps between the disputants' expectations and thus open doors for an agreement. However, at this level his substantive influence on the outcome may become determinative. Relying on the mediator's competence, the disputants may substitute his evaluations of their positions for their own assessments; therefore, it may be the mediator's ideas and values that shape the settlement rather than the disputants'.
For his evaluation of the disputants' positions, the mediator will refer to norms. These norms may be the ones that, according to the disputants' initial mediation agreement, shall be determinative for the resolution of the dispute; the mediator's perspective supports the realization of the disputants' expectations. More likely, however, especially where an expectation/position gap between the disputants hinders a settlement, the mediator's evaluation is oriented towards norms that were not contemplated by the disputants at the outset of mediation as authoritative for their settlement. Of course, the appropriation by the disputant of the mediator's assessment according to such additional norms may indicate that the disputant who adjusts his position now agrees to these additional norms. However, since the depreciation of a disputant's position by the mediator strengthens the position of the other disputant, the agreement to those additional norms is likely to be induced by the first disputant's yielding to the increased disputing power of the second disputant, and is therefore not equally voluntary as an initial agreement.

[208] This proposal may originally reflect the position of one disputant (or of both); the disputant may have confided this proposal to the mediator in a separate meeting, or may have indicated it in the discussion. Or the mediator develops and introduces a proposal that reflects his view of the course of the discussion or of the disputants' interests. Finally, the mediator may propose a settlement that complies with his personal ideas and values. This is the most intensive level of mediator intervention. See Breidenbach, *Mediation*, *supra* note 25 at 156.

[209] A precondition for the open exercise of the mediator's influence is that the mediator knows about the implications of his actions. Disclosure of influence, therefore, requires of the mediator a certain degree of rationality and of analysis of his actions, rather than a predominantly intuitive conduct.

disputants.[210] A mediated settlement may also be forced upon one or both disputants by the mediator's exercise of social pressure.

The degree of the mediator's substantial influence on the settlement depends on the respective disputant's ability to discover the influential character of the mediator's interventions, as well as on his ability and power to exploit or resist them.[211] Because of the (perceived) expertise and neutrality of the mediator and his entailed authority the disputants are not likely to reject the mediator's influence.[212]

b. Impartiality and Neutrality[213]

Impartiality, broadly defined as freedom from bias, is one of the basic features of the mediator's role.[214] It requires that the exercise of the mediator's influence be not

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[210] Especially the use of caucuses, *i.e.*, separate meetings with each disputant, makes it possible for the mediator to manipulate the disputants and thus to direct the discussion according to his perception of an appropriate settlement. (Breidenbach, *Mediation*, *supra* note 25 at 159).
Where the mediator does not rationalize the implications of his actions, he might not be aware of his influence on the disputants. However, this situation is similar to conscious and aimed exercise of influence in that the disputants are not aware of the influence the mediator exercises upon them; the unconscious influence of the mediator has a manipulating effect on the disputants.

[211] Breidenbach, *Mediation*, *supra* note 25 at 165.

[212] Breidenbach, *Mediation*, *supra* note 25 at 169. McEwen, "Note", *supra* note 186 at 156 voices "concerns, given some evidence that parties may be persuaded by mediators to accept positions reflecting the mediator's values and that the process itself creates its own momentum and pressures for agreement."

[213] Impartiality and neutrality are two different aspects of the mediator's conduct. However, in the literature as well as in the legal and professional materials, a terminological distinction between impartiality and neutrality can hardly be found; the terms are used synonymously, or other terms – *e.g.*, "conflict of interest" – are used in exchange. Sara Cobb & Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) , 16 Law and Social Inquiry 35 at 42 – 44 report findings that most mediators use the words "impartiality", "equidistance" or "equal" when asked to define neutrality. At 48, they point to the tension between the mediator's detachment required by his impartiality and his proactive involvement required by his role as a facilitator. Thus they distinguish between impartiality on one side, and – on the other side – neutrality as "a practice in discourse" (*ibid.* at 62), in other words, as the facilitative activities of the mediator.

[214] The importance of impartiality is reflected in the detailed procedure designed in the "AAA Rules", *supra* note 29 to prevent a partisan conduct or appearance of the mediator:

> "5. *Qualifications of Mediator.* No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree

determined by personal aspects of the disputants[215] or of a stake of the mediator in the dispute. A partisan mediator is likely to exercise his influence in favour of one disputant.

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as to whether the mediator shall serve, the AAA will appoint another mediator. The AAA is authorized to appoint another mediator if the appointed mediator is unable to serve promptly."

The "Due Process Protocol", *supra* note 30 emphasizes the importance of impartiality of the mediator:

"C. *Mediator and Arbitrator Qualification*. 1. *Roster Membership*. Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process. ...

4. *Conflicts of Interest*. The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties."

The requirement of impartiality is also a basic element in professional conduct codes for mediators; cf. the "Colorado Code" *supra* note 30 at 477:

"*Neutrality*. A mediator should determine and reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual neutrality of the professional in the performance of duties. If the mediator or any one of the major parties feel that the mediator's background will have or has had a potential to bias his or her performance, the mediator should disqualify himself or herself from performing the mediation service.

Impartiality. The mediator is obliged during the performance of professional services to maintain a posture of impartiality toward all involved parties. *Impartiality* is freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties, as opposed to a single party, in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role in the process of dispute resolution" (emphasis in original).

Cf. also the "Committee Standards", *supra* note 30:

"*III. Conflicts of Interest: A Mediator shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.*

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process."

Cf. also the "SPIDR Ethics", *supra* note 30:

"*Responsibilities to the Parties* 1. *Impartiality*. The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

4. *Conflict of Interest*. The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process."

[215] Breidenbach, *Mediation*, *supra* note 25 at 170 does not terminologically distinguish between impartiality and neutrality. He considers the principle of freedom from bias as the undisputed core of neutrality, and

Therefore, an infringement of impartiality is inconsistent with the principle of procedural fairness.

Bias can be induced by a financial or personal interest in the result of the mediation,[216] generated by monetary, psychological, emotional, associational, or authoritative affiliations of the mediator with one of the disputants.[217] The existence of such interests depends on the particular case. In addition, there are structural dangers that the mediator neglects his impartial position because of concerns for his own professional practice.[218] Professional mediators have incentive to favour repeated disputants over occasional disputants.[219] Where the mediator's compensation is paid by one disputant, the mediator might be tempted to favour the paying over the non-paying disputant.[220]

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points out that the perception by the disputants of the mediator's neutrality is equally important to his actual neutrality.
The "SPIDR Guidelines", *supra* note 30 (Section II) emphasize the importance of impartiality. They mark it as "essential to the integrity of the mediation process that mediators must not have a stake in the outcome of a dispute they mediate".

[216] "AAA Rules", *supra* note 29 (Section 5).

[217] "Colorado Code" *supra* note 30 (*Neutrality*) at 477.

[218] Riskin, *supra* note 9 at 25 recognizes that "[m]ost mediators will see their professional advancement enhanced by achieving agreements in cases they mediate."

[219] For many mediators, the practice of dispute resolution is their way to earn a living. As business people – whether self-employed or in employment with a mediation provider – they have to recruit and to hold clients. Repeated disputants, or people who are likely to be involved in (similar) future disputes, tend to choose mediation – and a particular mediator or provider – for the resolution of their future disputes if they were satisfied with their experience with mediation and with the mediator. See James L. Guill & Edward A. Slavin jr., "Rush to Unfairness: The Downside of ADR" (1989) Summer 1989 Judges J. 8 at 12. The satisfaction of a disputant depends to a great extent on his success in the dispute. Consequently, a mediator may try to make mediation a satisfying experience for repeated disputants. In addition, the mediator's familiarity with one disputant may render preconceptions of the disputant's credibility or integrity, which – in a lasting service relationship – tend to support the repeated disputant. On the other hand, a one-time disputant will not generate a significant volume of business for the mediator. Similarly, an occasional disputant cannot influence the mediator's perception of his credibility and integrity in advance of the dispute. For these reasons, the mediator has incentives to intervene in the dispute in favour of the repeated disputant. Since his preference is induced by reasons related to a particular disputant rather than to the substance of the dispute, a mediator's favouring of a repeat disputant over an occasional disputant is rooted in a partisan attitude and infringes the principle of impartiality.

[220] This concern is reflected in the "Due Process Protocol", *supra* note 30:

> "6. *Compensation of the Mediator and Arbitrator.* Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties share therein."

Neutrality is another fundamental principle of the mediator's role.[221] Since the facilitative activities of the mediator do influence the terms of the settlement,[222] the explanation of neutrality as "the absence of impact on outcomes"[223] is misleading.[224] Neutrality is rightly defined by the limits to the mediator's interventionist influence on the dispute.[225] It marks the permissible range of interventions, *i.e.* in effect the degree of substantial influence conceded to the mediator.[226]

Substantial influence may be of equal benefit to both disputants; it is, however, more likely to favour one disputant over the other[227] and to change the relation of disputing power of the disputants.[228] Mediator interventions can be directed to balance an existing

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Where a mediator's conduct is influenced by a desire to please the paying disputant, the mediator permits himself to be guided by a personal stake in the dispute. His acting in this situation is rooted in an infringement of his impartiality.

221 For Breidenbach, *Mediation*, *supra* note 25 at 170, this principle is "as simple as it is vague" (translation mine).

222 See Section a., above.

223 Ronald J. Fisher & Loraleigh Keashly, "Third Party Interventions in Intergroup Conflict: Consultation Is Not Mediation" [1988] Neg. J. 381 at 384. Stulberg, *supra* note 68 at 96 seems o mean the same when he says that "a mediator must be neutral with regard to outcome".

224 Breidenbach, *Mediation*, *supra* note 25 at 171.

225 These limits are determined by the mediator's perception of his role and will vary in content from mediator to mediator. Theoretically, the disputants can define the mediator's neutrality in their mediation agreement. However, often they will adopt the mediation rules suggested by the mediator (relying on his disputing experience and expertise), and thereby accept his conception of admissible mediator intervention. Therefore, the influence of the disputants on the standard of mediator neutrality is limited.
Breidenbach, *Mediation*, *supra* note 25 at 173 points out that the disputants' acceptance of the standard of neutrality requires their prior information about what goals the mediator pursues and about what interventions he thinks are legitimate. The disputants' have to know what kind of interventions they can expect in the mediation process; it is difficult for the them to reject interventions with which they are only confronted in the process.

226 Breidenbach, *Mediation*, *supra* note 25 at 172.

227 The mediator's substantial influence tends to support the position of the disputant whose set of ideas and values is closer to his own, thereby increasing the likelihood of these ideas to prevail in the settlement. This is true for situations in which the disputants' values and ideas differ. Such a difference is very likely in the context of disputes. Where the mediator's and both disputants' ideas and values are congruent – a condition that is probably of limited practical relevance – the mediator's activities tend to support the realization of these ideas in the settlement. Here, however, the ideas and values of persons interested in the dispute, but not participants in the mediation process, may be disregarded.

228 Any mediator intervention relatively favouring one disputant rises at the same time this disputant's disputing power. In effect, the mediator takes the side of this disputant, and the other disputant faces two opponents in the substance of the dispute, one of which is also (perceived as) powerful in procedural matters.
Breidenbach, *Mediation*, *supra* note 25 at 171 points out that the mediator's intervention to influence the power relationship poses the danger that he sides with one disputant, because such intervention is on the edge of being determined by personal aspects of the disputants.

power inequality; however, interventions with this direction pose the danger that the mediator acts in a partisan way, advocating the disadvantaged party, and thereby acting beyond the proper limits of impartial conduct.[229] On the other hand, interventions can intensify an existing imbalance and exploit it in order to reach a settlement,[230] thus in effect favouring the stronger disputant and infringing procedural fairness for the inferior disputant. These dangers to the fairness of the process make it necessary to limit the scope of his interventions, *i.e.*, to define his neutrality.

The determination of the scope of neutrality in a particular mediation is a combination of the mediator's and the disputants' neutrality concepts. The mediator's understanding of his role is largely determined by his ideological background,[231] his professional education,[232] and his resulting perception of the goals of mediation.[233] From this role concept, the mediator derives his concept of neutrality. The disputants may cooperate to find the proper scope of neutrality by bringing in their respective concepts of permissible mediator influence. However, depending on their dispute experience,[234] they are likely to adopt the proposals of the mediator about how he would like to conduct the mediation session.

In reaction to certain factors in the mediation, the mediator will be tempted to expand the scope of his activities beyond the conceded neutrality. Where the admitted interventions

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[229] Breidenbach, *Mediation*, *supra* note 25 at 231 shows that such a protective intervention not only infringes the mediator's status as an impartial third person, but also threatens mediation as a process relying on disputant participation: the stronger disputant – to whose expense the protection of his counterpart goes – will not repeat this experience and will stay away from mediation.

[230] Breidenbach, *Mediation*, *supra* note 25 at 173 points out that it can be very difficult for the inferior disputant to escape the pressure in such a situation.

[231] Breidenbach, *Mediation*, *supra* note 25 at 165.

[232] The mediator's role concept is likely to reflect the concept of mediation that was imparted to the him in his professional training. Thus, *e.g.*, a mediator trained in a program oriented on fast and efficient dispute resolution rather than on the fairness and stability of the mediated agreement, or the fostering of the disputants' autonomy, will tend to apply this approach in his mediation practice, and may emphasize a speedy settlement more than the substance of the outcome, or the development of the terms of an agreement by the disputants themselves.

[233] Breidenbach, *Mediation*, *supra* note 25 at 165.

[234] Repeat disputants potentially have greater dispute experience than an occasional disputants. A skilled repeat disputant may use this experience to suggest interventions that promise to support his position, and thus to influence the definition of mediator neutrality in his favour. In employment disputes, it will mostly be the employer who enjoys this procedural advantage.

are not sufficient to bring about a settlement, he has to decide whether to declare the failure of the mediation, or to apply unconceded means in order to break the impasse. Subject to internal[235] and external[236] pressure, the mediator may be tempted to choose the latter way,[237] thereby infringing his neutrality.

Whether the mediator has to assume a (partial) responsibility for the substantial fairness of a mediated settlement, is a controversial issue.[238] Accountability for the substance of

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[235] Breidenbach, *Mediation*, *supra* note 25 at 167 refers to the "*personally* difficult admission not to have made it this time" (translation mine, emphasis in original).

[236] Breidenbach, *Mediation*, *supra* note 25 at 167 points out that the competition between mediators and mediation programs on the market, as well as the necessity to prove the success of a particular program (*e.g.*, in order to receive funding and continue the program), may tempt mediators to put their effort in achieving a high quota of settlements as a – doubtful – measurement of success.

[237] Breidenbach, *Mediation*, *supra* note 25 at 167 considers "the divergence of demand (role concept) and reality (pressure to succeed, impasse) [as] a latent danger for every mediator" (translation mine). Merry, *supra* note 26 at 2070 points to other factors (mediator routine, "burnout" of mediators) that can bring about a divergence between the original concept of a mediation program and the mediation reality.

[238] See the illustrative fictitious debate between a professor (promoting mediator accountability) and a practitioner (rejecting the accountability claim) in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8, "Note: The Life of the Mediator – To Be or Not to Be (Accountable)", at 171. See also the discussion in Breidenbach, *Mediation*, *supra* note 25 at 174 – 179; Bush, "Efficiency", *supra* note 42.
Propounding mediator accountability, Lawrence Susskind, "Environmental Mediation and the Accountability Problem" (1981) 6 Vt. L. Rev. 1 at 18 suggests (for mediation of environmental disputes) that "mediators ought to accept responsibility for ensuring (1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected; (2) that agreements are as fair and stable as possible, and (3) that agreements reached are interpreted as intended by the community-at-large and set constructive precedents." Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 172 argue that the scope of the applicability of this standard could be extended beyond environmental disputes "to mediation in other contexts." For "public disputes", Susskind & Cruikshank, *supra* note 24 at 150 regard it as "important that [mediators] be willing to accept some responsibility for the fairness, efficiency, wisdom, and stability of the outcomes. This is not inconsistent with the concept of neutrality." *Ibid.* at 164 they state that "[t]he perceived fairness of the outcome, for example, is as much the mediator's responsibility as it is the parties'." Maute, *supra* note 36 at 532 considers accountability and impartiality as consistent because "enhanced responsibility for procedural and substantive fairness is essential to protect public values at risk from private settlement, particularly when the parties are not independently represented by counsel."
In opposition to mediator responsibility for the substance of the settlement, it has been pointed out that accountability would thwart the very purpose of mediation, to bring the disputants to an agreement. It is beyond the functional task and the competence of the mediator to direct his interventions in favour of a particular result or interest. Stulberg, *supra* note 68 at 86 notes that "[i]t is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure". Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 172 argue that therefore, the mediator should be committed to settlement only, and not to a particular interest; otherwise, "the mediator becomes just another negotiator. At that point the mediator is part of the problem, not part of the solution". John P. McCrory, "Environmental Mediation – Another Piece For the Puzzle" (1981) 6 Vt. L. Rev. 49 at 80 [hereinafter McCrory] rejects mediator accountability because "the mediator would have a real stake in the outcome of the dispute because he or she could be sued on the grounds that the settlement was not the best

the outcome requires the mediator to direct his interventions towards a particular content of the settlement, or towards the prevention of a particular result,[239] and thereby widens the boundaries of the mediator's neutrality: fostering a particular result, the mediator will very probably have to favour the position of one disputant over his counterpart's position. Thus, the mediator intervenes in the disputing power relationship. Therefore, the mediator's concern with the fairness of the settlement potentially collides with the principle of impartiality.[240]

c. Qualification

The experience and the skills of the mediator have an important impact on how he conducts mediation. Mediators have experience in how to facilitate dispute resolution (procedural experience). In addition, some mediators emphasize their expertise on the subject field of the dispute (substantive experience).[241]

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available" and "the unrepresented interests which the mediator [would be] responsible for protecting ... are likely to be at odds with those of the participants, including the mediator."
In some legislations (and sometimes confined to particular subject areas), mediators are held accountable by law for certain aspects of the substance of the mediated settlement. See the discussion in Rogers & McEwen, *Mediation*, *supra* note 8 at 186 – 195. See also the list of respective provisions in the United States in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 176 ("Note: Mediator Accountability"). Antaki, *supra* note 75 at 312 – 322 discusses the various legal sources of mediator accountability and of exemptions from mediator liability. The "CPR Procedures", *supra* note 4 provide:

> "*(d) Ground Rules of the Mediation Process.* xii. Neither the mediator nor CPR shall be liable to any party for any act or omission in connection with the mediation or application of the Employment Dispute Mediation Procedure."

[239] Breidenbach, *Mediation*, *supra* note 25 at 174.

[240] But see Susskind & Cruikshank, *supra* note 24 at 150. Folberg and Taylor, *supra* note 8 at 247 summarizes that "[t]here is a difference between being nonpartisan and being unconcerned".

[241] For mediation operated by employment law enforcement agencies, the "SPIDR Guidelines", *supra* note 30 (Section III) consider it essential that mediators have a reasonable degree of procedural and substantive qualification: "An agency should ensure that program mediators are knowledgeable concerning: 1) the mediation process and professional ethics; 2) employment discrimination law; 3) outcomes in typical discrimination cases; and 4) diversity issues. In addition, the agency should ensure that qualifications of mediators are reviewed on an ongoing basis."
The AAA admits into its "Roster of Neutrals" only mediators with "management skills, substantive expertise, commitment, ethics, training and suitability to the regional caseload, ... academic and professional honors which mark them as leaders in their fields. Qualifications include a minimum of ten (10) years of senior level business experience or legal practice, honors and awards indicating leadership in your field, and training and experience in arbitration or other forms of dispute resolution." American Arbitration Association (AAA), "The American Arbitration Association's National Roster of Arbitrators and Mediators", http://www.adr.org/roster/roster_info.html (date accessed: March 6th, 1999).

Procedural experience is an essential qualification for a mediator. Only an experienced mediator will be able to appropriately anticipate and reflect the effect of his facilitation, and therefore direct his interventions in a controlled and responsible way. Moreover, a person with experience in dispute resolution is more likely than a novice mediator to be able to direct the disputants towards a settlement.[242] The kind and the scope of his interventions may be influenced by the way in which the mediator gained his procedural experience.[243]

Whether a mediator should have substantive experience in the dispute matter is controversial.[244] Some mediators are specialized on disputes in a particular field;[245] others do not select their cases according to the subject.[246] It has been argued that specialized knowledge can distract the mediator from the psychological and social issues of the

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[242] Rogers & McEwen, *Mediation*, *supra* note 8 at 28 cite evidence indicating that "mediators with at least some experience tend to settle more cases, either because they know better which cases to accept or are more capable." See also Folberg and Taylor, *supra* note 8 at 15.

[243] How a mediator intervenes in a dispute is largely dependent on his perception of his role as a facilitating neutral. This understanding of his role is likely to reflect the concept of mediation that was imparted to the mediator in his professional training; see Section 4., above.

[244] Rogers & McEwen, *Mediation*, *supra* note 8 at 28 refer to the "heated debate ... on credentials for mediators" and refer to findings that "[o]ther attributes such as ... legal training ... and substantive knowledge of the field may be important to either attorneys or clients, depending on the case, but have not shown to affect settlement rates." For legal disputes, Singer, *Settling*, *supra* note 3 at 22 points out that it might be positive if the mediator has "some substantive knowledge about the subject in controversy." McCrory, *supra* note 238 at 57 states that "[a]s a practical matter, the quality of the mediation effort should be improved where the mediator has at least general knowledge about the subject matter of the dispute and the issues involved." Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 116 refer to findings that matching the mediator's substantive expertise and the substantive nature of the case ... does not improve settlement rates, but ... mediators prefer to handle cases within their areas of expertise." Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harvard L. Rev. 668 at 683 [hereinafter Edwards] summarizes the problem: "There are a number of ADR proponents who appear to believe that a good neutral can resolve any issue without regard to substantive expertise. Our experience with arbitrators and mediators in collective bargaining proves the folly of this notion. The best neutrals are those who understand the field in which they work. Yet, the ADR movement often seeks to replace issue-oriented dispute resolution mechanisms with more generic mechanisms without considering the importance of substantive expertise."

[245] The CPR contends that "[d]isputes in some areas of law are more readily resolved by neutrals who have substantial knowledge of the industry or practice area. For such purpose CPR has established Specialized Panels in these areas: ... Employment". Center for Public Resources (CPR), "CPR Specialized Panels", http://www.cpradr.org/speclpan.htm#_employ (date accessed: March 6th, 1999) [hereinafter "CPR Specialized Panels"]. Similarly, the AAA announces in AAA "Practical Guide", *supra* note 4 that it "has developed a roster of experienced mediators knowledgeable in the employment field. It assists the parties in selecting the right mediator for their dispute".

[246] These mediators contend that only "process expertise" is necessary for effective mediation. See Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 116.

dispute, or that focus on the substantial issues of the dispute may veil the actual social conflict underlying the dispute. However, without substantive experience, the mediator is unlikely to understand the issues in dispute, and the social setting in which the dispute emerged.[247] Therefore, specialized knowledge is an important mediator qualification.[248] On the other hand, the kind of substantive experience and the way in which it was gained, may influence the attitude of the mediator towards the disputants, threatening his neutrality.[249]

Generally, the disputants may select any person as a mediator, regardless of his qualifications. Understanding the importance of dispute resolution training and experience for the successful operation of mediation, the disputants will select the mediator according to his qualifications.[250] However, no formal qualification is required for the practice of mediation;[251] similarly, there is no general qualitative requirement for mediator training and experience.[252] A mediator's qualification can be assessed according to

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[247] Paul Wahrhaftig, "An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States" in Abel ed., *Politics*, *supra* note 93 at 82 marks that "a mediator who knows the parties, their situation, and the environment is better suited to help them resolve their problem."

[248] It enables the mediator to employ the "norm-educating" and "norm-advocating" models of mediation. See Waldman, *supra* note 85 at 727 – 756.

[249] His familiarity with the social setting may lead the mediator to favour one disputant over the other, because he has more understanding for his position: The experience of the mediator will be coloured by the social position in which he gained it. This is especially true for disputes in social environments that are marked by typical power and authority settings (role settings). In such settings, the mediator will often encounter a disputant, occupying his own former social role, with whose concerns and way of thinking he is familiar, and with whom he is therefore likely to identify. *E.g.*, a mediator who draws his experience in the area of employment from his previous work in a management position, is likely to view a dispute between management and an employee from the management point of view, and consequently to give greater weight to the arguments brought forward by the management disputant. This is likely to direct the exercise of his influence (if only unconscious) to the support of the management side rather than the employee, weakening the disputing power of the employee.

[250] See "Committee Standards", *supra* note 30 (Section V).

[251] Folberg and Taylor, *supra* note 8 at 260 for private mediation; Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 518. In contrast, many legislations regulate the qualifications for mediators in publicly administered or supported programs. See Rogers & McEwen, *Mediation*, *supra* note 8 at 184 and at 273 – 291 (Appendix B, "Qualifications of Mediators"). In some legislations there are educational degree requirements for mediators in publicly supported programs. Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 171.

[252] Folberg and Taylor, *supra* note 8 at 261 – 263 point to the absence of licensure and certification regulations and discuss the pros and cons of the enactment of such regulations. See also Goldberg *et al.*, *Dispute Resolution* 1st ed., *supra* note 12 at 520 – 521.

standards developed by established dispute resolution associations;[253] some associations provide rosters of mediators complying with their standards.[254] Dispute resolution institutes provide certifications for the (successful) completion of mediation courses on various levels.[255] However, there exists no standard for the content and quality of those courses.[256]

C. Sources of Disputing Power

It has been shown that the mediator's facilitation can significantly influence the disputing power balance and, as a consequence, the conduct of the disputants in mediation and the substance of the mediated agreement. To employ his facilitative activities in a specific manner, responsibly and according to his own standards of professional conduct, the mediator has to assess the power relationship between the disputants. The correctness of his assessment depends on his ability to identify the sources of the respective power of the disputants.

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[253] See, *e.g.*, the Society of Professionals in Dispute Resolution (SPIDR), "Report of the SPIDR Commission on Qualifications" (1989), excerpt reprinted in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 164 – 171. Bar associations increasingly develop qualification standards for lawyer-mediators, *e.g.*, in family disputes; see, *e.g.*, American Bar Association, "ABA Standards of Practice for Lawyer Mediators in Family Disputes" (1984), reprinted in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 469 – 474.

[254] The AAA has established rosters in different fields, including employment. For the resolution of employment disputes in programs administered by the association, "the AAA offers a national panel of experts – diverse in gender and ethnicity – who have significant employment law experience. ... Recognized for their standing and expertise in their fields, their integrity and their dispute resolution skills, neutrals are nominated to the National Roster of Arbitrators and Mediators of the American Arbitration Association by leaders in their industry or profession." American Arbitration Association (AAA), "A Brief Overview of the American Arbitration Association", http://www.adr.org/overview.html (date accessed: March 6th, 1999). Similarly, the CPR recognizes that "[d]isputes in some areas of law are more readily resolved by neutrals who have substantial knowledge of the industry or practice area. For such purpose CPR has established Specialized Panels in these areas: ... Employment. "CPR Specialized Panels", *supra* note 245. "The CPR Panels of Distinguished Neutrals are 700 nationally and internationally prominent attorneys, former judges, academics and legally-trained executives available to resolve business and public disputes." CPR "Panels", *supra* note 157.

[255] The range of these courses reaches from general introductory courses held by private dispute resolution providers over several days, to graduate university programs in dispute resolution.

[256] McEwen, "Note", *supra* note 186 at 156 states that "the substantial variation in training, format, court supervision, and restraint of mediators in mediation programs" raises concerns because of the substantial influence mediators have on the disputing process and on the outcome.

Disputing power is generated by a complex variety of factors that are very specific to every particular dispute; hence, there is only a very limited possibility to frame general remarks on these factors. It must therefore be sufficient here to identify some of the sources of disputing power that are of typical importance in the context of employment disputes.

The relative disputing power of two disputants in a process depends heavily upon how attractive to each is the option of not reaching agreement in this process[257] or, in other words, on the perceived quality of their respective alternatives to a solution of the dispute in the process at hand.[258] Since this factor is subjective in nature, the disputing power is affected by the correctness of the disputants' assumptions about their best alternatives. The degree of a disputant's access to substantive – *i.e.*, for legal disputes, legal – expertise and the quality of this expertise will affect the appropriateness of the assessment of his position and thereby influence his power in the dispute.[259] In this context also important is a disputant's ability and willingness to take risks[260] and to withstand a delay in the resolution of the dispute.[261] This ability is determined by the special importance of the disputed issue to the disputant,[262] as well as by the availability to the disputant of alternatives to the resources that are affected by the dispute.[263]

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[257] Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 102. Jack B. Weinstein, "Warning: Alternative Dispute Resolution May Be Dangerous to Your Health" (1986) 12 Litigation 5 at 6 [hereinafter Weinstein] refers to "the option of recourse to the courts".

[258] Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 102 call this the "Best Alternative To a Negotiated Agreement (BATNA)".

[259] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160.

[260] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160. Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 102 underscore the importance of a disputant's "Best Alternative To a Negotiated Agreement (BATNA)" which will often be determined by the possible outcome of dispute resolution in another available forum. See also Breidenbach, *Mediation*, *supra* note 25 at 107.

[261] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160. Rogers & McEwen, *Mediation*, *supra* note 8 at 77 refer to the pressure in mediation created by the prospect of the delay of judgment.

[262] Jay Folberg, "Divorce Mediation: Promises and Problems", Paper prepared for the Midwinter Meeting of the ABA Section on Family Law, St. Thomas (1983), excerpt reprinted in Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8, 308 at 309 [hereinafter Folberg, "Divorce"] sees the personal importance of the dispute influenced by the "emotional need for the resolution of the dispute". Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160 points to the "vulnerability to damage from publicity" as a factor for the special economic importance of a dispute for a disputant. Richard L. Abel, "Informalism: A Tactical Equivalent to Law" (1985) 19 Clearinghouse Rev. 375 at 382 [hereinafter Abel, "Informalism"] points out that "publicity is one of the principal weapons of the poor and

A disputant's power is also influenced by his access to disputing experience.[264] He may himself be experienced in this matter, or be supported by an experienced assistant. The quality of the available experience with the mechanisms of the dispute resolution process at hand influences a disputant's degree of control over the process. A high level of experience enables to influence procedure and outcome to the disputant's benefit, and to possibly avoid the procedural dangers for his disputing position.

Another source of disputing power are patterns of dominance[265] in the relationship from which the dispute arises. Dominance is typically generated by a superior power of one party in the basic relationship. Such a power superiority arises where the parties dispose of resources to a different extent that allow them to determine and control the conduct of the other; it can also be drawn from the structural organization of the relationship.[266]

D. Conclusion

It has been shown that mediation is an informal dispute resolution process that operates largely in private and is not subject to public control or coordination in its organization, operation, and procedure; however, some degree of control may be exercised by

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disadvantaged. By appealing to widespread sympathy for the underdog, publicity allows the poor and disadvantaged to transform their weakness into a strength and the strength of their adversaries into a weakness." See also Rogers & McEwen, *Mediation*, *supra* note 8 at 77 – 78; Breidenbach, *Mediation*, *supra* note 25 at 109 – 110.

[263] Folberg, "Divorce", *supra* note 262 at 309 refers to the "desire to avoid the expense and uncertainty of litigation".

[264] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160. Folberg, "Divorce", *supra* note 262 at 309 speaks generally of the "level of experience". Breidenbach, *Mediation*, *supra* note 25 at 110 refers to "strategic-tactical skills" (translation mine) as a source of disputing power.

[265] Folberg, "Divorce", *supra* note 262 at 309.

[266] Bishop, *supra* note 5 at 61. A further source of disputing power is touched upon by Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 183. They point out that a disputant's power can be enhanced by his reference to "external standards of legitimacy" (or "objective criteria", at 83) that support his claim. In their view, accepted standards are likely to persuade the other side of the fairness of a proposed solution, and are capable of getting the other side in a dispute to move off from a position based on the power of will. The reference to such standards makes sense where there is an applicable, mutually accepted standard according to which the dispute can be decided. However, often there will be different, conflicting standards for the solution of a dispute. The reliance on external standards might therefore only shift the dispute to the issue of the appropriate standard. Menkel-Meadow, "Whose Dispute", *supra* note 26 at 2677, footnote 71, admits that she has "always had trouble with Fisher and Ury's notion that negotiators should rely on 'objective criteria'. ... What if the 'objective criteria' are arguable or indeterminate like so

mediation associations or – in the case of mandatory mediation – by the public agency providing or ordering mediation. The process and the outcome usually remain confidential and are not communicated to the public. The participation in mediation is usually confined to the immediate disputants; depending on the process design, they can acquire assistance by an agent of their choice.

The mediator has no power to impose an outcome on the disputants. However, his facilitative interventions are a tool to control the process and the substance of the mediated agreement. Thus an appropriately qualified mediator can direct the disputants towards a certain quality of the settlement, and balance disparities in the disputing powers of the disputants. Despite these opportunities to result in quality settlements, the general lack of public control prevents mediation from offering mechanisms to ensure that power differences between the disputants do not influence the process and the outcome of the dispute, and that disputes involving the interests of persons or groups other than the immediate disputants are operated with adequate participation.

To assess the suitability of mediation for employment disputes from a legal perspective, these findings will be considered in the light of the rationales and functions of the legal rules governing the employment relationship.[267] These rationales and functions will be identified in the following chapter.[268]

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much legal argument?" Controversy in legal discussions shows "that appeals to 'legal principles' do not always successfully conclude or resolve the dispute."

[267] See Chapter 3, below.

[268] See Chapter 2, below.

Chapter 2: Employment Law

The institution of employment is a cornerstone of modern industrial societies. First, employment is the most important instrument of industrial economies. It is the institution in which the biggest part of the gross national product is generated, and through which most members of the society gain their livelihood. Second, employment characterizes the social structure of the community. It is by and large his position in the employment relationship by which an individual's social situation is determined. For the individual, employment is an important way to take part in social interactions and to make his contribution to the maintenance of the society.[269] Third, his employment situation significantly affects the psychological constitution of an individual. Employment is the institution in which employees spend a major part of their lifetime, and an important way for them to satisfy their needs for social interaction.[270] Their satisfaction with their employment situation is therefore determinative for their psychological well-being. Furthermore, the social status assigned by the employment position also influences the individual's psychological situation. In turn, the state of its members' psychological constitution has an important impact on the society's stability and inner peace. For this interdependence of economic, social, and psychological factors that "meet as a man"[271] in employment, the organization of this institution is determinative in the constitution of the society.[272]

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[269] Paul H. Tobias, "Current Trends in Employment Dismissal Law: The Plaintiff's Perspective" (1988) 67 Nebraska L. Rev. 178 at 181 [hereinafter Tobias] states that with the "declining loyalty to home, family, church, neighborhood, and community", employment becomes "the prime source of identity and a major social unit" for employees. For many, employment is "the focus of their lives". A. Edward Aust & Lyse Charette, *The Employment Contract*, 2nd ed. (Cowansville, Que.: Yvon Blais, 1993) at 2 [hereinafter Aust] point to the security of the employees that was found in pre-industrial society mainly "in their family relationships or community. In our industrial society, the employment relationship often provides this security."

[270] Singer, *Settling, supra* note 3 at 98 points out that "[f]rom the employee's perspective, the relationship with employers is the most critical one that most people have with any institution."

[271] Innis M. Christie, Geoffrey John England & W. Brent Cotter, *Employment Law in Canada*, 2nd ed. (Toronto, Ont.: Butterworths, 1993) at xiii [hereinafter Christie *et al.*, *Employment Law*].

[272] David M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston, Ont., and Montréal, Que.: McGill-Queen's University Press, 1987) at 16 [hereinafter Beatty, *Putting*].

Because of this important position of employment in the social fabric, society has a legitimate interest in determining the structure of the employment relationship. The instrument for this determination is the legal organization of employment. Hence, it is through employment law that the principles, values, and goals of the society find their way into the reality of employment.[273]

In the process of the introduction of law, society establishes a balance in the interests of the social groups concerned by the particular law. This balance is determined by the values and goals the society considers appropriate for the situation the law is meant to organize. Accordingly, the legal provisions governing employment reflect the society's values and goals with regard to employment. Almost every employment dispute concerns, beside its immediate issue, the application of these values; their realization may be furthered by the outcome of the dispute, or it may be frustrated. Therefore, the quality of the settlement of a dispute can be measured by the way and the extent in which these values and goals have been realized in the resolution.

To be able to assess the quality of a dispute settlement according to the social values and goals embodied in the legal organization of employment, employment law has to be examined for its underlying rationales. In this chapter this analysis will be made by identifying the philosophical and practical rationales of different elements of employment law. I will first outline an overview of the structure of modern employment law as a

[273] The concept of law as a legitimate expression of the values of the society is based on the basic ideas of the legal theory of scholars like Dworkin, Habermas, and Hart. Although these scholars differ in their explanations of the source of the legitimacy of law, they agree in the result that the society needs law as the means to organize the structure of the social interactions it relies on for its maintenance. Dworkin elucidates law as a way to legitimate the exercise of coercive force in the society. Law is mainly an expression of legitimate exercise of coercive force. See Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1986). Pursuant to the discourse theory of Habermas, on the other hand, law derives its legitimacy from its emergence from democratically backed up discourses. Discourses are the society's instrument to reconcile the interests of the members of the society and thereby to formulate the society's self-interest. Therefore, law is the pursued self-interest of society which needs it in order to maintain its existence. See Jürgen Habermas, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 4th ed. (Frankfurt a. M.: Suhrkamp, 1994). See also Herbert L. H. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), who predicates the concept of legal control upon the communication of law to the governed (*ibid.* at 20 – 25). A brief summary of the theories stressing the importance of law is provided by Brunet, *supra* note 69 at 16.

combination of contractual and regulatory elements.[274] Then I will analyze the general features, rationales and functions of contractual employment law,[275] followed by an analysis of the rationales and functions of employment regulations.[276] The findings provided by this examination will then be applied to the results of the analysis of mediation as a dispute resolution process in the preceding chapter.[277] This combination will provide the basis for the assessment of the suitability of mediation for employment disputes.[278]

A. The Structure of Employment Law

Basis of the modern employment law in western societies is the contract of employment in a capitalist economy. According to the contractual concept – that applies the liberalistic market theory to the area of employment law – employer and employee negotiate freely and, exercising their free will, agree on the conditions of employment. This free interaction of the labour market powers leads to optimal economic efficiency and offers maximum opportunities for both employer and employee to pursue their preferences. Therefore, employment law fundamentally requires the freedom to enter into and to end contracts of employment and determine their content.[279] Restrictions on this liberty through regulations are undesirable in principle and have to be kept at a minimum to guarantee the smooth functioning of the market.[280]

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[274] See Section A., below.
[275] See Section B., below.
[276] See Section C., below.
[277] See Chapter 1, above.
[278] See Chapter 3, below.
[279] Indeed, according to the liberal theory, the freedom of contract is an overriding value in itself, separable from the social reality it may bring about.
[280] This is the *leitmotiv* in the liberalist employment law literature. See, *e.g.*, Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston and Toronto: Little, Brown and Company, 1986) at 307 – 315 [hereinafter Posner, *Analysis*]; Richard A. Epstein, "In Defense of the Contract at Will" (1984) 51 U. Chi. L. Rev. 947 [hereinafter Epstein, "Defense"]; Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass., and London: Harvard University Press, 1992) [hereinafter Epstein, *Forbidden Grounds*]; Gregory S. Crespi, "Market Magic: Can The Invisible Hand Strangle Bigotry?" (1992) 72 B. U. L. Rev. 991.

However, the reality of an unregulated market does not live up to the theorists' promise of the realization of a maximum of preference for everybody.[281] Using his superior power in the labour market, the employer is able to determine the content of contracts mainly at his will; the employee has no other choice than to take the terms dictated by the employer.[282] This power imbalance is seen as undesirable in itself; moreover, it leads to outcomes that are perceived as socially unsatisfactory:[283] the employee's human rights, moral entitlements, and economic needs are likely to be subordinated or even sacrificed to the efficiency and profit interests of the employer. To diminish these negative phenomena, employment is increasingly regulated.[284] As a result, modern employment law is an amalgam of both contractual and regulatory elements.[285]

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281 Hon. A. Leon Higginbotham, "The Priority of Human Rights in Court Reform" (1976) 70 F.R.D. 134 at 150 [hereinafter Higginbotham]. Cass R. Sunstein, "Rights, Minimal Terms, and Solidarity: A Comment" (1984) 51 U. Chi. L. Rev. 1041 at 1048 – 1050 [hereinafter Sunstein] provides a critique of the liberal market theory that underlies contractual employment, showing that the assumptions of this theory are doubtful, and that the theory leaves important consequences unconsidered. For a more detailed discussion of the critique of the consequences of the contractual scheme see Section C. 1., below.

282 The realization of this superiority in power appears to be as old as the law of master and servant itself. As early as at the end of the 18th century, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 3rd ed. (London: W. Strahan and T. Cadell, 1784) at 100 said that "[i]t is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. ... In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate."

283 It was this realization that has initiated protective labour legislation from the beginning on. As early as 1904, Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago, Ill.: Callaghan, 1904) § 299 at 285 [hereinafter Freund] stated that "[o]ur whole economic system is based upon a very wide liberty of dealing and contract, and it is deemed perfectly legitimate to use this liberty for the purpose of securing special advantages over others. The resulting disparity of economic conditions is not, on the whole, regarded as inconsistent with the welfare of society. Yet a different view seems to be taken of this liberty of dealing, where economic superiority is used to dictate oppressive terms, or where a degree of economic power is aimed at that is liable to result in such oppression. The theory of legislative interference seems to be in some cases, that oppression is in itself, like fraud, immoral and a wrong either against the individual affected thereby or against the public at large; in other cases, that the excessive dependence of whole classes of the community threatens, though perhaps only remotely, the social fabric with grave disturbance or ultimate subversion and ruin."

284 Regulation of employment takes two different forms: Collective bargaining regulations purport to strengthen the employees and thereby to improve employment conditions – *i.e.*, bargaining outcomes – by supporting the formation of workers' associations with similar economic and bargaining power as employers and regulating the bargaining process. Substantive regulations, on the other hand, purport to

B. Contractual Employment Law

The contract of employment is the foundation of the legal organization of the employment relationship. Employment governed by a contractual scheme typically shows many common features in different legal systems. The organization of the employment contract in different legislations follows similar rules, and the economic and political conditions in which employment operates are quite homogenous in various modern capitalist societies. Consequentially, although is not uniformly designed in the different legislations, there are general features that mark the core of the contractual scheme. After outlining these features,[286] I will identify the rationale that underlies contractual employment law[287] and describe its function in the reality of employment.[288]

1. General Features

Under a purely contractual scheme, the parties to the employment relationship are free to shape their contract according to their particular needs. However, very often the express terms of the agreement leave important elements of employment unmentioned. For those "missing" elements, the law suggests suppletive provisions; the parties are deemed to have agreed to these default provisions if their agreement does not state otherwise. According to these default provisions, contractual employment law is generally characterized by the following features: the employment contract can be concluded at the

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improve the bargaining situation of the workers and the employment conditions by imposing – at least in part – the substance of the bargain. "The thinking behind substantive regulation is straightforward: because of inequality of bargaining power the outcome of the bargain is unfair, and we remedy this by regulating the outcome." Labour Law Casebook Group, *Labour and Employment Law. Cases, Materials and Commentary*, 6th ed. (Kingston, Ont.: Industrial Relations Centre, Queen's University at Kingston, 1997) at 59. This exposition deals only with non-union employment. Therefore, the discussion will only cover substantive regulations.

[285] Aust, *supra* note 269 at 2 and 29 – 31; Robert Bonhomme, Clément Gascon & Laurent Lesage, *The Employment Contract under the Civil Code of Québec* (Cowansville: Yvon Blais, 1994) at 13 – 18. Richard A. Epstein & Jeffrey Paul, "Introduction" (1984) 51 U. Chi. L. Rev. 945 at 945 – 946. Charles A. Sullivan, Deborah A. Calloway & Michael J. Zimmer, *Cases and Materials on Employment Law* (Boston *et al.*: Little, Brown and Company, 1993) at xliv [hereinafter Sullivan *et al.*] speak of a "crazy-quilt of regulation and laissez faire".

[286] See Section 1., below.

[287] See Section 2., below.

[288] See Section 3., below.

free will of both parties and terminated at the free will of either party; the kind and amount of work to be done, as well as the remuneration, are determined in the agreement between the employment parties; it is the right and the responsibility of the employer to determine the organization of work and of the enterprise.

2. Rationale – The Unitary Perspective

Contractual employment law is governed by a perspective that sees employee and employer as a team jointly striving for maximal efficiency of the enterprise, as well as of the society as a whole.[289] Maximal efficiency will allow the employer to maximize his profits; the employee will benefit from the success of the enterprise with job security and potentially higher remuneration. Emphasizing the common economic interest, this perspective subordinates any conflicting aspects of the workplace relationship to the efficiency goal. It entrusts the employer with the authority to design the way in which the efficiency goal is pursued and to take the functional measures to achieve this goal.

This perspective has been more obviously reflected by the employment law in its formative years in the late nineteenth and early twentieth centuries than it is today. Whereas in the early law of master and servant the employee was completely subordinated to the employer in all matters related to the job,[290] modern contractual employment law is increasingly influenced by the prevailing standards of personnel practice to grant greater recognition to the employee's interests.[291] The employer's prerogatives are not unfettered; rather, he is expected to act in the manner of the paternalistic "enlightened despot"[292] towards his employees.

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[289] Christie *et al.*, *Employment Law*, *supra* note 271 at 173 call this view the "unitary" perspective. Geoffrey John England, "Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1995) 20 Queen's L. J. 557 at 558 [hereinafter England, "Recent"] speaks of the "efficiency paradigm".

[290] For historical expositions of the common law of employment, see Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (New York *et al.*: Greenwood Press, 1989); Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350 - 1870* (Chapell Hill, N.C., and London: University of North Carolina Press, 1991).

[291] Christie *et al.*, *Employment Law*, *supra* note 271 at 173.

[292] *Ibid.* at 176.

Nevertheless, this perspective still dominates the law of the employment contract. The employer's authoritative position is reflected in the terms of the contract as well as in the way the employment relationship functions in reality. For the vast majority of workers, the terms of their employment are offered by the employer on a "take it or leave it" basis. The employee is subordinated to the employer's command in areas such as work assignments, hours of work, job performance standards etc. and is thus expected to follow orders for the good of the organization as determined by the employer.[293] Also, the employer may dismiss the worker if this would increase the efficiency of the enterprise.[294]

3. Function

According to its proponents, contractual employment law yields desirable results in the pursuit of an optimum of efficiency.[295] The employer will hire those workers needed for an efficient operation of the enterprise. The allocation of the organization of work and enterprise to the owner of capital (and of the result of the work) gives the economic incentive to make the most efficient use of the invested capital. Complemented by the subordination of the employee to the employer's orders, this allocation provides the necessary flexibility to react to the changing market conditions. Termination at the employer's will allows to downsize or exchange the workforce if economically

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[293] *Ibid.* at 174.

[294] Contractual employment may, of course, be terminated for other reasons as well, or even for no reason. However, the termination for economic reasons is of special relevance under the unitary perspective because under this view employment decisions are determined mainly by economic considerations.
It is true that, in principle, the employment relationship may be terminated by both parties at will. Allowing the employee to quit at will may seem to set the personal interests of the employee above the efficiency goal of the enterprise. However, in the reality of competitive labour markets the employer usually does not suffer significant economic losses by the quitting of one of his employees because he can replace him relatively easily. Furthermore, an employee will usually quit only if he expects to find or has found another employment, thus continuing to contribute to the efficiency goal of the society. On the other hand, a termination of employment by the employer often dismisses the worker into unemployment, subordinating his interests to the efficiency goal of the enterprise.

[295] Richard A. Posner, *Overcoming Law* (Cambridge, Mass., and London: Harvard University Press, 1995) at 308 believes that "a free market institution as persistent and widespread as employment at will is presumtively more efficient than an alternative imposed by government would be." See the summary of the economic defense of contractual employment in Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Mass., and London, England: Harvard University Press, 1990) at 59 – 61[hereinafter Weiler].

appropriate;[296] in case of termination at the employee's will the employer will find a new employee on the competitive labour market.[297] The resulting maximum of efficiency of the single enterprise will, in competition with other enterprises on a free market, lead to maximal efficiency of the society at large.

Being primarily concerned with the efficiency of the enterprise, unregulated employment law does not aim at a change of other social conditions; as far as social effects exist, they are seen as justified by the strive for efficiency. Thus the power balance between employer and employee established by the contractual scheme is seen as appropriate,[298] as is the protection of the human rights of the employee,[299] because they result from the

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[296] Tobias, *supra* note 269 at 179.

[297] Posner, *Analysis*, *supra* note 280 at 306; Weiler, *supra* note 295 at 62. Sherwin Rosen, "Commentary: *In Defense of the Contract at Will*" (1984) 51 U. Chi. L. Rev. 983 derives the economic desirability of at-will contracts from their potential to minimize transaction costs (*ibid.* at 984 – 985) and from their flexibility that enables both parties to maximize their gains from the contract (*ibid.* at 983).

[298] Harry J. Glasbeek, "Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life" in Geoffrey John England (ed.): *Essays in Labour Relations Law. Papers Presented at the Conference on Government and Labour Relations: The Death of Voluntarism* (Don Mills, Ont.: CCH Canadian, 1986) [hereinafter England ed., *Essays*] at 64 [hereinafter Glasbeek]. The argument is that free labor market will tend to balance the power between the market parties: Both employer and employee will enter a contract of employment out of their free choice, because out of the range of means to gain a livelihood they prefer the institution of employment. The employer chooses the risks and chances of capital investment over the relative security of employment; the employee takes the reverse choice. The terms of the contract will reflect the parties' material and immaterial preferences; exercising free choice, no party will agree to be exploited by the other. Termination at either will allows them to realize their respective preferences; in case of termination at the other party's will each of them will be able to enter into a new contract on the competitive job and labour market. Epstein, "Defense", *supra* note 280 at 973 concludes that in reality a power imbalance does not exist: "Indeed if such an inequality did govern the employment relationship, we should expect to see conditions that exist in no labor market. Wages should be driven to zero, ... the employee will be bound for a term while the employer ... retains the power to terminate at will. Yet in practice we observe both positive wages and employees with the right to quit at will." Consequentially, the employer's exercise of his superior market power is traditionally not considered as economic duress in contract law. See John P. Dawson, "Economic Duress – An Essay in Perspective" (1947) 45 Michigan. L. Rev. 253 at 287 – 288. See also Robert L. Hale, "Bargaining, Duress, and Economic Liberty" (1943) 43 Columbia L. Rev. 603.

[299] Free contractual employment law will create a setting in which each party can exercise his individual rights to the greatest possible extent: Each party will naturally prefer to maximize his possibility to exercise his rights. He will choose an employment setting which tends to offer him the greatest opportunity to realize this preference. If his employment relationship does not satisfy his desire to exercise his rights to the extent he wishes, he will quit and choose a more desirable employment relationship; a competitive labor and job market will provide this possibility. His stay in a particular employment relationship indicates that his preferences are realized to the greatest possible extent. For the example of health and safety, this argument is concisely explained by Tucker, Eric, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in England ed., *Essays*, *supra* note 298 at 22.

realization of preferences according to the free will of the contracting parties.[300] Contractual employment law will support the tendency of a free market to attain a state of just distribution of opportunities and resources in the society at large, or social justice.[301] It leads also to an appropriate state of human relations.[302]

C. Employment Regulations

Whereas market theory promises a world of efficiency and well-being as the result of the free play of the market forces with an unrestricted contractual employment law, the social

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[300] Sunstein, *supra* note 281 at 1046. Indeed, already the choice of employment as the means to gain one's livelihood is explained by market theorists as a realization of preferences and avoidance of risks. *E.g.*, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 255 states that employees choose to be employed because they do not wish to bear entrepreneurial risks, and continues at 256: "Often people who do not wish to bear risks feel entitled to rewards from those who do and win; yet these same people do not feel obligated to help out by sharing the losses of those who bear risks and lose. ... Why do some feel they may stand back to see whose ventures turn out well (by *hindsight* determine who has survived the risks and run profitably) and then claim a share of the success; though they do not feel they must bear the losses if things turn out poorly, or feel that if they wish to share in the profits or the control of the enterprise, they should invest and run the risks also?" (emphasis in original).

[301] According to liberal market theory, social justice is realized by a distribution of resources according to the result of each individual's preferences. Samuel Estreicher & Michael C. Harper, *Cases and Materials on The Law Governing the Employment Relationship*, 2nd ed. (St. Paul, Minn.: West, 1992) at 2 [hereinafter Estreicher & Harper] point out that the market model "defines social welfare as the aggregation of individual welfare decisions". A free market, it is argued, necessarily leads to such a distribution. *Ibid.* at 2: "It is then argued that, given any particular distribution of wealth, human satisfaction can be maximized by permitting unregulated free trading." Inequalities are considered as just because they are the result of the free exercise of choice and therefore reflect persons' different preferences. The market principle inherently provides unrestricted freedom for all. Therefore, each member of society has the same opportunities to use his freedom. Discrimination imposes unnecessary costs to the discriminator and hence will naturally be turned down by market forces. See Richard A. Posner, *The Economics of Justice* (Cambridge, Mass., and London: Harvard University Press, 1981) at 352; Milton Friedman, *Capitalism and Freedom* (Chicago and London: University of Chicago Press, 1962) at 108 – 110; Kenneth Arrow, "The Theory of Discrimination" in: Orley Ashenfelter & Albert Rees (eds.), *Discrimination in Labor Markets* (Princeton, N.J.: Princeton University Press, 1973) at 10 and 23; Epstein, *Forbidden Grounds*, *supra* note 280 at 9. Moreover, regulation of the employment relationship is seen as incapable of leading to an increase of wealth in the society and to a just distribution of resources. See, *e.g.*, Epstein, "Defense", *supra* note 280 at 977 – 979; Steven L. Willborn, "Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism" (1988) 67 Nebraska L. Rev. 101 at 114 – 115 [hereinafter Willborn].

[302] According to the liberal argument, due to the fact that people naturally prefer happiness over unhappiness, under free contractual employment law the employment relationship will increasingly be characterized by amenable human relations between employee and employer as well as within the workforce, because all market participants will, by choosing the respective employment, try to maximize their happiness. This positive environment is psychologically valuable for the well-being of each party; at the same time, it tends to increase the efficiency of the enterprise because it improves individual productivity as well as communication within the organization of the enterprise.

reality of unregulated employment was characterized by gross exploitation of the employees by their employers. Utilizing their superior bargaining power on the labour market, employers imposed employment conditions that hardly secured the employees' subsistence level and were perceived as incompatible with both their personal needs and society's responsibility for the well-being of all its members.[303]

Reacting to these shortcomings of free contractual employment law on a free market,[304] the legal framework of employment abandoned the purely contractual concept.[305] Although still fundamentally contractual, employment is characterized by a high density of regulations,[306] protecting the employees' interests and thereby removing important

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[303] Estreicher & Harper, *supra* note 301 at 3 – 5 outline counterarguments to the market model, questioning the applicability of the assumptions underlying this model to the employment relationship, and pointing to general flaws in the economic argument.

[304] David M. Beatty, "Labour is Not a Commodity" in Barry J. Reiter & John Swan, *Studies in Contract Law* (Toronto, Ont.: Butterworths, 1980) [hereinafter Reiter & Swan eds.] 313 at 315 [hereinafter Beatty, "Labour"], arguing for the necessity of the abandonment of the contractual scheme, suggests to evaluate contractual employment law "by how well it reconciles the role of each individual in the society with respect to how his (productive) capacities are to be utilized by and co-ordinated with the need of that society" and assesses it as "institutionally incapable of responding to this underlying tension except in the crudest of ways." He concludes that "the law of contract cannot seriously be regarded, by itself, as an appropriate or effective device to govern this primary social relationship." Katherine Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in Reiter & Swan eds, *supra*, 357 [hereinafter Swinton] argues that contract law, after a substantial revision of the concept of the employment contract, can be the proper forum to address the deplorable social reality that "traditional" contract law has contributed tto bring about.

[305] Weiler, *supra* note 295 at 22 explains the emergence of employment regulations as a political response to the demand of workers for working conditions that they cannot achieve on an unregulated labour market: "There is a sound analytical footing, then, for the feeling of the average career employee that an unfettered labor market will not deliver sufficient protection of the vital interests in adequate wages, benefits, and employment security, a safe and healthy workplace, and fair treatment on the job. ... In our political democracy, the votes of ... workers and their families were likely to elicit some response from the political system. That is why we have observed ... the emergence of ... direct legal regulation of the employment relationship." At 152 – 161 he discusses the advantages and drawbacks of government regulation as an instrument for workplace governance. Similarly, Christie *et al.*, *Employment Law*, *supra* note 271 at 182 see employment regulations – especially those providing employment standards – as based on a perspective that "acknowledge[s] the legitimacy of disputes of interests between employers and their non-unionized employees and seek[s] to temper the abuse of employer power in the resolution of such disputes by means of legislation produced as a result of the free play of competing pressure groups in the legislative forum."

[306] E. Merrick Dodd, "From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts" (1943) 43 Columbia L. Rev. 643 gives a detailed historical survey of labor legislation in England and in the United States from the Fourteenth to the middle of the Twentieth century. The historical development of employment law in the United States is also outlined by Sullivan *et al.*, *supra* note 285 at xxxvii –xliv; Mark A. Rothstein & Lance Liebman, *Cases and Materials on*

parts of the content of the contract from the parties' disposition, and imposing limits on employers' selection of their employees. These regulations are seen as the tools necessary to repair the unsatisfactory outcomes of an unregulated labour market.[307]

In this section these regulations will be analyzed. After outlining the critique of the contractual scheme in light of the actual social results of this scheme,[308] I will turn to an analysis of typical employment regulations.[309]

1. Workplace Reality under the Contractual Scheme

The appropriateness of an unregulated contractual employment law is being challenged on the ground that it does not render an optimum of efficiency[310] and individual achievements; rather, the social reality resulting from it is perceived to have major shortcomings[311] in regard to the balance of power of the employment parties[312] as well as employee rights,[313] social justice,[314] and the human relations in the enterprise.[315]

a. Power Balance

The unrestricted pursuit of individual preferences in a free market leads to inequalities in the distribution of material resources. The unequal allocation of economic and, as a result,

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Employment Law, 3rd ed. (Westbury, N.Y.: Foundation Press, 1994) 13 – 85 [hereinafter Rothstein & Liebman].

[307] Valere Fallon, *The Principles of Social Economy*, transl. by Rev. John L. McNulty, revised and adapted for the United States by Bert C. Goss (New York *et al.*: Benziger Brothers, 1933) at 298, sees employment regulations as a reaction to the unrestricted power play on the labor market: "The renowned words of Lacordaire are ever true: 'Between the strong and the weak, between the rich and the poor, between the master and the servant, it is liberty which oppresses and law which liberates.' From thence have arisen the laws governing labor."

[308] See Section 1., below.

[309] See Section 2., below.

[310] See Section b., below.

[311] Matthew W. Finkin, Alvin L. Goldman & Clyde W. Summers, *Legal Protection for the Individual Employee* (St. Paul, Minn.: West, 1989) at 1 [hereinafter Finkin *et al.*] consider the contractual scheme as questionable for the organization of employment, "not only because it subjects one person to the control of another and deals with human values of sustenance, security and survival, but also because it frequently leads to bargains which are socially unacceptable."

[312] See Section a., below.

[313] See Section c., below.

[314] See Section d., below.

intellectual, and legal resources typically invests the employer with a superior bargaining power.[316] The superiority of the employer's power is especially increased on a job market where demand exceeds supply,[317] and reinforced by the organizational and bureaucratic structure of the enterprise.[318]

This inequality of bargaining power typically results in the creation of forms of oppressive subordination "under the disguise of freely chosen agreements."[319] Relying on employment as his only possibility to gain a livelihood, and being dependent on his job in the face of unemployment, the employee is typically subject to coercion and exploitation

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[315] See Section e., below.

[316] Hugh Collins, "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 Industrial L. J. 1 at 1 [hereinafter Collins] elucidates that "[a]n employer commands superior resources, such as capital, information, and access to legal advice, which both reduce the opportunity costs of not hiring someone and permit an insistence upon control over the terms of the contract. In contrast, the ordinary employee lacks the time and resources to pick and choose between offers of employment and to haggle over the terms." Glasbeek, *supra* note 298 at 62 explains the source of the inequality of bargaining power with the unequal allocation of capital ownership: "The capitalist mode of production is such that an employer needs workers to produce profit from the investment of his capital. The development of contract law as a means by which to satisfy the requirements of a market economy signifies that employers have to bargain with workers as to how to share the yield of the investment. The fact that there are very few owners of the means of production and many 'property-less' persons who need to work, gives employers-to-be a massive advantage in the bargaining process. For productivity to begin, a capitalist must make a decision to invest his capital. He is truly free in that *he does not have to invest if he does not choose to do so*. The potential workers, the non-capitalists, have no equivalent freedom. In order to live (to consume, to reproduce themselves) they must sell the only thing which they can call capital – their labour power. *The ensuing contracts cannot be voluntary ones*. Moreover, workers must wait for, and react to, the capitalist's decision. The nature of the investment, its location, the materials and processes to be used, the duration of the investment, are all decided upon before the workers come forward to sell their labour power" (emphasis in original). However, Wolfgang Zöllner, *Arbeitsrecht*, 2nd ed. (München: C. H. Beck, 1979) at 2 [hereinafter Zöllner] marks this explanation as superficial and refers to the fact that "the contract of employment is not sufficient to protect the interests even in employment relationships in which means of production in the concrete sense are of no importance, as *e.g.* with the musician in an orchestra, or the actor in a traveling group, with the traveling salesman of a wholesaler etc." (translation mine).

[317] Glasbeek, *supra* note 298 at 63, states that "[t]he inherent bargaining advantage [of] the employer is increased even more if workers are forced to compete with each other for the opportunity to sell their labour power."

[318] Collins, *supra* note 316 at 1 explains the effect of the enterprise structure on the power relationship between employer and employee: "An employee normally joins a bureaucratic organization. He is allocated a particular role, which is defined by the rule of the institution. These bureaucratic rules create a hierarchy of ranks rising from the manual worker on the shop floor to the highest echelons of management. Having been assigned his role, the employee then finds himself in a relation of subordination with those above him in the system of ranks. This bureaucratic aspect of subordination arises from the organisational structure rather than from any initial inequality of bargaining power in the market, for it persists even when the employee, either individually or collectively, enjoys strong bargaining leverage."

by the employer. The results of this reality are forms and conditions of employment that are felt incompatible with societal values such as distributive justice, the guarantee of individual dignity and civil rights, or the guarantee of a livelihood for everybody. The inequality of bargaining power, generated by the superior economic power of the employer, is generally seen as the major flaw in the contractual scheme. Accordingly, it is the *leitmotiv* in the critique of contractual employment[320] and the main justification for the regulation of the employment relationship.[321]

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[319] Collins, *supra* note 316 at 1.

[320] Virtually all books on employment law expand on this critique. Lord Kenneth William Wedderburn of Charlton, *The Worker and the Law*, 3rd ed. (London: Sweet & Maxwell, 1986) at 106 recognizes that "[t]he lawyer's model of a freely bargained individual [employment] agreement is misleading. In reality, without collective or statutory intervention, many terms of the 'agreement' are imposed by the more powerful party, the employer, by what Fox has called 'the brute facts of power'. This is one reason for identifying the real social relationship that the law shrouds, in Kahn-Freund's phrase, under the 'indispensable figment' of contract as one involving the subordination of the individual worker." Paul Davies & Mark Freedland , *Kahn-Freund's Labour and the Law*, 3rd ed. (London: Stevens & Sons, 1983) at 18 [hereinafter Davies & Freedland] speak of "the inequality of bargaining power which is inherent and must be inherent in the employment relationship." John R. Commons & John B. Andrews , *Principles of Labor Legislation* (New York and London: Harper & Brothers, Rev. Ed. 1920) at 33 [hereinafter Commons & Andrews] acknowledge the necessity of "strengthening the bargaining power of laborers". Clyde W. Summers, "Labor Law as the Century Turns: A Changing of the Guard" (1988) 67 Nebraska L. Rev. 7 at 7 [hereinafter Summers, "Labor Law"] states: "The premise is that individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment." See also Roger W. Rideout, *Rideout's Principles of Labour Law*, 5th ed. (London: Sweet & Maxwell, 1989) at 19.

[321] Indeed, the balance of bargaining power, or the correction of the results of a power imbalance, has been the prevailing motive for protective regulation of employment in virtually all capitalist systems from the beginning on. Commons & Andrews, *supra* note 320 at 29 state that in the United States "... inequality of bargaining power is a justification under which the state may come to the protection of the weaker party to the bargain. ... [I]nequality of bargaining power has long been a ground for legislative and judicial protection of the weaker party. ... [I]t only needs a recognition of facts to justify labor legislation protecting the weak wage-earner against the more powerful capitalist. Such legislation could be held to deny equal protection of the laws only where the facts showed that both parties were actually equal. But where the parties are unequal (and a public purpose is shown), then the state which refuses to redress the inequality is actually denying to the weaker party the equal protection of the laws." They affirm that "the equality of bargaining power toward which the law of employer and employee is directed is a principle so important for the public benefit that it becomes in itself a public purpose. Many decisions of the courts base the justification of the police power, not merely upon the protection of health, safety and morals, but squarely upon strengthening the bargaining power of laborers." In their standard work on English employment law, Davies & Freedland, *supra* note 320 at 18, consider it as the main object of labour law to be "a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation – legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether – must be seen in this context. It is an attempt to infuse law into a relation of command and subordination." Cf. also Collins,

b. Efficiency

The contractual scheme of employment has proven to support an efficient use of capital in the production process. Although opponents of a purely contractual employment law argue that deviations from the contractual scheme could increase the productivity of the enterprise and the efficiency of the society as a whole,[322] they have not yet brought forward evidence for the economic preferability of a non-contractual system.[323] Therefore,

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supra note 316 at 1: "[The] inequality of bargaining power leads to the creation of forms of oppressive subordination under the disguise of freely chosen agreements. In turn, most of labour law ... granting employees protective rights finds its justification in combating the causes and effects of this form of market domination." Pierre Verge, "Canadian Labour Law: Mirror of the New Realities of Work?" in Janice R. Bellace & Max G. Rood (eds.): *Labour Law at the Crossroads: Changing Employment Relationships. Studies in honour of Benjamin Aaron.* (The Hague *et al.*: Kluwer Law International, 1997) [hereinafter Bellace & Rood eds.] at 236, holds it to be the main aim of Canadian employment laws "to assure the protection of the worker, given the limited and voluntary subjection of his or her will and physical person towards the employer. They also make up for, to varying degrees according to the norm in question, the inherent inferiority of the bargaining power of the worker." Summers, "Labor Law", *supra* note 320 at 7 states that in the late 20th century in the United States "[t]he premise is that individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment. When there is such economic inequality, the function of the law is to protect the weaker party." At 16 he points out that because of the technological and economical developments in the workplace the employee's power inferiority "will continue or become more acute. ... There will be an increased need to protect employees from their helplessness in individual bargaining." In contrast, Zöllner, *supra* note 316 at 2 calls the reference to the inequality in the making of the contract "not more than a metaphor, a result of assessment, by which the underlying reasons are rather disguised" (translation mine).

[322] The allocation of the power to decide how to use the capital exclusively to the employer keeps important intellectual capacities out of the determination of the most efficient use of the resources of the society. Including this intellectual potential into the decision-making process would improve efficiency. Contractual employment law does not provide this possibility and therefore does not render the most efficient results. Moreover, according to the economic theory of scholars like J.M. Keynes, unregulated employment law, in combination with a competitive job market, tends to establish a low wage level. Providing employees as consumers with only little resources, this systems fails to efficiently foster consummation. A high level consummation, however, is necessary to maintain an efficient use of the resources of society. Hence, unregulated employment law does not result in an optimum of efficiency. See John Maynard Keynes, *The General Theory of Employment, Interest and Money* (London: Macmillan, St. Martin's Press, 1936).
Furthermore, the unregulated market is unable to prevent unemployment. Thus it excludes significant parts of the potential workforce from the production of values. Aside from the psychological and socio-political implications, this exclusion is perceived as a waste of resources. Optimal economic efficiency can only be achieved by the efficient use of all resources of the society. Unregulated employment law has turned out to be counterproductive in this regard.

[323] Especially the recent history of economic breakdowns of planned economies has weakened the case of the advocates of employment regulation. Planned economies typically feature an employment law system that heavily relies on non-contractual elements. It is this regulation of employment – as part of the overall government control of the economy – that is held partly responsible by market theorists for the collapse of the economic systems. This argument is not unquestionable, because the economic collapse is not logically linked to employment regulations; rather, there are examples of strong market

the economic arguments against contractual employment do not prevail against the conventional opinion of contractual employment being the better choice in terms of economic efficiency.

Accordingly, employment regulations do not usually draw their justifications from economic arguments. Rather, their rationale is to support non-economic considerations against the superiority of economic reasoning. They do, however, reflect the prevalence of economic ideas in modern societies: Introduced to counterbalance the prevalence of economic arguments, in most cases they ultimately give way to efficiency considerations, because it is the economic interest of the employer that is ultimately decisive for the continuing operation of an enterprise – there is virtually no system in which an employer is required to continue to operate his enterprise in cases where an efficient operation is prevented by employment regulations.

c. Individual Rights and Freedoms of the Employee[324]

In a modern society, every individual is believed to have certain individual rights and freedoms that are essential for his dignified existence as an active member of society.[325] A forced restriction of the exercise of these rights and freedoms is seen as thwarting the efforts of society to guarantee the dignified participation of all individuals in social life.

On a labour market that is governed by an unregulated employment law and thus characterized by a strong power differential between employer and employee, the

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economies that are marked by a significant density of regulatory interventions in the labour market. Nevertheless, it is put forward by proponents of contractual employment law as a warning against government activity in this direction.

[324] The discussion of individual rights and freedoms will focus on the status of the individual worker, irrespective of the status of all other members of the workforce. Ruth Ben-Israel, "From Collective Justice to Individual Justice: Changing Employment Relationships in Israel" in Bellace & Rood eds., *supra* note 321 at 29 [hereinafter Ben-Israel] calls this perspective the "individual justice model".

[325] To these rights and freedoms belong, *e.g.*, the right to a guaranteed minimum livelihood, the right to an uncompromised human dignity, and the right of self-determination. See C. Wilfred Jenks, *Human Rights and International Labour Standards* (London: Steven & Sons, 1960) at 127 [hereinafter Jenks]. Especially the right of self-determination is increasing in importance, influenced by the growing awareness of the psychological and social importance of work and employment for the individual worker. For an exposition of this argument, see Beatty, "Labour", *supra* note 304.

employee is typically forced to trade his individual rights for his livelihood.[326] Possibly explained by market theorists as a question of preference exercise, this situation is seen by the critics of free contractual employment law as an unfree choice under the force of economic coercion, and therefore incompatible with the guarantee of dignity and self-determination for each person; it is the responsibility of society to protect the individual against forced trade-offs of his rights and freedoms.

Moreover, individual rights are considered to be essential for a free and democratic society.[327] The forced waiver of individual rights is therefore perceived as not only undesirable on the individual level, but also as dangerous to the fundamental values of our society.

d. Social Justice[328]

Modern societies draw their justification, *inter alia*, from their promise to establish a satisfactory state of social justice, or more exactly, a desirable distribution of fundamental rights and duties and an appropriate division of advantages from social cooperation by major social institutions, *i.e.*, the principal economic and social arrangements.[329] The organization of employment is an important example among these institutions, because it is situated at the meeting point of economic and social arrangements. It has turned out that, in coalition with the free play of the market forces, unregulated employment establishes and reinforces significant inequalities in regard to both economic wealth and social opportunity. According to our society's self-image, however, inequalities are

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[326] Where employment can be terminated at will of either party, an employer can dismiss an employee if the employee insists in the exercise of his rights and this exercise, from the viewpoint of the employer, interferes with the operation of the business. Confronted with the choice to insist in the exercise of his rights and have his employment terminated by the employer or to maintain his employment and thus secure his livelihood, an employee is likely to give up his fundamental rights in order to maintain his source of income.

[327] Of importance are in this context (beside the rights that guarantee the individual dignity) especially the freedom of expression, the right to vote freely, the right to assemble and similar rights.

[328] The discussion of social justice focuses on the individual status of each and every member of the soceity as well as on the well-being of the society at large. Including the large-scale social situation, it goes beyond the "collective justice model" of Ben-Israel, *supra* note 324 at 29.

[329] This definition of social justice is taken from John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971) at 7 [hereinafter Rawls, *Theory*].

considered to be tolerable if they are to the greatest benefit of the least advantaged members of society.[330] The actual inequalities established by the unregulated system are perceived as extending too far.[331] Unregulated employment law is therefore seen as distorting rather than improving social justice. The only way to realize an adjustment of the distribution of rights, duties, and opportunities to the promise of the society is the enactment and enforcement of regulations with distributive effects.[332]

e. Human Relations

Together with the other employment conditions, human relations in the workplace have an important effect on the economic and non-economic results of employment. An amenable atmosphere between the employee, his employer and his co-employees is likely to increase the employee's satisfaction with his employment situation and therefore his

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[330] See John Rawls, *Justice as Fairness. A Briefer Restatement* (Cambridge, Mass.: Harvard University Press, 1990) at 36 [hereinafter Rawls, *Fairness*] ("the difference principle").

[331] The market tends to increase the wealth of very few people and, at the same time, to increase the number of people who do not dispose of the economic means to reach a minimum standard of living. This is felt to be incompatible with the notion that every individual should have what he needs to live a dignified life. Parallel to the economic shortcomings, the free market did not provide equal social opportunities to each individual, but rather produced (or, at least, tolerated) and reinforced discrimination on various grounds. The least advantaged members of society – those who are discriminated against – are losing even further rather than benefit from a free market. Thus, unregulated employment law proves to be unable to achieve a desired state of social justice in it's economic and non-economic aspects.

[332] Estreicher & Harper, *supra* note 301 at 5. It is perhaps the issue of social justice where proponents of a contractual scheme of employment and advocates of employment regulations most heavily talk at cross purposes. Where the defenders of contractual employment law consider as just a distribution that assigns economic wealth (and, as a result, social opportunities) according to the individual's preferences and his contribution to the economic growth of the society (which typically depends on his given economic potential, his ownership of capital), the proponents of employment regulations point out that such a distributive system would only reinforce the already existing unjust (in their view) allocation of wealth and opportunities. Since the differences are conceptual (or even ideological) in nature, reconciliation of both sides seems to be improbable. Therefore, the justification of employment regulations can not be grounded in an understanding of social justice that is generally recognized, but must necessarily base on the regulation proponents' concept of just distribution.

psychological and even physical well-being[333] and tends to foster the productivity of the enterprise.[334]

The superiority of the economic and structural power of the employer typically exposes the employee to a permanent stress. In order to keep his employment he has to constantly fulfill the expectations of his employer and to restrict the expression of his ideas and emotions about the employment, the employer himself, and sometimes even about issues unrelated to the particular employment.[335] This state of constant pressure tends to establish a workplace atmosphere that is characterized by tension and stress rather than by communication and cooperation.[336] Therefore, contractual employment law does not create the kind of human relations that could foster individual well-being and overall efficiency, but rather countervails the development of an amenable work environment.[337]

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[333] An employee spends a significant part of his life-time at his workplace. Hence, it is especially the workplace atmosphere that influences his overall well-being. Moreover, employment as the means to realize his productive potential is an important factor of an employee's self-image and self-esteem. The sense of satisfaction with this important identification factor tends to establish a positive attitude in general and to his employment in particular.

[334] Human relations affect the productivity of the enterprise in several ways, *e.g.*: First, good human relations in his workplace improve the satisfaction of the employee with his employment and, consequentially, his physical health. A positive state of psychological and physical well-being significantly improves the employee's work performance. Second, in a more amenable atmosphere, an employee is more likely to voice his ideas, concerns and proposals about his employment, enabling the employer to discover problems and reserves in his enterprise and thus to improve its efficient operation. Third, the enterprise's image, notably marked also by a positive workplace atmosphere, can be an important advertising factor, potentially attracting both qualified personnel and other businesses.

[335] It is true that a restriction of expression is part of almost all social conventions. However, there is hardly any other field of social interaction where an expression beyond the conventional restriction can have consequences as far-reaching and existential as they can be in employment.

[336] Moreover, the employment parties do not face equal or similar restrictions, as it is the case in many other social fields. Relying on his economic and structural power, the employer enjoys an almost unrestricted freedom to voice any ideas and emotions towards the employee. This "despotic" power of the employer tends to intensify the stress and tension the employee faces.

[337] The proponents of contractual employment point out that an employee is free to quit an employment with an unsatisfactory workplace atmosphere and to enter a more pleasing one; the human relations in the workplace are just one condition of employment, just a preference that the employee can realize or can trade off against other preferences. A prevailing preference for amenable relations would, in their view, lead to a general improvement of human relations in the workplace. However, the relationship of demand and supply on the existing job market, and the economic and social dependence of the employee on his job, prevent the free exercise of preferences, which is assumed by the market theorists; the employee does not have the free choice to abandon strained human relations for an alternative job with a more amenable atmosphere.

However, in quite the same way as contractual employment law is rather unconcerned with the quality of human relations in the workplace, employment regulations do not aim at the improvement of these relations either. Employment regulations may have side-effects on the workplace atmosphere. But a specific intervention to improve this important condition of employment has yet to be introduced.

2. Typical Employment Regulations

It has been shown that employment governed by a contractual scheme typically shows many common features in different legal systems, because the organization of the employment contract under different laws follows similar rules, and the economic and political conditions in which employment operates are quite homogenous in various modern capitalist societies.[338] Consequentially, the interventionist reaction to the shortcomings of contractual employment law results in employment regulations that are quite similar in different legislations. Every system deals, *inter alia*, with the eradication of discriminatory practices in employment, with the guarantee of a minimum level of employment conditions, or employment standards, and with the protection of the employee from unjust dismissal.

Employment regulations are enacted in order to pursue social goals that are perceived to be important public policies. Departures from the regulatory provisions would thwart the achievement of these social goals and therefore infringe public policy; hence, they are not legally tolerated. Consequentially, regulatory provisions are designed as mandatory minimum provisions. In all legislations, therefore, an agreement that would infringe or undermine employment regulations cannot be legally enforced.[339]

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[338] See Section B., above.

[339] Christie *et al.*, *Employment Law*, *supra* note 271 at 171 emphasizes that "the parties are free to contract for higher benefits than those contained in the legislation, but are precluded from undercutting the statutory minima." In German law, too, the "inalienability" (translation mine) of protective provisions is a fundamental principle; cf. Zöllner, *supra* note 316 at 54 (he refers to the "imperative effect" [translation mine] of protective employment regulations) and Schaub, *supra* note 32 at 167 for legislative provisions, and at 1699 for provisions in collective agreements which, in case of applicability of the collective agreement, have a similar effect to legislative provisions.

This part will identify the rationales of employment regulations by examining typical employment regulations – anti-discrimination,[340] employment standards,[341] and unjust dismissal regulations[342] – as to their general features,[343] their philosophical basis[344] and their actual effects on the employment relationship.[345]

a. Anti-discrimination Regulations

Anti-discrimination regulations are not exclusively found in the employment context. However, they have a special significance in employment, because of the central importance of employment for the economic and social well-being of the employee[346] and for society at large.

(1) General Features

These regulations prohibit discrimination on various grounds. In virtually all modern systems, a discriminatory treatment on the ground of gender is banned, as is discrimination because of race or ethnic origin. Other features that must not be ground for discriminatory treatment include, for example, in different systems: nationality or citizenship, marital status, social origin and conditions, age, religious and/or political convictions, disabilities, and sexual orientation.[347] Often socially valued activities are a banned ground of discrimination.[348]

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[340] See Section a., below.
[341] See Section b., below.
[342] See Section c., below.
[343] The general features of the various employment regulations are outlined in the respective Subsections (1) of the Sections a., b., and c., below.
[344] The philosophical bases, or rationales, of the various employment regulations are discussed in the respective Subsections (2) of the Sections a., b., and c., below.
[345] The discussions of the effects on the reality of employment, or functions, of the various employment regulations are provided in the respective Subsections (3) of the Sections a., b., and c., below.
[346] Jenks, *supra* note 325 at 73 notes this essential importance of anti-discrimination laws in employment: "The elimination of discrimination in respect of employment and occupation represents the application of this basic concept of human equality to the manner in which man gains his daily bread."
[347] See the list of prohibited grounds of discrimination in the Canadian jurisdictions in Christie *et al.*, *Employment Law*, *supra* note 271 at 70. See also the exposition of U.S. Federal anti-discrimination laws in Silver, *supra* note 16 at 485 – 493.
[348] See Estreicher & Harper, *supra* note 301 at 468 – 620.

The prohibition of discrimination applies generally to all stages of the employment relationship. The personal features marked by the prohibited grounds may not be take into account in decisions about hiring, promoting and dismissing employees, and may not be the basis for unequal treatment in the operation of employment.[349]

A special place take provisions prohibiting sexual harassment. Whereas the protection from discrimination through other anti-discrimination provisions is dependent on an employment decision that was not free from irrelevant considerations, the function of sexual harassment prohibitions goes further than this: the provisions also protect the personal integrity of the employee as an independent value. Their infringement can be remedied even if there is no effect on the carrying out of the employment.[350]

(2) Rationale – The Rights Perspective

Employment regulations prohibiting discrimination are determined by a perspective that sees the individual employee as having certain inalienable fundamental human rights that must be guaranteed in the workplace. Only with those rights ensured can the system of work organization be considered "just" and therefore worthy of support.[351]

This perspective grows from a philosophical movement[352] that defines social justice as the fair distribution of rights, duties, and advantages from social cooperation in society,

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[349] This applies in principle with regard to all conditions of employment, *e.g.*, amount and payment of remuneration (equal pay provisions), amount and allocation of working hours, tasks to be performed, leave and vacations, working dresses, *etc.*. See Arjun Prakash Aggarwal, *Sex Discrimination: Employment Law and Practices* (Toronto, Ont., and Vancouver, B.C.: Butterworths, 1994) at 36 [hereinafter Aggarwal].

[350] Bond, *supra* note 6 at 15 notes that sexual harassment can be remedied in two strands: "quid pro quo harassment", which occurs "when employment benefits are contingent to submission to sexual requests", and "hostile environment harassment" by offensive or unwelcome conduct of a sexual nature without effects on employment decisions. Hostile environment discrimination is generally found in regulations on sexual harassment only; although it exists based on other grounds as well, it has not yet made its way into the respective laws prohibiting discrimination.

[351] Christie *et al.*, *Employment Law*, *supra* note 271 at 177, mark this as the "rights" perspective. England, "Recent", *supra* note 289 at 558 speaks of the "rights paradigm" which "gives paramountcy ... to the employee's dignity and autonomy".

[352] Influential proponents of this philosophy are Rawls, *Theory*, *supra* note 329 and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978). For a restatement of

regardless of the individual's place in society, his class position or social status, his fortune in the distribution of natural assets and abilities, his intelligence, strength etc.[353] Where those personal circumstances are relevant for the social distribution of rights, duties, and advantages, the individual's rights are infringed – he is discriminated against. Therefore, the relevance of personal circumstances in the social distribution – what is called discrimination – must be eradicated.[354]

Contractual employment law, organizing employment predominantly under economic aspects, proves insufficient to provide the guarantee of these individual human rights.[355] As a consequence, widespread regulations have been enacted that employ the state as the guardian over the individual employee's rights. However, although it assumes a "moral absolute"[356], the rights philosophy is not completely translated into public policy. The protection provided by the regulations lags behind the goal of complete freedom from discrimination. The competition with other political goals (*e.g.*, efficiency) and the prevalence of psychologically deep-rooted discriminatory attitudes hinder its full realization in the democratic discourse. This shows that anti-discrimination regulations are further influenced by a perspective that involves the mediation of competing ideologies, assumptions, economic and moral claims and political pressures, in brief, the constant balancing of interests between the claims of employers and employees in the

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Rawls' theory see Rawls, *Fairness*, *supra* note 330. The implications of this philosophy on employment are explored by Beatty, "Labour", *supra* note 304, Beatty, *Putting*, *supra* note 272 at 1 – 49 and *passim*.

[353] Rawls, *Theory*, *supra* note 329 at 7 – 12. See also Beatty, "Labour", *supra* note 304 at 339, stating that "a just society must treat the individuals in it as equals at least in respect to certain fundamental opportunities of life" and concludes that "in a just society there must also be an egalitarian distribution of those means by which one secures that sense of self-respect."

[354] In the context of civil rights enforcement, Silver, *supra* note 16 at 520 defines justice as "the achievement of a discrimination-free society." Justice requires "rectification of historical inequities in the treatment of minorities, women, the handicapped, and the aged" and "achieving statutory goals" of the civil rights regulations.

[355] The inadequacy of contract law for the employment relationship is very clearly expressed in Beatty, "Labour", *supra* note 304. Swinton, *supra* note 304 argues for a limited adequacy in a reformed contract law. For a defense of contractual employment against any regulatory limitations prohibiting discrimination see Epstein, *Forbidden Grounds*, *supra* note 280.

[356] Christie *et al.*, *Employment Law*, *supra* note 271 at 182. Edelman *et al.*, *supra* note 16 at 505 state that "in theory, law grants minorities and women in the workplace an absolute right not to be discriminated against by their employmers."

political arena.[357] Dominating, however, is the perspective that sees in the anti-discrimination regulations the realization of an absolute moral claim: the right to be free from discrimination follows from human dignity rather than from the free play of political forces.[358]

(3) Function

Anti-discrimination regulations of the employment relationship are designed to extinguish discriminatory practices and attitudes[359] in every single case as well as to eradicate discrimination as a behavioural pattern in society at large.[360] Therefore, they aim at the correction of the unequal power relationship between discriminator and discriminatee established by their respective social situations.[361]

The regulations focus on the protection of individual rights of the employee. From their rationale follows the idea that inherent in a person's dignity is the right to be evaluated only according to merit; characteristics beyond a person's control – gender, descent, religion, age, disability, *etc.* – are not elements of his merit. Judgment according to considerations beyond a person's merit reduces the person to a member of a group, denies his individuality, and thus infringes his dignity. These personal features should therefore

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[357] Christie *et al.*, *Employment Law*, *supra* note 271 at 182 – 183, call this the "pluralist" perspective.

[358] *Ibid.* at 186.

[359] Estreicher & Harper, *supra* note 301 at 5 sees it as one role of law "to reshape the preferences of even a majority of citizens in accord with deeper (or at least higher) social values.

[360] Weiler, *supra* note 295 at 23 describes this societal focus of anti-discrimination laws: "But at the outset this body of law was viewed less as employment regulation than as part of the emerging civil rights jurisprudence, designed to eradicate demeaning and disparaging treatment of blacks and other groups in public accommodations, schools, voting, or housing, as well as in the workplace." Thilo Ramm, "Discrimination: International Development and Remarks of Legal Theory" in Schmidt, Folke (ed.), *Discrimination in Employment* (Stockholm, Sweden: Almqvist & Wiksell International, 1978) at 512 [hereinafter Ramm] states that "employment discrimination cannot be considered in isolation but rather as a problem which can be satisfactorily solved only within the entire society."

[361] Because of the economic and administrative power of the employer over the employee, discrimination in employment victimizes in almost all cases the employee. In addition to the power inequalities grounded on the economic status in society, the bargaining power of employees who are members of discriminated classes is further weakened because of the negative attitude against them that tempers employers' decisions in a discriminatory society. Anti-discrimination regulations are designed to hold employment decisions free from irrelevant discriminatory considerations. The removal of issues that tend to diminish market chances from the realm of permitted considerations increases the market chances of potential discriminatees. Increased chances strengthen the bargaining power.

be irrelevant in impersonal decisions, such as business decisions.[362] The employer's legitimate interest in the employee is – according to the nature of the employment relationship – limited to the employee's ability and readiness to perform the work assigned to him. Every consideration beyond these work-related features infringes the employee's personality rights. Anti-discrimination regulations, transforming the illegitimacy of discriminatory considerations into illegality of discriminatory practices, are designed to realize this philosophical concept and thereby to protect the employee's personality rights.[363]

Another main goal of these regulations is the enhancement of the state of social justice.[364] Discrimination grounds, even in individual discrimination cases, are mostly class characteristics. Therefore, anti-discrimination regulations usually prohibit class characteristics as grounds for differential treatment. Fostering the opportunities of the class as a whole will foster the opportunities of the individual class member. In turn, the

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[362] Aggarwal, *supra* note 349 at 34 – 35; Rosalie Silberman Abella, *Report of the Commission on Equality in Employment* (Ottawa: Canadian Government Publishing Centre, 1984) at 2 [hereinafter Abella].

[363] Whereas Katherine O'Donovan & Erika Szyszczak, *Equality and Sex Discrimination Law* (Oxford and New York: Basil Blackwell, 1988) at 12 consider the main goal of anti-discrimination laws to be to establish equality of all members of the society, Ramm, *supra* note 360 at 522 emphasizes the personality rights aspect of these regulations and reflects "that the discrimination problem cannot be understood only as a question of equality. Its real dimension is the protection of freedom of the socially powerless. Antidiscriminatory policy achieves the ideal of liberalism that everybody shall be able to express his individuality, regardless of his factual situation and that he should be regarded and rewarded only according to his merits. It is the concept of individualism which is behind all attendant problems, and it enables us to arrive at the solutions."
However, some regulations may have counteracting effects. Quotas, *e.g.*, can lead to a situation where the employer's orients his decision on the fulfillment of the quota requirement rather than on merit considerations. In this case, discrimination is redirected, but not eradicated. These effects may be tolerable from a social justice perspective; they do not, however, protect individual rights in the single case.

[364] One of the major goals of anti-discrimination regulations is the elimination of discrimination as a social phenomenon through redistribution of opportunities. See Silver, *supra* note 16 at 520. According to the basic tenets of modern society, a person can properly be judged only according to his merit. The merit of a person depends, besides his individual inclinations, on his opportunities to develop merit. The right to be judged according to merit, hence, includes the right to have development opportunities. In a society where discrimination is a widespread behavioural pattern, the distribution of opportunities is to the disadvantage of discriminatees; opportunities enjoyed by non-discriminatees are denied to discriminatees. This situation is incompatible with the prevailing notion of social justice. Anti-discrimination regulations purport to improve the opportunities of potential discriminatees. They are aimed at a socially just redistribution of opportunities. With a just distribution of opportunities – *i.e.*, equal opportunity for every individual – all persons will have the same chances to develop merit. This is a prerequisite for judgment according to merit only, *i.e.*, for the realization of individual rights.

elimination of discrimination in a singular case can discourage discrimination in similar cases and thus support the elimination of discrimination against the class as a whole. Thus the singular case is important for the achievement of the goals of social justice.

The introduction of anti-discrimination regulations is usually not motivated by efficiency or human relations considerations. Nevertheless, these regulations can have positive and negative side-effects on the efficiency of the enterprise and of society at large[365] as well as on the state of human relations in the enterprise.[366]

b. Employment Standards Regulations

In all modern systems of employment law, there are regulations of labour standards which establish for the employee an irreducible "floor of rights" which cannot be undercut by

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[365] The efficiency of the enterprise depends largely on the productivity of the employees, which in turn depends on their performance ability and readiness. Non-meritual characteristics are not related to productivity. In removing these characteristics from the realm of considerations for employment decisions, anti-discrimination regulations tend to ensure that only productivity-related issues are considered in employment. Thus they foster the efficiency of the enterprise. Moreover, these regulations lead, on a societal level, to an allocation of work according to productivity. Therefore, they tend to result in an efficient use of labour resources in society at large. See Ronald Oaxaca, "Sex Discrimination in Wages" in: Orley Ashenfelter & Albert Rees (eds.), *Discrimination in Labor Markets* (Princeton, N.J.: Princeton University Press, 1973) at 124, for the underutilization of women's work.
However, anti-discrimination regulations can impose increased transaction costs on the enterprise. Interviewing or hiring quotas need administration; interviewing quotas potentially increase the relative number of job interviews. These cost effects can counteract the potential efficiency gain of these regulations. See Posner, *Analysis*, *supra* note 280 at 314.

[366] Discrimination inevitably causes conflicts between discriminatee and discriminator. Therefore, the elimination of discrimination in particular and at large tends to eliminate this conflict potential. Thus, anti-discrimination regulations can have a positive effect on amicable human relations between employer and employee. On the other hand, the effects of those regulations can deflect negatively. As long as discriminatory thinking and behaviour are widespread patterns, anti-discrimination regulations will impose anti-discriminatory solutions on discriminators against their will. This compulsion can raise the tension between the discriminator and the discriminatee, who is likely to be seen as the source of the legal constraint. See, *e.g.*, the discussion of the effects of regulations protecting AIDS-infected workers on the workplace atmosphere in Thomas H. Barnard & Martin S. List, "Defense Perspective on Individual Employment Rights" (1988) 67 Nebraska L. Rev. 193 at 205 – 207. This tension burdens in itself the human relations in employment; it is also likely to increase the conflict potential.
The effects of anti-discrimination regulations on the relationship amongst the employees can be twofold; solidarity with the discriminatee can enhance these relations, whereas envy can affect them in the negative, where the anti-discriminatory action is seen as a vehicle to gain an advantage which is seen by the co-workers as illegitimate.

the provisions of an employment contract, but which can be improved upon in a contract.[367]

(1) General Features

Employment standards regulations generally cover: the employee's remuneration, guaranteeing minimum wages and other monetary benefits; the working hours, providing for a maximum daily and/or weekly working time; the work conditions securing health and safety, diminishing the risks of the workplace environment to the physical integrity of the employee; the employment conditions of rest, leave, and vacation, securing the employee's health and diminishing the importance of material constraints on the autonomous planning of his life; and other conditions.

(2) Rationale – The Pluralist Perspective

The regulation of employment standards is dominated by a perspective that sees the establishment of employment standards as a balance of competing interests according to the respective political strength of the opposing lobbies of employees and employers. Acknowledging the legitimacy of interest disputes between employers and employees, it seeks to temper the exploitation of the employer's power position in the resolution of such disputes by means of regulation produced as a result of the free play of competing pressure groups in the legislative forum.[368] To establish employment standards, competing ideologies, assumptions, economic and moral claims and political pressures have to be mediated, and a balance has to be struck between the interest claims of employers and employees in the political arena.[369] Employment standard regulations are a response to the

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[367] Christie *et al.*, *Employment Law*, *supra* note 271 at 192.

[368] *Ibid.* at 182, about the "pluralist" perspective.

[369] *Ibid.* at 182. Summers, "Labor Law", *supra* note 320 at 18 refers to the example of interest balance in the case of health and safety regulations: "The protection most costly to employers is safety and health regulations, but the high value society places on physical integrity will continue to outweigh concern for increased costs attributable to safety and health. These legal protections are quite unlike proposals to require employers to provide ... economic benefits which add substantially to labor costs. ... [L]egislators will be reluctant to place such burdens on ... businesses and put them at a competitive disadvantage".

failure of contractual employment law to adjust the legal relation between employer and employee to the relation of their political powers.

On the other hand it is argued that the establishment of employment standards is a moral imperative because these standards, like anti-discrimination laws, entrench fundamental human rights.[370] Employment is an essential thread in the fabric of society:[371] Employment rights are – to a large extent – the basis for the individual's exercise of his civil rights and his freedom to pursue the kind of lifestyle which he is morally entitled to enjoy, because for many people employment is the only institution that provides the means of securing the necessities for living: it establishes an individual's status and prestige[372] and provides him with his main outlet for exercising his creative skills and for social intercourse with other people.[373] Consequentially, it is through their employment that many people secure much of their self-respect and self-esteem.[374] Therefore, the protection of employment standards is an essential prerequisite for the individual's participation within society in a manner to which he is morally entitled.[375] In the political discourse, however, this perspective does not prevail. The dominating justification for employment standards regulations is that they are a function of the political competition of interests.[376]

(3) Function

Regulation of employment standards aims mainly at balancing the power relationship between employer and employee.[377] Under an unregulated contractual scheme, existing

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[370] Christie *et al.*, *Employment Law*, *supra* note 271 at 179.

[371] This exposition can only briefly reflect the basic ideas of the meaning of employment. In more length, the topic is explored by Beatty, "Labour", *supra* note 304 at 318 – 326.

[372] Geoffrey John England, "Part-time, Casual and Other Atypical Workers: A Legal View", Research and Current Issues Series, No. 48 (Queen's University Industrial Relations Centre, 1987) at 46; quoted in Christie *et al.*, *Employment Law*, *supra* note 271, 179 at 180 [hereinafter England, "Part-Time"]; Beatty, "Labour", *supra* note 304 at 323.

[373] England, "Part-Time", *supra* note 372 at 180.

[374] Beatty, "Labour", *supra* note 304 at 324.

[375] England, "Part-Time", *supra* note 372 at 179.

[376] Christie *et al.*, *Employment Law*, *supra* note 271 at 186. For a justification of employment standards on economic grounds see Willborn, *supra* note 301 at 119 – 139.

[377] Summers, "Labor Law", *supra* note 320 at 7; Weiler, *supra* note 295 at 26.

power inequalities tend to establish a low level of employment standards: low wages, long working hours, insufficient health and safety protection. Providing substantial minimum conditions of the employment, employment standards regulations remove employment standards from the bargaining table and thereby from the influence of power inequalities, thus diminishing the effects of the employer's power superiority.[378]

The regulations intend to foster the realization of the employee's individual rights to physical and psychological well-being[379] and to a decent livelihood.[380] By redistributing wealth and opportunities in society at large, they also aim at an improvement of the state of social justice. Employment standards regulations usually increase the wealth of the

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[378] For Commons & Andrews, *supra* note 320 at 182, this is the prevailing motive of employment standard – here: minimum wage – regulations: "[I]n any modern industrial community large numbers of unorganized workers are found, still bargaining individually, employed at low wages and apparently unable to make any effective efforts themselves to improve their condition. If they are to be helped toward an equality in bargaining power with the employer, the state must take the initiative. This it does by setting standards below which wages may not be depressed – in other words, by passing minimum wage legislation." However, the equalizing effect of the regulations is limited to basic working conditions; they do not eliminate the impact of the power relationship on the contracting of conditions above the minimum or on the control the employer exercises over the employee in the process of work.

[379] Health and safety regulations directly protect the employee from injuries and health damages resulting from a hazardous work environment, thus securing his integrity. Working hour regulations increase the amount of reproductive time in relation to the amount of time spent at work, and thereby protect the employee from the health hazards resulting from exhaustion beyond his physical and psychic capacities. They provide him with more time to pursue his self-fulfillment and thus contribute to the realization of his psychological well-being. At the same time, they reduce the risk of health hazards, produced by overly exhausted employees working in a potentially dangerous environment or with potentially dangerous tools and materials, for other people and for society at large. Freund, *supra* note 283, § 316 at 301 sees this aspect of "public safety" as the prevalent purpose for maximum working time regulations at the beginning of the 20th century, and cites as examples regulations concerning railroad employees and pharmacists. See also Rothstein & Liebman, *supra* note 306 at 352.

[380] Beatty, *Putting*, *supra* note 272 at 82. Minimum wage standards help to provide the employee and his family with a certain level of wealth, and thus support his pursuit of self-fulfillment and dignity. Finkin *et al.*, *supra* note 311 at 76 note that minimum wage legislation "is supposed to provide a financial 'safety net' to ensure that workers will be able to maintain a standard of living in excess of bare subsistence." Moreover, they also potentially reduce the individual employee's working hours and have the corresponding effect of diminishing health risks; cf. Commons & Andrews, *supra* note 320 at 183: "Work may be done under safe and sanitary conditions for hours not too long, and payment of wages may be prompt and regular, but if the amount received is too small to secure the necessaries of life the worker's health and welfare are menaced. Therefore, the same motives which have caused most of our states to establish minimum standards to guard the worker against unsafe and unsanitary conditions have caused many of them to set up standards for protection against the evils of low wage rates." Provided with more economic resources from a fixed amount of working hours, the employee has less incentive to expand his working time beyond the appropriate amount. This health aspect, however, is rather a welcome side effect; the prevailing motive seems to be to enhance the economic situation of the

employees at the employers' expense.[381] Provided with increased economic resources, the employee can utilize these resources to enhance his social opportunities, *e.g.*, through the pursuit of higher education or through the accumulation and utilization of capital.[382]

Although efficiency is usually not a prevalent motive for the introduction of employment standard regulations,[383] they can have positive effects on efficiency, optimizing transaction costs in the enterprise[384] and improving productivity[385] and the employees'

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employee. See Freund, *supra* note 283, § 318 at 303, stating that the regulation of wage rates "would be purely of an economic character".

[381] Willborn, *supra* note 301 at 134 – 136. Minimum wage regulations do so most obviously by directly increasing the wage package. The premises provided for by health and safety regulations are, from an economic perspective, part of the wage package, and thus have the same effect as minimum wage standards. Although employers may be able to partly compensate the increased costs imposed by the standards through cuts in other parts of the wage package, the regulations usually have the effect of supporting an adjustment of the distribution of economic resources between the owner of capital and the supplier of labour to a relation that is in accordance with the prevailing concept of social justice.
Distributional effects do not only occur between employers and employees. Willborn, *supra* note 301 at 137 – 138 describes the impact of employment standards regulations on the distribution between various classes of workers.

[382] Working hours regulations can provide the employee with the necessary time and strength to pursue these possibilities and thus support the employee's efforts to enhance his social situation. Employment standards regulations thus help to improve the state of social justice not just in monetary terms, but also from a humanistic perspective that sees equality of opportunity and chance as an integral element of social justice.
Some employment standard regulations intend to enhance health and safety of the public. This purpose was prevalent in early 20th century maximum worktime regulations. Freund, *supra* note 283, § 316 at 301 writes that regulations of hours of labour "can be justified on the ground of public safety" and cites as examples regulations concerning railroad employees and pharmacists.

[383] Freund, *supra* note 283, § 310 at 295 states (at the beginning of the 20th century) that"[l]egislation for the protection of labor which restrains individual liberty and property rights falls under the police power, but the object is not necessarily an economic one. The great mass of labor legislation is enacted in the interest of health and safety, and in factory and mining regulations we find, especially where women and young persons are concerned, provisions to promote decency and comfort. Laws of this character rest upon a clear and undisputed title of public power."

[384] Although they are mainly criticized for their alleged negative economic effects (see, *e.g.*, Posner, *Analysis*, *supra* note 280 at 308 – 312), these regulations do not necessarily lead to worse results than an unregulated market would render. Employment standard regulations can help to foster efficiency, as far as they provide for the results a perfect market would have rendered, and thus correct inefficient outcomes resulting from irrational behaviour of market participants or from sub-optimal communication. Willborn, *supra* note 301 at 129. Employment standards, providing standard terms for a large number of employment contracts, can also to a large extent replace individual negotiations, and thus reduce transaction costs in the administration of the enterprise. See Willborn, *supra* note 301 at 120 – 127.

[385] For maximum working hours this effect is indicated by Commons & Andrews, *supra* note 320 at 224: "Moreover, long hours do not necessarily make for the greatest economy and efficiency in production. ... Studies of output before and after a shortening of hours show that where the human element enters into production hour reductions by no means imply a decrease in output." Rather, studies are reported that show an increase of output through increased efficiency by shortening the hours of work. See Commons

consumption potential.[386] They can also decrease the conflict potential between both parties to the employment relationship[387] and from the relationship between the employee and his co-workers,[388] and thereby enhance the state of human relations in the workplace.

c. Wrongful Dismissal Regulations

In an increasing number of legislations, the legal structure of the employment relationship further deviates from the at-will model pursuant to unjust dismissal regulations.[389]

(1) General Features

Under these regulations, the employer needs a valid cause for the termination of the employment. The scope of valid causes varies from legislation to legislation; typical examples are employee misbehaviour of a certain gravity, personal circumstances of the employee that are detrimental to the purpose of the employment, and the economic

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& Andrews, *supra* note 320 at 225. Health and safety regulations diminish the risk of injuries and diseases and thus foster an efficient use of the employees' labour resources.

[386] Finkin *et al.*, *supra* note 311 at 76 refer to the purpose of minimum wage legislation "to stimulate economic activity and growth by placing increased buying power in the hands of people who must consume all or almost all that they earn." Thus they foster production and can lead to a more efficient use of the economic resources of society.

[387] As far as employment standards regulations provide standard terms for employment contracts, they remove negotiations and differences about these conditions from the relationship between employee and employer. Commons & Andrews, *supra* note 320 at 182, indicate this effect of dispute avoidance: "In contrast with conciliation and arbitration, either voluntarily or compulsory, which take place only after a demand has been made by one party and refused by the other, minimum wage laws seek to regulate the wage rate before any dispute over the terms of the wage bargain has arisen." Furthermore, the power balancing effect of these regulations can contribute to a more respectful atmosphere in negotiations and in the daily operation of the enterprise, because the attitudes of inferiority and superiority that reflect the power inequalities are potentially diminished corresponding to the decreased inequality.

[388] Providing comparable conditions for comparable work, the regulations tend to diminish discriminatory or arbitrary treatment of employees by the employer or by superiors, a possible source of negative feelings or attitudes of superiority or inferiority among the workforce, and hence to establish a more amicable work environment.

[389] See the overviews over protection from wrongful dismissal in the United States and in Western Europe in Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute" (1976) 62 Virginia L. Rev. 481 [hereinafter Summers, "Individual"]; William B. Gould IV, "Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective" (1988) 67 Nebraska L. Rev. 28 [hereinafter Gould]. Manfred Weiss, "Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany" (1988) 67 Nebraska L. Rev. 82 [hereinafter Weiss] provides an outline of the system of unjust dismissal protection under German employment law.

interest of the employer in the termination of the employment.[390] Often the employee's interest in continuing his employment is weighed against the employer's interest in terminating the employee; to validate the dismissal, the employer's interest needs to prevail. When downsizing for economic reasons, in some systems the employer has to select the dismissees according to social factors, dismissing the socially strong ones before those who are more in need of continuing their employment.

(2) Rationale

The rationale of wrongful dismissal regulations follows in principle the employment standards regulations. The regulations strike a balance between the employee's interest in job security and the employer's interest in personnel flexibility and efficiency that are put forward by respective political lobbies. They result from the mediation of the supporting economic and moral claims, assumptions, and ideologies in the political discourse, according to the relative strength of the respective pressure groups.

Perhaps more so than for employment standards, it is argued that the protection of the employee against wrongful dismissal regulations rests on a moral imperative.[391] The fundamental psychological, social, and economic importance of employment for the individual[392] vests the employee with a certain moral entitlement to maintain his specific employment.[393] Because contract law with its predominant economic perspective proves insufficient to guarantee the realization of this entitlement,[394] regulations are needed to

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[390] See the overview in Bob Hepple, "Security of Employment", in *Comparative Labour Law and Industrial Relations*, 3rd ed. (1987), excerpt reprinted in Sullivan *et al.*, *supra* note 285, 865 at 865 – 868.

[391] Summers, "Individual", *supra* note 389 at 520 notes that protection against unjust dismissal "has earned acceptance as an essential element of a tolerable and humane employment relation, and it expresses an increasing recognition that employees have valuable rights in their jobs that society ought to protect against arbitrary action."

[392] The role of employment is discussed in the introduction to this Chapter, above. See also Beatty, "Labour", *supra* note 304 at 318 – 326; Weiler, *supra* note 295 at 63 – 67. Tobias, *supra* note 269 at 181, labels discharge as "the capital punishment of the industrial world."

[393] Beatty, "Labour", *supra* note 304 at 346 speaks of the "normative value" of the "personal meaning of employment".

[394] Beatty, "Labour", *supra* note 304 at 326 – 330. See also Christie *et al.*, *Employment Law*, *supra* note 271 at 744 – 754. For a defense of contractual employment law against regulatory protection against wrongful dismissal, see Epstein, "Defense", *supra* note 280.

translate it into a legal right.[395] However, this perspective does not prevail in political reality. Here, wrongful dismissal regulations are seen as a result of the free play of the political forces supporting the employees' or the employers' interests.[396]

(3) Function

Unjust dismissal regulations are not aimed at balancing the initial bargaining power between employer and employee in entering the employment relationship. However, they can strengthen the employee's position in the operation of the employment.[397] Therefore, they are mainly designed to increase the relative importance of the employee's economic and psychological interests[398] in the employment as against the employer's interests and thus strengthen the employee's power.[399]

The prohibition of unjust dismissal protects the exercise of civil rights and freedoms; under an employment regime with protection from unjust dismissal, employees can more freely exercise their civil freedoms – freedom of speech, freedom of association, freedom of religion, *etc.* – than under the at-will model.[400] Unjust dismissal regulations also

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[395] Summers, "Individual", *supra* note 389 at 520. See also Gould, *supra* note 389 at 29.

[396] A justification of unjust dismissal regulations from an economic perspective is provided by Sunstein, *supra* note 281 at 1051 – 1056.

[397] Weiler, *supra* note 295 at 49. In at-will employment, the employer can terminate the employment whenever an employee behaviour or remark incurs his displeasure, even if the employee's expression is perfectly legal. Therefore, the employee is likely to be cautious in pursuing his rights and legitimate interests. Under unjust dismissal regulations, however, the employee can exercise his rights and pursue his interests without running the risk of losing his employment, as long as his behaviour is not covered by the valid grounds for dismissal. This situation strengthens the employees position to actively renegotiate his employment terms or to resist detrimental changes imposed by the employer.

[398] For Summers, "Labor Law", *supra* note 320 at 15 the emphasis of unjust dismissal protection is on "non-economic interests in fairness, personal dignity, privacy, and physical integrity. Protection against unjust discharge focuses more on substantial and procedural fairness and personal dignity than on the economic value of the job."

[399] Summers, "Labor Law", *supra* note 320 at 7.

[400] At-will employment can be terminated by the employer for the reason that the employee legally exercised his civil freedom, and is likely to be so if the employee's behaviour incurs the employer's displeasure. Thus, an employee who is dependent on his job is likely to put his legitimate freedoms and rights behind the desire not to attract his employer's unwanted attention. In contrast to this, in no regulatory system is the exercise of civil freedoms a valid ground for dismissal. An employee acting according to his rights and freedoms cannot be dismissed for this reason and is thereby protected in their exercise. This protection tends to increase the degree of realization of rights and freedoms, a result that is seen as desirable in a society that highly values the freedom of the individual.

support the realization of the employee's right to live a dignified life and to pursue his self-fulfillment.[401]

Unjust dismissal regulations are not directed at an improvement of the large-scale state of justice in society. They can enhance the just redistribution of opportunities and risks in society and thus improve the state of social justice.[402] On the other hand, protection from unjust dismissal can have effects that are detrimental to a concept of solidary social justice.[403]

The enhancement of efficiency is usually not one of the prevailing goals of the introduction of unjust dismissal regulations. Nevertheless, these regulations can have positive effects on the efficiency of the enterprise and on macroefficiency, because they prevent, in effect, the termination of experienced and therefore productive employees[404]

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[401] Emphasizing this aspect, David Harris, *Wrongful Dismissal*, revised ed. (Scarborough, Ont.: Carswell, 1998) at 1-1, relates the protection against the unlawful termination of the contract of employment to the "importance of employment to an employee's self-respect and self-esteem". Tobias, *supra* note 269 at 181 – 182 points to the "emotional distress" the dismissed employee suffers because he has been "labeled a failure", and to the "harm to the discharged employee's reputation." For the meaning of employment to the individual employee in general, see Beatty, "Labour", *supra* note 304; see also Theodore J. St. Antoine, "A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower" (1988) 67 Nebraska L. Rev. 57 at 67 [hereinafter St. Antoine].
In order to organize their lives according to their preferences, many employees feel the need for a certain degree of economic security and social stability. In a society where social status depends very much on the individual's way to gain his livelihood, it is mainly job security that provides this social stability. Moreover, an employee is seen to invest – besides his labour – also education and training as well as personal commitment in his employment and, consequentially, to be entitled to the fruits of his investment. The denial of job security is seen as deprivation of the value of this investment; except in case of economic necessity for dismissal, the employer usurps the value of the employee's investment without compensation – a situation incompatible with the prevailing notion of justice. On an unregulated market, however, the employee's lack of bargaining power makes him unable to obtain the employment security he seeks. Recognizing the importance of economic security and social stability for the employee's right of self-determination, unjust dismissal regulations help to provide the employee and his family with a certain level of this security and stability, and thus support his pursuit of self-fulfillment and dignity.

[402] This effect is generated where the validity of a dismissal requires an internal selection of dismissees according to social criteria (as in German law in case of dismissal for economic reasons; see Weiss, *supra* note 389 at 88). In making socially strong employees the first to be dismissed, the risk of losing employment is allocated according to the social ability to bear it. Unjust dismissal regulations thus enforce the principle of solidarity as an element of social justice on the enterprise level.

[403] Unjust dismissal regulations protect existing employment and may thereby hinder currently unemployed workers from entering employment. Since employment is an important element of social strength, these regulations tend to alter the distribution of opportunities to the benefit of the already socially strong.

[404] See St. Antoine, *supra* note 401 at 69; Summers, "Labor Law", *supra* note 320 at 17. An employee's experience is, *inter alia*, the product of investment of time and financial resources in education and

and enhance the communication in the enterprise.[405] On the other hand, unjust dismissal regulations may often have a detrimental effect on enterprise efficiency.[406] In all systems, efficiency considerations ultimately prevail over the employee's interest in his job.[407]

Unjust dismissal regulations can have the effect of enhancing the communication between employee and employer and may, thereby, improve the human relations in employment.[408]

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training by employee and employer as well as by the society. Often this experience rests on the particular workplace and career situation and is most useful in that particular context. Therefore, only in continued employment can this experience be utilized in the most efficient way. Termination of the employment, however, removes the experience and, hence, the fruits of the investment from the enterprise and thereby prevents their efficient use, leading to a sub-optimal efficiency of the enterprise and, in combination, of society at large. In contrast to this, unjust dismissal regulations keep enterprise and society from loosing this experience. Thus they can effect a more efficient resource utilization.

[405] Willborn, *supra* note 301 at 131 points to the encouragement of voice by unjust dismissal regulations. An employee who can be dismissed for incurring his employer's displeasure is unlikely to criticize his employer for fear to give a reason for the termination of employment. Employee criticism, however, can support the efficiency of an enterprise, since employees in their daily work may have insights in the operation of the enterprise that management may lack. Suppressing criticism can therefore lead to sub-optimal efficiency. Unjust dismissal regulations, however, do not provide for expression of criticism as validating reasons for a dismissal; therefore, under a regulatory regime the employee is more likely to come forward with constructive proposals for the improvement of the efficient operation of the enterprise.

[406] Where dismissees are selected according to social criteria (as, *e.g.*, in German law in case of dismissal for economic reasons; see Weiss, *supra* note 389 at 88), the employer may be required to dismiss a productive, but socially strong, worker in order to keep the employee who is more in need of social protection but whose productivity lags behind that of his co-workers. This situation will result in sub-optimal efficiency of the enterprise and tends likewise to affect the macroefficiency.

[407] There is no system of unjust dismissal protection in which the employee's interests in keeping his employment overrun the employer's economic interests in downsizing his enterprise; the decision to eliminate a job is vested in the employer as the guardian of enterprise efficiency, who is not systematically required to include the employee's interests in his entrepreneurial considerations. See Geoffrey John England, "Epilogue: Some Observations on 'Voluntarism'" in England ed., *Essays*, *supra* note 298 at 265; Fraser Davidson, *The Judiciary and the Development of Employment Law* (Aldershot, Hampshire: Gower, 1984) at 84.

[408] An employee who can be dismissed for incurring his employer's displeasure is unlikely to express any dissatisfaction with employment conditions for fear to give a reason for the termination of employment, and rather to contain his negative feelings. Contained dissatisfaction, however, tends to deteriorate human relations. In contrast to this, mere expressions of dissatisfaction are not provided for as valid grounds for a dismissal under any unjust dismissal regulation. The communication over the employment relationship gives employees and employers the chance to improve their relationship. The main goal of unjust dismissal regulations is to preserve the employment relationship. Good human relations support this goal since an amenable relationship is more likely to be stable and productive than an adversarial one.

D. Conclusion

I have argued that, because of the importance of employment as a cornerstone of society and the center of the employee's social life, society has a legitimate interest to realize its values and goals in the reality of employment. The instrument for the realization of these social principles is the institution of employment law.

It has been shown that modern employment law consists of contractual and regulatory elements. Where it is governed by contractual principles, employment law is dominated by the unitary perspective that considers employee and employer as jointly striving for the maximization of the efficiency of the enterprise and of society as a whole. Contractual employment law is mainly directed at an efficient operation of employment. It does have other effects on the reality of employment; however, these functions are subordinated to the efficiency goal.

Employment regulations are introduced as a means to correct the employment reality according to the aspirations of society to guarantee to every member his individual rights, and to achieve a higher level of social justice. They are dominated to different extents by two theoretical perspectives: the rights perspective that emphasizes the guarantee of the individual's fundamental rights in the workplace, and the pluralist perspective that sees employment law as balancing the competing interests of social groups. In practice, regulations rearrange the power relationship in employment to the advantage of the employee, guarantee his individual rights, and intend to redefine the state of social justice.

In the light of the employment law rationales and functions identified in this chapter the process characteristics of mediation that have been analyzed in the preceding chapter[409] will now be reconsidered. The analysis in the following chapter will examine the effect of

[409] See Chapter 1, above.

the mediation characteristics on the principles, values and goals that underlie the various elements of employment law.[410]

[410] See Chapter 3, below.

Chapter 3: The Suitability of Mediation for Employment Disputes

Having identified the process characteristics of mediation[411] and the rationales and functions of the different employment law elements,[412] I will now turn to synthesize the analyses provided in the preceding chapters. The process characteristics will be examined for their consistency with the various employment law rationales and their potential to foster the intended functions of employment law. Since the discussion in the preceding chapters has been theoretical in nature rather than practical, the identification of tendencies and possible effects of mediation on the goals of employment law will be in theory as well.

However, the discussion is not without importance in practice, because the theoretical identification of these tendencies and effects is a prerequisite to the assessment of their possible practical consequences. Sometimes the practical importance of a tendency may not immediately be obvious; similarly, it may be argued that some of the possible effects of mediation that I will point out are only marginal, that they are unlikely to have any significant consequences in the resolution of the individual dispute or in the society at large. However, the significance of the effects will very much depend on the circumstances in the particular case, as well as on the regularity and density with which mediation is used to resolve employment disputes; what is only a tendency without measurable consequences in one case may notably influence the resolution of the dispute in another case, and the assessment of an effect neglectable in a single case may change through the multiplication of the effect by mediation of a greater number of employment disputes.[413] The lack of consequences in a particular case does not mean that the tendency does not exist and may gain importance in another case or on a large scale.

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[411] See Chapter 1, above.

[412] See Chapter 2, above.

[413] Antaki, *supra* note 75 notes that "[*s*]*'il fallait que ce mode* [*amiable*] *de règlement se généralise, la conséquence pour la paix sociale serait grave.*"

Drawing on the analyses in the preceding chapters, I will first provide an examination of mediation for its structural consistency with the rationales of employment law,[414] followed by an analysis of the effects of the mediation characteristics on the employment law functions.[415] The rationales and functions will then be reassigned to the different employment law elements, and conclusions will be drawn for the mediation of employment disputes according to the respective employment law elements governing the disputes.[416]

A. Mediation and the Conceptual Rationales of Employment Law

Examining the structural consistency of mediation with the conceptual rationales of employment law, I will in this section consider the relationship between fundamental characteristics of the mediation process and the different perspectives on employment law: the unitary perspective that considers employee and employer as directing their mutual efforts mainly towards efficiency,[417] the rights perspective that emphasizes the guarantee of the individual's fundamental rights in the workplace,[418] and the pluralist perspective that sees employment law as balancing the competing interests of social groups.[419]

1. Unitary Perspective

The unitary perspective on employment law sees employees and employers as jointly striving as a team towards a common goal, the maximization of the efficiency of the enterprise and of society as a whole.[420] This teamwork requires that the employment parties cooperate towards the realization of their goal. Therefore, the operation of employment should be characterized by cooperative structures and attitudes. Processes and mechanisms that establish or support this cooperation are likely to further the goal of

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[414] See Section A., below.
[415] See Section B., below.
[416] See Section C., below.
[417] See Section 1., below.
[418] See Section 2., below.
[419] See Section 3., below.

the employment parties and of society as a whole and are therefore compatible with the unitary perspective. Among the processes that can fulfill such a function are dispute resolution processes. The resolution of employment disputes influences the organization of employment, because their procedural structures can have an impact on the attitudes of the employment parties towards each other, and the terms of the settlement can bring about substantial changes in the organization of employment. Therefore, a cooperative dispute resolution process is in accord with the unitary perspective.

Mediation is a dispute resolution process that emphasizes cooperation rather than competition. The disputants are supposed not to confront each other with opposing demands, but to work together towards a solution of their dispute. The cooperative attitudes developed in mediation are supposed to be continued in the organization of employment, and the disputants are invited to transform them into cooperative structures. Conceptually, their consent to the mediated settlement secures compliance with the terms of the agreement.[421] Thus, mediation is supposed to help the employment parties to develop a team spirit and supports therefore the goals of the unitary perspective on employment law.

An efficient operation of the enterprise requires flexibility in the organization of employment. With its specific products an enterprise serves a certain market. This market is subject to constant changes, brought about by technological, legal, psychological and other developments. To hold its position on the market, an enterprise has to adapt its production to the changing market conditions. This requires a high degree of flexibility of production. A flexible production, in turn, calls for adaptability in the organization of employment, characterized by flexible employment conditions and an adaptable structure of the enterprise. Therefore, the efficiency goal is supported by a process that guarantees the adaptability of employment conditions to the requirements of the enterprise.

[420] See Chapter 2, Section B. 2., above.
[421] See Chapter 1, Section B. 4., above.

Mediation is characterized by a virtually unrestricted informality.[422] The lack of procedural and operational requirements guarantees a high degree of adaptability in the process and in the substance of the outcome. The disputants define the mediation process according to the conditions of their particular dispute. They are not bound to a particular standard with which the terms of their settlement must comply,[423] but are free to design the solution of their disputes according to the needs of their relationship. Thus, the informality of mediation makes it a very flexible dispute resolution process and therefore compatible with the unitary perspective on employment.

On the other hand, the unitary perspective views conflict between workers and employers as deviant. The employer is envisaged as the sole source of legitimate authority in the workplace,[424] and solely responsible for the well-being of the enterprise. This authoritative position is reinforced by processes and mechanisms that leave any decision about the operation of employment and all related matters to the unrestricted discretion of the employer.

Mediation counteracts this power of the employer to some extent. As a dispute resolution process, it recognizes the justification of conflict as a means to design the employment reality. Furthermore, the consensual character of the process curtails the absolutist position of the employer in the workplace and lets the employee to some extent take part in decisions about the operation of employment.[425] However, mediation leaves untouched the allocation of the exclusive responsibility for the well-being of the enterprise to the employer. Every substantial change in employment conditions or the operation of employment is subject to the final approval of the employer.[426] The maintenance of the

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[422] Informality is identified as a determinative feature of mediation in Chapter 1, Section B. 2., above.

[423] See Chapter 1, Section B. 2. c., above.

[424] Christie *et al.*, *Employment Law*, *supra* note 271 at 173.

[425] See the discussion of the various conceptual goals of mediation in Chapter 1, Section B. 4., above.

[426] In mediation, the employer exercises this approval through his consent to the mediated settlement. Mediation does not give the employee the power to bring about a change in the operation of employment against the will of the employer. Nor can the employer succeed with his position in mediation against the employee's will. However, mediation does not challenge the basic structure of employment. According to this structure, the employer has the final decision-making power, whereas the employee has to yield to the employer's decisions. Thus, the exclusive responsibility for the enterprise remains vested in the employer.

employer's responsibility limits the restriction of the employer's discretion. Nevertheless, to the extent that mediation restricts the discretion of the employer, it is incompatible with the unitary perspective.

2. Rights Perspective

According to the rights perspective on employment law, every individual holds certain fundamental rights and freedoms. Rooted in the person's human dignity and in the principle of equality of all members of society, these rights are inviolable, *i.e.*, no person, organization or institution has the right to restrict their exercise; and they are inalienable, *i.e.*, the holder does not have the legal power to waive them, he can not trade their exercise for any supposed advantage.[427] To be compatible with this view, processes and mechanisms have to prevent both the violation and the alienation of these fundamental rights.

Mediation conceptually disregards any uniform standard for the resolution of disputes as incapable of covering the whole variety of dispute situations; it aims at solutions that are in the first place practicable and opportune in the individual situation.[428] Consequentially, mediation does not consider individual rights as unconditionally binding in all situations where they are affected; it refuses to recognize the moral absolutes underlying the guarantee of fundamental rights. However, the recognition of a standard is a prerequisite for the guarantee of its realization. Thus, mediation can not ensure that fundamental rights will be fully realized and not violated or alienated; it is therefore incompatible with the rights perspective on employment law.[429]

Furthermore, the conciliatory character of mediation contradicts the rights view. Mediation aims at an agreement between the disputants; for the resolution of the dispute,

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[427] See Chapter 2, Section C. 2. a. (2), above.
[428] See the discussion of the role of norms in mediation in Chapter 1, Section B. 2. c., above.
[429] Antaki, *supra* note 75 at 137 points to the contradiction between the value-orientation of legal norms and the utilitarian character of mediation: "*La norme publique a pour objectif de faire respecter une valeur sociale quand le seul objectif du règlement amiable est de terminer un litige.*"

it relies on both disputants' consent.[430] The disputants will agree to a solution only if the substantial terms of the settlement accommodate the interests and needs underlying their respective claims. To achieve such a bilateral accommodation, it will often be necessary for one or both disputants to abandon their original claim in part;[431] mediation will result in a compromise settlement. Where a claim aims at the realization of a fundamental right, a compromise will curtail the right and thus lead to a violation or an alienation of the right; the realization of the right is incomplete – a result that is incompatible with the assumption of a moral absolute[432] that fundamentally characterizes the rights perspective.

Another contradiction between mediation and the rights perspective lies in the voluntary character of mediation and the reliance on the need for compulsion in the rights view. The guarantee of rights conceptually necessitates the potential exercise of some sort of compulsion. An individual's rights correspond to another individual's duties; freedoms are complemented by the prohibition to other individuals to restrict them without an entitlement to do so. To guarantee rights and freedoms means to protect their exercise from unauthorized hindrance. This requires the prevention of activities that infringe guaranteed rights and freedoms, and the enforcement of the corresponding duties. Where individuals do not voluntarily refrain from infringing activities or fulfill their duties, the right's guarantee entitles the right holder to have his right realized and have infringements suppressed with some kind of compulsion. In modern societies, it is the state that is vested with the competence to exercise this compulsion.

Mediation, in contrast, is a process that is characterized by the principle of voluntariness.[433] No disputant can be compelled to take part in the process or to work towards the achievement of a mediated solution. There is no imposition of an outcome or

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[430] See Chapter 1, Section B. 4., above.

[431] Silver, *supra* note 16 at 514 states that in mediation "[e]ach side gives up something to receive something. The complainant relinquishes the right to pursue claims against the institution; the institution agrees to some change or restitution."

[432] Fiss, "Against Settlement", *supra* note 19 at 1086 notes: "To settle for something means to accept less than some ideal."

[433] See Chapter 1, Section B. 1., above.

of a standard with which an outcome must comply.[434] Mediation does not dispose of mechanisms to prevent a certain behaviour of a disputant, or to make sure that a certain activity is carried out; such mechanisms would contradict the conception of mediation. The process relies on the – already existing or raised in mediation – good will, the understanding and the reason of the disputants and on their respect for the person on the other side and for the interests and needs underlying his claim.

Thus, the voluntariness of mediation collides with the principle of legitimate compulsion that is inherent in the rights perspective.[435] Because of its "lack of teeth"[436] mediation can not guarantee the realization of rights in the resolution of the dispute, and is therefore incompatible with the rights perspective on employment law.[437]

3. Pluralist Perspective

According to the pluralist perspective, employment law reflects the social compromise between the interests of employers and employees.[438] In employment mediation too, compromise plays an important role: mostly the accommodation of both disputants' interests and needs in a mediated agreement will require each disputant to abandon his claim in part; the result will often be a compromise settlement. The conciliatory character of mediation may thus appear as constitutionally harmonious with the basic character of employment law under the pluralist perspective.

However, compromise is not the goal of employment law; it is only the means to achieve the goal. The pluralist perspective conceptualizes employment law as the means to realize the appropriate balance of the various interests of competing social groups, and it is

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[434] See Chapter 1, Section B. 2. c. and B. 5. a., above.

[435] Owen M. Fiss, "Out of Eden" (1985) 94 Yale L. J. 1669 at 1673 criticizes the use of private dispute resolution mechanisms because "the inequalities and divisions that so pervade our society" establish "the need for a power as great as that of the state to close the gap between our ideals and the actual conditions of our social life".

[436] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 103.

[437] The lack of compulsory elements in private dispute resolution processes is the reason why Higginbotham, *supra* note 281 at 156 holds formal courts for indispensable for the guarantee of individual rights.

[438] See Chapter 2, Section C. 2. b. (2), above.

according to this goal that processes and mechanisms, including dispute resolution processes, have to be measured as to their compatibility with this perspective. Dispute resolution processes that foster the realization of the balance of interests as it is defined in employment law are compatible with the pluralist view. In order to support the achievement of this social goal, processes have to acknowledge the social balance as a binding standard for their results, have to orient their results on this balance. Mediation is characterized by the disputants' free choice of the norms or standards according to which their dispute will be settled.[439] Any prescription of a standard is restricting this freedom and is therefore structurally incompatible with the concept of mediation. Thus, the process does not accept the goal of employment law under the pluralist perspective as binding for its results and is therefore not in accord with this perspective.

Moreover, mediation is likely to counteract the task of employment law according to the pluralist view. Employment law is society's means to establish a social balance that reflects the respective political strength of the concerned social groups. This balance is expressed in the generalized resolution of employment disputes: drawing from analyses of social data and experience, employment law identifies typical employment disputes and provides resolutions that balance the involved interests according to the political power of the respective interest groups. Where the power relation in the individual dispute differs from the political power relation of the respective social groups, a settlement that is not oriented on the provided model solution is likely to reflect individual rather than social power relations. Deviations in a significant number of individual employment disputes from the generalized resolutions tend to establish a social reality that is different from the social balance envisaged by the employment law. Therefore, processes in which the resolution of a dispute is not oriented on the model resolution tend to counteract the purpose of employment law. In mediation the disputants are invited to settle their dispute according to the individual circumstances of the case; generalized arrangements, especially those provided by the employment law, are painted as inappropriate for the settlement of the individual dispute, and the orientation on these precepts is discouraged.

[439] See Chapter 1, Section B. 2. c., above.

With the conceptual disregard of model resolutions, mediation results in settlements that do not reflect the social, but the individual power relation, and thus tends to disturb the social balance that employment law is supposed to establish under the pluralist perspective. From this point of view, mediation is incompatible with this perspective.

Furthermore, mediation does not harmonize with the pluralist view because of its individualistic character. According to this view, the organization of employment requires the participation of all social groups that are concerned with the subject matter in question. Employment law is the means to establish a social reality that draws its justification from democratic discourse. Mediation of employment disputes in a significant number, too, can bring about changes in social reality. These changes emerge without participation of the concerned social groups and without consideration of their interests, because mediation is characterized by the participation only of the immediate disputants; other people who may be concerned in the dispute are structurally excluded, their interests are not taken into account in the settlement of the dispute.[440] The social changes generated by mediation are therefore not democratically justified. Thus, employment mediation is incompatible with the democratic character of employment law according to the pluralist perspective.

Where pluralist perspective characterizes employment law, employment disputes are raised on a social level: the mediation of interests has already taken place in the democratic process of drafting and introducing the law.[441] Large-scale employment mediation on the individual level undermines the function of employment law and conflicts with the pluralist concept.

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[440] See Chapter 1, Section B. 3., above.

[441] Abel, "Conservative", *supra* note 186 at 250 assigns this process to his category of "liberating conflict" that tends to change the status quo, as opposed to "conservative conflict" which preserves it. According to this categorization, the described characteristics of mediation make it potentially liberating. In a democracy, liberating institutions require democratic participation because they change the status quo of the society. Mediation lacks this democratic element.

4. Conclusion

It has been shown that mediation is to a great extent compatible with the unitary perspective on employment law, but widely contradicts the rights perspective and the pluralist perspective. To the extent that employment law that governs a particular dispute is dominated by one of these perspectives, the compatibility of mediation with this perspective indicates the conceptual suitability of mediation for the resolution of this disputes. Where more than one of the above perspectives dominates the law governing a dispute, the appropriateness of mediation will depend on which elements of the perspectives are of superior importance. In this case, the conceptual assessment of mediation will require a careful examination of the values and goals that are at stake in the dispute and an appropriate application of the analysis provided in this section to these values and goals.

B. Mediation and the Functions of Employment Law

Having examined the conceptual compatibility of mediation with the various rationales dominating employment law,[442] I will now turn to the analysis of the effects of mediation characteristics on the practical functions of employment law: the influence on the power relationship in employment;[443] the guarantee of the employee's individual rights in the workplace;[444] the potential to bring about social change and thus affect the state of social justice;[445] the effects on the efficiency of the enterprise and of society at large;[446] and the capability to enhance the human relations in the workplace.[447]

1. Power Balance

To assess the effects of mediation on the power relationship between the employment parties in the situation of a dispute, it is first necessary to determine the general disputing

[442] See Section A., above.
[443] See Section 1., below.
[444] See Section 2., below.
[445] See Section 3., below.
[446] See Section 4., below.
[447] See Section 5., below.

power relationship between employer and employee.[448] After this determination, the potential of mediation to change or to reinforce this power relationship will be analyzed.[449]

a. Disputing Power

From the superior power of the employer in the labour market, it can not without further examination be concluded that he will also typically be invested with a superior disputing power in the mediation process. Disputing power is generated by factors that are not congruent with those that favour the employer in the labour market. To determine the typical disputing power relationship in employment disputes, it is necessary to identify these factors and their effects[450] and to set them in relation to the factors generating the employer's superior labour market powers.[451]

(1) Sources of Disputing Power

It has been shown earlier that because of the complex variety of specific factors by which disputing power is generated, there is only limited possibility to determine a disputing power relationship in general.[452] There are however power-generating factors that indicate that there is a pattern according to which disputing power will be distributed between the employment parties and that the typical distribution is likely to be to the benefit of the employer. I will discuss some of these factors in this section.

(a) Access to Expertise

Disputing power is generated by a party's access to legal expertise[453] and negotiating experience.[454] First, where the disputants are not represented in the mediation process, the

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[448] See Section a., below.
[449] See Section b., below.
[450] See Section (1), below.
[451] See Section (2), below.
[452] See Chapter 1, Section C., above.
[453] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160.
[454] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160. Folberg, "Divorce", *supra* note 262 at 309 speaks of the "level of experience".

employer will typically enjoy the advantage of greater legal and disputing expertise. Without representation, this factor depends on the respective skills and experience of the disputants themselves. Employers – or management as their agent in employment disputes – are more likely to have special knowledge and experience with employment law application, due to the importance of this field in personnel practice and the fact that they regularly deal with employment cases. Because employers usually have more than one employee, they may also tend to benefit from a disputing experience gained in the mediation of previous employment disputes. The employee, on the other hand, will only in atypical cases dispose of knowledge in employment law or experience in employment disputes. Second, where the parties are represented by disputing agents, it is again the employer who is favoured by superior expertise at his disposal. Quality representation providing a high level of legal and disputing expertise heavily consumes the disputant's resources. The disputant disposing of superior resources is therefore likely to benefit from a better quality of representation.[455] Given the typical distribution of resources in the employment relationship, the beneficiary will in most cases be the employer.[456] Thus, the factor of access to legal and disputing expertise favours the disputing power of the employer over that of the employee.

(b) Need for a Mediated Resolution

Disputing power also depends on a disputant's need to reach a solution of the dispute in mediation.[457] One disputant who needs a mediated solution more urgently than the other is more likely to partly surrender his claims and interests in order to reach an agreement. The need for a mediated agreement can have economic and non-economic sources.

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[455] Fiss, "Against Settlement", *supra* note 19 at 1076 states that "the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process."

[456] Lamont E. Stallworth, "Finding a Place for Non-Lawyer Representation in Mediation" (1997) 4:2 Dispute Resolution Magazine 19 at 19 – 20 [hereinafter Stallworth] reports a program that is designed to diminish the employee's disadvantages stemming from the unaffordability of legal advice by providing him with qualified "non-lawyer representation". It is not clear, however, how the provision of more affordable representation can address the issue of quality differences in representation.

[457] Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 102 note that "the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement."

From an economic perspective, there is no side in employment disputes that is structurally more dependent on a success of the mediation. The economic need of each disputant for a mediated solution depends heavily on the circumstances of the particular case and on the relative economic importance of the disputed claims. For the employer as well as the employee the economic interest at stake in the dispute can be significant, sometimes even existential.[458] The perception of these interests is likely to be influenced by possible outcomes of dispute resolution in other forums[459] and the relative ability to withstand a delay in the resolution of the dispute,[460] which again depend heavily on the particular circumstances.[461] However, from an economic view, alternative forums may be less available for the employee, because he is less likely than the employer to dispose of sufficient economic resources to further pursue the resolution of the dispute in another, possibly very costly, forum.[462] On the other hand, the employer is potentially more vulnerable to economic damage from publicity of the dispute.[463] These two factors may not strike a balance between the economic risks of the two sides. However, the overall

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[458] *E.g.*, in a dispute about a dismissal the employee will perceive his employment and thus the economic foundation of his existence as endangered by the dispute. The employer, on the other hand, is likely to perceive his enterprise threatened by a possible high compensation for the employee.

[459] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160 call this factor "the ability and willingness to take risks". Folberg, "Divorce", *supra* note 262 at 309 refers to the "desire to avoid the expense and uncertainty of litigation". Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 102 underscore the importance of a disputant's "Best Alternative To a Negotiated Agreement (BATNA)" which will often be determined by the possible outcome of dispute resolution in another available forum.

[460] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160. *E.g.*, where the payment of remuneration is pending during the dispute (for instance in case of a dispute about a dismissal), a delay in dispute resolution may heavily burden the economic reserves of the employee since his economic sustenance typically depends on the regular income from his employment. On the other hand, under the same circumstances a delay may lead to the addition of outstanding remuneration payments which have to be paid in one sum after the dispute is settled; such a payment can put a great strain on the economic capacity of the employer.

[461] Fiss, "Against Settlement", *supra* note 19 at 1076 sees a general disadvantage of the disputant who disposes of less resources than his counterpart: "[T]he poorer party ... may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment."

[462] Fiss, "Against Settlement", *supra* note 19 at 1076: "the poorer party may be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery."

[463] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160 refers to the "vulnerability to damage from publicity" as a source of disputing power.

assessment of the disputants' economic need to resolve the dispute in mediation does not reveal a clear structural advantage generated by either side's disputing power.

The determinant non-economic element of the dependence on a success of the mediation is the psychological or emotional need for the resolution of the dispute.[464] A disputant who experiences the dispute as burdening his emotional or psychological well-being is likely to yield in the pursuit of his claim to the greater psychological stability of his counterpart. In employment disputes, it is likely that the employee suffers the disadvantage from this difference.[465] Since the particular employment that is the issue in the dispute lies at the basis of the employee's economic, social, and psychological existence,[466] he is typically more deeply emotionally involved in the dispute than the employer. The deeper emotional and psychological involvement decreases his ability to tolerate delay in resolution,[467] furthering the probability of giving in to his counterpart. His emotional involvement also increases the employee's inability to tolerate the uncertainty whether the dispute can be resolved in another forum and what the substantial qualities of a resolution in this forum might be.[468] These factors make him more vulnerable to the psychological pressure to reach an agreement in mediation.

(c) External Standards

A disputant's power is increased where he can ground his claim in external standards of legitimacy.[469] Where a claim is grounded in provisions of employment law, it is precisely this employment law that exercises the persuasive power of an objective criterion. Which

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[464] Folberg, "Divorce", *supra* note 262 at 309.

[465] The emotional involvement of employee and employer in the dispute depends heavily on the kind of dispute, on the scope of the claims and the justification of the allegations, the conduct of the disputants in the employment relationship and in the dispute, the chances to succeed in a dispute resolution in another process, and countless other factors. There may very well be many cases where the employee "stays cool" whereas the employer's nerves are strained. The remarks in this paragraph are grounded on the observation that a particular job is psychologically and emotionally more important for an employee, than it is for an employer of a number of employees. It is this fact, I believe, that upsets the probabilities to the disadvantage lying with the employee.

[466] See Chapter 2, Introduction, above.

[467] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160.

[468] Goldberg *et al.*, *Dispute Resolution* 2nd ed., *supra* note 8 at 160 refer to the "ability and willingness to take risks".

of the disputants will tend to benefit from that persuasive power depends on whether the employment law justifies the claim. There is no structural advantage for either disputant that can be drawn from this power source. Similarly, where the mediated agreement is designed according to non-legal standards, these standards will support the power position of that disputant whose claim is justified by the standards; which disputant this will be depends in every particular case on the factual basis of the dispute and on the standards selected by the disputants and the mediator. Neither disputant will in this regard structurally benefit from the availability of those non-legal standards.

(d) Hierarchical Structures

The power relation in the dispute is likely to reflect differences of power in the basic relationship from which the dispute emerges. Patterns of dominance in the basic relationship are very likely to be perpetuated in the dispute.[470] This constellation puts a heavy burden on the employee in mediation. In the employment relationship the employer controls superior resources on which the employee is dependent. This economic advantage vests the employer with a power superiority which is increased by the hierarchical organization of the enterprise.[471] The power differential is reinforced by the legal organization of employment which invests the employer with the determinative control over the operation of the enterprise.[472] This structural inferiority of the employee leads to patterns of subordination in the employment relationship which are likely to continue in the mediation process. Also, the employer's economic and organizational control over the employee's job will negatively affect the employee's insistence in the pursuit of his claim in the dispute.

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[469] Fisher *et al.*, *Getting To Yes*, *supra* note 145 at 183.

[470] Folberg, "Divorce", *supra* note 262 at 309. However, Rifkin, *supra* note 155 at 31 reports case studies of mediation involving gender issues where "the women felt that the relationship of dominance had been altered and the hierarchy in the relationship had to some extent been altered" and thus the power relationship had been affected.

[471] See Chapter 2, Section C. 1. a., above.

[472] See Chapter 2, Section B. 1. and B. 2., above.

(2) Disputing Power and Labour Market Power

The structural advantage of the employer in the allocation of disputing power stems from the same sources that as his structural superiority in the employment. His control and disposal of superior economic resources vest him with the determinative power in the employment relationship;[473] in mediation, they increase his power by granting him better access to quality representation and perpetuating the subordination pattern of the employee.[474] The employee's social, psychological and emotional dependence on his job enables the employer to put the employee under economic and psychological pressure and to consolidate his determinative position in the workplace;[475] in mediation, they increase the employer's disputing power by putting the employee at a greater need to resolve the dispute in mediation.[476] The organizational and hierarchical superiority of the employer and his legal prerogatives place him in a position of determination and control in the employment relationship; in mediation they result in a tendency of continued subordination of the employee.[477] Hence, the superiority of the employer in mediation stems from the same sources and is by and large an intensification of his superiority in the employment relationship.[478] A stabilization of the employer's disputing power superiority in the mediation is at the same time a reinforcement of his structural power advantage in the employment relationship.

b. Power Balance in Mediation

Mediation can have significant balancing effects on a power disparity in a dispute relationship. The mediator disposes of a variety of facilitative possibilities that can

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[473] See Chapter 2, Section C. 1. a., above.
[474] See Section (1) (a) and (1) (d), above.
[475] See Chapter 2, Introduction and Section C. 1. a., above.
[476] See Section (1) (b), above.
[477] See Section (1) (d), above.
[478] The connection between market power and disputing power has been pointed out by Summers, "Labor Law", *supra* note 320 at 25 for the case of employment litigation: "The individual's weakness in bargaining with the employer is matched with the individual's weakness in litigating against the employer. Most workers do not have the price of admission to the legal system."

significantly defuse or even neutralize a power imbalance.[479] Where he detects a power differential, an able and responsible mediator will make specific use of these possibilities in order to ensure that the original power disparity does not or only minimally affect the conduct of the disputants in mediation and the substance of the mediated agreement. A growing body of codes of professional conduct and self-regulations is directed to ensure that such a responsible operation becomes the generally accepted and expected standard in mediation.[480] Thus, mediation is a potentially useful way to counterbalance the power structures of the employment relationship that would in an unassisted process have strong effects on the resolution of the dispute. However, the mediation process does not have structural mechanisms to actually ensure that the superiority of the employer's disputing power is defused; rather, there is the risk that the existing power disparity is stabilized or even reinforced.[481] This risk is posed by the informality of mediation,[482] by the kind and the scope of the mediator's use of his facilitative activities,[483] and by the structure of representation of the disputants in mediation.[484] These factors will be discussed in this section.

(1) Informality

The operation of the mediation process is to a great extent unregulated. There are generally no legal requirements that provide for procedural measures to ensure that power disparities are revealed and counteracted. Neither are disputants required to acquire substantial or procedural aid in order to level their respective disputing powers, nor is there a controlling force that balances differences in the quality of representation of each.

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[479] See Chapter 1, Section B. 5. a., above.
[480] See *supra*, note 30.
[481] Abel, "Conservative", *supra* note 186 at 257 points to this risk in informal institutions in general: "Informal processes commonly characterize their outcomes as compromise solutions in which nobody wins or loses. But compromise produces unbiased results only when opponents are equal; compromise between unequals inevitably reproduces inequality."
[482] See Section (1), below.
[483] See Section (2), below.
[484] See Section (3), below.

The control of the procedural measures and the responsibility for their specific use lies ultimately in the hands of the mediator. The mediator's specific intervention to balance the disputing powers depends on his ability to detect imbalances and on his perception of the power relation. However, there are no requirements of qualification of the mediator which could ensure an appropriate and competent detection of power disproportions. Nor are there standards according to which the existence of power inequality can be assessed in mediation. Moreover, even where a power disparity is detected and appropriately assessed by the mediator, there is no legal or otherwise binding standard either for the direction in which balancing measures shall applied or for the degree of the mediator's efforts to defuse a disputant's superior power.

Therefore, there is no legal or otherwise effective protection for the typically inferior employee against the determinate influence of the employer's superior power on the substance of the mediated agreement.[485]

(2) Neutrality

The neutrality of a mediator determines the scope of his facilitative interventions in the dispute and thereby influences the substantial outcome of the mediation. Hence, the scope and direction of permitted and encouraged interventions influences the power relationship in the dispute. In employment disputes, the superior disputing power of the employer may tend to allow him to influence the determination of neutrality to his advantage.

The scope of the mediator's neutrality is determined by the disputants under the assistance of the mediator. A disputant who disposes of disputing experience in mediation or who is aided by an experienced representative can more easily identify the effects of specific facilitative activities on the outcome of the dispute and control the drafting of neutrality. He will try to encourage interventions that support his position, and to avoid those that can be disadvantageous to his claim. Since in employment disputes the employer enjoys better access to a high quality of disputing experience than the

employee, he is likely to be able to enjoy the advantage from a skillfully designed scope of interventions conceded to the mediator.

Even where the scope of interventions has been determined in advance, the mediator may be tempted to expand his interventions beyond this scope, notably by internal or external pressure to break an impasse in the mediation. This opens the way for a greater influence of the mediator's assessment of the dispute, determined by his own expertise of the subject matter and by his set of values and ideas. The effect of such an exceeding of neutrality depends, beside the particular circumstances of the dispute, on the level of congruency of the mediator's and each disputant's values and ideas. Although the broader intervention of the employer will enhance the disputing power of one disputant in the particular case, there is no side in employment disputes that enjoys a structural advantage from this influence.

However, the employee may tend to suffer a disadvantage from a structural threat to the mediator's impartiality. Because of concerns for his own professional practice, a mediator has incentive to favour a repeated disputant over an occasional participant in mediation. In employment disputes, it is typically the employer who, because of the number of employees he has under contract and the resulting probability of employment disputes, is likely to make use of mediation more often, sometimes even systematically.[486] If a number of mediations are conducted by the same mediator or mediation service, the economic and prestigious interest of the mediator in pleasing a regular client may lead him to favour the employer's position in the dispute over the employee's case.

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[485] Abel, "Conservative", *supra* note 186 at 257 notes that "[t]he movement from formalism to informalism thus reflects and carries forward a shift in power from the less privileged to the more."

[486] In addition, the mediator may be tempted to favour the paying over the non-paying disputant. In employment disputes, because of the generally limited resources of the employee, this is likely to be the employer. This concern is not sufficiently reflected in Bond's suggestion for a payment clause in a mediation agreement, which provides for the employer's responsibility for 90% of the mediator's fees. Bond, *supra* note 6 at 18.

(3) Representation

A disputant's representation has a significant impact on his power position in the dispute. In employment disputes, the employee tends to suffer the disadvantage of qualitatively inferior representation, mainly because of his limited economic resources. Mediation does not offer mechanisms to ensure that the effects of this disadvantage can be neutralized.

The mediator can suggest that one or both disputants acquire some form of representation; however, he does not have the power to require them to do so. Where the disputants are not aided in an employment dispute, the employer is likely to be in a better power position because of his potentially greater disputing experience.[487] Also, the mediator has no control whether the disputants are counseled outside the actual mediation process. Thus it may happen that one disputant consults an advisor whereas his counterpart relies on his own substantive and disputing knowledge and skills, or that the quality of the consultation differs significantly. Because of the greater availability of quality advice to the employer due to his superior resources, the employer is likely to draw an advantage from this situation.

Furthermore, where disputants are aided by qualitatively different representatives, the mediator is likely to resist intervening in this quality difference. His advise to only one disputant to improve the quality of his representation is likely to be perceived as offending the mediator's neutrality and impartiality. Therefore, established quality differences in representation are likely to continue in the course of the dispute. Due to his better access to quality representation, it is the employer whose disputing power tends to be increased by these differences.

2. Rights Protection

It is true that mediation can, in favourable circumstances, result in an agreement that fully guarantees the individual rights of the employee. The disputants may have sufficient

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[487] Maute, *supra* note 36 at 523 notes that in sexual harassment disputes, "[p]articularly where the victim is not represented by counsel, the private settlement likely reinforces existing power disparities."

knowledge of the protective laws and of the values that underlie the protection of such rights, and may consider them as binding and guiding in the negotiation of their agreement. Both sides might be represented by agents who are willing and able to secure the protection of the employee's rights in the mediated agreement, and they might come across a mediator who is willing and able to help them to achieve this goal. However, the rights guarantee is threatened by structural countereffects and is therefore not very likely to succeed in mediation.[488] It is especially contradicted by the normative orientation of mediation and the kind and scope of fact determination in the process,[489] as well as by the kind and quality of the assistance provided to the disputants by the mediator and by their representatives, and their different access to quality assistance.[490] These factors will be discussed in this section.

a. Norm Orientation and Fact Determination

Individual employment is a densely regulated field. The protective employment laws are to a significant degree prominent issues in the public discussion. Therefore, employees are likely to have at least a superficial knowledge of the existence of the laws providing them with protection. Where this knowledge is present, the employee is likely to rely on the apparently applicable legal provisions to support his claim in an employment dispute because the reliance on those norms will support the legitimacy of his claim. Thus it is probable that protective employment law provisions are not completely disregarded in mediation. However, because of its structural informality,[491] mediation is not capable of actually securing the compliance with these protective norms in the mediated agreement.

On the one hand, mediation is commonly promoted as an alternative to legal dispute resolution. There is no regulation or custom that requires mediators to consider the legal provisions that are applicable to the dispute,[492] not even if they are mandatory provisions.

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[488] Abel, "Informalism", *supra* note 262 at 381: "[I]nformal institutions tend to be less respectful of formal legal rights."
[489] See Section a., below.
[490] See Section b., below.
[491] See Chapter 1, Section B. 2., above.
[492] See Chapter 1, Section B. 2. c., above.

Very often, mediation proponents emphasize an alleged narrowness of the law and paint legal solutions as inappropriate for many actual dispute situations.[493] Hence, although employment law is likely to be a reference point in employment mediation, the disputants may tend to refuse to let themselves be guided by the protective legal provisions.[494] In the mediation process this tendency can be set by a mediator who – in exercise of his authority as procedural guide in the dispute – promotes the disregard of the reference to law for conceptual or ideological reasons,[495] or by an employer who – in exercise of his superior disputing power – paints a settlement according to the legal standards as inappropriate for the particular case. In such cases, legal rules tend to be replaced by reference to social standards. These social standards, however, typically reflect the values, assumptions, and attitudes of the social groups that both disputants, or the disputant with the superior disputing power, or the mediator belong to. Thus it is not unlikely that they are characterized by exactly those discriminatory attitudes that employment law aims to eradicate. With a mediated agreement according to such social standards, those attitudes and conditions are perpetuated and reinforced that society regards as undesirable or unacceptable and tries to wipe out with the legal reorganization of employment.[496] A

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[493] Edelman *et al.*, *supra* note 16 at 500 derive the disregard for legal standards in in-house employment mediation from "structural incentives for organizational deviance: the competitive environment in which organizations operate, as well as many internal processes such as interdivisional competition, encourage individuals within organizations to resist compliance with laws that might interfere with organizational success."
However, Neil Vidmar & Jeffrey Rice, "Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture" (1991) 19 Fla. St. U. L. Rev. 89 at 93 point out that there are many cases where the issue of the dispute is defined by the disputants themselves in legal terms and the remedy sought is one provided by law. For these cases, they suggest, the potential of mediation to provide "creative" solutions is irrelevant; a less flexible process might be more suitable to settle those cases.

[494] Edwards, *supra* note 244 at 679 holds that a "potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law."

[495] Such a mediator rejects the "norm-educating" and the "norm-advocating" models of mediation. See Waldman, *supra* note 85 at 727 – 756. See also the discussion of the different mediation concepts in Chapter 1, Section B. 4., above.

[496] Maute, *supra* note 36 at 519 points to the inability of a disputant to "evaluate the fairness of an option without minimally adequate information about the law. Mediation that does not assure each party has such information is likely to reinforce existing disparities in knowledge, resources and power."

settlement that draws on social standards can therefore directly frustrate the realization of the social values and goals that are embodied in employment law.[497]

On the other hand, even where legal rules are taken as the reference point for the mediated agreement, mediation is not always likely to result in full compliance with the protective regulations.[498] Mediation lacks the structural mechanisms to secure an adequate determination of the facts from which a dispute emerges.[499] This may not be a serious problem in cases where the facts are apparent and uncontested, and in which the range of facts necessary to detect an infringement of rights is clear to the disputants and the mediator. However, in cases of employment disputes that are very fact-sensitive, the structural incapability of mediation to establish a complete record of the factual basis of the dispute will lead to an incorrect application of the legal rules.[500] The disputants and the mediator are likely to leave facts unconsidered that are indispensable for the determination of compliance with the law, or to consider facts that are irrelevant for the application of legal norms. Thus the protective goal of employment law is likely to be thwarted.[501]

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[497] Brunet, *supra* note 69 at 17 – 27 argues that the disregard of law in ADR is likely to result in a loss of the guidance function of law. At 18 he states that "[d]ispute processing systems that are predicated upon so-called 'creative' solutions send a false signal to the community that the outcomes dictated by substantive law are unworthy of enforcement."

[498] See Chapter 1, Section B. 2. c., above. Edelman *et al.*, *supra* note 16 at 501 points out that internal mediation procedures are incapable of ensuring law compliance: "because civil rights law is ambiguous, procedurally oriented, and has weak enforcement mechanisms, it does not guarantee that the symbolic structures organizations create in response to law will cause organizations to realize legal ideals; in the case of discrimination complaint procedures, law does not assure that these structures will produce results similar to those of legal forums for discrimination complaints."

[499] See Chapter 1, Section B. 2. a., above.

[500] Brunet, *supra* note 69 at 34 – 35 notes that "[j]ust results are accurate results. The fact-finding function of dispute processing cannot operate properly without mechanisms to force disclosure of facts. ... An accurately determined set of facts is a precondition for proper application of law in all disputes. Without procedural mechanisms for determining facts accurately, legal results become useless."

[501] David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 Georgetown L. Rev. 2619 at 2639 [hereinafter Luban] describes this danger: "[I]f legal justice arises from applying law to facts, it presupposes accurate facts. To the extent that out-of-court settlements are based on bargaining power and negotiation skills, facts lose their importance to the outcome, and the outcome will resemble legal justice only coincidentally."

b. Legal Representation and Mediator Assistance

Even where legal norms are considered as binding and guiding in the mediation of an agreement, mediation does not dispose of structural elements that secure a correct application of the law. Disputants in employment will usually not dispose of the necessary legal training to correctly apply the ever more complicated employment law.[502] The necessary assistance has to be given by the mediator or by the agents that represent the disputants in the mediation process.

(1) Mediator Assistance in the Absence of Representation

Where the disputants are not represented, or represented by counsel without legal skills, it is the mediator who bears the responsibility to make sure that the mediated agreement complies to the applicable law.[503] In order to fulfill this task, he needs a legal education and a continuing training that keeps his knowledge up to date with the development of employment law. Not all mediators dispose of these prerequisites,[504] and there is no legal requirement for mediators to acquire the necessary knowledge and skills.[505] Even if the mediator is legally knowledgeable and skilled, the degree of law compliance in the settlement depends on his conception of mediation[506] and of the degree of facilitation employed by him.[507] A mediator who emphasizes the empowerment of the disputants will

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[502] This is certainly true for most employees who are trained only in their profession which will in most cases not be the area of employment law. On the other side, employers – or management as their agent in employment disputes – are more likely to have knowledge and experience with employment law application, due to the importance and frequency of this field in personnel practice. However, the legal skills on the side of the employer can not assure the correct application of legal provisions protecting the rights of the employee. In an employment dispute about employee rights, the employer's interest is counteracted by the realization of the right in question. The employer will therefore not work towards an application of the law that provides the full legal protection to the employee.

[503] Edelman *et al.*, *supra* note 16 at 501 emphasize the importance of the mediator's attitude: "The substantive effect of discrimination complaint procedures and other symbolic structures is likely to depend on the commitments and role of professionals within organizations."

[504] Maute, *supra* note 36 at 519 illustrates this problem: "Most mediators are non-lawyers; many serve as volunteers. Many mediation professionals come from other disciplines such as mental health and social work. They are often trained in interpersonal skills and are better equipped to mediate relational problems than most lawyers."

[505] See Chapter 1, Section B. 5. c., above.

[506] See Chapter 1, Section B. 4., above.

[507] See Chapter 1, Section B. 5. a., above.

not usually put strong pressure on the disputants to settle according to legal rules, as will a mediator who aims at a quick and efficient settlement without much concern for the content of the agreement. Also, the mediator's concern for his own professional practice may influence the way he dismisses his task.[508] The potential tendency of the mediator to favour repeated disputants can lead him to endorse a legal interpretation that supports the repeat player's position in the dispute. Because of the structures of employment it will typically be the employer who benefits from this mediator influence.[509] Given all these circumstances, it is not certain, in no-representation settings, that the intention of the disputants to find an agreement compatible with the law actually succeeds.[510]

(2) Unilateral Representation

Where only one disputant disposes of legal counsel, the interpretation and application of the law is very likely to be influenced by the position and the interests of the represented disputant in the dispute. Because of his superior resources, the employer is likely to benefit from such a situation.[511] In such a case, it would be the responsibility of the

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[508] See Chapter 1, Section B. 5. b., above.

[509] Edelman *et al.*, *supra* note 16 at 501 – 502 point out that internal mediators with an initial commitment to employee rights are constrained by their structural position to efficiently advocate employee protection, and are therefore likely to adopt an attitude that gives greater recognition to the employer's interests. *Ibid.* at 507 they note that "the managers who handle complaints have career ties to the employer and may uphold the legitimacy of management actions to advance their own careers". Similarly, for in-house dispute resolution, Maute, *supra* note 36 at 523 expresses concerns that "[w]here the mediator is also an employee, her neutrality might be compromised because of institutional concerns to avoid future liability."

[510] Nolan-Haley, "Court Mediation", *supra* note 151 at 81 shows that even where the mediator is willing and able to provide appropriate legal advice, law compliance is still problematical "particularly when unrepresented parties are involved. These are the most vulnerable players because many of them do not even know what questions to ask of the mediator, let alone make informed decisions about their legal rights."

[511] Silver, *supra* note 16 at 557 states that [t]he presence of counsel is likely to mitigate the effects of the complainant's lack of sophistication and inequality of bargaining power" and warns that "[T]he risk is substantial ... that the employer/recipient will be accompanied by an attorney and the complainant, with limited resources, will not. This may exacerbate an already unbalanced situation to the complainant's detriment." Stallworth, *supra* note 456 at 19 reports that in mediation in many cases "attorneys reject potential cases from workplace claimants".
However, not always will the advantage be on the employer's side. A situation of unilateral representation may occur because of the disputants' different need for aid. Brunet, *supra* note 69 at 45 – 46 notes that legal representation may be less important to an experienced disputant than to a "novice disputant". Thus, it may be the employee who needs and acquires representation whereas the employer relies on his personal skills and experience.

mediator to ensure that the power imbalance caused by the unilateral representation does not affect the law compliance in the mediated settlement.[512] In doing so, however, the mediator would become an advocate of the interests of the unaided disputant. His conduct would leave the scope of neutral intervention, and the mediator would even run the risk of infringing the principle of impartiality.[513] Therefore, a responsible mediator is likely to defer the mediation until both disputants are equally represented.[514] If bilateral representation or non-representation can not be reached, such a mediator will probably resign from his mediation mandate.

(3) Bilateral Representation

In cases where both disputants are represented by counsel with legal skills, the correct application of the law depends on the kind and the quality of representation.[515] An agent who takes active part in the mediation process is more likely to be able to ensure law compliance in the interest of his client than a representative whose role is confined to advice outside the actual mediation process.[516] Taking part in the process, the agent has a more direct influence on the negotiations, and his skills are immediately available to control a settlement proposal as to its impact on the legal rights of his client. The quality of representation affects the degree to which a disputant can secure the kind and extent of law compliance in the settlement that serves his interests and guarantees his legal rights. Negotiation skills and mediation experience will enable a representative to more

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[512] The realization of this task requires that the mediator disposes of legal skills; a situation that is not guaranteed in mediation.

[513] See Chapter 1, Section B. 5. b., above.

[514] Nolan-Haley, "Court Mediation", *supra* note 151 at 82 – 83 states that because of the inability of disdvantaged disputants to afford counsel, the mediator's advice to acquire appropriate representation is "a particularly illusory concept for litigants in the informal courts whose initial attraction was the promise of a people's court where lawyers would be unnecessary" (*ibid.* at 83) and therefore "a woefully inadequate response to the problem of unrepresented parties in court mediation" (*ibid.* at 82).

[515] See Chapter 1, Section B. 2. b., above.

[516] But also an outside counsel has an influence on the outcome. Maute, *supra* note 36 at 534 notes that "[o]utside review protects the parties' interests, but also begins to bring private resolution back into the public domain. An independent counsel can safeguard public concern for the quality of individualized justice by advising her client against an unfair agreement, helping with further negotiations or pursuing litigation."

successfully pursue the interests of his client.[517] Because of his neutrality and impartiality, the mediator has only limited power to balance differences in the quality of representation. Therefore, those quality differences are likely to influence the degree of the rights protection in the mediated settlement.

Because it is typically the employer who disposes of some representation having a superior quality,[518] it is not probable that a legal interpretation will be accepted that fully secures the employee's individual rights. Therefore, although representation is likely to increase the law compliance in the mediated agreement, it is not capable of assuring that the employee will enjoy the full legal protection of his individual rights.

3. Social Justice

Social justice marks the distribution of fundamental rights and duties and an appropriate division of advantages from social cooperation within the scope of society as a whole.[519] The outcome of a single dispute – especially between individual parties – will usually have only marginal direct effects on the state of social justice. However, each settlement defines the rights and duties and the allocation of resources in the particular case. Therefore, many settlements taken together can have an influence on the large-scale distribution of rights, duties, and resources. Thus, mediation of a single case does not significantly effect social justice;[520] but mediation as a wide-spread method to resolve disputes is likely to influence the state of justice in society.[521]

Under favourable circumstances, mediation can help to enhance the state of justice in the society as a whole. It could be systematically employed. Mediators and disputants who

[517] However, the representative may have personal incentives to settle or to continue a dispute that contradict the interests of his client. See Yarkon, *supra* note 143 at 177 – 191.

[518] See Section 1. a. (1) (a), above.

[519] See Chapter 2, Section C. 1. d., above.

[520] In contrast, Bush, "Dispute Resolution", *supra* note 35 at 911 points out that also the resolution of an individual dispute can effect the social justice because "the individual case can serve as an opportunity to articulate a rule that shifts wealth and power beyond a particular case".

[521] Abel, "Conservative", *supra* note 186 at 249 states that informal institutions "must have *some* impact on the larger society: even in informal processes disputants win or lose, grievances are expressed or

have adopted the democratically developed standards of social justice could work towards the realization of these goals in mediated settlements.[522] Social groups concerned with public affairs affected by the issue of the dispute could be invited to participate in the mediation and voice their concerns. The participants could communicate those settlements to the public at large and thus increase the chances for the general acceptance of the goals and standards. However, the structure of mediation rather suggests that even where it is widely used, mediation is unlikely to positively influence the state of social justice. The process characteristics that hinder mediation to be systematically employed to bring about a desired change in society are its confidentiality,[523] its informality,[524] the character of norm orientation in mediation,[525] and the scope of participants in the process.[526] I will explore these factors in this section.

a. Confidentiality

For the enhancement of social justice, a major structural flaw of mediation lies in the confidentiality of the process.[527] There is no structural mechanism to inform the public about the factual basis of a dispute, the substance of the mediated settlement, and the standards according to which the settlement has been designed. Rather, the confidentiality of mediation is often painted as an important advantage of the process, because it allows secluding the public from information the disputants would like to keep secret. It is precisely its confidentiality that prevents mediation from being effective in the improvement of social justice.

The enhancement of the state of social justice depends to a large extent on publicity. In order to effectively improve social justice, the established social inequities have to be

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repressed, conflict is transformed, substantive rights are implemented or frustrated" [emphasis in original].

[522] *I.e.*, adopt a "norm-advocating" model of mediation; See Waldman, *supra* note 85 at 742 – 756.

[523] See Section a., below.

[524] See Section b., below.

[525] See Section c., below.

[526] See Section d., below.

[527] See Chapter 1, Section B. 1., above.

revealed,[528] analyzed and specific measures have to be applied to change the status quo. To conduct such an analysis it is necessary to acquire extensive information about the actual distribution of opportunities and resources in the society at large. The distribution of these goods, and the social attitudes of discriminatory and oppressive character that develop from this state of distribution and reinforce it, express themselves mainly in individual cases. Therefore it is necessary to systematically discover individual cases of injustices in order to reveal the respective social facts and attitudes. The confidentiality of mediation prevents the communication of the factual situations from which a dispute emerges.[529] Thus, situations of social injustice remain undetected by the public.[530] Hence, mediation is structurally not capable of supporting the discovery of social injustices.

On the other hand, if unjust distributions of resources and the respective attitudes prevail in individual cases they tend to reinforce the resource distributions and attitudes prevailing in the society at large, because it is from many individual cases that social attitudes develop and large-scale distributions result. Therefore, in cases where such inequities have a determinate influence on the mediated settlement, they will further characterize the relationship between the disputants and thus strengthen the respective social disposition. In this way, too, the lack of communication of mediated settlements hinders the detection of social injustices.

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[528] Brunet, *supra* note 69 at 38 notes that "[i]nformation brought to light during discovery of a particular dispute can have widespread value" because it "has the capacity to affect morals since the discovery of information revealed ... may influence morality". Menkel-Meadow, "Pursuing", *supra* note 73 at 25 – 30 discusses the issue that settlement "may rob the public of important information" (at 25) on the basis of several recent cases.

[529] Rogers & McEwen, *Mediation*, *supra* note 8 at 237 – 238 point out that "enforcement agencies are denied information to ascertain patterns of misbehavior and to address them."

[530] Silver, *supra* note 16 at 524 fears that in mediation "[p]otential claimants may lack the incentive to discover others who might share their complaint. In addition, due to the facility of informal procedures, agency officials might fail to uncover larger patterns of discrimination, the eradication of which demands governmental intervention." Similarly, Richard L. Abel, "The Contradictions of Informal Justice" in in Abel ed., *Politics*, *supra* note 93, 267 at 289 criticizes informality of dispute resolution procedures because "its effect is to isolate grievants from one another and from the community, inhibiting the perception of common grievances. Without the possibility of aggregation, of some greater impact, even the most committed grievant will burn out and 'lump' the complaint. ... Informal institutions often lack the records that would permit the perception of common patterns. The use of amateur or paraprofessional mediators, who handle disputes infrequently and display high turnover, also hinders aggregation, for they, like the disputants themselves, experience everyone as a first offender."

But even where mediation results in settlements in which the values of social justice are realized, the confidentiality of the process hinders the large scale realization of these values. Because these outcomes are not communicated to the public or to concerned social groups, they can not develop a guiding force that could influence the development of the attitudes and lead to a change in the distribution of goods in society at large.[531]

These factors suggest that it is the disclosure of mediated settlements that can foster the development of social justice. However, for the pursuit of social justice, the value of an isolated publicity of the outcomes is questionable. Dispute settlements depend heavily on the factual situation that is the base of the dispute. Only where the facts from which the dispute arises are communicated with the outcome can the outcome be examined for its degree of realization of the social justice values. The same is true for the reasons of the settlement, the standards according to which the agreement is shaped. If they are not made public, the terms of the settlement alone might not show whether the reasoning that leads to the agreement is characterized by the values of social justice, or whether those attitudes prevailed that democratic society intends to erase, or even whether it was mainly the superior power of one disputant that determined the settlement.[532] In this regard, too, mediation is conceptionally incapable of securing the necessary acquisition of information. There is no public participation in the process, and the proceedings are not communicated to the public. Moreover, usually there is not even a record about the basis of the dispute or the statements of the disputants in mediation.[533] Often the disputants will

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The same concern is expressed by Weinstein, *supra* note 257 at 48; Hanns Prütting, "Verfahrensrecht und Mediation" in Breidenbach & Henssler eds., *supra* note 188, 57 at 71.

[531] The loss of the guiding function of disputes is one of the major points of the settlement criticism of Fiss, "Against Settlement", *supra* note 19. See also Weinstein, *supra* note 257 at 6.

[532] Luban, *supra* note 501 at 2639 criticizes settlements because "[w]hen a case settles, it does so on terms agreeable to its parties, but those terms are not necessarily illuminating to the law or to the public. Indeed, those terms may be harmful to the public. Instead of reasoned consideration of the law, we often find little more than a bare announcement of how much money changed hands ... [S]ettlement information offers no reasons or reasoning, nothing to feed or provoke further argument" and thus hinders "public conversation about the strains of commitment that the law imposes" (at 2640).

[533] Luban, *supra* note 501 at 2650 – 2658 discusses the importance of the publicity of factual bases of disputes for the public debate about "issue[s] of substantial political significance" (*ibid.* at 2653) and concludes that this publicity is essential in "situations in which the public interest in matters relating to health, safety, and the operations of government outweighs the plaintiff's interest in gaining a favorable settlement" (*ibid.* at 2657).

protect their interest in secrecy by agreeing to maintain silence on the mediation process or even on the settlement. Consequentially, when the mediation is concluded it is not possible thereafter to determine the sources of the settlement.

b. Informality

The distribution of opportunities and resources in society at large is a function of the distributions in individual cases. An intended specific change in the total distribution requires specific changes in the individual distributions. To succeed with an intended improvement of social justice, the realization of the necessary changes in individual cases has to be coordinated and controlled by a body that bears the democratic responsibility for the realization of the intended social changes.

This coordination and control can not be exercised in regard to mediation. As a process that is characterized by the absence of binding elements for its organization and operation,[534] it is structurally not open to coordination on a society-wide level. Mediation is free from regulations of its organizational structure. This organizational freedom keeps mediators free from any subordination under a public authority with the authority to coordinate or control their activities. Also the operation of mediation is widely unregulated. Thus the mediators are not subject to any public control of their observance of goals and principles for the operation of mediation, of rules of conduct and the scope of responsibility of the mediator. Further, mediation is free from procedural requirements. As a highly customized process that is, in principle, newly designed in each and every dispute, mediation is not open to any control or coordination of its procedure. The inaccessibility of mediation for coordination and control makes it unsuitable to bring about specific changes in the state of social justice.

A further flaw of mediation in regard to the enhancement of social justice is its voluntary character. The coordinated social change requires some sort of compulsion to dissolve the old state of resource distribution and establish a new one, to eradicate social attitudes that

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[534] See Chapter 1, Section B. 2., above.

stand in the way of social change and produce new ones that support the intended state of social justice. The participation in mediation, on the other hand, is generally voluntary throughout the process. Unless he is bound by a contract, no disputant can be compelled to take part in mediation or to work towards a specific agreement. This voluntariness leaves no room for the application of compulsion to improve the state of social justice.[535]

c. Norm Orientation

The improvement of social justice depends on the norms according to which the interactions in the society are organized.[536] These norms determine the distribution of rights, opportunities, and resources in the individual case. The sum of individual cases constitute the total distribution of goods in society, *i.e.*, the state of social justice. An interaction determined by norms that are based in the state of distribution that the society intends to change can not contribute to this change. In mediation, the typical norm-orientation counteracts the social justice goals pursued by employment law.

A mediated settlement is to a large extent determined by the norms that the disputants and the mediator apply to the dispute. Typically, mediation discourages the use of legal norms and rather promotes the use of social standards, *i.e.*, norms that are widely accepted in the social setting from which the dispute arises.[537] These standards typically reflect the status quo of the distribution of opportunities and resources in society.[538] A settlement according to these standards will reinforce their prevalence in the society and will obstruct the

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[535] Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & Davis Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 1985 Wisconsin L. Rev. 1359 at 1391 point out that also the procedural informality of mediation counteracts the efforts to eradicate discriminatory attitudes and behaviour: "[P]ublic institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures. Informal settings allow wider scope for the participants' emotional and behavioral idiosyncrasies; in these settings majority group members are most likely to exhibit prejudicial behavior."

[536] Silver, *supra* note 16 at 541 states that norms are essential to bring about social change because "resolving cases in the absence of norms creates a risk of inconsistent results. ... Without norms, without a definition of discrimination ... we cannot measure whether justice, particularly in the sense of non-discrimination, is being achieved."

[537] See Chapter 1, Section B. 2. c., above.

[538] Fiss, "Against Settlement", *supra* note 19 at 1078 describes settlement as a process that "accepts inequalities of wealth as an integral and legitimate component of the process" and thus reinforces these dispartities.

opportunity to contribute to social change.[539] Hence, the reference to social norms in mediation tends to counteract the purpose of employment law to redefine the standard of social justice.[540]

Moreover, where the disputant's ideas about the applicable standards differ, the more powerful disputant tends to impose his preferred standard on the other side; in employment disputes, this will usually be the employer.[541] Thus, the agreement will be determined by standards that favour the employer over the employee and will reinforce the economically and structurally strong social position of the employer. This tendency is detrimental to the purpose of employment law, because wherever employment law is designed to bring about a redistribution of opportunities, it is the employee who is intended to benefit from the social change.

d. Participation

The state of social justice is defined in a democratic process in which the individual members of society are grouped according to common characteristics as their social situation, status, wealth, etc.[542] The resources of society are distributed to its members according to their belonging to one of these social groups. Therefore, the social groups have an interest and – in a democratic society – an entitlement to participate in those social interactions that influence the definition of social justice. Because mediated

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[539] Edelman *et al.*, *supra* note 16 at 504 point to the loss of the guidance of law that effects the realization of the goals and values underlying law on a large scale: "To the extent that dispute resolution forums transform disputes from rights claims to individual problems, they depoliticize those claims and preclude future claimants from grounding their claims in precedent." Abel, Informality, at 383 concludes that "only within the legal system can advocates even hope to pursue the ideal of equal justice in a society riven by inequalities of class, race and gender and dominated by the power of capital and state. Formal law cannot eliminate substantive social equalities, but it can limit their influence. Law is the sole arena within which unequals can hope to achieve justice."

[540] Brunet, *supra* note 69 at 30 argues that "a radical increase in ADR procedures carries a danger of reducing the substantive justice produced continuously by the 'guidance function of law' and occasionally by private attorney-general enforcement of substantive law."

[541] See Section 1., above.

[542] Note that the grouping in one society is specific to the subject matter. Thus, individuals who are members of the same social group in the context of, *e.g.*, housing can belong to different groups in the context of employment (For instance, both employee and employer can live in rented homes). Even within a particular subject matter one social group can be further split. *E.g.*, whereas one employee belongs to a social majority, another one may belong to a discriminated minority.

employment settlements reorganize the distribution of rights, duties, and resources between the individual disputants, they also affect the state of social justice. Therefore, the scope of persons who hold a stake in the mediated dispute goes beyond the immediate disputants and includes the social groups whose members might be affected by the outcome of the dispute.

Mediation does not structurally provide for the participation of affected groups,[543] and is therefore structurally incapable of supporting the improvement of social justice. The process does not offer a mechanism that secures the appropriate identification of affected persons, the announcement of the emergence and the scope of the dispute to these persons, the consideration of their interests, and their inclusion in the mediation process. Rather, the structure of mediation discourages the participation of persons or groups that have a stake but are not immediately involved in the dispute. Mediation is directed towards an agreement between all disputants on the total range of disputed issues. The inclusion of affected persons complicates the finding of an agreement in mediation, because the broadened range of issues is more difficult to accommodate in a settlement, and the increased number of participants increases the risk of dissent among the disputants and thus of the failure of mediation. Therefore, mediation is likely to exclude affected persons from the dispute resolution and leave their interests unconsidered in the mediated settlement.

Moreover, mediation affects not only the state of justice in society at large, but also the distribution of resources and opportunities on a smaller scale, *e.g.*, in the enterprise. Employment disputes often result in an agreement between the employer and the employee about the allocation of specific resources. This allocation is likely to affect the position of other employees in the enterprise. Where a divisible resource is in dispute, the allocation of a specific part of the resource to the disputing employee is likely to affect the share of the other employees. If the dispute is about a unique resource, the allocation to the disputant is likely to result in the loss of the resource for another employee, or in a

[543] See Chapter 1, Section B. 3., above.

loss of the chance to have the resource allocated to him.[544] For a just distribution of the resources within the enterprise, the interests of all affected persons have to be considered and weighed against each other. However, mediation structurally discourages the participation of these affected persons or the consideration of their concerns and interests in the dispute. Therefore, it is unsuitable to bring about justice in the enterprise.

4. Efficiency

Mediation is generally promoted as an efficient dispute resolution process.[545] The assessment of efficiency depends on the process with which mediation is compared. Mostly, mediation is evaluated in relation to court litigation. Here it is said to consume less of the disputants' and of the society's resources than the resolution of the dispute in a public court.[546] Although it has been argued that the efficiency gains through mediation are limited,[547] mediation firmly enjoys the reputation in the business and ADR communities to be an effective means to save on dispute resolution costs.

Dispute resolution costs are a part of the total costs of an enterprise; they are also a part of the costs the society bears for the organization of social transactions. Savings on dispute resolution costs make resources available for other tasks of the enterprise or of the

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[544] Silver, *supra* note 16 at 579 recognizes that "even a mediated resolution of an individual complaint may have negative repercussions for nonparties. For example, a resolution that guaranteed an individual victim of alleged sex discrimination the next available supervisor position would mean that other persons, perhaps equally or even more qualified, would not receive a position that they might have attained but for the mediated agreement." See also *supra* note 163.

[545] See, *e.g.*, Silver, *supra* note 16 at 527.

[546] See, *e.g.*, Shavell, *supra* note 22 at 21.

[547] McEwen, "Note", *supra* note 186 at 156 refers to evidence from empirical research to this result. Weinstein, *supra* note 257 at 6 emphasizes that "[c]ourts ... are designed to be inexpensive to litigants" while private dispute resolution is not subsidized. However, this argument leaves unconsidered the costs of dispute resolution that occur outside the court, *e.g.*, the cost for representation. Yarkon, *supra* note 143 at 171 reports the cost to the defendant in typical discrimination litigation to be "in the range of $ 75,000 to $ 100,000". The claimant in such cases, too, faces a significant financial burden: "Even in contingency fee arrangements, typical employee out-of-pocket litigation costs may be $ 5,000 to 20,000."

society. Thereby they can improve the efficiency of the enterprise and of society at large and thus support the respective goal of employment law.[548]

The cost of mediation and thus the efficiency of the process is influenced by the range of participants in the process and the confidentiality of the outcome,[549] by the degree to which facts are determined and norms observed,[550] by the kind and quality of professional services employed,[551] and by the degree of formality with which the process must comply.[552] These factors will be discussed in this section.

a. Participation and Confidentiality

The restriction of participation and disputed issues in mediation to those of the immediate disputants[553] is an important potential to keep disputing costs at a low level. An increased number of disputants is likely to prolong the mediation process, thus increasing the cost of the dispute resolution. A prolongation of the process will raise the level of fees for the mediator and for the representatives; it will also generate a higher loss of working hours for the participation of the employee and the employer in the process. Similarly, a broadened range of issues and interests to be considered is likely to have an increasing effect on the dispute resolution costs: it will take more time and resources to draft an agreement that is responsive to a great number of concerns. Moreover, an increase in the number of participants is likely to increase the number of representatives and thereby the total cost of representation in the resolution of a dispute. Therefore, mediation with its limited participation is likely to contribute to the efficiency of the enterprise by holding down disputing costs.[554]

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[548] Not only the direct cost of dispute resolution affects the efficiency of the enterprise. Mediation is often reported to increase the employees' job satisfaction and thus to boost productivity. See Bishop, *supra* note 5 at 11; Singer, *Settling, supra* note 3 at 100.

[549] See Section a., below.

[550] See Section b., below.

[551] See Section c., below.

[552] See Section d., below.

[553] See Chapter 1, Section B. 3., above.

[554] McEwen, "Note", *supra* note 186 at 157 points out that at least some of the costs savings may be achieved at the expense of the quality of mediation: "Many mediation advocates would argue that to involve parties and consider issues in depth, mediation should take longer than perfunctory court

However, mediation may have the effect of increasing disputing costs at a broader level. Because of the confidentiality of mediation,[555] mediated settlements and the standards according to which they have been shaped are generally not communicated to social groups whose members may be in similar positions as the disputants. Therefore, confidential mediated settlements do not provide guidance or reference points for disputes potentially arising from similar factual situations. Such a guiding and reference function could avoid disputes of similarly situated disputants. A potential disputant might be discouraged to initiate a dispute by the rejection of a claim similar to his own in the previous mediation because he expects a similar outcome in his dispute. In addition to the avoidance effect, the guiding function can also lower the cost of an existing dispute. The previous outcome may work as an external standard, making it easier for the disputants to conclude an agreement on similar terms. The lack of public communication of mediated settlements deprives future disputants and the society of the benefit of this standard.[556]

b. Fact Determination and Norm Orientation

The determination of the factual situation from which a dispute emerges can give rise to a significant part of the total costs of dispute resolution. Therefore, the limited fact determination in mediation[557] tends to contribute to a low cost of dispute resolution in this process.

Fact determination can be a costly venture. Facts that are directly accessible to a disputant have to be gathered, filed, and prepared for presentation in the dispute resolution process. Additional information has to be acquired from third persons who are likely to ask for compensation for the disclosure of internal material and for their effort to process the included information. The production of documents can consume extensive resources. Furthermore, the gathering and procession of information can take a great amount of time,

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hearings or lawyer-to-lawyer negotiation. When mediation operates under time-pressures, in contrast, it may not need party needs and may increase pressures to settle."

[555] See Chapter 1, Section B. 1., above.

[556] See Brunet, *supra* note 69 at 23 – 24. Antaki, *supra* note 75 notes that "*la règle de droit deviendrait désuète et le nombre de recours judiciaires augmenterait à cause de l'atrophie de la référence sociale.*"

[557] See Chapter 1, Section B. 2. a., above.

use up capacity for work that is missing for other tasks, and often it requires the employment of skills of highly remunerated specialists.

In mediation, the determination of the facts underlying the dispute tends to be limited to the essential facts. Extensive discovery of the total situation from which the dispute emerges is discouraged; disputants may be asked, but can not be compelled, to provide additional information. There is no requirement to prove alleged facts. Generally, the disclosure of facts is limited to information that is readily available for the disputants. Thus the generation of high costs for factual discovery is avoided.[558]

Furthermore, the kind of norms according to which the dispute is settled in mediation can have an impact on the cost of mediation. The application and interpretation of highly technical norms requires expertise in this field. The disputants themselves are not likely to have this expertise; they depend on the employment of specialized aid which tends to generate high costs. On the other hand, where the selected norms are characterized by community standards and common sense, the need for specialized representation is decreased, and costs can be avoided. Mediation structurally discourages the use of – highly technical – legal standards and rather promotes the settlement of the dispute according to social standards,[559] reducing the need for specialized representation. Thus it tends to decrease the cost of representation and supports an efficient settlement of the dispute.

c. Representation and Mediator Services

A significant part of the cost of dispute resolution is incurred by representation. It involves the sometimes time-intensive employment of agents for the preparation of the dispute, and the participation of these agents in the process. In mediation, the costs of

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[558] However, Brunet, *supra* note 69 at 41 points to a possible adverse effect of the voluntary fact determination in mediation if one disputant is not satisfied with the degree to which facts have been determined: "[T]he lack of a method to compel critical information may cause the dispute ... to be continued in the court system by a disputant, who perceives the need for information, and knows relevant information can be obtained readily through compulsion". In this case mediation would be not more than a prelude to litigation, and thus only add to the costs of the resolution of the dispute.

[559] See Chapter 1, Section B. 2. c., above.

representation can be reduced; however, savings may come at the expense of the quality of representation.

Mediation emphasizes the direct participation of the disputants.[560] Where the disputants are not represented in the process, the spending of resources for representation will be avoided or at least reduced. In such a case, the disputants may still consult advisors outside of the actual mediation process; such a consultation will provoke costs, but at a considerably smaller level than full representation in the process would generate.

Where the disputants are represented by agents in the mediation process, the cost of representation depends on the amount of work and the time invested by the agents, as well as on the qualification of the agents. Because of its limited determination of facts[561] and the informal norm-orientation,[562] mediation can decrease the amount of work and time to be invested and thus to lower the cost of representation. Also, the process poses no requirements for the qualification of agents.[563] Therefore, the selection of agents is not restricted to a community of highly specialized professionals who, because of their extensive training and the demand for their services, commonly command high compensation. Disputants can choose a less specialized representative and thus save costs on representation. However, specialization structurally enhances the quality of representation, and consequentially increases the disputant's ability to introduce his ideas in the mediation process and the reflection of his position in the mediated settlement. Hence, savings in representation cost are likely to be traded against the quality of representation.

A further part of the mediation cost is generated by the mediator's fees. In this regard, the same arguments apply that have been raised for the cost of representation. The fees will be dependent on the time and the amount of work invested by the mediator into the

[560] See Chapter 1, Section B. 2. b., above.
[561] See Chapter 1, Section B. 2. a., above.
[562] See Chapter 1, Section B. 2. c., above.
[563] See Chapter 1, Section B. 2. b., above.

resolution of the dispute.[564] Also, the level of fees might depend on the mediator's qualification and the quality of his services.[565] Therefore, the reduction of the costs for the compensation of the mediator is likely to be associated with a decrease in the quality of the mediation.

d. Informality

The level of formality of a dispute resolution process can have an impact on the efficiency of the process. A formal process is characterized by a certain density of requirements regarding its organization and operation. These requirements are likely to generate costs for their realization, coordination and control.

Dispute resolution processes can be subject to prescriptions regarding their organizational structure. They may be required to operate in specific bureaucratic or hierarchical arrangements, providing clear responsibilities for the internal division of tasks and external accountability. The increase of bureaucracy and hierarchy tends to increase the operation costs of the dispute resolution service. Regulations may also establish a body that controls and coordinates the provision of the dispute resolution service in question. The establishment of such a body and its operation have to be financed, a task that is likely to be fulfilled by those who call on the dispute resolution service that is subject to control and coordination by the body. Therefore, the regulation of a process is likely to increase the costs of dispute resolution employing it.

Mediation is widely free from organizational requirements.[566] Unrestricted by legal or customary restrictions, mediators can operate their services in the way they see most suitable for their task. Because they earn their living with mediation and/or are stand in competition with other dispute resolution providers, they will tend to include efficiency

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[564] The time and amount of mediator work tends to differ according to the intensity of the facilitative interventions employed by the mediator. This intensity depends on the mediator's procedural concept; see Chapter 1, Section B. 4., above. Thus, the disputants can influence the amount of mediator fees incurred by their mediation by choosing a mediator according to the intensity of the mediator's facilitation.

[565] See Chapter 1, Section B. 5. c., above.

[566] See Chapter 1, Section B. 2., above.

considerations in the organization of their services. This will keep the operation costs at a low level. This cost advantage can be forwarded to the clients of these services, and is therefore likely to be reflected in the cost of mediation for the disputants.

Likewise, the regulation of the operation and the procedure of dispute resolution entails costs, first for the introduction of the regulation and second for its coordination and the control of compliance with it. Since mediation is widely free from such regulations,[567] there are no formality costs to pass on to the disputants; the dispute resolution costs tend not to increase in this respect.

Some mediators are affiliated with associations that develop a certain level of self-regulation and represent their members towards the public. The operation of such an association will generate costs that are likely to be passed on to the clients of the mediators. Similarly, where the operation of a free mediation service is supervised or administrated by an agency or association, the exercised coordination and control will tend to increase the costs for the disputants. However, these increases are likely to be balanced or reversed, *e.g.*, by a concentration of resources or by advertising or lobbying effects of the association. These effects tend to increase the efficiency of the operation of the dispute resolution service. Even where these efficiency advantages are not affected, the voluntariness of the membership in the association and the subjection to the supervision, in connection with the competition of unaffiliated or unsupervised mediators, will tend to keep the increase at a low level.

5. Human Relations

The human relations in the employment relationship are not typically characterized by a high degree of amenability. The organizational structure of employment and the power differential between the employment parties, together with the reality of a strong competition on the job market, tend to establish a state of human relations in the workplace that is marked by a high degree of adversariness between employer and

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[567] See Chapter 1, Section B. 2., above.

employee and by a certain distrustful tension among employees. These conflicting attitudes tend to hinder free communication in the workplace. The lack of communication prevents employer and employees from acquiring information about the situation of the other side, of their interests and needs, and therefore possibly from understanding the other side's preferences, opinions, and the demands resulting from them. Without some mutual understanding, these claims are likely to be perceived as not justified and selfish; this perception of selfishness, in turn, tends to reinforce an adversarial attitude towards the other side.

Employment mediation enters with the promise to enhance the human relations in the workplace. The proposed means to bring about this change is to start communication between the employment parties. The mediator's facilitation, it is argued, will give the disputants the opportunity to explain the interests and needs that are behind their claims, and thus enable the other side to understand the situation.[568] According to the concept of mediation, this understanding generates mutual trust and thus transforms adversarial attitudes into cooperative ones.[569] These positive attitudes are supposed to durably improve the workplace atmosphere. Furthermore, in the mediated settlement the disputants themselves design the continuity of their relationship. This cooperative conduct in mediation is supposed to continue in a cooperative pattern in the operation of employment and in an increased sense of responsibility for the employment relationship.

Mediation has some potential to enhance the communication between the disputants and may thus tend to bring them closer to an appreciation of the foundation of the other side's claim in the dispute. However, other factors suggest that mediation does not necessarily enhance the workplace atmosphere.[570] Moreover, it is questionable whether the enhancement of communication and the gain in mutual understanding in the mediation

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[568] Rogers & McEwen, *Mediation*, *supra* note 8 at 10.

[569] In contrast, Sander, "Varieties", *supra* note 11 at 122 notes that disputes usually are accompanied by an adversarial atmosphere between the disputants; therefore, mediation may fail to foster communication "if the parties have become too entrenched in their respective positions."

[570] The potential of mediation to foster a communicative attitude is discussed in Section a., below.

process are sufficient to bring about an improvement in the human relations in the workplace.[571] These issues will be discussed in this section.

a. Mediation Characteristics

The potential of mediation to enhance the communication between the disputants and thus to improve the human relationship between them is mainly a function of the mediator's facilitation.[572] It is also affected by the privacy and voluntariness of the process,[573] as well as by scope of participants in the resolution of a dispute. I will explore these factors in this section.[574]

(1) Facilitation

It is the function of the mediator to facilitate the negotiations between the disputants and to lead them towards a settlement on their own.[575] As a neutral and impartial outsider of the dispute, he can generate in the disputants a readiness to make concessions and direct their dispute resolution efforts towards a rather cooperative mode.[576] He can show the disputants cooperative alternatives to come to a settlement and thus break down their competitive attitude,[577] or diminish the risk for the disputants to disclose information by functioning as an information pool and filter, transferring only that information that is likely to bring about a settlement.[578] With these – exemplary – interventions the mediator can remove communication obstacles in the dispute resolution process.

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[571] The connection between communication in mediation and workplace relations is discussed in Section b., below.

[572] See Section (1), below.

[573] See Section (2), below.

[574] See Section (3), below.

[575] See Chapter 1, Section B. 5. a., above.

[576] Breidenbach, *Mediation*, *supra* note 25 at 98.

[577] Breidenbach, *Mediation*, *supra* note 25 at 98. Susskind & Cruikshank, *supra* note 24 at 146, speak of "inventing options".

[578] Breidenbach, *Mediation*, *supra* note 25 at 98 and at 157 refers to the importance of "caucussing" in this regard.

(2) Private Character of Mediation

The confidentiality of mediation[579] may enhance the communication between the disputants. It guarantees that the information the disputants disclose in mediation will not be transmitted to persons outside the dispute or to the public without the consent of the disputant. This security prevents the disputants from negative effects of disclosure of information that is sensitive for business reasons or that a disputant does not want to be made public for personal reasons. The exclusion of this negative effect of disclosure may increase the readiness of the disputants to provide the other side with information they would not have disclosed otherwise.

An improvement of the communication between the disputants might be prompted by the voluntariness of the participation in mediation.[580] The absence of compulsion to participate raises the probability that the disputants freely and voluntarily choose mediation as the forum to settle their dispute. Therefore they tend to enter the process with a readiness to accept the rules of mediation and to support the mediator's efforts to bring about a settlement. They may be prepared at the beginning of mediation to take up communication with their counterpart, or their readiness to communicate might be brought about by the mediator's facilitative efforts.

However, the disputants' participation does not always reflect their free and voluntary choice. A disputant may be prompted to settle the dispute in mediation by a pre-dispute agreement to mediate employment disputes that he now regrets, or he may be subject to pressure to enter or continue to participate in the mediation process. In such cases, the disputant's attitude to dispute resolution in mediation is not likely to be characterized by a readiness to support the process by increasing his effort to communicate.

The doubts raised with regard to the voluntariness of participation are also valid for the consensual character of a settlement.[581] Consent of both disputants to the mediated

[579] See Chapter 1, Section B. 1., above.
[580] See Chapter 1, Section B. 1., above.
[581] See Chapter 1, Section B. 4., above.

solution is the main prerequisite for the success of mediation. Where this consent is generated by the disputants' satisfaction with the outcome, it can lead to a decrease of conflict potential in the workplace and thus contribute to the improvement of the human relations. However, consent to a settlement in mediation is not a safe indicator for a disputant's satisfaction with the outcome, because the agreement may be induced by manipulation of the disputant or by settlement pressure. A settlement that is not perceived as fair by one disputant is not suitable to generate a positive attitude to the other disputant, and therefore fails to enhance the workplace atmosphere.

(3) Participation

Mediation structurally invites only the immediate disputants to take part in the dispute resolution.[582] Concerned social groups and persons can not influence the settlement; their interests and concerns are not likely to be taken into consideration. The terms of a settlement may in fact favour a disputant at the expense of persons who are not invited to participate in drafting the settlement. Thus, an employee may, in a settlement, secure the allocation of resources to himself, thereby diminishing or excluding the chances of other employees to benefit from these resources.[583] Such a situation is likely to raise resentments and in the workplace and diminish solidarity between employees. Thus, it is likely the workplace atmosphere will deteriorate rather than human relations will be enhanced.

b. Communication and the Improvement of Human Relations

Mediation can enhance the communication in the dispute resolution process.[584] If and how this improvement can be perpetuated in the day-to-day reality of the workplace depends on the inclusion of communicative structures and patterns in the substance of the mediated settlement and on the realization of the settlement terms in the operation of employment. But even where improved communication in mediation can be transferred

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[582] See Chapter 1, Section B. 3., above.
[583] See Section 3. d., above.

into an improved communication structure in the workplace, it is doubtful whether in this improvement is structurally capable of fundamentally and lastingly enhancing the workplace atmosphere.

The lack of communication is a factor for the reinforcement of adversarial attitudes and their consequences for the workplace atmosphere that can be diminished or even eliminated by the enhancement of communication and the development of cooperative attitudes.[585] However, the elimination of this reinforcing factor does not eliminate the sources of adversarial and competitive attitudes in the workplace, like the power differential between the employer and the employee, the structural subordination of the employee, and the competition between the employees on the job market.

A fundamental improvement of human relations by the eradication of adversarial attitudes and establishment of cooperative structures in the workplace can only be effective where the sources for these negative attitudes are eliminated and the organizational structure employment is constructed in a truly cooperative arrangement. Employment mediation has not been introduced – and does not intend – to bring about this fundamental change in the economic and political structure of modern industrial societies, and would not be capable of achieving this goal.

C. Consequences for the Suitability of Mediation in Employment Disputes

Having identified the effects of mediation on the various concepts underlying employment law and on the functions of these legal provisions, it is now possible to reassign conceptual and functional features to the different elements of the legal organization of employment. Thus the impact of mediation on particular elements of employment law will become clear, and the suitability of mediation can be assessed according to the effects of the process on disputes that are governed by the legal provision in question.

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[584] See Section a., above.
[585] Singer, *Settling, supra* note 3 at 98.

In this section, I will first conclude the analysis of the preceding sections with an evaluation of mediation for the resolution of disputes that are governed by contractual employment law,[586] followed by an assessment of mediation for disputes involving regulatory provisions.[587] The section will end with a note on the suitability of mediation for disputes that are governed by a combination of contractual and regulatory elements.[588]

1. Contractual Employment Law

Under a legal perspective, the suitability of mediation for employment disputes under a contractual scheme depends on its compatibility with the rationale of contractual employment,[589] as well as on its potential to foster the functions of the contractual scheme.[590] After exploring these different aspects I will summarize the findings.[591]

a. Rationale

Contractual employment law is dominated by the unitary perspective.[592] Mediation is to a large degree compatible with this perspective, because the structural features of mediation are to a great extent congruent with the factors that support the unitary view on employment law.[593] The informality of mediation provides the flexibility that is necessary to maximize the efficiency of the enterprise and of the society at large, and the process' emphasis on cooperation between the disputants supports the teamwork of employer and employee that is required to achieve the mutual efficiency goal. On the other hand, mediation tends to restrict the employer's discretion in the operation of employment and thus contradicts the unitary view. Therefore, mediation is conceptually to a large degree, but not completely, suitable for the resolution of employment disputes that are governed by contractual employment law.

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[586] See Section 1., below.
[587] See Section 2., below.
[588] See Section 3., below.
[589] See Section a., below.
[590] See Section b., below.
[591] See Section c., below.
[592] See Chapter 2, Section B. 2., above.
[593] See Section A. 1., above.

b. Function

The primary function of contractual employment law is to support the employment parties' strive for a maximum of efficiency of the enterprise.[594] Mediation supports this function with the minimization of dispute resolution costs and time through the restriction of the range of disputants, the limited expenditure in factual determinations and the use of non-technical norms, the waiver of the requirement of representation, and its informal organization and operation.[595] Thus mediation contributes to the reduction of the overall expenses of the enterprise and thereby fosters an efficient operation of the enterprise.

Other social consequences of contractual employment law are merely side-effects of the striving for efficiency.[596] Therefore, the social effects of mediation are not determinative for the assessment of the process' suitability for contractual employment disputes. Nevertheless, mediation supports contractual employment in this regard too, because the social reality established by the unregulated scheme tends to continue in mediation. The power difference in employment is legitimized by the parties' different contributions to the economic product. This proportion is reflected by the disputing power relation in mediation;[597] therefore, mediation supports the power balance established by the contractual employment law. The degree of the guarantee of the employee's rights in the workplace depends on the power relation on the labour market.[598] In mediation, there is a similar connection: the dispute power relation determines the realization of individual rights.[599] The social distribution of advantages and opportunities is not a separate concern of contractual employment law, but only a function of the economic activities of the different members of society.[600] This indifference is reflected in mediation's lack of structural mechanisms to directly influence the state of social justice.[601] Contract law does not aim at good human relations, but welcomes them because of their positive effects on

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[594] See Chapter 1, Section B. 3., above.
[595] See Section B. 4., above.
[596] See Chapter 1, Section B. 3., above.
[597] See Section 1. a. (2), above.
[598] See Chapter 1, Section B. 3., above.
[599] See Section B. 2., above.
[600] See Chapter 1, Section B. 3., above.

the efficiency of employment.[602] Mediation has a significant potential to enhance human relations and thus assists the improvement of efficiency.[603]

Because of its support of the functions of contractual employment law, mediation is in practice suitable for the resolution of employment disputes that are governed by the contractual scheme.

c. Summary

The concept and the structure of mediation are highly compatible with the rationale that underlies contractual employment.[604] Furthermore, mediation reflects and reinforces the social reality established and promoted by contractual employment law.[605] Therefore, under a legal point of view mediation is to a large degree suitable for the resolution of disputes that arise under the contractual scheme.

2. Employment Regulations

The primary rationale of employment regulations is to provide the employee with a protection that he be considered as morally entitled to and that he needs because of his inferior power on the labour market, but does not enjoy under contractual employment law. To guarantee the effect of this protection, employment regulations are generally designed as mandatory provisions.[606] An agreement that does not fulfill the regulatory provisions is not legally enforceable. It could be argued that the legal invalidity of such an agreement prevents the loss of legal protection for the employee. It is true that an invalid agreement does not preclude the employee from seeking a new and legally valid solution of the dispute which ensures that he can enjoy the full protection provided by the employment law. However, to some extent the danger remains that even an invalid agreement will be adhered to by the disputants: the employee might not know about the

[601] See Section B. 3., above.
[602] See Chapter 1, Section B. 3., above.
[603] See Section B. 5., above.
[604] See Section a., above.
[605] See Section b., above.

protection the law provides, or he might waive the pursuit of his right in order to retain his employment, or he might not dispose of the necessary means for another attempt to resolve the dispute.[607] Thus even invalid agreements can gain a substantive force and in fact design the employment relationship.

Mediation generally insists on the freedom of the disputants to select on their own the norms and standards that shall govern the settlement of their dispute.[608] Thus, it fails to acknowledge in principle the binding authority of employment regulations. Even where the employment regulations are selected as the governing standard, mediation does not provide the structural mechanisms to ensure that the legal provisions are applied correctly. Therefore, it threatens to bring about an agreement between the disputants that is not legally enforceable.[609] If mediation results in such an invalid settlement, it provides the solution with an appearance of legitimacy, and thus poses an additional obstacle to the further pursuit of the employee's right: an invalid settlement is more likely to be applied in the employment reality if it results from the mediation of the dispute than if it is concluded in unassisted negotiations between employee and employer.[610] Therefore, mediation is not capable of ensuring compliance with employment regulations. This incapability speaks against its suitability for disputes governed by employment regulations.[611]

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[606] See Chapter 2, Section C. 2., above.

[607] Edelman *et al.*, *supra* note 16 at 497 point out that employers often "encourage employees to use internal complaint procedures in an attempt to satisfy complainants and to insulate the employer from lawsuits, liability, and intervention by regulatory agencies."

[608] See Chapter 1, Section B. 2. c., above.

[609] See Stallworth, *supra* note 456 at 19. Generally, mediated settlements are enforceable as contracts. See Rogers & McEwen, *Mediation*, *supra* note 8 at 197 – 200; Rogers & McEwen, *Supplement*, *supra* note 199 at 48 – 49. Contracts are unenforceable if they infringe public policy or mandatory law. The same is therefore true for mediated agreements.

[610] Silver, *supra* note 16 at 575: "If an agreement between the complainant and the respondent is consensual, noncoerced, and thus acceptable to both parties, there arguably will be a greater likelihood of compliance with its terms."

[611] Silver, *supra* note 16 at 541 finds that the thrust of mediation "is not to bring the employer ... into compliance with the civil rights laws; rather it seeks to find a solution that is mutually agreeable to the complainant and respondent, regardless of whether the solution would constitute full compliance with the applicable laws." Desmarais, *supra* note 16 at 419 considers mediation as appropriate in employment disputes only if it does not abridge the employee protection provided by the "*ordre public social*".

However, the appropriateness of a dispute resolution process can not only be assessed by its compliance with the letter of the legal provisions, but also by its capability of fostering the purpose of the law.[612] Therefore, to evaluate the suitability of mediation for the resolution of disputes that are governed by regulated employment law, the process will be considered in the light of the conceptual rationale[613] and of the practical function[614] of employment regulations prohibiting discrimination,[615] providing employment standards,[616] and prohibiting unjust dismissal,[617] and a summary of the findings for the regulations in question will be given.[618]

a. Anti-discrimination Regulations

(1) Rationale

Regulations prohibiting discrimination in employment are determined by the rights perspective on employment law that is based on the concept of fundamental rights as a moral absolute and on the guarantee of these rights for the individual in the workplace.[619] Mediation contradicts this perspective, because it does not prevent the violation and alienation of fundamental rights.[620] It does not recognize the validity of absolutes and, consequentially, does not acknowledge in principle the authoritative character of fundamental rights. The process' emphasis on compromise is likely to curtail protected rights. The voluntariness of mediation is incompatible with the necessary enforcement of

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[612] Silver, *supra* note 16 at 520 holds that "strict compliance with the law will best serve the interest of justice in most circumstances. But, even those who generally equate justice with conformity to the letter of the law will recognize certain circumstances in which strict compliance may not ultimately achieve the desired goal. If there is a strong majoritarian resistance to full compliance with the law, a compromise solution – even one falling short of full compliance – might be preferable." In principle, however, "any compromise is inherently *less* just than attaining the ideal" (emphasis in original). For the rejection of compromise as unjust see also Fiss, "Against Settlement", *supra* note 19 at 1085 – 1086.

[613] See Sections (1) of the Sections a., b., and c., below.

[614] See Sections (2) of the Sections a., b., and c., below.

[615] See Section a., below.

[616] See Section b., below.

[617] See Section c., below.

[618] See Sections (3) of the Sections a., b., and c., below.

[619] See Chapter 2, Section C. 2. a. (2), above.

[620] See Section A. 2., above.

rights. Therefore, mediation is conceptually not suitable for the resolution of employment disputes that are governed by anti-discrimination regulations.

(2) Function

For the extinction of discriminatory practices in individual cases, anti-discrimination regulations aim at the realization of the individual's rights.[621] Mediation is not suited to guarantee the realization of individual rights.[622] Conceptually, it rejects the binding authority of legal rights. Moreover, the limited expenditure in the determination of the facts underlying a dispute hinders the correct application of legal provisions.[623] The process does not ensure that the employee disposes of qualified assistance that controls and guards the settlement as to its compliance with the law.

The regulations are also directed at the eradication of discrimination in society at large, *i.e.*, at the enhancement of the state of social justice.[624] Mediation does not provide the mechanisms for exercising a specific influence on the state of social relations,[625] and is therefore not suitable to foster the improvement of justice in the society.[626] Its confidentiality hinders the detection of discriminatory patterns in society,[627] and its lack of

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[621] See Chapter 2, Section C. 2. a. (3), above.
[622] See Section B. 2., above.
[623] Edwards, *supra* note 244 at 680 sees ADR as potentially suited to resolve those employment discrimination cases that do not present unresolved questions of law: "Many employment discrimination cases are highly fact-bound and can be resolved by applying established principles of law." However, he does not consider the capability of ADR techniques of determining the facts underlying a dispute.
[624] See Chapter 2, Section C. 2. a. (3), above.
[625] See Section B. 3., above.
[626] Mediation as an individual process is unsuited for the eradication of discrimination because "[s]ystemic discrimination requires systemic remedies." Abella, *supra* note 362 at 9. Silver, *supra* note 16 at 523 states that the use of voluntary dispute resolution procedures by complaint handling agencies had proven detrimental to the eradication of discrimination in employment, because discrimination can not be viewed as "a series of isolated events, due primarily to the ill will of some identifiable individuals or organizations" but is "a fare more complex and pervasive problem than had been thought previously".
[627] However, specially in discrimination disputes mediation is often employed because of its confidentiality. Menkel-Meadow, "Whose Dispute", *supra* note 26 at 2695 argues that in employment discrimination cases the secrecy interests of the employment parties should prevail over the society's disclosure interest. In principle, she argues, "certain settlements so implicate the interests of those beyond the disputes that some 'public' exposure of such cases may be a necessary part of our democratic process", but "[e]mployment discrimination cases, which some see as important 'public interest' cases that should be 'tried' in public are, to many victims of employment discrimination, cases that they want very much

formal control and coordination prevents the communication and social cooperation that is required to counteract negative patterns and bring about specific changes in social relations.[628]

Anti-discrimination regulations pursue a change of the power relation in employment to the benefit of the employee as the potential victim of discrimination by the employer.[629] In contrast, mediation threatens to reinforce the power balance under an unregulated scheme.[630] Because of his superior resources, the employer enjoys a disputing power advantage in mediation. Mediation lacks structural mechanisms to prevent the power difference to determine the substance of the mediated settlement. Therefore, the superior power of the employer is likely to be continued in the workplace.

Although anti-discrimination regulations may have effects on the efficiency of the enterprise and on the state of human relations in the workplace, they do not specifically aim at an improvement of these factors.[631] Therefore, the capacity of mediation to positively influence both efficiency[632] and human relations[633] does not increase its suitability for the resolution of discrimination disputes.

Because it is in contradiction with of the functions of anti-discrimination regulations, mediation is in practice unsuitable for the resolution of employment discrimination disputes.

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constrained to private settlements for fear of exposure of complicated employment records and history." The same argument is made by Yarkon, *supra* note 143 at 169 – 170.

[628] Bond, *supra* note 6 at 21 points to concerns that "mediation does not do enough to set appropriate standards for conduct in the workplace." Silver, *supra* note 16 at 540 holds mediation unsuitable for the resolution of discrimination disputes because "resolving cases through mediation ... is much like putting out small brush fires without ascertaining what is causing those fires. ... When cases are resolved ad hoc, there is the risk that the individual complaints are not merely a collection of unrelated happenings, but rather suggest a larger, deeper problem that warrants close and careful attention and concerted action."

[629] See Chapter 2, Section C. 2. a. (3), above.

[630] See Section B. 1., above. Ramm, *supra* note 360 at 518 discusses the chances of eradicating discrimination without employing the authoritative power of the state. He states that " [s]ocial protection of discriminatees by the institutions of self-help therefore meets the natural barriers of a democratic system: the interests, opinions and prejudices of the majority. These institutions are insufficient for the protection of minorities."

[631] See Chapter 2, Section C. 2. a. (3), above.

[632] See Section B. 4., above.

[633] See Section B. 5., above.

(3) Summary

Mediation is conceptually incompatible with the rationale that underlies employment regulations prohibiting discrimination.[634] Furthermore, mediation does not support the changes in the social reality that these regulations intend to bring about.[635] Therefore, from a legal perspective, mediation is not suitable for the resolution of disputes about employment discrimination.[636]

b. Employment Standards Regulations

(1) Rationale

Regulations establishing minimum employment conditions are dominated by the pluralist perspective that sees employment law as the expression of the social balance of the employment parties' interests.[637] Mediation is inconsistent with this perspective[638] because it does not accept the social balance of interests as an authoritative standard. Moreover, the process tends to counteract the social balance because it encourages the deviation from the model outcome of dispute resolution provided by employment law as the basis for the large-scale balance of interests. Its individualistic participation contradicts the democratic process in which the appropriate social balance is defined. For these reasons, mediation is conceptually unsuited to be employed in the resolution of disputes governed by employment standards regulations.

(2) Function

Employment standards regulations aim mainly at an increase of the employee's power in the employment relationship.[639] Mediation poses the danger that the superiority of the

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[634] See Section (1), above.
[635] See Section (2), above.
[636] Ramm, *supra* note 360 at 523 concludes that "self-help institutions will mostly give no aid but even prolong the process of developing new laws and new behaviour."
[637] See Chapter 2, Section C. 2. b. (2), above.
[638] See Section A. 3., above.
[639] See Chapter 2, Section C. 2. b. (3), above.

employer's disputing power is continued in the operation of employment.[640] Thus it contradicts the main purpose of the regulations.

These regulations are an important source of employee rights and support the realization of existing rights. At the same time they pursue a redistribution of resources and opportunities in the society at large and thus are intended to enhance the state of social justice.[641] These aspirations run the risk of being thwarted by the structural features of mediation. The process is neither suited to guarantee the realization of individual rights,[642] nor does it provide the mechanisms to specifically influence the state of justice in society.[643] Therefore, mediation is not suitable to foster the aims of the regulations to guarantee individual rights and improve the social justice.

The improvement of human relations in the workplace is usually not a prevalent motive for the establishment of employment standards.[644] The possible positive impact of mediation on the workplace atmosphere[645] is at best a welcome side effect; however, it does not have a determinative influence on the evaluation of mediation of disputes about employment standards. Similarly, employment standards regulations are not in the first place intended to foster the efficiency of the enterprise. Efficiency considerations may play a role in their introduction, but they are overshadowed by the purpose of guaranteeing individual rights of the employee and redefine the state of justice in society.[646] Mediation's potential to foster efficiency[647] does not therefore determine its suitability for the resolution of disputes about employment standards.

The prevalent purposes of employment standards regulations run the risk of being counteracted in mediation. Therefore, the process is in practice unsuitable for the resolution of disputes that are governed by these regulations.

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[640] See Section B. 1., above.
[641] See Chapter 2, Section C. 2. b. (3), above.
[642] See Section B. 2., above.
[643] See Section B. 3., above.
[644] See Chapter 2, Section C. 2. b. (3), above.
[645] See Section B. 5., above.
[646] See Chapter 2, Section C. 2. b. (3), above.
[647] See Section B. 4.,above.

(3) Summary

Mediation is conceptually unsuited to be employed in the resolution of disputes governed by employment standards regulations.[648] In practice, it poses the danger of frustrating the main goals of these regulations.[649] Therefore, legal considerations suggest that mediation is not an appropriate process for the resolution of disputes about employment standards.

c. Wrongful Dismissal Regulations

(1) Rationale

Employment regulations binding the employer's power to dismiss the employee to the existence of a just cause are determined by a mixture of the pluralist perspective and the rights perspective on employment law.[650] The structural characteristics of mediation make it inconsistent with both perspectives.[651] Therefore, mediation is conceptually unsuited for the resolution of wrongful dismissal disputes.

(2) Function

Wrongful dismissal regulations intend to increase the power of the employee in the employment relationship. Thus they shall establish the conditions for the employee to be able to exercise his individual rights more freely.[652] Mediation is inconsistent with these purposes, because it reinforces the superiority of the employer's power in the dispute and in the operation of employment[653] and is not suited to guarantee the protection and realization of individual rights.[654]

The improvement of the state of social justice is not a prevailing goal of the regulations. Similarly, they do not aim at an enhancement of efficiency or of the human relations in

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[648] See Section (1), above.
[649] See Section (2), above.
[650] See Chapter 2, Section C. 2. c. (2), above.
[651] See Sections A. 2. and 3., above.
[652] See Chapter 2, Section C. 2. c. (3), above.
[653] See Section B. 1., above.

the enterprise. [655] Therefore, neither the predominantly negative effects of mediation on efforts to bring about a social change[656] nor the potentially positive effects of the process on efficiency[657] and the state of human relations[658] are determinative for the assessment of mediation in the wrongful dismissal context.

Mediation threatens to counter the prevalent purposes of wrongful dismissal regulations. It is therefore in practice inappropriate for the resolution of disputes about wrongful dismissals.

(3) Summary

Mediation is conceptually inappropriate for the resolution of wrongful dismissal disputes.[659] In practice it threatens to counteract the purposes of the regulations.[660] Therefore, from a legal point of view it is unsuitable for the resolution of disputes that are governed by wrongful dismissal regulations.

3. Mediation and the Structure of Employment Law

For the resolution of employment disputes that are governed by a contractual scheme of employment, the utilization of mediation is legitimized by the consistency of the process with the rationale and the purpose of unregulated employment law.[661] In contrast, mediation is unsuited to resolve disputes under employment regulations because it conceptually contradicts the different rationales of these provisions and practically poses the threat to counteract their purposes.[662] Therefore, a clear legal assessment of mediation

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[654] See Section B. 2., above.
[655] See Chapter 2, Section C. 2. c. (3), above.
[656] See Section B. 3., above.
[657] See Section B. 4., above.
[658] See Section B. 5., above.
[659] See Section (1), above.
[660] See Section (2), above.
[661] See Section 1., above.
[662] See Section 2., above. As a consequence, Breidenbach, *Mediation*, *supra* note 25 at 252 considers mediation as unsuited for the resolution of disputes whose subject matter is governed by protective laws. Antaki, *supra* note 75 at 142 states that where the purpose of the law is to provide protection to one side in a dispute, mediation "*est possible, ... mais il s'agit alors d'une médiation aggressive et très active qui*

is only possible for disputes that are governed either by purely contractual employment law or by a purely regulatory scheme.

However, modern employment law is an amalgam of both contractual and regulatory elements.[663] Employment regulations only limit the effects of the contractual scheme on the employment relationship, but do not eliminate them. The contract of employment remains the basis of the relationship between employer and employee. Therefore, in practice there will hardly ever be a dispute that can be assigned exclusively to one employment law element; rather the intermingling of contractual and regulatory components will be the typical characteristic for employment disputes. Hence, the suitability of mediation will mostly be a function of the tension between the conflicting elements.

To assess the suitability of mediation in a particular dispute, the legal elements that govern the issue have to be precisely identified and weighed against each other to identify their relative importance for the individual case. The kind of legal elements governing the dispute and their relation to each other will then determine the evaluation of mediation from a legal perspective.

Where this examination does not render unequivocal results, it is the responsibility of the disputants, their representatives, and the mediator to carefully weigh the conflicting values and goals of employment law, and the functions of the legal provisions for their importance in the individual dispute. With the intentions of the society as they are expressed in the respective employment law element in mind they must then responsibly decide whether or not to mediate the employment dispute in question, and design the process to guarantee the appropriate protection of the employee envisaged by employment law.

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ne peut pas se contenter de techniques de simple conciliation informelle. On doit aussi respecter les exigences de la protection souhaitée."

[663] See Chapter 2, Section A., above.

Conclusion

The analysis of employment mediation from a legal perspective supports the scholarly skepticism against the flowering enthusiasm about this process in the business community. It shows that the results of mediation are likely to fall short of the employee protection that employment law envisages in order to balance the structural inferiority of the employee in the workplace, and that mediation tends to frustrate concerted efforts to bring the reality of social interactions in accord with society's aspirations to guarantee justice and rights, individual and social welfare. Therefore, it is rightly said that "[m]ediation is not the cure-all that the hucksters, the cultists and the happy zealots among the learned professions would have us believe".[664]

Whether it is "a worthwile idea"[665] depends on the kind of disputes it is used in, and on the procedural features it is equipped with. Cases in which employee protection or social change are not significant purposes of the legal rules governing the dispute might, from a legal perspective, well be suited for mediation. Here mediation can develop its alleged potentials to save cost and time, and maybe bring the disputants closer to an understanding of each other's views.

In contrast, many employment disputes are governed by legal provisions that recognize the workers need for protection from the uncontrolled exercise of the employer's power. Mediation has some potential to balance power disparities between the disputants: representation, the orientation towards the applicable law, appropriate qualification of the participating professionals, and the exercise of some form of public control, to name just a few examples, can help to check power imbalances and bar their influence on mediated settlements. However, the more and stronger safeguards are built into mediation, the less the process will be capable of bringing its alleged benefits to bear. Safeguards are costly, possibly time-consuming, and they tend to bring mediation closer to the kind of dispute resolution that it was initially introduced to be an alternative to. On the other hand, the

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[664] Crouch, *supra* note 1 at 357.
[665] *Ibid.*

informality of the process prevents these safeguards from being effective in every single mediation. Thus, it is likely that employee protection is the price paid for the economic savings and psychological gains that mediation promises.

In many employment disputes, the purpose of the applicable legal rules goes beyond the resolution of the individual dispute; the law is intended to change the social distribution of opportunities and to reshape attitudes in accord with important social goals. Here, too, there is some potential in mediation to support these objectives: the process could be opened to persons other than the immediate disputants to have their concerns considered; mediation could be subjected to some form of public control. Thus, mediation could be worked into a system of concerted efforts to bring about the desired social change. But in this situation, too, these safeguards would run counter to mediation's promise to be fast, inexpensive, and confidential; and here, too, it is the process' most advertised strength – its informality – that prevents them from being effective in each and every dispute.

With the consideration of these trade-offs in mind, it appears that a responsible use of mediation in employment would raise the cost of mediation, decrease the volume of mediated employment disputes, and require the introduction of a mechanism to involve the public in the operation and control of the process. Thus, mediation may loose some of its appeal from a utilitarian perspective. On the other hand, it may gain a reputation of producing results that are both individually fair and socially sound. As long as these social responsibilities continue to be overlooked in the discussion of employment mediation as well as in its actual operation, the warning voices are not to become silent.