ARTICLES

AUTHORITY-BASED MEDIATION

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ABSTRACT

The paper describes and defines, for the first time, a unique mediation procedure—the authority-based mediation. This procedure was developed by one of the authors of this paper, and is characterized by handling highly complex conflicts in multi-party disputes, which are mostly referred to mediation by the court. Authority-based mediation is conducted in an evaluative manner, combining in-depth legal discussion with a soft dialog that relates to emotions and interests and results in a settlement, usually following one extended mediation meeting.

Based on a combination of observations conducted in the mediation room and reflections of the mediator himself in relation to the development of the method and its components, the paper proposes two new aspects for understanding the unique role of authority within this method: the first, bringing the parties to a certain level of agreement and to a high level of commitment to ending the procedure with a settlement. The second, the formulation of a new concept of “relational authority,” which is connected to the interpersonal interactions between the mediator and the parties; and between the parties themselves, as a derivative of the mediator’s impact on the process.

Authority-based mediation is examined against two central current legal phenomena: the first, the institutionalization of existing mediation methods alongside their failure to bring about the resolution of many of the cases referred to them. The second is the vanishing trial phenomenon, and the increased involvement of judges in settling cases. We will argue that the unique characteristics of authority-based mediation create a new outlook regarding the relationship between mediation and adjudication, which differs both from

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standard mediation, and from the manner in which judges conduct settlement-oriented procedures under the shadow of their judicial authority.

I. INTRODUCTION

This article examines the tension between authority and consent as it manifests itself in the work of a professional and skilled third party who intervenes with legal disputes and conducts mediation procedures aimed at bringing the parties to an agreement. We focus on a unique mediation practice, which combines various elements of existing approaches to mediation, and which was developed by one of the authors of this paper. This practice, or approach, is characterized by handling highly complex conflicts in multi-party disputes, which are usually referred to mediation by the court. This mediation is conducted in an evaluative manner, involving a profound discussion of the relevant legal material, while still combining a soft dialogue that relates to emotions and interests and results in an agreement between the parties, usually at the end of one extended and intensive mediation meeting.

In light of its unique characteristics, and considering the proved success of this practice, as discussed in the following parts, three alternatives may come to mind: Is this a completely new approach to mediation? Is it an improved and enhanced model of an existing approach to mediation? Or, perhaps, we are looking at a phenomenon that is characterized and defined mainly by the identity and style of the mediator himself? We will argue that this is a

1 In writing this article we joined together—a mediator, a legal practitioner, who developed the mediation process discussed here, and scholars in the fields of law and conflict resolution. The paper is therefore characterized by a unique methodology, combining self-reflection of the mediator with observations of the scholars on the same phenomenon, which are based on observations conducted in the mediation room and conversations with the mediators. In addition to this descriptive element of the paper, we discuss the theoretical aspects of authority-based mediation, and its relation to the legal world. A previous and preliminary version of this paper was published in Hebrew at Hamishpat Law Review. We thank the editorial board for permission to use translated sections of it in this paper.

2 Most cases are referred to mediation with the consent of the parties, or upon their own request, at various stages of the legal process. In the minority of cases, the parties turn to mediation prior to initiating legal procedures.

new kind of mediation, which incorporates the two other alternatives mentioned above. We will show how the new method described here—which we will call from now on “authority-based mediation”—offers a new outlook regarding the role of authority within mediation; It reflects a move from approaches that view authority as external to mediation and as having no role within it, to viewing authority as an important tool within mediation, one that expands this process and its limits, until it redefines mediation altogether.

We examine authority-based mediation against the backdrop of two central phenomena in the current legal environment: first, forty years after the mediation revolution, mediation is no longer considered an alternative mechanism but is rather institutionally integrated into the work of courts.4 And yet, the number of legal cases that end through mediation remains low in comparison to all cases that are disposed without a contested judgment.5 Second, we witness, in Israel and elsewhere, the “vanishing trial” phenomenon,6 meaning that while more cases are filed in courts, the number of cases that go through a full litigation process is dramatically diminishing, due to, among other things, judicial conflict resolution activities and the promotion of settlement within the courtroom.7 Judges’ efforts to promote settlement and reduce the number of cases that are fully litigated on the one hand, and mediation playing a relatively marginal role within this reality on the other, have created a fertile ground for the development of the hybrid model

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5 See The Committee for the Examination of Ways to Enhance the Use of Mediation Within Israeli Courts, Report of the Committee for the Examination of Ways to Enhance the Use of Mediation Within Israeli Courts 22–23 (2006) (Isr.).

6 The term “vanishing trial” was coined by Marc Galanter. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459 (2004); there is updated data on the extent of this phenomenon in Israeli courts. See generally Ayelet Sela & Limor Gabay-Egozi, The Role of Judges in Adjudication, Settlement and Other Vanished Trials: Evidence from Civil Trial Courts (Sept. 27, 2017) (unpublished manuscript) (on file with authors).

we examine here. Consent is required and imbedded within this model from start to finish, but at the same time, this model maintains a closer dialogue with the legal process than it has with traditional mediation processes. Based on our observations of this new model, we will examine its unique authority-related features. We will argue that the unique characteristics of authority-based mediation—which differs both from traditional mediation and from the manner in which judges conduct settlement-oriented procedures in the shadow of their judicial authority—create a new outlook regarding the relationship between mediation and adjudication, and the role of authority in promoting consent-based legal outcomes.

In Part II of the paper, we will review the development of different models of mediation, and will locate the authority-based mediation with regard to them. In Part III, we will present the evolvement of authority-based mediation, as experienced and described from the point of view of the mediator himself. This part will describe how authority-based mediation was developed through interaction with adjudication, and its emerging into a hybrid model which challenges the alleged inherent difference between mediation and adjudication. Authority-based mediation uses the strengths of the law, but does not refrain from leaving the law aside, where its rigidity stands at the way of consent, or when a settlement that is derived from the legal rules is so complicated that it opens the path for another legal dispute. This practice maintains close relationship with the law, while maintaining and using the flexibility and malleability that mediation offers in the path towards consent.

In Part IV, we will present preliminary findings from the field, based on observations we have conducted in the mediation room, interviews with the mediator, and legal materials related to mediations he has conducted. We will characterize this practice according to types of discourse and themes it involves, focusing on the

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8 This model may correspond with contemporary mediation practices as used by JAMS mediators and was acknowledged by Hon. Daniel Weinstein (ret.), one of the founders of JAMS, as capturing his practice. See JAMS Mediation Process, JAMS MEDIATION, ARB., ADR SERVS., https://www.jamsadr.com/mediation (last visited Nov. 4, 2018); see also Bar-Ilan University, ERC-JCR Project-01.02.17-Judge Daniel Weinstein & Adv. Amos Gabrieli, YouTube (Feb. 20, 2017), https://www.youtube.com/watch?time_continue=3066&v=O9rytEzDO5A.

authority as it derives from the special relation between law and the dispute occurring within these mediation procedures.\(^\text{10}\)

In Part V, we will discuss the meaning of the authority emerging in this model, and offer two different ways to understand it. The first relates to the use of authority in order to bring parties to an agreement, and end the dispute. The second meaning concerns relational authority—which relates to the relationship between the possessor of authority and those who “obey” it, relations that are informal, are not regulated by rules, and develop organically along their personal interactions in the mediation room.

In Part VI, we will shortly discuss some possible critiques of the authority-based model of mediation.

## II. Models of Mediation

The pragmatic mediation, from the school of Fisher and Ury,\(^\text{11}\) which is based on the principles of cooperative negotiation, assumes that the parties prefer a cooperative discourse aiming at problem solving rather than adversarial, interests-based discourse which characterizes the legal process. This model of mediation is based on a consistent movement towards pragmatic problem solving while fulfilling the parties’ needs. This model assumes that the parties will choose to cooperate since they understand the malfunctions and disadvantages of competitive negotiation.\(^\text{12}\) Within this model, law becomes relevant in the movement towards an agreement only at the stage of turning to objectives criteria, and the possible legal outcome is part of a set of considerations that the parties take into account while choosing between their options. The more incidental the legal aspects are to the process, the more autonomy the parties have in conducting a free dialogue which lacks legal significance or influence. According to the pragmatic model, the distance from legal discourse allows the parties to freely stray in a

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\(^{10}\) As mentioned above, one main principle of mediation is its being a neutral and fair process in which the power to decide is left at the hands of the parties. The outcome of mediation is based on the autonomous and informed consent of the parties, without any obligation to accept one solution or another. The mediator is perceived as neutral, unbiased, and without prejudice, and he must remain aware of his lack of authority to determine the outcome. See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 101–08 (1997).

\(^{11}\) *Fisher & Ury*, supra note 9.

\(^{12}\) *Id.*
parallel and trustful field of interests, feelings, needs, and human insight.

Other models of mediation may give law a more significant role in the parties’ autonomous decision-making process, and there are some evaluative models that emphasize narrow, legal solutions that are promoted by the mediator.

At the same time, within the world of conflict resolution, progressive models such as transformative mediation take further steps away from the legal world, and even from the pragmatic concept of problem solving. As part of the second generation of the conflict resolution movement, where we can count models such as transformative mediation, restorative justice, and humanistic mediation, the process of third party intervention is conceptualized as having therapeutic features. The importance of the intervention is in empowering the parties—emotionally, morally, and sometimes even spiritually—and in strengthening their ability to have a constructive dialogue and to reach decisions with minimal intervention on behalf of the third party in the practical solutions the parties may reach. Such procedures are very distanced from the legal world, and emphasize the true alternative they present to the perception of dispute resolution that is based on authority and rights.

It is possible to think of the development of the authority-based mediation model as a reaction to the growing distance between the world of conflict resolution and the legal world. The internal development of the field of conflict resolution, while maintaining the primal motivations of its founders to present an alternative model to legal procedures, have led to more complex
procedural models, and ones that are more challenging with regard to the type of conflicts they deal with. The new conflicts deal with crisis in relationship, harms that involve criminal aspects as well as identity-based conflicts. In many ways, the focus on these types of conflicts and progressive models have driven lawyers—who are mostly dealing with practical disagreements—away from the world of mediation.

One such example would be the narrative mediation model, first developed by Winslade and Monk, which promotes the mediation discourse towards an interpretive paradigm, and defines anew the role of the mediator. This model presents a dynamic process, with no structure, rules, or program that are known in advance. The mediator listens to the parties, and responds to their narratives and actions providing attentiveness and reflection. The main characteristic of narrative mediation is its focus on language and discourse, and the main role of the mediator is to build the trust between the parties (which is defined as “intervention”), deconstructing the original disputed narrative, and creating an alternative narrative in which the conflict is diminished or even disappears. The goal of narrative mediation is to lead the parties through an educational process, in which they will learn to challenge their own perceptions of entitlement within their cultural environment. This model requires cultural thinking, deep social discourse, and a rejection of traditional social paradigms.

Unlike the typical characteristics of the mediation models described in this chapter, the evolvement of authority-based mediation offers an alternative that grows from within legal grounds, in search for legal solutions that incorporate the parties’ consent and their extra-legal interests. This model is closely related with the decrease in the number of contested judgments and the “vanishing trial” phenomenon that turns the legal field into a field of agreements and settlements that are closely related to the legal process. The encounter of the authoritarian mediator with the world of dispute resolution is grounded in his identity as a lawyer and a legal expert. At the heart of the development of authority-based mediation is therefore the creation of tools and solutions that stem from

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20 For a more detailed discussion of this model, see Michal Alberstein, The Jurisprudence of Mediation 292–397 (2007) (1st.).
the world of dispute resolution but at the same time maintain a
close dialogue with the legal world. The combination that is the
result of this intuitive yet systematic development will be examined
here as a legal branch of mediation, which deserves to be studied
and further developed. The unique characteristics of the authority
that is part of this model explain how at the end of a voluntary,
sanction-less procedure,\(^{21}\) the parties may reach an agreement that
is often completely different from their positions at the beginning
of this mediation.\(^ {22}\) In the theory of traditional mediation, such a
gap is often explained through reference to a hidden layer of interests
that is revealed through mediation, thus completely changing
the outline of the dispute (in referring to issues that were not
raised in pleading to relationships, emotional needs, biases, and
more).\(^ {23}\) Within authority-based mediation, on the other hand, this
dramatic change and willingness of parties to depart from their
original claims is explained by the unique authoritarian elements of
this process, as mentioned before: the creation of commitment to-
wards achieving an agreement, and the acceptance of the media-
tor’s authority in that regard; the incorporation of legal elements;
and emotional discourse and soft dialogue between the mediator
and the parties. In that respect, authority-based mediation draws
its convincing methods from traditional mediation, but offers a
unique form of this method, which is more adaptable to the legal
normative, adversarial sphere.

\(^{21}\) The term “sanction” attributes to the mediator a concrete coercive force that may result in
actual negative consequences. There are those who argue that this type of force actually exists
with mediators who deal with international disputes. See Omer Shapira, *The Paradox of Power
Within Mediation: Strength and Weakness in the Relationship Between the Mediator and the Par-
ties*, 6 Kiryat Hamishpat 371, 393–96 (2006) (Isr.). See also Deborah M. Kolb, When Talk
and mediation that the mediator Kolbourne performs in public housing projects, she tries to
convince the parties, but also mentions that the alternative is activating an actual sanction which
she can use in her alternative role as a regulator).

\(^{22}\) One should distinguish between the many papers that describe the various ways by which
mediation may end a conflict, including the different techniques and tactics that are used in that
process, and the question of why and how this process actually happens. See Robert H.
Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8

\(^{23}\) See Alberstein, *supra* note 15, for a description of the overarching narratives of alterna-
tive dispute resolution movements and the ways in which using such different methods creates a
new understanding of conflicts and processes of changing positions.
III. AUTHORITY-BASED MEDIATION: A HYBRID MODEL COMING INTO BEING

A. The Evolvement of Authority-Based Mediation

The origins that formed the foundations for the new model were both external and internal. Externally, the new perception of courts regarding mediation created the need for a mediation procedure that is outcome oriented (rather than process oriented). The Israeli legal system, looking for ways to deal with caseloads and backlogs, discovered that the number of cases returning to the courts following unsuccessful mediations was large, even though the mediation may have improved the relationship between the parties and may have also caused a positive change in their view of the dispute. We will argue, in face of the increased turn to mediators that were retired judges, that with regard to its outcome, from the courts’ point of view, traditional mediation has failed to fulfill its purposes.

On the internal level, the model has developed through the mediator’s evolving ability to create authority within mediation procedures, as a result of his interactions with the parties. This development involved trial and error, and the inclusion of basic elements of formal legal jurisdiction.

The practice we describe here began as part of the work of one of the writers as a lawyer, and later as an arbitrator, dealing with cases that were referred to him by the courts. The success as an arbitrator was based on his decision-making ability as well as his legal reputation and legal knowledge. At the same time, in cases where the arbitrator found that there was real uncertainty or ambiguity as for the legal outcome or the facts of the case, he saw bringing the parties to settle as the better option. The arbitrator’s ability

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26 In that respect, it is interesting to examine the development of the work of the mediator Kolbourne that was appointed, at first, by the church and the state in Hawaii as responsible for setting the policy and rules, as well as regulation of entitlement for public housing. From this role, that has external sources of authority, she has evolved as a mediator, or in her words “a peacemaker.” See Kolb, supra note 21, at 417–18.
to balance what he saw as the “poetic justice” (combining intuitive impression from the facts and sensitivity to harm or injustice) against a possible legal outcome created what was from the parties’ perspective a balanced agreement. Based on the reflection of the arbitrator, the agreement was seen as a better possibility than a quasi-legal outcome (when these two options are compared with the possible legal outcome were the case to be decided by a judge).

The arbitrator started to present to the parties possible legal scenarios in view of the legal situation, evidentiary difficulties, problems in the pleadings, and other faults that could diminish a party’s ability to prove his case. This is how most arbitrations actually ended through agreed solutions. It seems that being referred by the court, in addition to their expectation to participate in a different kind of conflict resolution process, and the authoritative mode of discussion—all those elements had helped the parties to converge into the sphere of consent. This was similar to what happens in court when the parties reach a settlement after the judge provides his impression of the case and of the parties’ claims.27

Part of the development of this unique arbitration practice was a deliberative discourse between the arbitrator and the parties regarding the evidentiary and legal foundations of the dispute. This created the possibility for a deep and critical-thinking process in which any outcome between zero and one hundred is possible, as opposed to the traditional perception of mediation that speaks about a compromise. That way, the claimant does not have a preliminary expectation to receive parts of his claim, just as the defendant cannot expect that the claims against him will necessarily be reduced. The source of this dialect is in the mediators’ public view of mediation which sees the grand social goal as ending the conflict between the parties and creating a new order between them that is legally binding that may even enable, under some circumstances, the furtherance of their commercial, or other, relationships.

The active approach of the arbitrator/mediator was perceived as natural, both by the parties and by himself, since the mediational elements of this process were not a result of an organized training in mediation, and was influenced mainly by the pragmatic model of mediation (rather than the transformative one). The result in practice was a hybrid model, based on a new concept of authority which is based on authoritativenseness but is also wider, conducting a discus-

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27 In that regard we will distinguish the procedure that is termed “Med-Arb” and the process described here. See John Blankenship, Developing Your ADR Attitude: Med-Arb, a Template for Adaptive ADR, 42 TENN. B.J. 28 (2006).
AUTHORITY-BASED MEDIATION

This development in the practice of the dispute resolver, the use of authority whose nature was not completely clear and which was not yet used in mediation procedures, became accepted by the parties since it proved as an efficient tool in resolving disputes that were until then perceived as unresolvable through mediation. The parties learnt that this specific procedure has proved outcomes, and therefore they accepted the existence of authority as a necessary and material feature within this procedure. This was true both for the parties and their attorneys, which internalized that the main goal of this mediation process was to reach an agreement, a fact that seemed to be forgotten in other alternative procedures they were familiar with. Moreover, the discourse that evolved in this model of mediation, similar to the discourse of the legal sphere, was clear to them and thus drew lawyers into the process. Accordingly, the suspicious attitude towards mediation, which was characteristic of many lawyers, had diminished and they became active and meaningful actors in the move towards an agreement, which reflected what they saw as the legal reality. This was due to the fact that the process had included and reflected, from the start, a comprehensive early evaluation of the different possibilities in adjudication (Early Neutral Evaluation). The important role of the representing attorneys became even more significant when the me-

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mediation was dealing with complicated cases that involved complex legal questions and no clear precedent.

The incorporation of lawyers as necessary and significant participants in mediation, unlike other mediation models that tend to minimize the role of lawyers, created a discourse that was very similar to the formal legal discourse. At the same time, though, and unlike formal legal procedures, authority-based mediation has no limitation in its ability to reflect to the parties their own positions. The mediator is an active participant, leading and initiating the discussion, and he does not have to use indirect, implied, and hidden techniques to establish an agreement-based procedure.31

The parties came to realize that for a relatively low cost they could achieve an end to their legal dispute, even if that process itself did not help them in improving their relationships as one might expect of a more traditional mediation process. The lawyers have found that they can promise their clients, with a high degree of confidence, that the outcome of this mediation would be an agreement that would reflect the legal reality in practice.

This is the point in which this model of mediation, which was developed under the authoritarian umbrella of arbitration, distanced itself from the realms of compromise and became a procedure that may lead to any kind of outcome. A procedure that may lead the claimant to completely withdraw his suit when he realizes that the legal outcome may be worse; or, on the other hand, may result in the claimant receiving more than he could have received in a contested judgment when the limitations of a lawsuit made it impossible to receive the whole of the remedies he was due. In that spirit, it was possible to discuss a financial remedy in an eviction suit, or in a suit concerning duty to account.

The unique encounter between outcome-oriented courts and a dispute resolver, which evolved in a formal legal sphere, resulted in a unique conflict resolution procedure which combined, in varying degrees, elements from traditional mediation models and created a new concept of authority, as we discuss later on.

**B. Definition, Structure, and Unique Characteristics**

Authority-based mediation, unlike traditional mediation, is closely connected with the court that refers the dispute, and per-
haps even obtains its authority from the court. The mediation is conducted in a way that examines the law as well as possible legal outcomes, the agreement is approved by the court, and it might even set a precedent in mediations that concern similar circumstances or in mediations that involve the same parties.

This model is suitable to represented parties whose lawyers are present in the mediation room. It incorporates, throughout the mediation, authoritarian elements that correspond with the dynamic that typifies many courtroom encounters where a judge aims to bring the parties to an agreement, even though he has the authority to make a judgment. We will therefore examine the existence and use of this specific type of authority, which evolves in the work of a neutral third party that intervenes in a legal dispute following an invitation of the parties, and based on their desire for a voluntary procedure to resolve their conflicts.

Authority-based mediation is characterized by incorporating authority that is both related and unrelated to the authoritativeness and trustworthiness of the mediator himself. That authority

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32 Due to its unique characteristics, judges refer to this procedure cases that involve many parties, complex and precedential legal questions or questions with significant public importance, and appeals that are heard before the District Courts and the Supreme Court. In general, this practice provides a solution for cases that traditionally were considered (by the courts and by lawyers) as unmediatable. See Aharon Barak, *On Mediation*, 3 *Shaarei Mishpat* 9, 10 (2002) (Isr.) (“There are cases in which an agreed solution between the parties is not an achievable goal. Judicial decision is necessary. In other cases, an agreed solution is feasible, yet it is more desirable that they will be decided by the court, so that a precedent will be created to apply to the general public.”).

33 See the words of the lawyers in the court-hearing transcript in File No. 65143-12-15 CC (TA), Alias v. Verint Systems Ltd. (Nov. 16, 2016) (unpublished transcript) (copy on file with authors) (Isr.) (Pliner, J.) (“We have heard the court’s comment with regard to referring the case to mediation before the mediator . . . that already dealt with a similar case (Galamidi).”) (This case ended with an agreement following mediation on Oct. 2, 2017).


35 One should distinguish between general authority and the authority to make a ruling. Other writers use the words “power” or “influence” when discussing the work of the mediator. See *Shapira*, *supra* note 21, at 386–87 (“In the field of social psychology there is a lot of interest in the meaning of power, how it is created, the motivations and means for its use. French & Raven defined social power as the potential ability to influence another person, meaning the possibility to influence. Influence is defined as the use of force by one person . . . in order to cause a change, including change in behavior, opinions, goals, needs and values.”); see John R. P. French, Jr. & Bertram H. Raven, *The Bases of Social Power*, in *Studies in Social Power* 150, 152 (Dorwin Cartwright ed., 1959).

36 We assume that there are elements of authority in any given mediation, but in the context of authority-based mediation we have witnessed a phenomenon with unique elements of authority, and the enhanced use of such elements require that the mediator will have an authoritative
grows, in part, from reaching an agreement that is created under the guidance of the mediator, within the sphere of adversarial discourse between the parties, and based on a preliminary ruling of the forum itself as for the importance of reaching an agreement. Based on this agreement (to agree), another form of authority is created, one that stems from the relationship between the parties and the mediator (we will define this as “relational authority”). This type of authority is created as a result of the ways in which the parties perceive the neutral third party (as a result of his behavior, or reputation) and the dynamic that is created in the mediation room when they all sit together. This is a kind of coincidental authority that is recreated within each mediation, and its form depends on the unique characteristics of each dispute and the parties that are part of it.

In that context, one could claim that any mediator that works according to the features of the authority-based mediation model will establish authority in his own form. However, we could still define general parameters that are not dependent in any specific mediator, that are manifested in any procedure of that kind, and which establish and ground that authority. These are: reputation; rich experience in this specific method that develops the ability to successfully move between the legal and emotional discourses; a deep legal understanding and the ability to use the law as a tool within mediation; a close relationship with the court; and a strong commitment of the mediator towards his own proposal.

Unlike traditional mediation, the discourse in authority-based mediation does not focus on the search for creative solutions that may benefit all parties. While these traditional paradigms seem to increase the feasibility of meaningful agreement, even in terms of benefiting the social order, some issues require clarification:

37 The paradigm is that mediation develops a different type of discourse, one that is non-adversarial. The assumption is that within mediation, which focuses on an open, interests-based dialogue, there is no room for an adversarial discourse which focuses on rights and legal questions. In reality, we will argue, the move from the court into the mediation room brings with it, at least at the beginning of the process and before the mediator works to change the discourse, an adversarial tone.

38 As distinguished from the personality aspect of that reputation, we can relate to it as a value that can be attributed to the process itself.


40 FISHER & URY, supra note 9.
first, the mediator’s ability to increase the number of possible solutions, as stemming from his originality; second, the parties’ willingness to see the good in a solution that does not fulfill their original aspirations; and, finally, the ability to distinguish the legal reality from which the parties started and promote possible solutions which do not stem from the legal reality and might even contradict the possibilities that a legal solution would provide. Notice, the ability to bring the parties to agree to a solution that negates a possible legal outcome requires a process of transformation in how the parties perceive their own good. It is not clear at all that a mediation procedure that is limited in time, and is being conducted under the supervision of the court and according to the legal time frame, provides the appropriate setting to achieve such a transformative process.

Authority-based mediation is not a forum of free negotiation that is not bounded by any rules or that is detached from the legal reality. But rather, it promotes a legal discussion that does not shy from the humanistic and even emotional aspects, which takes into account the crucial interests of the parties and the actual possibility that they may fulfill them through a formal legal procedure. For example, when a party held his ground—because he thought the law was on his side, or because his lawyers had told him so—the mediator was not afraid of reflecting an opposing opinion, accompanied with a detailed analysis of the legal situation, in a way which may have left the claimant without his claims or, alternatively, provided remedies that were not included in his original lawsuit.

In this model, the parties and their attorneys are required to arrive at mediation ready as they would have arrived to an evidentiary hearing in the court. This is mainly since most cases end in an agreement at the end of the first meeting. Other models of mediation suggest that the mediator does not have to, and even should

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41 A deep change in their perceptions, which allows the parties to develop a fresh understanding of the conflict and the possible ways to solve it, characterizes transformative mediation, which emphasizes the importance of empowering the parties and helping them develop a better ability to control their own future. In that sense only, the authoritative element of mediation that we discuss in this paper actually creates a process of personal empowerment, rather than avoidance from decision, in circumstances in which a third party is the one who gets to decide the outcome.

42 From data collected along the years of practice of one of the writers of this paper, and analyzed for the purpose of explaining the new model suggested in this paper, we have found that more than 90% of the cases resulted in an agreement, and in 80% of these cases an agreement was reached after only one session. For example, between the years 2012 and 2015, 344 agreements were signed following only one mediation session, out of 430 cases that were referred to this process.
not read the parties’ pleadings in order to reach an agreement.43 Contrary to that perception, within authority-based mediation the parties are required to submit to the mediator all relevant legal materials, and they may additionally be asked to relate to specific aspects through position papers that are submitted to the mediator to allow for an informed and balanced evaluation of the dispute.

During the early period of transitioning from arbitration to mediation, most cases were referred to the mediator by lower courts (courts of first instance), and the mediator held two or three mediations per day. In more than 95% of the cases an agreement was reached. This furthered the establishment of the model, and legitimized the authority of the mediator as an integral part of the process. An authority-based procedure, in which the mediator provides a clear opinion regarding the outcome, required great care on behalf of the mediator to make sure that the agreement was reached autonomously by the parties, and not under any type of pressure.44 All mediations were therefore held only in the presence of lawyers, who could reflect to the parties the suggested reality and the legal analysis provided by the mediator (not in his presence) in a way that allowed the parties to freely consider, along with their legal advisors, the different options they had and their meaning and consequence.45

At times, when what stood in the way of an agreement were emotional or behavioral factors, the mediator might sit with the parties without the presence of their lawyers. This was done, though, only with the approval of the lawyers, who were later informed by the mediator as for what was discussed in their absence. Part of the authority of the mediator, vis-à-vis the attorneys, apart from his complete familiarity with the legal materials, was their incorporation in an open, rational,46 intellectual discourse, and develop-

43 See, e.g., Riskin, supra note 3, at 28–29; Alberstein, supra note 20, at 181 (“Modern mediation is usually characterized in activity towards settlement that is not based on the parties’ legal positions and requirements, but is rather based on interests and problem solving.”).


45 This is, as mentioned above, in contrast to many other traditions of mediation in which the lawyer is considered incidental to the process. See Welsh, supra note 29, at 874–75; but see Menkel-Meadow, supra note 29. Authority-based mediation leads the parties through a process of realization of the legal reality vis-à-vis their original aspirations, and perhaps also the legal possibilities as these were presented to each party by his legal counsel. The lawyers, therefore, have become effective, integral parties to this process that is completely connected with the legal world, thus requiring the ongoing involvement of legal counsel.

46 We use here the term “rational” discourse to describe a process in which reason is used as a tool through which aspirations and desires can be explored. One of the main tools of authority-
OPING their trust in the possibility that such a discourse may lead to an outcome that is completely different from what they themselves had anticipated at the beginning of the legal process. The insight that may result from such realization turns the lawyers into the mediator’s long arm, and he even defines them as such before the parties. That way, once the attorney is convinced that the mediator’s evaluation and proposal is based on a deep understanding of the law and of the facts of the case, he can reflect to his clients the authority of the mediator, thus increasing their own trust in the process and in the mediator. We should emphasize that this method requires a great degree of sensitivity from the mediator so that he does not harm the parties’ trust in their lawyers, which may have reflected to them a different legal reality than he himself did. Accordingly, when the mediator finds that the lawyer had presented to the party a legal reality that dramatically differed from his evaluation of the case, or when he found malfunctions in the work of attorneys, he would present such issues before the lawyer and not before the parties, so that the lawyer may choose the way in which those concerns will be presented before his client.

From an analysis of the data concerning cases that were mediated over three years, which were mainly magistrate court cases, we find that 90% of the cases reached an agreement after just one mediation session. Once an agreement is reached, the mediator puts it in writing. The parties then immediately sign it, and it is then referred to the court to be approved and receive the validity of a legal judgment. The parties and their attorneys have learnt that the first mediation session is usually also the last one. They therefore arrive prepared for this session, to be best able to present their arguments and interests, and make sure that those who have the authority to approve an agreement are present.

With the years, this process has created a clear and foreseeable practice for anyone who was interested to take part in a mediation process that is constantly in touch with the law and which leads to outcomes that suit the probable gain, or cost, of a legal process. The legal alternative has become an integral part in the design of an agreement, as well as a main consideration in the parties’ willingness to accept the terms of such an agreement. The relevant legal rules that applied to each case were not only not forgotten in the mediation room, but were actually emphasized, and closely examined as part of the parties’ interests in settling the dispute.
C. The Model in Practice

The rapid development of the authority-based model of mediation and its incorporation into the work of courts, as a result of both its characteristics\(^{47}\) and the outcomes it yielded, paved the way for mediating more complex cases that are heard in the district courts and unique appeals referred by the Supreme Court. Judges have realized that cases that beforehand were perceived as “unmediatable,” or as ones that require a judicial decision because they raised fundamental legal and social questions, actually end in an agreement following one mediation session.\(^{48}\) This revelation led judges to actively recommend this process and to cooperate with it.

The fact that this unique model was immersed in legal experience, that is reflected to a large degree how judges themselves try to promote consent-based solution in the courtroom, and that the mediator spoke the same language as the court (as was apparent from the agreements that were submitted to the court)—all these have made the cooperation and conversation between the mediator and the judge even more active and efficient. This was expressed in several ways: the court became an advocate for this unique mediation, which increased the parties’ expectation that the process will lead to an agreement. Judges explained their choice to refer specific cases to this specific process (over other mediators) based on the complexity of the case, the lack of precedent, or the possibility that a judicial ruling will not end the dispute between the parties and might even cause an escalation.\(^{49}\) In addition, the court was able to tell the parties about the unique expertise of the mediator in specific legal areas, such as questions of intellectual property that were not yet decided in case law.\(^{50}\) Finally, judges

\(^{47}\) File No. 59007-01-12 DC (TA), Shmueli v. Electra Constructions Ltd. (Jan. 7, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

\(^{48}\) Even when the practice developed to deal with complex cases, litigated in the District and Supreme Court, the percentage of cases ending with an agreement was not significantly diminished. According to data collected over a period of three years, more than 80% of cases ended following one mediation session.

\(^{49}\) See File No. 65143-12-15 CC (TA), Alias v. Verint Systems Ltd. (Nov. 16, 2016) (unpublished transcript) (copy on file with authors) (Isr.); file No. 9033/14 CA, Churi v. Castodia di Tara Santa (May 19, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

\(^{50}\) See transcript of court hearing in File No. 25360-11-11 CC (TA), Sendako v. Dasa (Apr. 3, 2016) (unpublished transcript) (Isr.) (“I should mention that the mediation procedures conducted by Adv. Gabrieli are well known for their effectiveness as we can also see in this case. Because of that, after a clear path to solution has been established, I have asked that the parties return to the mediator . . . in order to complete the wording of a certain document.”). See also
agreed to postpone the hearings in a case for a significant period of time (ten months or more sometimes) since they recognized that the waiting period for a mediation meeting was longer than the average for other mediators. Judges’ willingness to adjust the court’s schedule to available dates for mediation, and the way they related to the process, contributed to the establishment of the mediator’s authority and to the positioning of this model of mediation as different than other alternative dispute resolution mechanisms.

A dialogue was created between the mediator and the court—a dialogue that is based on mutual trust that results from a shared language. In that way, the mediation turned from an alternative model for dispute resolution to a parallel process which offers dif-

[51] See, e.g., File No. 14712-08-14 DC (TA), Shmuel v. Gindi Ltd. (Dec. 1, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“I am aware that the mediator’s calendar is especially busy. Nonetheless, and given the unique circumstances of this case, I will be grateful if it would be possible to invite the parties for a mediation session as soon as possible . . . . I am withholding the court proceedings in all related cases for a period of 4 months.”); file No. 35053-09-11 CC (TA), Yaakov and Elazar Avrahami Construction Co. Ltd. et al. v. Mendelson (Dec. 29, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“The parties’ lawyers will contact the mediator in order to set a mediation session. Until I receive a note from the mediator stating the conclusion of mediation, with or without a settlement, I withhold giving a ruling”); file No. 3699-01-14 CC Magistrate Court (TA), Municipality of Tel Aviv-Jaffa v. Hayun (Apr. 26, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“I believe that it would be wise to refer the parties to mediation. In this case I would choose to refer them to Adv. Amos Gabrieli [. . .] Obviously, if the mediation succeeds, then not only will precious judicial time be saved, but the parties themselves will be able to see an end to their conflicts in a much shorter period of time.”).


[53] It might be that in the absence of detailed knowledge regarding the techniques the mediator uses to settle such complex cases, the authority-based procedure has been perceived by the courts as a new type of arbitration—a procedure that is better known to judges, and one that seemed appropriate to the kind of agreements that were submitted to the court’s approval. Such a perception may explain the high level of trust towards this model of mediation, which has a shared legal language. See Nolan-Haley, supra note 28, at 63–73.
ferent solutions to the same disputes that are managed by the courts.54

The model became well accepted for cases that were at the appeal stage;55 cases that involved many parties, where any decision may lead to additional claims towards new parties;56 cases that were conducted in courts for many years but have not yet reached a final decision;57 cases raising questions of law and principle in which the parties were not interested in a legal precedent but rather in a solution for the specific dispute; cases where no clear precedent could be applied and cases which required extensive research into extra-legal fields, such as patent law disputes.

Further on, and based on its outcomes, the model has been perceived as suitable for administrative cases as well. For many years, governmental bodies refrained from using alternative dispute resolution procedures. The accepted view was that cases involving the state require a publicly open discussion on the merits, as part of the requirement for transparency and equality, as they often raise questions of principle and social values or involve significant power imbalances between the parties. In addition, it seems that the degree of trust towards mediators that were not retired judges was not very high.58

54 See, e.g., a sample of court decisions: File No. 9748/05 CA, Yahalomi Liel v. Mizrachi Bank (Oct. 15, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); see also File No. 7139/11 CA, Liovin v. Sagiv (Jan. 14, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), where the court, in its decision, specifically asked the mediator to try and make an earlier date available for mediation due to the parties’ old age.

55 File No. 8145/13 CA, Korem v. Anana Ltd. (Oct. 2, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).


57 File No. 13-04-3316 CC (TA), Israel v. Credit Lines Israel Ltd. (May 11, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

58 Despite the increased use of mediation and other alternative dispute resolution mechanisms by the state, in practice, there are still many barriers that prevent a wide use of these mechanisms by administrative and governmental entities. See Mediating Cases that Involve the State as a Party, in ATTORNEY GENERAL GUIDELINES 6.1203 (2011) (Isr.); Zamir, supra note 34 (discussing guidelines for the use of mediation in cases that involve the state); A similar attitude characterized governmental and administrative bodies in the U.K. as well. A study conducted in the U.K. among 145 lawyers that represent administrative bodies revealed five main explanations to support the belief that administrative cases are not suitable for mediation: the tight timeframe that is required in such cases; the fact that such cases often involve general questions of law or policy, and especially questions concerning human rights; when the state believes that her case is strong and there is no point in settlement; high cost of mediation; and the typical power imbalances between the parties. See VARDA BONDY ET AL., MEDIATION AND JUDICIAL REVIEW: AN EMPIRICAL RESEARCH STUDY 38 (2009).
With time though, the need arose for these governmental bodies to turn to an alternative dispute resolution mechanism, and they became familiar with the existence of this unique mediation model that emphasizes legal discourse as an integral part of mediation. The tendency of public attorneys to turn to this process has increased, and in some instances they turned to this mediation in order to receive an evaluation of an expert neutral third party as for the actual legal standing of the executive body. The administrative bodies, who take extra care with public funds, had felt greater trust towards this procedure where they felt they were not treated like a “deep pocket,” but rather that the proposed outcome was the result of a reasoned legal discussion regarding appropriate administrative conduct. Accordingly, the authority-based mediation has become an adequate and customary forum for mediations involving the state or administrative bodies, and the responsible governmental authorities usually approve the mediator’s recommendations for the resolution of disputes.

In that respect, we should note that the described method, which requires the presence in the mediation of those who are in the position to approve an agreement, has been internalized by these bodies. The responsible figures personally participate in the mediation, and at its conclusion they commit to recommending that the approving bodies (usually at the ministry of finance) approve the settlement as it is without any changes. In this way, the approval of settlements by governmental and municipal accountants has become much easier. The mere invitation and consent to

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59 This claim is based on the increasing number of cases involving the state that were referred to this process, as well as the positions of relevant state officials which are delivered to the mediator. In addition, the Accountant General approves the payment of higher fees, compared with what was paid in other mediation procedures. See, e.g., the decision in File No. 21014-02-11 CC (CT), Karni Ltd. v. Israel (Sept. 19, 2017) (unpublished transcript) (Isr.), in which the judge agreed to postpone the hearing of evidence, in a case to which the state was a party, due to the parties’ request to allow them to mediate before Adv. Gabrieli: “The Court also believes that it is desirable to attempt to solve the dispute through mediation, even at the cost of postponing the legal procedures, especially since the mediation is to be held before Adv. Gabrieli, whose success in that regard is undisputable.” Another example of a case in which the state has already participated in one mediation which did not succeed and then agreed to try and mediate the case again in authority-based mediation, because this mediation practically assists the court in dealing with such cases, can be found at CA Magistrate Court (Ashkelon), 6/09 Local Planning Institute Ashkelon v. A.C.H.A. Millennium Constructions Ltd. (Feb. 2, 2012) (unpublished transcript) (Isr.).

60 From 2012 to 2017 the mediator dealt with 132 cases that involved the state, local municipality, or another administrative body. One hundred ten of these cases resulted in an agreement, fifteen cases are still being handled (with experts, etc.), and seven cases were returned to the court with no agreement.
take part in this type of a procedure already creates an expectation to reach an agreement, an expectation that usually fulfills itself.

The fact that the administrative bodies approve agreements that are reached through this mediation and are committed to its outcomes also creates a willingness on behalf of the private parties to participate in a mediation with the state, a practice that for years has been considered useless. Private entities have learnt in the past that the state or its administrative bodies do not mediate since it was easier for them to accept legal rulings, even if their outcome was worse than what could be achieved in mediation. The authority-based mediation, in its requirement for the presence of those with authority, creates an expectation based on past cases for reaching an agreement following just one mediation session, and thus rebuilds private parties’ belief in the ability of the administrative body to reach a solution that is other than judicial ruling.\(^{61}\)

The authority-based mediation therefore started as an evaluative procedure within arbitration, continued as mediation in cases referred by magistrate courts, established its success in complicated cases referred by the district and supreme court, and eventually gained a unique standing in mediating public cases that involve governmental and administrative bodies. This process of evolution was accompanied by an intense dialogue with the courts and constant support and trust on their behalf, demonstrated in referring cases, willingness to adjust the court’s schedule, and, finally, approving the agreements that were reached through mediation.

\(^{61}\) We will note that there is a common assumption that the word “public” does not suit the confidentiality that characterizes mediation and its being held in the private sphere. One of the characteristics of mediation that is closely connected with legal reality (like authority-based mediation) is the blurring of boundaries between the public and private spheres. In that context, we can show that agreements that have been achieved through this process and that involve public entities have served as a standard for the resolution of future conflicts that involved the same entities. In addition, the publication of the terms of settlement within local municipalities and their workers, or even its application within any public institution, grant the agreement a public dimension, albeit limited, within these bodies. When an agreement is approved by the court and the decision is published, parties can develop an expectation that similar solutions will apply in similar cases. Also, precedential settlements are often well known within groups with similar conflicts with the state, and the state itself often conditions its consent on the publication of the agreement and its application to similar cases.
IV. Authority-Based Mediation: Preliminary Findings from the Field

In this chapter we will offer preliminary findings from observations of authority-based mediations we have conducted, combined with some interviews conducted with the mediator. We will refer to elements of this process that seem to distinguish it from other models of mediation—as these are described in the literature, or based on our own familiarity with such models. Throughout our observations we tried to answer our research question, which stems from the two phenomena we have mentioned above—the increasing use of mediation along its limited success and the vanishing trial phenomenon, referring to the decrease in the number of legal cases that end through contested judgment. What is unique in this model of mediation that develops as part of the relationship between adjudication and mediation and what is the role of authority within it?

In the observations we have conducted we identified several repeating themes, which provide a partial answer to these questions. We will present these themes along with findings from our conversations with the mediator, as well as legal documents that refer to this unique process.

62 As part of the process of learning about authority-based mediation, two of the writers of this paper sat as observers in the mediation room for four days and were exposed to mediations in four different cases. In one of the cases the state was directly involved, another case involved an administrative body, and the third and fourth cases dealt with complicated private business-related disputes involving significant sums of money. Three of the four cases we observed resulted in an agreement on the same day. In the fourth case, it was decided that mediation would continue and the day ended with an agreement regarding future procedures, including the joining into mediation of other parties in related cases, including a large class action. While the observations were conducted with the consent of the parties, we decided that in order not to harm their privacy and the confidential nature of the procedure, we do not describe the details of the cases themselves but rather focus on the mediator’s actions. For a general discussion on the tool of observations, see Michael Angrosino, Doing Ethnographic and Observational Research (2007).

63 Our method is based, in part, on previous studies conducted in the United States which examined the work of different mediators in order to learn whether their practice is based on unique methods or whether these methods can be defined as models with clear characteristics which can be applied by other mediators as well. See, e.g., Kolb, supra note 21, at 417–18; Daniel M. Klerman & Lisa Klerman, Inside the Caucus: An Empirical Analysis of Mediation from Within, 12 J. Empirical Legal Stud. 686 (2015).
A. Waiting for Mediation and the Mediator’s Reputation

A significant part of the success of authority-based mediation may be attributed to the expectations that the parties develop as they wait for the mediation session. The average waiting time is more than ten months, and the parties agree to wait that long in order to participate in a process that enjoys a very high reputation. The evolution of the expectation for an agreement seems to increase the parties’ willingness to actually reach an agreement as they chose to wait for such a long time in order to arrive at a process which emphasizes persuasion and consent. The mediation meeting is therefore the end of a long waiting period that began when the parties chose this specific path. As mentioned above, this choice is based to a large extent on the unique reputation of this process, which is manifested in several ways: first, within the legal community, this model enjoys great appreciation and cooperation from behalf of attorneys; second, from the court itself—in referring the case to that mediation, in agreeing to delay the legal process for such a long period while waiting for mediation, and in many court decisions which refer to the mediator and his success. For example, in one decision the court writes: “The mediator has gained fame as a peacemaker.”64 And in another decision the court writes that the mediator seems to have “magical powers.”65 During an observation we have conducted in a magistrate court (with relation to another study) we encountered a judge telling the parties:

“We need a good mediator here, there are a lot of emotions, this is a classic case for mediation . . . maybe we should send you to the magician?”

The attorneys ask the judge whether she means Amos Gabrieli, and she affirms. Later on she says “we have turned Gabrieli into the god of mediations. I think he has a good method.”66

In addition to references in many additional court decisions, one could find more than a few paper articles describing the media-

64 File No. 41605-03-11 DC (TA), Eizenberg Property Group v. Haaretz (Nov. 9, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
65 File No. 11736-07-10 DC (TA), Electra Constrs. Ltd. v. Assuta Health Servs. (Dec. 25, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
66 This observation was conducted on January 1, 2017 in the Hashalom Court in Tel-Aviv as part of a study that examines judicial settlement work (on file with authors). See generally JCR COLLABORATORY, www.jcrlab.com (last visited Nov. 17, 2018).
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...tor’s style and success. These, it seems, are well known to the parties who arrive at the mediation meeting. In one of the mediations we have observed the parties specifically referred to the fact they have read about the mediator prior to coming, and mentioned his title, “the magician.” In another session we have observed one of the parties tell the mediator: “It is true what they say about you, you are truly a special man.”

**B. The Setting of Mediation**

The mediation room is located in a modest office building in a peripheral city in Israel. At the ground level there is a half-empty coffee shop where the parties sometimes meet before the mediation begins. The feeling is of a distanced little town (compared with the offices at the city center of Tel Aviv). The mediation room itself is not very big. A large, elliptic table, with deep lines that direct the look towards the mediator, takes up most of the room. The blinds are shut, and there is no appearance of the surrounding environment. It feels like an enclosed space. The parties sit on both sides of the table. At the head of the table sits the mediator, and the attorneys next to him. Behind the mediator is a large bookcase. Another book, titled *How Judges Think* is presented on a side table. During the mediation, drinks and light refresh-

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68 See, e.g., File No. 11736-07-10 DC (TA), Electra Constrs. Ltd. v. Assuta Health Servs. (Dec. 25, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 26951-01-11 DC (TA), Arbel v. Spirocor Ltd. (Apr. 18, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.). In that regard, we can think of a kind of mythic perception of the mediator as creating a certain kind of authority that is based on personal charisma, such as the one described by Max Weber. In this paper, we attempt to present a structure that may explain the “magic,” and in that regard the paper is part of the “disenchanted” of this process. See Max Weber, **On Charisma and Institution Building** (Shmuel Noah Eisenstadt ed., 1968); Max Weber, **The Theory of Social and Economical Organization** (Talcott Parsons ed., A. M. Henderson & Talcott Parsons trans., 1947); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 **OHIO ST. J. ON DISP. RESOL.** 509, 514 (2004) (“The mediator is free, within extremely broad limitations, to work her magic on the participants, establish the rules of the process, and then to use these rules to trash, bash, or hash out a settlement”); John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 **LOY. U. CHI. L.J.** 1, 7 (1997).

ments are served. Ordering the drinks, speaking about the refreshments, organizing them on the table—dealing with all these aspects helps in creating a pleasant and relaxed atmosphere at the beginning of the meeting. We will later find out that lunch is not served, and the mediation may go on for many hours (after 9 p.m. in one session we observed) without their being a real break. It seems that the length of the meetings in a closed environment (in one room or in separate rooms) may contribute, on the one hand, to the creation of expectation and, on the other hand, to the evolution of a pragmatic, businesslike, agreement-oriented atmosphere, which one may even describe as a bit urgent.\footnote{\textsuperscript{70} It is interesting to note, in that regard, that in view of the increasing number of requests of parties to annul mediated agreements due to pressure or misunderstanding of their content and, on the other hand, requests to enforce mediated agreements that are not kept by the parties, there is a proposal according to which a “cooling-off period” of a few days will be provided to parties to the mediation (through legislation) during which they can withdraw from their consent after they freely reconsider its terms. Nancy A. Welsh, \textit{The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?}, 6 \textit{Harv. Negot. L. Rev.} \text{1} (2001).} In one of the sessions the mediator joked and said: “we serve bad coffee and an unbearable temperature in the room in order to finish.”

Also in that context it is interesting to note that once an agreement is reached, the mediator, along with his team, writes down a detailed document in a very short time (20–30 minutes). The lawyers then receive this document, go over it, and suggest changes and corrections. The parties and their attorneys then sign the agreement. In one of the mediations we observed we saw how from the minute of reaching an agreement, it was less than an hour before the parties had signed the agreement, after it was examined and changed by their lawyers, and even after they had consulted with their accountant regarding the tax implications of the outcome. This process ended late at night, following a very long mediation session. The agreement was sent to the court to be approved that same night.

\textbf{C. Opening Statement}

The opening of the mediation meeting by the mediator is an especially meaningful moment, and may even last up to half an hour in some cases. During his opening statement, the mediator frames the mediation process, defines its rules, creates preliminary connections with the participants, and sets the desired tone for the
conversation. In the mediations we have observed, it was possible to identify some similarities within the opening statements, and especially in the messages that they conveyed. The mediator defined the discourse within mediation as an open discourse, free of limitations:

We speak with complete honesty, we say things the way they really are, and there is no point in pretending. In mediation there is no room for untruthful statements. . . . In this procedure telling the truth is crucial. . . . The truth is important both for me and for yourselves, and it will establish the next layer for the legal discussion.

The purpose of the process—which is to reach an agreement—is clearly presented:

“I am interested in an agreement. And I hope that you are as well. I usually like to finish in one meeting, and go home.”

The mediator then continues to describe the unique characteristics of mediation. He refers to the typical elements of mediation—such as putting the decision at the hands of the parties. But especially, he defines mediation as opposed to the legal procedure. Mediation is presented as “a temporary truce,” a sphere for an open conversation and creative solutions. For example:

“Mediation is not about maximizing your claims. . . . Mediation could end in any possible outcome. This is an intellectual, rational process where people speak about everything, listen to one another, and reach a solution. . . . You may think of everything and anything.”

At the same time, while he distinguishes mediation from legal procedures, the mediator also emphasizes, already in his opening statement, the centrality of law within this type of mediation. For instance:

“You will reflect to me what you want to achieve, what your interests are, not your dreams, and I will in turn reflect to you the legal situation.”

In that context, and in view of the unique role of the law within authority-based mediation, the mediator also distinguishes this unique mediation model from other models. Here is what he says:

I am completely open, and willing to be convinced in the intellectual level. But once I set my mind on the facts, then the traditional mediation where the mediator does not intervene, this is not that kind of forum. You will receive here an open forum,
considerate, rational, that will lead you to a decision, that is different from a legal decision.

The mediation process is presented in advance as evaluative and intervening. As for the authority of the mediator, and its relation to the authority to make a ruling, though, the mediator delivers a more nuanced and complex message. On the one hand, the mediator emphasizes his lack of authority to make a ruling: “I cannot make a ruling, therefore there is no need to convince me of anything.” On the other hand, the mediator keeps referring to reaching an agreement within mediation as a kind of “ruling.” Also, from the moment the mediator gives a proposal, an outline for a solution, his commitment towards his proposal is presented as such that either the process will end with the parties agreeing to the proposal, or that the case will return to court. Another solution is not available.

D. Establishing Authority

Along his emphasizing his lack of authority to make a decision, the mediator establishes his authority, and upholds his rich experience and professionalism. He does that in several different ways. The noteworthy ones are: recurring referrals to mediations he had conducted in significant and well-known cases that ended in an agreement and were published; referrals to his rich and vast experience (for example, he turns to the lawyers at the beginning of the meeting and says “you have many hours of sitting with me, and the public attorneys have hundreds of hours sitting with me”); he mentions publications regarding famous figures that sat around the table in this mediation room; and he speaks about judges and senior attorneys in familiarity and ease. On top of this there is his complete knowledge of the facts of the case and the relevant legal materials, including up-to-date case law. These assist in establishing his professional authority, and in positioning the mediator as an authority in the legal realm.

Referring to past cases, speaking about the participants’ army service (a common Israeli way of “breaking the ice”), the use of humor, personal anecdotes, discussing culture, classical music, local politics, kids, TV programs, and more—all these create an easy, pleasant, and friendly atmosphere. The mediator is perceived as a paternal figure, pleasant and beneficent, funny, and at the same
time as an expert, with full control of the conversation within the mediation room.

E. Relationship with the Court

As the mediator himself puts it at the beginning of one of the meetings: “There is a Ping-Pong between me and the court, there is a truce, but you cannot ignore the court, nor the legal discourse. You are in a pause, but this is not going to be a soft conversation, but rather a profound one.”

The relationship with the court fulfills several functions throughout the mediation. First, one should remember, as discussed above, that referring to the court frames the dispute within its legal context. Second, speaking about the court helps in establishing the mediator’s authority as one that corresponds with the authority of the court that referred the case to mediation. Third, mentioning the legal process makes present and actual the possibility of returning to the court if the mediation fails to reach an agreement. Of course, returning to the court has its ramifications as for the outcome, but it may also have emotional and other consequences. In one of the sessions we have observed, the mediator specifically discussed statements of the presiding judge regarding the parties’ chances of winning in court. In another case, the mediator told the parties “think about the judge for a moment,” and then went on to describe the ways in which each side’s position may influence the judge if he has to make a judgment in the case. In yet another procedure, the mediator described before a young woman, a claimant, the ways in which continuing the case in court for the coming years will influence her life. The return to court is also presented as the parties’ giving up on the opportunity to actually affect the resolution of the case, and as a choice to return to a world of uncertainty regarding the outcome:

In a world in which everyone perceives himself as completely right, a judge will have to give a ruling. In this uncertain sphere, I am offering you a final opportunity to conduct an intellectual, modest discourse, which assumes that not all claims of the other party are unfounded. Your lawyers may tell you that even a judge may make a mistake . . . I see risks and possibilities. I know how to make an evaluation, but I do not know how a case will end in court.
F. Normative Discourse Regarding Outcomes

During one of our conversations with the mediator he told us that “agreeing to involve me in the mediation is agreeing to include my values within the process.” Indeed, in the cases we observed, the mediator was able to lead a normative dialogue regarding the appropriate legal outcome in the sense of interpreting and challenging the legal limitations. In contrast to the customary expectation that a mediator will focus on personal interests and will refrain from questions of law and justice, it seems that at the back of the authority-based mediation (and especially when the government is a party) there is a reasoned perception of a better law, which leads to normative discourse concerning the social values that are at the core of legal rules (much like Owen Fiss’ perception of the social goals of adjudication). In the cases we observed that involved the government as a party, it seems that the parties had cooperated with that perception and did not retreat to an adversarial discourse or a narrow rights-based discourse. We find, therefore, that the common critique against mediation as privatization of justice, or as a silencing mechanism that is based on solving public disputes that raise public interest questions based solely on the parties’ interests, is less accurate with regard to the authority-based mediation. The “Fissian” dialogue regarding the values that are reflected in the law seems inherent within this process and as part of its public dimension, especially with cases that involved a governmental authority. In a case we observed that involved two private entities, the normative discourse was present through the use of expressions such as “it is not right” or “it is not fair” that the result would be that or another.

G. In Praise of Settlement

Inside the mediation room, reaching an agreement is presented as freeing the parties from the burden of the dispute, and as a cure for their pain. In one meeting, for example, the mediator promised the parties that after reaching an agreement they “breathe differently as they leave the room.” In conversations we

72 For a developed discussion of the critique that may arise in that context, see infra Part VI.
have had with him, the mediator is similarly using terms like “getting the burden off the parties,” or even “redeeming them from the conflict.” “Any time you can turn a conflict into something positive—that is a holy task, it is moving,” the mediator told us.

Throughout the mediation, the agreement is presented as the most important goal that is, to a certain degree, more significant than other values that typically identify mediation, such as—autonomous decision-making or even parties’ transformation. Other models of mediation like the transformative one, or even the pragmatic model, present a variety of values and goals—such as the improvement of the dispute resolution abilities of the parties, or a new deep understanding of the conflict and sometimes transformation—as being just as important as the outcome of the process. The authority-based mediation, on the other hand, signals the agreement in a binary way, usually unacceptable in the realm of mediation, as the ultimate marker of the process’ success. The agreement is given an absolute value. Without an agreement, without a chance for consent, the long meeting will be perceived as a failure. At the same time, the mediator does speak sometimes, along with his praise of an agreement of the costs and concessions that are associated with consent, along with the costs and risks that are involved in continuing to trial. In one of the meetings the mediator said the following:

I think that you need to stop this bleeding today. This will have a cost! (hitting the table) A cost! High financial cost! . . . I will not offer you anything that is worse than the worst possible legal outcome. . . . We need to find something that is proportional and right. Be modest . . . I don’t feel that this side is more right than the other. If you are hungry, I wish you success in court . . . . Your potential risk in this case, in exposing the irrelevant elements is greater than the probable gain in the relevant ones. Do not play in this case.

In another case, during a separate meeting with the claimants, and following a mediator’s proposal which the claimants were reluctant to accept, the mediator said: “Do you want to punish them [the defendants]? I don’t know how to do this. I know how to do what is best for you, and not what is bad for the other side.” The mediator then continued to detail the high costs (financial and others) and the risks that are part of continuing the legal suit, and convinced them that in light of these costs, it would be better to accept the proposal, even if it is significantly lower than what they had hoped to receive when filing the suit.
H. The Mediator’s Proposal

Unlike other models of mediation in which the mediator is prevented from conducting evaluations or presenting proposals for ending the dispute, at the heart of authority-based mediation stands the constant movement towards an agreement that is based on the mediator’s proposal as to the appropriate outcome of the case. The mediator does not rush into making statements as for the right way to resolve the dispute. But, once a number or another specific solution has been pronounced in a way that creates a psychological anchor, the mediator will not stray an inch from his proposal, and would create a literal commitment to not change his proposal. This is a commitment that is created through public announcement. This tactic brings us to view the authoritative mediator as conducting a competitive negotiation with the parties: a negotiation regarding the question whether an agreement would be reached or whether the case will return to court, and the mediator’s success is manifested in the parties’ consent to the agreement he proposed.

I. Separate Meetings

According to the mediator, he conducts most mediations in one room, without separately meeting with the parties that are common in other models of mediation. This is similar to the transformative model where the transformation happens within the room and through the interaction between the parties, and the tendency is to not conduct separate meetings. At the same time, when required, in view of this emphasis on reaching an agreement, and unlike the transformative model, when separate meetings do occur their aim is to lead the parties to the outcome that the mediator sees as correctly reflecting the suitable legal balance. During the

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73 See Ben-Arzi, supra note 44, at 311–49.
74 Commitment, according to Schelling, is a tactic used in competitive negotiation which limits one party’s freedom to choose. See Thomas C. Schelling, The Strategy of Conflict (1980). Commitment is created through statement of future actions. It limits the leeway of the person who made the statement, and at the same time, it limits the other side’s options. Commitments need to be credible and reliable, or they will not be effective. Commitments are characterized in three central elements: high degree of finality, high degree of specificity, and a clear statement of their consequences. See Roy J. Lewicki, Bruce Barry & David M. Saunders, Negotiation (6th ed. 2010).
75 See Schelling, supra note 74; Lewicki et al., supra note 74.
separate meetings the mediator conducts private conversations with the parties (mostly at the presence of their attorneys but at times in a more intimate setting). In those private conversations the mediator creates two types of dialogue with the parties. The first is an emotional and open dialogue that allows a party to reveal his feelings and his aspirations, as separated from the legal reflection or the reality check that the mediator usually offers. This type of conversation creates closeness between the mediator and the party. Second, the separate meetings allow the mediator to clearly, and sometimes even bluntly, reflect to each party the evidentiary and procedural weaknesses or holes in his legal arguments. This helps clarify the parties’ insight regarding their actual legal standing, and the risks in arguing their case in court, in a way that helps them to forsake their original aspirations and cognitive biases they held to while filing the lawsuit and perhaps even before that.

J. The Lawyers and the Parties

During the mediation sessions, we noticed a difference between the discourse that the mediator uses with the lawyers and the discourse he uses when speaking with the parties. As a rule, authority-based mediation is conducted to a great extent vis-à-vis the attorneys. The lawyers (sometimes three or four lawyers for each party) are the ones who sit closer to the mediator. The lawyers arrive ready to present their legal arguments. In front of them, on the table, are large bundles of legal materials, and they are often required to search for documents in them, or find other answers to the mediators’ questions. The legal discourse—which includes discussion of the relevant legal questions, case law, and chances of winning in court based on the strength/weakness of the legal arguments—is conducted mainly with the lawyers. The parties themselves are, obviously, important observers to such conversations, and when they ask questions, or when the mediator finds it otherwise necessary, he would stop and provide explanations. Alongside the conversation with the lawyers, the mediator conducts a personal conversation with the parties. Here, the mediator leaves the stage to the parties themselves to fully provide their own narrative of the dispute, their feelings, and needs. It is interesting to note that during our observations we encountered a few instances where the lawyers themselves were the ones who asked the parties to refrain from speaking, not ask questions, and not disturb
the conversation. The distinction between lawyers and parties is significant with respect to not only the different types of discourse that are held in the mediation room, but also, sometimes, as leverage used in advancing an agreement. The mediator relates to the lawyers and their professional judgment as a factor that helps in promoting consent: “I rely on the lawyer’s discretion, as they understand the legal risk.” Or, on a different occasion he told us: “The mediator and the lawyers want to bring the parties to agree. Continuing litigation is bad for the parties, since you never know what will happen in court.”

In a different way, one that is more implied and subtle, the mediator can inform the parties that what was promised to them by their attorneys is not necessarily realistic or feasible. He does through reflection of the legal reality, and also by emphasizing that he sees the pleadings as representing nothing more than the parties’ “aspirations” or “wishes.” To demonstrate this, the mediator may, for example, ask the attorneys—in the presence of the parties—how many legal cases they know in which the court ruling granted the litigants the full amount or remedy they were originally suing for.

K. Emotions and Relationships

In our observations we have witnessed how the mediator creates relationships with the parties. It was additionally apparent that the lawyers who participated in the process respect him, and that he maintains friendly relationships with most of them, including the senior ones. With the lawyers, trust seems to be the dominant characteristic of the relationships. When necessary, the mediator will use humor to reduce their defiance. For example, when a lawyer told him “what you just said was already said by the court,” he answers: “I knew that, but I have to earn a living.” The mediator does not seem to be threatened by emotions in the mediation room, and he has the capacity to contain and manage extreme emotions, including negative ones. For example, when one party discusses his own vulnerability, he receives empathic reactions from the mediator who, in turn, makes these feeling present in the discussion and expects a recognition and reaction from the other party. When one party said, bitterly: “you mistakenly think that the government cares about us,” the mediator replies: “I am an irreparable romanticist.” When the mediator turns to another
party, who describes the circumstances of the case, he asks: “look me in the eyes—did you give up?” Even when discussing compensations, the mediator may use emotional terms: “we need a compensation that will justify the pain.”

Apologies in the mediation room are common and receive recognition. We have found that even representatives of the government express sorrow for harm that was conducted under their responsibility. Expressions such as “I am losing sleep over this case,” or “it breaks my heart,” are heard in the mediation room from representatives of large entities—commercial and administrative alike—which were not directly involved in the original cause for conflict. So, for example, we have heard a public attorney saying: “we completely screwed up, we are sorry for that,” while at the same time refusing to pay compensations based on legal arguments.

The state, in that context, can “take responsibility” for its actions, a term that is legally meaningless, and patiently listen to individuals’ grievances and pain—even representatives of commercial bodies feel safe enough to share their pain and speak in emotional terms about their harm. For example, this is what a private party, that received through mediation a lower sum than what he sued for, writes to the mediator: “The financial ending point is less important. The inspiration I got from you and from your way of work is what I’ll be taking with me onwards, and this, for me, is a treasure.”

L. Parallel Spheres

It seems that authority-based mediation is simultaneously run in two parallel levels, each of them with its distinct position regarding the legal process. As the mediator told us in one of our meetings: “there is a dialectic here between compassion and legal reason.” In the first level, the mediator conducts a profound legal discourse, one that is based on complete knowledge of both the details of the case and the legal situation (including precedents, upcoming decisions of the Supreme Court, predictions of decision in the case based on the judges sitting on the panel, etc.). This conversation is mostly being held vis-à-vis the representing lawyers (as mentioned before, authority-based mediation is only conducted with represented parties). At the same time, the parties themselves are important spectators to this legal investigation, and the
mediator makes sure that they clearly understand the legal situation as he sees it. The legal discourse or, more accurately, the legal analysis provided by the mediator, combined with his moral perception, are the most influential factors regarding the outcome of the mediation process, i.e. the content of the agreement and its terms.

Parallel to the legal discussion, there is within the mediation room another distinct conversation. This conversation—open, honest, and emotional—is held mainly between the mediator and the parties. The mediator expresses real interest in the parties and encourages them to speak about themselves, about the case, their feelings, and wishes. In one of the cases we observed, the mediator turned to the claimant and asked her: “tell me the story, in lay people language, the law is not interesting at the moment.” This non-legal discourse, just like the legal discourse, is held with patience and restraint. Each person in the room gets an opportunity to express himself and to voice his or her opinion. Within this conversation, the mediator also discusses the personal and emotional (and not only economical) consequences of continuing to litigate the case in court. He also stresses the inherent advantages of consent, as well as the benefits of ending the conflict. The personal, emotional discourse is what will eventually lead the parties to choose to accept the agreement that was designed through the legal discourse. This discourse, which involves authority that is bound with the acceptance of consent as the better option—acceptance that is created already during the waiting period before the mediation begins—presents a new version of authority that characterizes this unique model of mediation.

V. EVOLVING MEANINGS OF AUTHORITY: FROM AUTONOMY TO RELATIONALITY

The use of tactics that involve power or influence76 within mediation, as opposed to guidance that is related to authority,77 creates tension between authority and consent and therefore does not

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76 Shapira, supra note 21, at 393–408. It should be noted, though, that the support for this theory arrives mainly from the fields of behavioral psychology and behavioral science.

77 We are aware of some studies that examine characteristics of authority and its use within mediation, but these relate, mostly, to implied or hidden authority which is not central to the process and is not perceived as such by the mediator, the parties, or their attorneys. See, e.g., Shapira, supra note 21, at 393–408.
completely fit within the common definition of mediation, and perhaps not with their parties’ informed choice in mediation. The use of authority may additionally harm the parties’ expectations and deny the essence of a procedure that is based on consent and autonomous choice, and on the negation of the third party’s ability to dominate the procedure, let alone make a decision at its conclusion.

One of the basic principles of modern mediation is the emphasis on promoting the parties’ autonomy. At the same time, one of the constitutive articles in that field defined this autonomy as “relational autonomy”—autonomy that is grounded in the evolving relationship between the parties. This definition, which in itself contains a paradox, had influenced the evolvement of mediation over the years, and we will argue that it receives a new meaning in the process we observed. Going over the literature that deals with the definition of traditional mediation, its development, and characteristics will reveal that the use of the term “authority” with regard to mediation is not common. Any use—direct or implied—of tactics of influence and pressure receives harsh critique including statements according to which any form of influence denies the mediational nature of the process. Clearly, a procedure that is defined as one in which the parties autonomously and freely decide its outcome does not assume any authority on behalf of the neutral, impartial third party.

78 The mediator’s lack of authority to make a ruling and the importance of the parties’ autonomous decision making are the cornerstones of the traditional view of mediation as “a procedure in which the mediator meets with the parties in order to bring them to agree on resolution of a conflict, without himself having any authority to make a ruling in that dispute.” Israeli Courts Law, 5744–1984, § 79(C)(1), (Isr.).


80 Id.

81 Michal Alberstein, Mediating Paradoxically: Complementing the Paradox or Relational Autonomy with the Paradox of Rights in Thinking Mediation, in Paradoxes and Inconsistencies in the Law 225 (Oren Perez & Gunther Teubner eds., 2005).

82 See, for example, a discussion of the authority that develops in court-connected mediation where we view the mediator as an agent of the court. Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949 (2000). Reuben distinguishes court-connected mediation from cases in which the parties were not referred to mediation by the court but chose it on their own. He argues that only mediators in court-connected mediations can be perceived as performing a public role and as representatives of the state. See also Wayne D. Brazil, Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts, 2000 J. Disp. Resol. 11, 24 (2000); Wayne D. Brazil, Hosting Mediations as a Representative of the System of Civil Justice, 22 Ohio St. J. on Disp. Resol. 227 (2006). See also Scott H. Hughes, Mediator Immunity: The
Accordingly, the definition of mediation in legislation explicitly denies the mediator’s authority to make a ruling in the disputes that are brought before him. The conventional definition of the mediator’s role relates to him, to a large extent, as a neutral observer with a limited range of intervention. As the parties become more active in reaching an agreement, the mediator’s status as an objective and neutral observer is emphasized. The mediator’s role is to sustain and foster the process using well-defined tools, while improving and reinforcing the parties’ ability to solve the dispute on their own. Within this framework, even an estimation by the mediator of the expected legal outcome of the dispute, let alone a proposed agreement, are considered problematic, and

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Misguided and Inequitable Shifting of Risk, 83 OR. L. REV. 107, 149 (2004), for American legislation specifically defining the mediator as a representative of the court. In Israeli law, the possibility to submit a mediated agreement to be approved by the court, even before a lawsuit has been filed as per § 79(C)(8) of the Israeli Courts Law, signifies the semi-public nature of mediation. Similarly, the mediator’s duty to maintain his neutrality also posits him as carrying a judicial role. For the legal situation in the U.S.A., see Ellen E. Deason, Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide, 80 NOTRE DAME L. REV. 553 (2005). Also, in that regard, there is importance to the mediator’s authorization of the agreement with his signature; the court will not approve an agreement without the mediator’s signature on it, or without a notice from the mediator himself (and not from the parties) that an agreement was achieved and signed. See, e.g., CC Magistrate Court (Jer), ALSTER v. Danva Cebus Holdings 1965 Ltd. (May 18, 1999), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (“The mediator is the professional-neutral authorized person, and he is the one that should inform the court regarding an agreement that was achieved through mediation.”). See also Nancy A. Welsh, Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, 2002 J. DISP. RESOL. 179 (2002); and, finally, the fact that mediation is sometimes funded by the state, or, alternatively, the fact that court fees could be paid back to litigants who ended their dispute through settlement. See Leonard Wayne Scott, The Law of Mediation in Texas, 37 ST. MARY’S L.J. 325 (2006).

83 The term “mediation” relates to many different types of dispute resolution procedures, whose nature often changes according to the mediator’s personality, ad-hoc procedures that are determined by the mediator and by the parties, and in relation to the nature of the dispute and of the parties. A comprehensive review of different methods of mediation, all of them characterized by the autonomous standing of the parties and the mediator’s lack of authority to make a ruling, can be found in Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin’s Grid, 3 HARV. NEGOT. L. REV. 71 (1998).


85 ALBERSTEIN, supra note 20, at 62–63; Fuller, supra note 9, at 325 (“[T]he central quality of mediation namely, [is] its capacity 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 towards one another.”).

86 See Israeli Courts Regulations (Mediation), 5753–1993, § 5(G) (Isr.) (“The mediator shall not advice the parties in any professional matter that is not in his fields of expertise, and shall not provide a professional opinion on a question that arose during mediation, even if that question is within his field of expertise.”). For a discussion of this rule, see Ben-Arzi, supra note 45, at 225–56.
some scholars would even say that a process which includes such activities should not be defined as mediation. Professor Mironi, for example, argues that a narrow, evaluative procedure leading to an agreement should be termed conciliation and not mediation. 87 Most writers agree that the term “mediation” should be used only in relation to a wide and enabling process, and the use of authority is not acceptable even within evaluative mediation.

And so, as opposed to the conventional perception of mediation as a soft procedure, open-ended and lacking in authority, we chose to present in this paper a new model of mediation, one that is closer to the legal world and is characterized in extensive use of authority. This model is a product that reflects the two phenomena described in the introduction: the vanishing trial on the one hand and the relatively limited success of mediation in cases that are referred by the courts. 88 The authoritative mediator performs activities that are commonly used by judges today in their attempts to promote settlement within the courtroom. 89 The mediator, however, performs these activities without having the authority to make a ruling in the case (which defines the judicial promotion of settlement) but with the use of a different kind of authority, as we have argued before. Since some of the qualities that are manifested in this process are originated from the world of mediation, and since this version of mediation does seem more appropriate within the complicated settlement culture of the 21st century, we chose to keep the term “mediation” when speaking about this authority-based dispute resolution procedure, and not use other terms such as “Med-Arb.” 90

87 Mironi, supra note 25. We should note there is at times a mix-up in terms between similar procedures. On the difficulty in distinguishing and defining different types of procedures and setting parameters for their characterizations, see Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,” 19 FLA. ST. U. L. REV. 1 (1999); Kovach & Love, supra note 83.

88 See supra Part I.

89 In that regard, see JCR COLLABORATORY, www.jcrlab.com (last visited Nov. 17, 2018) (depicting the Bar-Ilan research project on judicial conflict resolution).

90 It seems that although some of the characteristics of authority-based mediation fall under Mironi’s definition of conciliation, it has many other essential characteristics that fall under the definition of mediation, even according to Mironi. For example, authority-based mediation uses traditional mediational tools such as soft discourse, focus on interests, and solutions that sometimes include future cooperation and amending the parties’ personal and other relationships. See Mironi, supra note 25, at 499–500; Carrie Menkel-Meadow, Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation, 5 CARDOZO J. CONFLICT RESOL. 97, 101–11 (2004).
When speaking about the use of authority within mediation, one should distinguish between legitimate use of authority and illegitimate use of authority. One should also differentiate authority from influence (which might explain the parties’ changed positions, but not their acceptance of the mediator’s authoritativeness). In order to do so, we suggest thinking about the realization of authority within the new model of authority-based mediation as related to two new forms of authority:

The first relates to the mediator’s ability to subject the parties to the goal of reaching an agreement. This authority is being realized mainly with respect to consent in itself, and not the terms of the final agreement, as the process itself focuses on creating a “mindset of agreement.” The parties in this process accept the mediators’ reasons as to the positive value of consent, and they then replace their own judgment with that of the mediator’s with respect to the search for agreed solution. Unlike the arbitrator, whose authoritativeness stems from his authority to make a ruling based on his expertise, the authoritative mediator employs the parties to take part in the effort to reach an agreement as the main purpose of the process. In that sense the parties surrender their original position to not agree, continue the process of deliberation, and focus on designing the terms of the final agreement. Within a process of authority-based mediation of this kind, a mediator’s proposal does not intervene with the parties’ autonomy, since their preliminary autonomous choice to agree legitimizes their latter acceptance of the proposal of the mediator who they perceive as a unique legal expert. As we saw during our observations, the mediator himself is an interested party in the process of reaching an agreement. He is decisively and actively working to achieve consent and he creates a commitment to a certain outcome. He praises consent, and creates a behavioral contract with the parties, in which they subject themselves to his will, and in effect “agree to agree.”

The second form is relational authority. This kind of authority is connected to a relationship between the authoritative figure and those who “obey” him, a relationship that is less formal, not structured by rules, and develops along the interaction between the two. This type of authority is present in the mediation room in two ways: the first has to do with the relationship between the parties and the mediator, and the second is not related to the parties, but

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rather to the connections between the world of legal norms and the principles of the field of conflict resolution.

A. The Evolving Relationship Between the Mediator and the Parties

Within traditional mediation, the mediator maintains his neutrality by refraining from directly intervening in the parties’ dialogue. This is an integral part of the mediation process and is conducted in a demonstrative way as the mediator encourages the parties to find solutions on their own and even to better their relationships. In a different manner, the authoritative mediator focuses on creating relationships with the parties and not between themselves, and he is significantly involved in the process, striving and working towards a settlement in a way that makes him an interested party. The atmosphere in the mediation room, different from the relational atmosphere in the courtroom, allows the mediator to create and sustain close and intimate interactions with the parties and with their attorneys. The mediator establishes trust through his competence and expertise, and his personal relationships with lawyers and parties; the parties chose this specific mediator and have waited for a long time to meet him; before the mediation session begins, the mediator meets with the parties and their lawyers at the coffee shop below his offices, and in this informal setting he creates preliminary trust; he signals to the parties that he has the capacity to contain their stories and feelings, and he is being viewed as a beneficial figure that can save them from their conflicts; he uses persuasion techniques that combine legal knowledge with interpersonal skills. The authority that is created within these diverse actions is the intricate outcome of soft effects, within the personal relationships that are integrated with the legal dispute. One could even say that because of the active evaluation by the mediator, and the guidance towards choosing between several clear options, authority-based mediation presents a unique form of neutrality—one we can call “equal favoritism.”

92 Nourit Zimerman, Procedure as Relationship, in Procedures (Issi Rozen-Zvi & Talia Fisher eds., 2014) (Isr.).
created through intimacy, showing interest in the parties, expressing emotions and opinions—when all of these are directed towards both parties. This unique personal relationship that is created between the mediator and the parties helps them to eventually accept the mediator’s proposal.

B. The Relationship Between Mediation and Law

We have found that the evolving relationship between mediation and adjudication within the new practice described here are richer and more complex than those who characterized mediation in its early days: our observations revealed that legal rules are relevant within the mediation room. Legal rules are in constant dialectics with the possibilities of reaching an agreement. The law that is being dealt with within the mediation room reflects, at times, a “Fissian” discourse of values, but at times it could also be a prediction of a clear and formal possible legal outcome. In any event, the legal discourse is not used as an authoritative, coercive system, but as a tool in convincing the parties. Such authority is sometimes referred to in the area of public international law as “persuasive authority.”

We think that in correspondence with the term “relational autonomy” which characterizes traditional mediation, this form of authority should be called “relational authority.” This authority is manifested in the mediation room along the legal norms. It is demonstrated in the relationship of the court and the mediator in relation to the parties and their attorneys: the case is referred to mediation by the court, which specifically signals this mediator; the court holds the process, in waiting for that mediation, for more than a year sometimes in order to allow a successful mediation procedure. When an agreement is reached, it is returned to the court to be approved. These agreements are sometimes mentioned in court decisions, and are referred to as “mediated rulings.”


95 See File No. 8145/13 CA, Korem v. Anana Ltd. (Oct. 2, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The resolution of this case—involving precedential questions concerning the relationship between an artist and her producers—was reached through mediation, and the agreement was then approved by the court. Despite this fact it seem that the accepted view (in the public) is that the Supreme Court set the precedent. See, e.g., The Law for Protecting Musician’s Rights Steps Up, NRG-CULTURE (Nov. 13, 2014), www.nrg.co.il/online/47/ART2/645/212.html (“Only last month, the Supreme Court, in a revolutionary decision, decided
legal expertise of the mediator is relevant to the relationship with the court and is acknowledged within that relationship. At times, one could find that the court maintains a dialogue with the mediator in its decisions or in the court’s transcript. Such a dialogue indicates the close connection between the two institutes. The relationship of the mediator with the court is seen as close and significant, and as such, it seems that the mediator enjoys the institutional legitimacy of the court.

Relational authority, as developed within the mediation room, and as related to the interface between the world of legal norms and the world of dispute resolution, offers new insight regarding the relationship between mediation and law: Since the early days of mediation, it was clear that mediation is managed in the shadow of legal prediction, at least as long as it closely connected to the legal system and was being promoted by the legal system. The term “bargaining in the shadow of the law” expressed in the clearest way the fact that the prediction regarding the legal outcome plays a significant part in any negotiation as a factor that the parties need to take into consideration either as a better alternative (“BATNA”) or a worse alternative (“WATNA”) to a negotiated agreement. As the legal system progressed and changed, it became clear that “negotiating in the shadow of the law” does not appropriately depict the reality within the world of conflict resolution: first, predicting the legal outcome is almost never a simple task. The law is complete with grey areas, lacunas, ambiguousness, discretion, and conflicting values and norms as well as procedural and evidentiary challenges that may make the process of finding the legal truth uncertain, and at times even mistaken. Second, the legal system is driven by strong efficiency considerations which incentivize judges to avoid as much as possible complicated judgments that involve high costs to the system. Therefore, it is not that simple for the parties to recognize the “shadow of the law,” which often becomes

that it is not possible to force a musician to work with a producer under a long-term and unavoidable contract. This decision was given in the appeal of the singer Aya Korem on the District Court’s ruling in the lawsuit filed against her by her producer.

96 For example, see the court’s decision in File No. 59007-01-12 DC (TA), Shmueli v. Ellectra Constructions Ltd. (Jan. 7, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

97 The beginning of the ADR movement was an attempt to solve the heavy caseload problem and other institutional problems of the court system. Therefore, alongside community mediation which continues to take place without any relation to the courts, most cases are referred to mediation by the courts.

98 This is especially true for Common Law legal systems where the judge can define the law through its interpretation, and where he can distinguish one case from another according to their specific circumstances.
the shadow of the shadow since again and again the court will refer them to mediation or to try and reach an agreement on their own—and in general, ask them to forgo a judicial ruling.

Third, the complexity of legal cases has risen with the years, in a way that makes it difficult for the legal system to decide them in a clear and simple way. In the words of Fuller, cases have become polycentric, and therefore a court’s solution for a legal question is not always practical or feasible due to the multiple parties and issues which characterize such cases. A mediated solution, which results from a multi-party and multi-interests negotiation, may be the better option for these cases.

Based on all the above, one could argue that the formation of a dialectic sphere where there is room for “soft law,” norms that relate to the different aspects of the dispute as well as procedural and hermeneutic flexibility, give the authority-based mediation an advantage. It also seems that in a world of vanishing trials, this new model of mediation may provide a better version of legal resolutions that involve public aspects.

VI. AUTHORITY-BASED MEDIATION: CONSIDERING POSSIBLE CRITIQUES

The authority-based mediation model that we have described in this paper is not free of critique. Here are a few central concerns that may arise with regard to this evolving hybrid model:

The first point of critique concerns one of the main impasses in the world of mediation—that is the question of free will, and whether this procedure actually creates limited autonomy. Authority-based mediation procedures do in fact limit the alternatives that are available to the parties, in a way that suits the mediator’s values. This results in a sphere of limited choice. It may be, therefore, that the outcome itself is less optimal for the parties and may even create, in retrospect, negative feelings regarding the process or dissatisfaction that may lead to additional disputes.

100 Jacqueline M. Nolan-Haley, Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent, 5 Y.B. ARB. & MEDIATION 152 (2013). Nolan-Haley argues that mandatory mediation, with sanctions toward those who unfaithfully refuse to mediate, along with the significant involvement of courts in mediation and powerful mediators who direct the parties toward an agreement that does not always relate to their essential interests, all lead to a reality in which many parties do not comply with their commitments according to the settlement agreement. These violations of agreement result, in turn, in more litigation and many requests to
A possible response to this concern would be that the idea of free will and autonomy is not as simple to achieve even within mediations that are held “by the book,” or with regard to contractual meeting of the minds. Disputing parties sometimes agree from an experience of ambivalence. It seems then that assuming heteronomy and a meeting of complex needs and goals would be a more realistic way of understanding the sphere of legal agreements. If we examine the question of free will and consent in respect to authority-based mediation, we will find that in practice, out of thousands of signed agreements that were submitted to the approval of the courts, only three petitions were filed which reflect a change of minds that is explained by a negation of free will.

The second point of critique is that if we were to accept Owen Fiss’ assumption according to which each conflict contains elements that require public discussion, then it would be clear that the more successful a mediation practice is in reaching agreements, the more it works against the public good. The high success rates of authority-based mediation, therefore, reflect a process that is completely undesirable from a “Fissian” perspective: more settlements, fewer cases return to the courts, and the result is a silencing of public issues. In that sense alone, authority-based mediation does indeed reflect a process of privatization of resolving disputes that would otherwise result in social rectifications within the courts.

On the other hand, one can argue in that regard that the inclusion of legal rules, and widely defined public norms and values within authority-based mediation (i.e., including within mediation public considerations which are typical to the legal sphere and were explicitly rejected from the traditional mediation field), in a way that blurs the dichotomous difference between the procedures, actually allows the inclusion of norms and principles within mediation, in a way that may actually promote the desired social change that Fiss speaks about. In that respect we will argue that authority-based mediation has an actual bearing within the public sphere, unlike traditional mediation that focuses on private negotiation and a narrow view of the interests that should be taken into account within it. It is in the nature of authority-based mediation to enforce mediated agreements. In other words, such agreements do not reflect the parties’ will, harm their autonomy, and lead to them being unwilling to fulfill the obligations they took upon themselves.

encourage wide discourse concerning public values that are within the legal world. The fact that this model of mediation makes such public values and norms relevant within mediation means that it enriches the public sphere (especially when compared with pragmatic or other models of mediation), even if the content of mediation sessions are not made public.103

The third point of critique concerns a more general claim that Fiss develops in his article104 regarding the inequality that characterizes mediation procedures. That inequality results from economic capacity, as well as a re-enforcement of already existing power imbalances between weak and strong parties, within a private procedure with a limited involvement of a third party. While we can agree with this critique that related back in time to the traditional form of mediation, it seems that authority-based mediation deals with power imbalances in a different way.

Even if we accept the assumption that the legal process does a better job in dealing with power imbalances and that it does not suffer from similar biases to traditional mediation,105 authority-based mediation, unlike other mediation models, is meant to focus on certain types of disputes, and it is not clear at all that one of its goals is to deal with the inequality that Fiss writes about. Nonetheless, the model described here may still mitigate inequality in two ways: first, with regard to economic inequality, the cost of mediation is insignificant when compared to the expected costs in fully litigating a case. Second, the claim regarding re-enforcement of power imbalances stems to a great extent from the fact that traditional mediation minimizes the role of lawyers within it. Unlike other mediation models, however, authority-based mediation assigns lawyers a significant role in the process, therefore providing the parties with professional protection and guidance, which is similar to what they would have in a courtroom procedure.

Finally, another possible critique may be that the use of legal tools within authority-based mediation might enhance this process and make it more sophisticated, but at the same time it blurs the differences between mediation and adjudication. The question may arise, therefore, whether this means that there is not efficient

103 See File No. 8145/13 CA, Korem v. Anana Ltd. (Oct. 2, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
104 Fiss, supra note 102, at 1085–87.
mediation without law, which leads to the conclusion that mediation remains in the shadow of the law and not vice versa.

Our response would be that the hybrid model of mediation we presented here may provide better solutions to various disputes, and therefore this model does not use “the law” or the idea of “legal ruling,” but rather uses legal tools. The incorporation of these tools within mediation does not harm the basic principles of that process—autonomous decision making and dialogue that is extraterritorial to the law—and might even add to these principles. As long as we speak about an adoption of the tool, and not an adoption of the essence of the legal process (using the authority to decide in promoting conflict resolution within the courtroom), then we could still claim that the law is in the shadow of mediation.

VII. Conclusion

We began this article by presenting new phenomena in the development of mediation vis-à-vis adjudication. Traditional mediation was born, to a large extent, in presenting an alternative model that inherently differed from adjudication, and by offering a completely different way for dealing with legal disputes. Following decades of developments within the realm of mediation and conflict resolution, we went out into the field in order to examine a mediation practice that seems to gain much recognition within the legal system in a way that differs from traditional mediation and the original promise of the ADR movement.

In view of our findings it seems that with the development of mediational practice and the parallel increase of the vanishing trial phenomenon, the relationship between mediation and adjudication became more complex and rich than it was in the past. Instead of a dichotomous and opposing relation, which emphasized each of these processes as distinct and as having its own unique features, we have found in the authority-based mediation a model that presents a relational-based dialogue between the legal and mediational axis: first, legal norms are present within the authority-based mediation room, along with the interest of solving the dispute, which may lead to various solutions. Second, the mediator’s work on the relationships between him and the parties (as opposed to the parties’ relationships with one another) creates a kind of authority that is focused on establishing a solution at almost any cost. Legal prediction is intertwined with the movement towards agree-
ment; the relationship with the mediator and the parties’ trust in him increase the parties’ readiness to reach an agreement and to free themselves from the burden that is associated with the legal dispute. This readiness is achieved mainly through the parties’ acceptance of the mediators’ authority, before and throughout the mediation process. These new interfaces bring mediation closer to the legal world, thus providing a mediation version that is more familiar and friendlier towards lawyers and judges as it speaks their own language. The development of such a relationship, which represents the progress of the mediation-law dialogue along the past decades, is significant in understanding the current legal world, which is identified by a constant move towards settlement, at the shadow of a possible judicial decision which is perceived as a last, and undesirable, resort.