Theorizing Mediation: Lessons Learned from Legal Anthropology

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1. Introduction

Since the 1990s, there has been an increasing interest in mediation in the Netherlands, as part of a set of 'alternative dispute resolution' (ADR) methods.[1] Politicians, lawyers and practitioners have embraced mediation as a legitimate method for settling disputes, alongside the adjudication of conflicts in courts of law. Simultaneously, a kind of 'mediation industry' has arisen which comprises an increased number of mediators, the establishment of mediation associations, courses on mediation, and an extensive literature. The main motives for this growing interest in mediation appear to be pragmatic and political rather than 'scientific'.[2] This certainly holds true for the multitude of textbooks, handbooks and other written sources aimed at 'mediation in practice', which for the most part are non-theoretical.[3] Specifically striking is the lack of literature aimed at theorizing mediation from a legal perspective. This article argues that the legal anthropology literature on disputes and dispute settlement offers useful insights for understanding mediation from a 'legal research' point of view. This is because a lot of current common knowledge on mediation has its roots in a legal anthropological understanding. The argument that is set forth in this article is that the most important lesson that can be learned is that mediation should not be seen in isolation, but as part of a social process.

1.1. The mediation growth and the absence of mediation theory

Mediation involves a wide range of practices and practitioners, and the use of various strategies to resolve disputes. A mediator is a neutral, impartial third party who does not have any authority to make any decision for the parties, which in fact is not the mediator's role or function. He or she facilitates the process and helps parties to try to reach a settlement of their dispute themselves. Mediation is based on the premise that disputes often concern more than a strictly legal conflict. In this regard, mediation can be distinguished from a formal court procedure. Consequently, mediation is seen as a form of 'alternative dispute resolution', which in practical terms means an alternative to litigation in formal courts of law. The process of mediation concerns a rather structured set of interaction methods: intake, exploration, negotiation and recording the outcome. In essence, mediation aims at better understanding between parties in order to provide a sustainable, future-oriented resolution. Important features of mediation include self-determination of the parties involved, voluntary participation, and confidentiality. Not every dispute is conducive to resolution

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1 Other forms of alternative dispute resolution (ADR) in the Netherlands are: arbitration, Arbitration Boards (in Dutch: *geschillencommissies*), binding advice (*bindend advies*), neighbourhood justice, and restorative justice within criminal law.
2 See also W. Twining, 'Alternative to what? Theories of litigation, procedure and dispute settlement in Anglo-American jurisprudence: Some neglected classics', (1993) 56 *The Modern Law Review*, pp. 380-392. This work described a similar trend in the United States some 20 years ago.
3 A. Brenninkmeijer et al. (eds.), *Handboek Mediation* (2013), p. 29 argue in a similar way.

via mediation. For example, in order for mediation to be viable, there has to be room for negotiation, and the dispute should not escalate too far. In addition, disputes of a purely legal nature are not suitable for mediation.

Mediation is currently experiencing a growing interest in the Netherlands from the judiciary as well as from Dutch politicians. There are several reasons for this. First, there is the argument that disputes often concern more than a merely legal conflict. Secondly, citizens are increasingly viewed as being capable of, and responsible for, managing their own conflicts whenever it is possible to avoid recourse to courts of law. Advocates of mediation argue that it seems to offer an effective solution for this. Mediation is also steadily increasing, in terms of professionals at work as well as in terms of cases handled. While there were only 100 mediators registered in 1994, in 2011 about 4,500 mediators were registered,[4] of whom about 20% were certified.[5] The number of mediation cases grew to more than 50,000 in 2011 and continuing growth is expected.[6] As part of this growth trend, something of a 'mediation industry' emerged. For example, the *Nederlands Mediation Instituut* began registering mediators and setting quality standards in 1993. Currently, *Mediatorsfederatie Nederland* manages the register. The *Stichting Kwaliteit Mediators* sets standards for registered mediators, and also ensures the continuing quality of their services. The *Nederlandse Mediatorsvereniging* represents the interests of professional mediators. There has been a similar growth trend in mediator education and training,[7] while mediation has also been frequently resorted to in a political context.[8] In 1996, the Dutch Minister of Justice presented the *Alternative Dispute Resolution Platform* to investigate the possibilities for formalizing ADR in Dutch law.[9] This resulted in a policy letter *ADR 2000-2002*[10] and a subsequent policy letter *Mediation en het rechtsbestel*.[11] Additionally, an evaluation of the standards resulting from the latter policy letter (e.g. referring certain cases for mediation by the Legal Services Desk, the so-called '*het Juridisch Loket*') were presented in a report called *Mediation Monitor 2005-2008*.[12] More recently, three bills[13] were submitted by Second Chamber representative Ard van der Steur,[14] with the intention of making mediation mandatory in certain cases. Although these bills were withdrawn in June 2015, it is expected that the Dutch government will soon make a similar initiative to formalize mediation within the nation's legal system.[15] Seen from a European perspective, the developments to institutionalize mediation have kept pace with similar developments in neighbouring countries.[16]

Increasing recourse to mediation, along with the growth in the number of professional mediators, and the establishment of an infrastructure supporting the mediation profession is often explained in two different ways. The first explanation is pragmatic in nature, and holds that solutions reached via mediation are more effective (e.g. in terms of costs, duration, anticipated outcome, etc.), and offer a more sustainable solution for the parties involved, than a court decision. Settling disputes in courts provides a win-lose decision, while mediation leads to a win-win settlement. Since most disputes touch on more than just a strict legal conflict (e.g. in terms of the 'history' of the conflict, parties and stakeholders involved, and the possible impact of the settlement in the future) this first explanation contends that, in most cases, both parties are better off

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4   In the early days of mediation, mediators were registered at the *Nederlands Mediation Instituut* (Dutch Mediation Institute, NMI), which nowadays is called *Mediators federatie Nederland* (Dutch Mediators Federation, MfN).

5   Brenninkmeijer et al., supra note 3, p. 26; J. Kocken, 'Is "mediation" een alternatief voor rechtspraak bij het beslechten van conflicten?', in M. Hertogh & H. Weyers (eds.), *Recht van onderop. Antwoorden uit de rechtssociologie* (2011), p. 231; R. Vogels, 'De stand van mediation in Nederland', Stratus (2011), research commissioned by the NMI.

6   Vogels, supra note 5; S. Drooglever Fortuyn, 'Kiezen, kiezen en nog eens kiezen', (2014) *Advocatenblad*, no. 7, pp. 18-22; P. Ingelse, 'De rechter en de mediator', (2014) *Nederlands Juristenblad*, no. 40, pp. 2856-2863. It needs to be noted, however, that statistics show that the percentage of mediations leading to a settlement compared to other formal forms of dispute settlement is still less than 3%, J. Barendrecht & B. Baarsma, 'Mediation 2.0', (2012) *Nederlands Juristenblad*, no. 32, pp. 2239-2243; B. van Velthoven & C. Klein Haarhuis, *Geschilbeslechtingsdelta 2009. Over verloop en afloop van (potentieel) juridische problemen van burgers* (2010).

7   Several universities provide courses or minors on mediation, and in Amsterdam the *ADR Instituut* (ADR Institute) provides training in becoming a 'Legal Mediator', a title which is necessary to obtain an accreditation at the MfN.

8   See Brenninkmeijer et al., supra note 3, pp. 26-29; *Raad van State* (Council of State) *Advies* W03.13.0323/II, W03.13.0324/II, W03.13.0325/II.

9   *Staatscourant* 1996, no.74, no. 549856/896/DRJB.

10   *Kamerstukken II* 1990/2000, 26 352, no. 19.

11   *Kamerstukken II* 2003/04, 29 528, no. 1.

12   M. Guiaux et al., *Mediation Monitor, Eindrapport*, WODC Cahier 2009-9.

13   *Wet bevordering van mediation in het bestuursrecht*, *Wet bevordering mediation in het burgerlijk recht*, and *Wet registermediator*.

14   On 20 March 2015, Ard van der Steur was appointed Minister of Security and Justice.

15   *Kamerstukken II* 2014/15, 33 722, no. 24.

16   See also: *Kamerstukken II*, supra note 10.

when they settle the case themselves via dialogue mediated by a professional who stands *between* them (i.e. win-win), instead of a judge who stands *above* them and who rules in favour of just one of the parties (i.e. win-lose). The second explanation is political in nature and builds upon the premise that Dutch citizens are nowadays capable of, and responsible for, settling many of their conflicts without recourse to courts of law. On the one hand, this explanation holds that people tend to be more and more capable of handling their own business instead of relying on the state or the judiciary. On the other hand, the government has increasingly emphasized this 'responsibility' which parties have 'first and foremost (…) for settling their disputes.'[17] Yet another advantage of mediation is that it reduces the burden on courts of law, even though this justification has never been adduced by Dutch government authorities. The bulk of the literature on mediation underscores these arguments, although there has also been some cogent criticism regarding mediation that cannot easily be dismissed. Perhaps the most incisive of these criticisms is the argument that not everybody is equally well equipped in terms of power, education etc., to stand up for one's interests.[18] As we shall see, legal anthropological literature is the basis of this as well as other critical views of mediation.

An extensive analysis of the literature on mediation shows that much of it either serves educational purposes or is essentially descriptive in nature. Thus, a great deal of the existing literature on mediation provides practical oriented and *ad hoc* suggestions or a discussion of practical issues involving the mediation process. However, a theoretical approach seems to be lacking in the mediation literature. A good example of the typical approach is the leading Dutch handbook on mediation, the *Handboek Mediation*.[19] This work is a comprehensive introduction, with contributions written by various authors with different backgrounds, and it was written for practising mediators. The topic of mediation also appears in several legal textbooks,[20] and at least three multi-volume series have appeared during the past ten years,[21] all of which basically function as 'how-to' books that provide guidelines for handling certain conflicts, parties, and/or situations. Several specialised journals serve the market of mediation professionals nowadays too.[22] Additionally, various government-initiated reports have been published since mediation has grown in popularity.[23] What these writings have in common is that they are mostly non-theoretical in nature. Thus, questions as to what mediation exactly is and why it is employed, and what can be learned from this, have not yet been addressed in any depth. In short, no scholarly reflection on mediation from a legal perspective is made. One exception to this generalization are articles that deal with mediation from a social psychological viewpoint.[24] Yet this does not change the fact that the application of legal theory to mediation remains uncharted territory. Brenninkmeijer, on the first page of the *Handboek Mediation,* even states that mediation is based on applying social psychological *knowledge* in a juridical *context*.[25] In other words, Brenninkmeijer's view suggests that the legal sciences seem to have thus far failed to truly include mediation within their purview, with law only serving as a surrounding context for social psychology's research on mediation.

This article challenges such a statement for being far too modest, at least from a legal anthropological perspective. There is quite an extensive and excellent legal anthropology literature on disputes and dispute settlement and this article argues that insights drawn from these writings can be fruitfully applied to mediation. Many contemporary, generally known insights regarding mediation can actually be traced back to earlier legal anthropological research. Knowledge derived from legal anthropological literature does not only explain why mediation proves to be an effective and sustainable solution in so many cases. It can also

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17 See *Raad van State Advies*, supra note 8; 'Contourennota modernisering rechterlijke organisatie', *Kamerstukken II*, 1998/99, 26 352, A.
18 Laura Nader, for example, can be seen as one of the earliest and most formative criticasters of the emergence of ADR in the United States, L. Nader, *The Life of the Law: Anthropological Projects* (2002).
19 See Brenninkmeijer et al., supra note 3.
20 E.g. chapters in the leading *Asser Serie* on civil law (J.B.M. Vranken, *C. Asser's Handleiding tot het beoefenen van het Nederlands burgerlijk recht. Algemeen deel***: een vervolg* (2005)), and in the socio-legal oriented books M. Hertogh & H. Weyers, *Recht van Onderop. Antwoorden uit de rechtssociologie* (2011), and N. Huls, *Actie en Reactie. Een inleiding in de rechtssociologie* (2009).
21 These series are: 1) The Sdu *Mediationreeks* (e.g. K. van Oyen et al., *Groepsmediation* (2008)); 2) a Maklu in cooperation with Hogeschool Utrecht and Utrecht University series (e.g. G. Frerks et al., *Interculturele mediation* (2011)); and 3) the NMI *Kennisreeks* (e.g. E. Schutte et al., *Juridische aspecten van mediation* (2007)).
22 E.g. *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement*, *Tijdschrift voor Mediation* and *Tijdschrift voor herstelrecht*.
23 E.g. *Mediation monitor 2005-2008* by the WODC, *Mediation naast rechtspraak* (2011) and *Wetsadvisering concept initiatiefvoorstellen Mediation* (2013), both by the *Raad voor de Rechtspraak* (Council for the Judiciary).
24 E.g. H. Prein, 'Benaderingen', in Brenninkmeijer et al., supra note 3, pp. 199-250.
25 See Brenninkmeijer et al., supra note 3, p. 25.

be used to draw conclusions as to what will happen when the legal playing field with regard to mediation changes. The most important lesson here is that mediation should not be seen as an activity that occurs outside of particular social contexts.[26]

1.2. A roadmap

This article starts with an overview of legal anthropological literature. Since the 1940s, much of the focus of legal anthropological research has been on studying disputes, with researchers consistently stating the view that State law is just one of the alternatives to settle disputes. The next section is on understanding disputes, and here it is emphasized that disputing is a dynamic process that comprises distinct phases and permutations. In Section 3, knowledge derived from legal anthropological research on disputes and the disputing process is applied to mediation activities. The main argument in that section is that the practice of mediation could benefit from applying the insights offered by legal anthropology.

2. Legal anthropology and dispute settlement

2.1. An overview of legal anthropology

Legal anthropology (also called anthropology of law) initially was regarded as a sub-discipline of cultural anthropology, but eventually developed into an independent discipline, offering its own theories of dispute settlement. As an independent discipline, it can be compared with other disciplines that highlight different, empirical perspectives on law, such as sociology of law and psychology of law. Legal anthropology specifically focuses on rules and processes within a specific social, legal, economic, political and cultural context.[27] Legal anthropological research is holistic in nature in that it appreciates and addresses the multiplicity of legal systems and dispute resolution mechanisms that exist in any society. The approach of legal anthropology is actor-centred, examining the ways individuals control and are controlled by the institutions and persons that govern them. 'The law in action', from a legal anthropological perspective, refers to a study and interpretation of the way in which people think and make use of law in their daily reality. Legal anthropology's main activity is field-based ethnography, and its methodology involves participant observation, interviews and occasionally archival research.[28] Studying and analyzing the daily practice of law in a particular local setting (e.g. *what* happens in a court, an organization, a specific cultural setting, or during a mediation process) provides a framework for deriving tentative general hypotheses as to *why* these things happen.

In legal anthropology, while 'socio-legal' aspects include formal juridical institutions and their social surroundings, they also encompass other activities related to the law, as well as processes of disputing and dispute settlement in other social domains, whether officially or unofficially. Legal anthropologists do not ask themselves what disputes are in terms of law, or how the latter should be enforced. Instead, they address the fundamentally different question of how the law works in practice. A legal anthropological approach thus looks at who makes the rules, how these rules are normalized and enforced, and the way in which these rules are morally justified. Yet another typical line of inquiry within legal anthropology is the important question of what lies outside of the norm-governed domain and is thus open to individual or group interpretation. Finally, legal anthropologists not only ask questions about how people deal with the law, but also about how they avoid doing so.[29] In short, from a legal anthropological point of view, law provides a point of entry into broad questions about regular and irregular, and official and unofficial social arrangements concerning disputes and dispute settlement.

Originally, legal anthropology concerned the study of small-scale, traditional or 'unknown' societies and how they dealt with crime, conflicts and sanctions. The foundation for legal anthropology's development

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26 S.E. Merry, 'Disputing without culture', (1986-1987) 100 *Harvard Law Review*, p. 2063.
27 J. Comaroff & S. Roberts, *Rules and processes: The cultural logic of dispute in an African context* (1981); L. Nader & H. Todd Jr., *The disputing process: Law in ten societies* (1978).
28 J. Starr & M. Goodale, *Practicing ethnography in law: New dialogues, enduring methods* (2002).
29 J. Donovan, *Legal Anthropology: An introduction* (2008); P. Just, 'History, power, ideology, and culture: Current directions in the Anthropology of Law', (1992) 26 *Law & Society Review*, pp. 373-412; S.F. Moore, *Law as process: An anthropological approach* (2005); P. Sack & J. Aleck, *Law and Anthropology* (1992).

was laid by – among others – the jurist and historian Henry Maine and the sociologist Emile Durkheim. They worked within a broad comparative framework, addressing the development of social organisation, government and law. Both of these men had (as was common at the end of the nineteenth century) a sociocultural evolutionary view regarding legal conceptions. Maine stated that one's legal situation originally was determined by one's parents (*ius sanguinus*), and later was negotiated by oneself (*ius soli*) in modern society.[30] Durkheim's approach to the evolution of law was different. He argued that, in traditional societies, law served to prevent deviant behaviour, and that it constituted a repressive force, while justice was enacted by the community itself. In modern societies, on the other hand, the law's aim was to be restrictive, and accordingly it tried to anticipate potential conflicts. The field of law thus became professionalized.[31] The distinction between communal, repressive rules and individual, restrictive rules constitutes a component of some present-day descriptions of customary law; especially in contrast to Western, positive law.

Bronislaw Malinowski, one of the most prominent early legal ethnographers,[32] distanced himself from Durkheim's ideas of law. Malinowski argued that, in every society, repressive and restrictive rules existed simultaneously.[33] Throughout his study of norms and practices in the Trobiand Islands, he emphasized themes such as reciprocity, social pressure and tradition. According to Malinowski, all societies have some kind of law, although he introduced a division of norms with and without a formal authority that served as their guarantors. Later, Alfred Reginald Radcliffe-Brown, one of the founding fathers of structural functionalism, took as his point of departure the notion that solidarity and norms together defined equilibrium in society. He held that norms were guaranteed by the use of coercive force, applied by a tribunal or specialized body, and that the aim of sanctions was to restore balance.[34] In the work of both men, the focus had shifted from larger questions of change and historical development (i.e. the work of Maine and Durkheim) towards a focus on very detailed studies of individual societies, even single communities. In contrast to Malinowski, Radcliffe-Brown concluded that some 'simpler' societies had no law.[35] It was, however, Malinowski's view that every society could be said to have some sort of law, and this became the predominant assumption for future generations of researchers studying law in primitive societies.[36]

Viewed in retrospect, Malinowski and Radcliffe-Brown were mainly concerned with whether traditional societies could be considered to have laws. Among their followers, a new debate arose around the question of how to study law. The first theoretical conceptualization in this regard posited the existence of general rules which applied to everyone, and which aimed at the maintenance of order within a society. Their research concentrated more on authorities and institutions and less on social processes. Conflicts were considered deviant behaviour, and – according to this view – one could infer the underlying rule through analysing the decisions of authorities and institutions in combination with the power they exercise. This line of thought regarding customary law, which prevailed during the first half of the last century, is called the normative paradigm[37] or rule-centred paradigm.[38] Beginning in the 1940s, this view was criticized on the ground that it appeared to overestimate the importance of authorities and institutions. Such an overemphasis led the anthropologist Evans-Pritchard, for example, to declare that the Nuer of the Southern Sudan did not have laws.[39] Dissatisfaction with the characterization of such societies as 'lawless' prompted later scholars to shift their focus to the study of disputes.[40]

Thereafter, a second paradigm, which arose in the 1940s and fell out of favour in the 1960s, considered disputes to constitute normal rather than exceptional social behaviour. This view held that, when analysing norms and conflicts, one should also pay attention to the arguments, negotiations and compromises of

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30 Sir H.S. Maine, *Ancient Law: Its connection with early history of society and its relation to modern ideas* [1861] (1908).
31 E. Durkheim, *The division of labor in society* [1893] (1984).
32 S.F. Moore, *Law and Anthropology: A reader* (2005).
33 B. Malinowski, *Crime and custom in savage society* [1926] (1985).
34 A.R. Radcliffe-Brown, *Structure and function in primitive society: Essays and addresses* (1952).
35 Nader, supra note 18, p. 85.
36 Ibid., p. 86.
37 M.T. Sierra & V. Chenaut, 'Los debates recientes y actuales en la antropología jurídica. Las corrientes anglosajonas', in E. Krotz (ed.), *Antropología jurídica. Perspectivas socioculturales en el estudio del derecho* (2002), pp. 116-123.
38 Comaroff & Roberts, supra note 27.
39 Ibid., p. 9.
40 A. Griffiths, 'Legal pluralism', in R. Banakar & M. Travers, *An introduction to Law and Social Theory* (2002), p. 292.

the concerned parties, instead of focusing solely on authorities or institutions. The earlier interest in rules and practices was thus replaced by the assumption that order could only be understood as the product of the actions and strategies of living men and women. Consequently, conflicts and their resolution became the focus of legal anthropology. The joint work of the jurist Llewellyn and the anthropologist Hoebel on 'trouble cases' and Cheyenne law can be regarded as one of the first studies conducted according to this second paradigm.[41] Their work was followed by several major studies.[42] Pospisil, studying the Kapauku in New Guinea, stated that it was not 'the abstract rule that affects the Kapauku people, but the actual decision of the headman',[43] thus emphasizing the importance of the *process*, rather than *rules*.

Eventually, this second, process-oriented paradigm[44] for the study of disputes came under attack. Specifically, critics held that studying the settlement of disputes alone was too limited. Among other things, this meant that if one studied problem cases, one also had to study 'non-problematic' cases in order to get a complete picture of everyday life. As Holleman stated: 'In the study of substantive law and its practice, and in a field of law in which litigation is rare, a fieldworker relying mainly on a case method focused upon actual [problematic] cases may get a skewed idea of the accepted principles and regularities in this particular field (…). The [non-problematic] case then becomes a necessary check on the [problematic] case, rather than the other way around.'[45] More importantly, in the 1970s, legal anthropologists began to advocate a shift in research focus 'to the description and analysis of *behaviour* connected with *disputing*'.[46] An integration of the two paradigms was sought, one in which the broader context would also be taken into account (i.e. a shift from rules *or* processes, via rules *and* processes, to rules and processes *within* their social, cultural and political context).[47]

As noted previously, during the early years legal anthropology mainly concerned the study of law in 'traditional' societies; cutting their units of research off from their surroundings, and treating customary law independently form state law. The paradigm had shifted from rule-centred to process-oriented. Starting in the 1970s, a third, more pluralistic paradigm was embraced, meaning that the customary law of the societies under research could not be studied without paying attention to colonialism and post-colonial dynamics and holding that it should be studied in relation to State law. The interrelationships among small-scale, 'simple' societies, the State, and the greater, outside world began to attract the interest of legal anthropological researchers in the late 1970s.[48] At that time, the study of legal pluralism became one of the main focuses of legal anthropology.[49] The idea that State law is not the only source of organised social order also paved the way to an analysis of law in the context of history and power relations.[50] The main focus of research in legal anthropology thus shifted to the interaction between customary law and state law, or more precisely to 'the dialectic, mutually constitutive relationship between state law and other normative orders',[51] while this legal pluralism 'is [best] understood as a relation of dominance and resistance'.[52] Or, in more general terms, legal anthropological research in mostly non-Western societies has taught us that people can have more

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41 K.N. Llewellyn & E.A. Hoebel, *The Cheyenne way: conflict and case law in primitive jurisprudence* (1941). See also: P.H. Gulliver, *Social control in African society: A study of the Arusha: agricultural Masai of Northern Tanganyika* (1968) and V. Turner, *Schism and continuity in an African society: A study of Ndembu village life* (1957).

42 E.g. P. Bohannan, *Justice and judgement among the Tiv (with a new preface)* [1957] (1989); M. Gluckmann, *The judicial process among the Barotese of Northern Rhodesia (Zambia)* (1955); L. Pospisil, *Kapauku Papuans and their law* (1958).

43 Pospisil, supra note 42, p. 255.

44 Comaroff & Roberts, supra note 27.

45 J.F. Holleman, 'Trouble-cases and trouble-less cases in the study of customary law and legal reform', (1973) 7 *Law & Society Review*, p. 599, uses the rather unwieldy terms 'trouble-cases' and 'trouble-less cases' to distinguish between problematic cases (i.e. cases in which a dyadic disagreement becomes transformed into a triadic process) and cases which were resolved without the mediation of a third party (because these latter cases did not give rise to a grievance or disagreement).

46 Just, supra note 29, p. 374 (emphasis in the original).

47 Nader & Todd Jr., supra note 27.

48 E.g. P. Fitzpatrick, *Law and state in Papua New Guinea* (1980); F. von Benda-Beckmann, *Property in social continuity: Continuity and change in the maintenance of property relationships through time in Minangkabau, West Sumatra* (1979).

49 See: J. Griffiths, 'What is Legal Pluralism?', (1986) 24 *Journal of Legal Pluralism*, pp. 1-55; A.J. Hoekema, *Rechtspluralisme en interlegaliteit* (2004); S.E. Merry, 'Legal pluralism', (1988) 22 *Law & Society Review*, pp. 869-896; F. von Benda-Beckmann, 'Who's afraid of legal pluralism?', (2002) 47 *Journal of Legal Pluralism*, pp. 37-82.

50 J. Starr & J. Collier (eds.), *History and power in the study of law: New directions in legal anthropology* (1989).

51 Merry, supra note 49, p. 880.

52 R. Sieder, *Customary law and democratic transition in Guatemala* (1997), p. 10.

normative orders to refer to than only State law, and that the significance of disparities in power should not be underestimated.

But perhaps most important of all, nowadays legal anthropological research is not only reserved for post-colonial, non-Western research settings,[53] and is conducted in all kinds of settings around the world. Current research takes into account not only normative rules, but also political events, economic realities and social inequalities. And it does this while studying legal practices in daily life in both non-Western and Western countries. Themes that are of interest for legal anthropologists include struggles over property, human rights, multiculturalism and collective rights, and law and religion.[54] Disputes and dispute resolution remained on the research agenda of legal anthropology as well, while some overlap with socio-legal studies cannot be denied (see the next section). Current legal anthropological research is not only concerned with the experiences of indigenous people. It is emphatically concerned with ordinary Western people's experience and use of state law and courts,[55] while the focus in such research has often been on litigants' interests and strategies.[56] In sum, legal anthropological research takes a different perspective on law. Instead of looking at the different ways that law handles conflicts, legal anthropologists examine the various ways conflicts are resolved, with law presenting only one possible approach.[57] This insight can be easily applied to the study of mediation; as a matter of fact, to a certain extent, this has been happening in the United States,[58] where academics who went to Africa in the 1960s and 1970s to teach law in universities there became interested in how people settled disputes without courts, and their observations and analyses had an effect on the teaching and adaption of ADR.[59] In Dutch literature on mediation, however, legal anthropological knowledge has not yet been fully recognized.

2.2. Understanding disputes

But before this article turns to the significance of legal anthropological research for the field of mediation, a basic understanding of disputes and disputing processes is essential. Basically, a dispute is a dynamic process comprising distinct phases, in which parties' standpoints and interests seem to grow less flexible as the process evolves. The legal anthropologist Snyder, for example, recognizes the pre-conflict or grievance stage, the conflict stage, and the dispute stage, as three phases of the dispute process.[60] Broadly speaking, two kinds of disputes can be distinguished: those concerning material resources and power, and those of a social-emotional nature, which involve matters of perception and belief.[61] In a way, the two negotiation models in mediation derived from social psychology (i.e. the so-called Harvard rational choice model and the transformative model, emphasizing empowerment of the disputing parties) respectively mirror these two classes of disputes, although there is by no means a strict one-to-one correspondence between material disputes and the rational-choice model, on the one hand, and social-emotional disputes and the transformative model, on the other. It is generally understood that the events and circumstances that occur during one phase influence happenings during the next phase.

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53 M. Hertzfeld, *The social production of indifference: Exploring the symbolic roots of Western bureaucracy* (1992).

54 A good overview of the current work of Dutch legal anthropologists can be found in: A. Böcker et al. (eds.), *Legal anthropology from the Low Countries* (2009).

55 It is beyond the scope of this article to provide a complete overview, but much recent work can be found in specialized journals such as: *Political and Legal Anthropology Review*, *Journal of Legal Pluralism*, or *Law & Anthropology*.

56 Moore, supra note 32.

57 Merry, supra note 26, p. 2060.

58 K. Avruch & P.W. Black, 'ADR, Palau, and the Contribution of Anthropology', in A.W. Wolfe & H. Yang (eds.), *Anthropological Contributions to Conflict Resolution* (1996), pp. 47-63; C.J. Greenhouse, 'Mediation: A comparative approach', (1985) 20 *Man, New Series*, pp. 90-114; Merry, supra note 26, pp. 2057-2073; Twining, supra note 2, p. 380.

59 R. Abel, *The Politics of Informal Justice. Volume1. The American Experience* (1982); J. Gibbs, Jr., 'The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes', (1963) 33 *Africa*, no. 1, pp.1-11; J. Krishnan, 'Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957/1977', (2012) 52 *American Journal of Legal History*, no. 3, pp. 261-324. See also Greenhouse, supra note 58. For critiques on the emergence of ADR in the United States, especially on the erosion of the plaintiff's power in relation to that of powerful, often corporate, interests, see M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law and Society Review*, no. 1: pp. 95-160; Nader, supra note 18.

60 F.G. Snyder, 'Anthropology, dispute process and law: A critical introduction', (1981) 8 *British Journal of Law and Society*, pp. 141-180.

61 K. Avruch, *Culture and conflict resolution* (2006).

A classic scholarly model for studying the process of disputing is the 'naming, blaming, claiming …' framework, developed by socio-legal scholars William Felstiner, Richard Abel and Austin Sarat.[62] As these authors explain, in order for disputes to emerge and remedial action to be taken, 'an unperceived injurious experience (unPIE, in short) must be transformed into a perceived injurious experience (PIE)'.[63] When an unPIE becomes a PIE, they call this 'naming' (i.e. characterizing a particular experience as injurious). The next step is the transformation of a PIE into a grievance; they call this 'blaming' (i.e. attributing an injury to the fault of another individual or social entity). Then, the third transformation occurs, which they call 'claiming' (i.e. involving the voicing of a grievance to the person or entity believed to be responsible, and the requesting of some remedy). During the 'claiming' phase, the grievance becomes transformed into a dyadic disagreement. As soon as the parties are not able to solve the problem themselves and decide to turn to a third party to help them settle their conflict, a dyadic disagreement turns into a triadic disagreement.

Following Felstiner et al., others also emphasize that the process of disputes contains different phases. Friedrich Glasl, for example, has developed a nine-stage model of conflict escalation.[64] His nine stages can be grouped in three main phases: in the first phase, conflict is considered a 'problem' that can still be resolved jointly; the parties are on speaking terms and a win-win solution is still within reach. In the second phase, conflict is considered to be a battle that needs to be won (win-lose), while during the third phase each party basically tries to harm the other as much as possible, even at its own expense (lose-lose). Glasl also implies that a dispute moves from one stage to another as a result of certain events or changing circumstances. These progressions from one stage to another do not occur gradually, he argues, but instead are rather abrupt. Given the fact that not every phase or stage needs to occur in every case, the models by Felstiner et al. and Glasl constitute so-called pyramid models.[65] At the bottom of the pyramid, any kind of problem can be found, while at the top only really seriously escalated disputes can be detected. Depending on the degree of escalation, mediation is considered to provide a workable solution, and what a mediator then basically does is to help parties to walk down the pyramid of escalation in order to reach the phase in which they can settle their dispute themselves via dialogue.

While the above-mentioned authors emphasize the different phases preceding the settlement of a dispute, Keebet von Benda-Beckmann argues that the dispute process should not be considered over after the final ruling has been issued.[66] She in fact takes up a point previously made by Felstiner et al., namely that 'there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, colour later conflict.'[67] Felstiner et al. also argue that any given dispute might continue even after a settlement, or that the end of one dispute might lead in turn to a new grievance. Von Benda-Beckmann consequently argues that the transformation process enters a new phase when a dispute is settled by mediation, a court, or another authority and (together with the parties involved) returns to the social environment from which it originated. It is in this old (or more often: changed) social setting where the *real* outcome of the settlement is negotiated. Thus, it is possible to not only distinguish a pre-trial and a trial phase in the disputing process, but also a post-trial phase. And it is in this post-trial phase that disputes can continue in new forms or with new definitions over prolonged periods, with the trial simply being a point at which the dispute enters a new phase or becomes transformed in some way. It is because of this that social science research on disputing sometimes talks about dispute processing rather than dispute resolution.[68]

62 W. Felstiner et al., 'The emergence and transformation of disputes: Naming, blaming, claiming …' (1980-81) 15 *Law & Society Review*, pp. 631-654.
63 Ibid., p. 633.
64 F. Glasl, *Help! Conflicten* (2000).
65 The metaphor of the 'dispute pyramid' stems from R.E. Miller & A. Sarat, 'Grievances, claims and disputes: assessing the adversary culture', (1980-81) 15 *Law & Society Review*, no. 3-4, pp. 525-566. Contrary to this pyramid model is the so-called delta model as was developed by research done by order of the Dutch WODC: B. van Velthoven & M. ter Voert, *Geschilbeslechtingsdelta 2003 Over verloop en afloop van (potentieel) juridische problemen van burgers* (2004); Van Velthoven & Klein Haarhuis, supra note 6.
66 K. von Benda-Beckmann, 'The environment of disputes', in W. van Binsbergen (ed.), *The dynamics of power and the rule of law: Essays on Africa and beyond* (2003), pp. 235-245.
67 Felstiner et al., supra note 62, p. 639.
68 Merry, supra note 26, p. 2065.

However, more important than subdividing disputes into phases or stages is the emphasis of Felstiner et al. on the transitions between the various phases. Such transitions are caused by,[69] and have consequences for, the parties involved, the scope of the conflict, and the entities adjudicating disputes.[70] Furthermore, these transitions lead to a further development, in which the dyadic disagreement eventually evolves into a triadic process. According to the authors, such transformations are subjective, unstable, reactive, complicated, and incomplete.[71] However, they need to be taken into account because they provide insight into parties' individual perceptions, behaviour, and decision making; or in broader terms, into the why and how of the dispute process. For example, when a dispute is likely to be brought to court (a dispute institution), or when a lawyer becomes involved (a representative added), this will likely narrow the conflict down to a strictly legal case (i.e. the scope of the conflict changes). This change in scope in turn influences the potential tactics used and the relative probabilities of particular outcomes. Felstiner et al. emphasize that it is not possible to present subjects (i.e. what is being transformed) and agents (i.e. those who do the transformation) by means of a simple matrix, since every factor can be construed as both. In other words, during transformations the parties involved, the scope of the conflict, and the entities adjudicating disputes, among other factors, appear to be interactive.

In sum, disputes provide information about more than just law. Studying disputes is not only about trials. It is about disputing processes – including the pre-trial and the post-trial phase, in which the law plays a role. In other words, in contemporary legal anthropology research, disputes do not primarily serve as a means to understand law, but rather provide an insight into dispute processes, the behaviour of human beings involved in the dispute, and the role of law in its resolution.

3. Lessons to be learned

A lot of knowledge in the field of mediation can be traced back to earlier legal anthropological research that aimed at describing and analyzing disputes and dispute settlement. As Simon Roberts has written, in most societies, even early nomadic hunters, 'meeting and talking' has been used to resolve disputes.[72] Accordingly, legal anthropology has analyzed a wealth of information regarding alternative dispute resolution. In a way, legal anthropologists challenge traditional understandings of the centrality of adjudication to the maintenance of social order in modern society, and so does mediation. Mediation expresses a certain 'anti-law ideology' by claiming that non-adversarial ways of resolving conflict can create more sustainable solutions.[73]

Perhaps the most important lesson that can be learned from legal anthropology is that a dispute is a social construct. In other words, it is a process which takes place within a wider social context. As Merry argues, the definition of a dispute shifts with the audience to which it is presented, and each audience may actually redefine it, expressing the interactive relationship between mediation and its context.[74] Disputes and dispute settlement have been at the core of legal anthropological research since the 1940s. With the integration of the above-mentioned rule-centred paradigm and the process-oriented paradigm, scholars came to acknowledge that rules are applied and processes occur within a social, cultural and political context. Disputing, from the perspective of legal anthropology, is social behaviour. It is informed by the parties' moral views about how to disagree, the meaning parties attach to consulting a mediator or going to court, social practices that indicate when and how to escalate disputes from a dyadic disagreement to a triadic one, and parties' notions of rights and entitlement. Therefore, legal anthropological research lies at the basis of the major premise that disputes often concern more than just a strict legal conflict (e.g. in terms of the background of the conflict, the parties, stakeholders and institutions involved, and the possible

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69 On dispute transformations, see also: L. Mather & B. Yngvesson, 'Language, audience, and the transformation of disputes', (1980-81) 15 *Law & Society Review*, pp. 775-821.
70 In their article, Felstiner et al., supra note 62, differentiate between: 1) the identity and the number of parties involved, 2) the scope of the conflict, 3) the choice of an audience and/or institution, 4) the objectives sought, 5) the prevailing ideology, 6) the influence of reference groups, 7) the representatives and officials involved, and 8) the dispute institutions involved.
71 Felstiner et al., supra note 62, pp. 637-639.
72 S. Roberts, *Order and dispute: An introduction to Legal Anthropology* [1979] (2013).
73 Merry, supra note 26, p. 2058.
74 Ibid., p. 2061.

impact of the resolution in the future). Anthropology of law provides us with the tools for a holistic view on disputes and, as such, underscores the benefits that are often attributed to mediation.

Legal anthropological research, in combination with socio-legal research, has also taught us that disputing is a *dynamic* process and that disputes develop in stages or phases. Snyder, Felstiner et al., Glasl, and von Benda-Beckmann respectively identified pre-conflict, conflict, and dispute stages; naming, blaming, and claiming; problem, conflict and 'war'; and the pre-trial, trial, and post-trial phases. In line with what Kritzer views as the 'naming-blaming-claiming' schema as an abstraction of a more complex reality,[75] it is fair to argue that this counts for the other models as well. Different phases overlap, and parties and institutions easily switch between being an object or a subject during the whole process. But still, these models prove to be very helpful in analysing disputes in a scholarly way, as well as for mediators in a more practical way. It is the transitions among these phases that deserve special attention, in theory as well as in practice. This is very relevant for mediators de-escalating a dispute in order to reach the phase in which disputing parties can settle their dispute themselves via dialogue.

In addition to these broad lessons that it has to offer, legal anthropology has had an impact on mediation in a couple of more specific ways as well. First, the well-known assumption that mediation leads to win-win settlements, while court decisions provide win-lose solutions, has its origin in legal anthropological research. The distinction between court decisions and mediated settlements in terms of outcome and processes was first introduced by Philip Gulliver more than 30 years ago.[76] He has become famous for his positing a sharp dichotomy between negotiations (i.e. joint-decision making) and adjudication (i.e. decision making by a third party). It is this sharp distinction that paved the way for acknowledging the differences in the outcome of these two alternatives. In general, anthropological studies indicate that when disputants are bound by multi-stranded social relationships, they will seek to compromise their differences (win-win), but when they have only single-stranded social ties, they will seek victory in adversarial contests (win-lose) rather than attempt to reach compromise,[77] and this is reflected in the way they choose institutions.

Second, the principle of voluntariness in a mediation process supposes a parties' free choice for an alternative institution.[78] And this idea of parties choosing among different institutions in order to select the one they feel best serves their own interests obviously stems from the pluralistic paradigm in legal anthropology. The phenomenon of selecting parties is described in the literature as 'forum shopping', and this concept was introduced into legal anthropology by Keebet von Benda-Beckmann.[79] Legal anthropological research, however, proves that forum shopping does not involve a strictly rational choice that takes place within a context of different legal forums operating on the same level playing field. The decision-making process is often far more complex than just 'a simple outcome of a rational deliberation of pros and cons.'[80] Legal anthropological research shows that forum shopping practices are embedded in social, cultural, and political contexts that render legal scholars' voluntary rational choice assumptions invalid.[81] As a matter of fact, it was Keebet von Benda-Beckmann herself who, more than thirty years ago, suggested that 'social control at the village level' influenced people's choice-making behaviour.[82] And, as demonstrated by legal anthropology's pluralistic approach, there is no reason to suggest that such social control does not play a role in contemporary Western contexts as well. Therefore, we need to acknowledge that forum shopping (or in the context of this article: selecting mediation rather than resorting to courts of law) might not be

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75 H.M. Kritzer, 'The antecedents of disputes: Complaining and claiming', (2011) 1 *Oñati Socio-Legal Series*.

76 E.g. P.H. Gulliver, *Disputes and negotiations: A cross-cultural perspective* (1979).

77 Merry, supra note 26, p. 2061, note 17.

78 Drooglever Fortuyn, supra note 6, pp. 18-22.

79 K. von Benda-Beckmann, 'Forum shopping and shopping forums: Dispute processing in a Minangkabau village in West-Sumatra', (1981) 19 *Journal of Legal Pluralism*, pp. 117-159. Keebet von Benda-Beckmann acknowledges having introduced the term 'forum shopping' based on an analogy with private international law. According to private international law, forum shopping refers to the choice one of the parties makes between two or more courts that have the power to consider the case at hand. This choice is based on the assumption that the chosen court is likely to consider that case in a way that is biased in favour of the party making the choice.

80 I. Shahar, 'Forum shopping between civil and shari'a courts: Maintenance suits in contemporary Jerusalem', in F. van Benda-Beckmann et al. (eds.), *Religion in disputes: Pervasiveness of religious normativity in disputing processes* (2013), pp. 147-164.

81 Ibid.

82 Von Benda-Beckmann, supra note 79, p. 143.

possible under all circumstances. Differences in power, education, social class and culture, in relation to 'access to mediation' (or in general: access to justice), might very well influence parties' ability to choose.[83]

The significance of disparities in power is another thing we have learned from legal anthropological research. The argument that the preconditions for access to mediation are not equally distributed constitutes one of the most cogent criticisms of mediation. Similarly, wide disparities in individuals' ability to stand up for their own interests would certainly seem a valid argument against *mandatory* mediation. In a negotiated process such as mediation, the danger of the negative influence of power imbalances on the final outcome cannot be understated, according to certain critics. Accordingly, these critics hold that people should not be pushed into an alternative in which they have to rely so heavily on their own skills. There are still other reasons for withholding an endorsement of mandatory mediation (which is expected to soon be proposed in the Netherlands). For example, based on what we know about the different stages and phases of a conflict, and the consequences of transformations, the whole idea of a *mandatory* institution introduces an *a priori* transformation of the dispute. Additionally, parties' awareness that, if mediation fails, a court procedure will follow (and this is another part of the proposed Dutch rules) is a factor which is certain to affect the course of any given mediation process. The dynamics of the mediation in such a case will differ sharply from 'pure mediation', because the expectation of an imposed settlement will inevitably alter the meaning of the event for all actors.[84] In general, as courts or legislators move to make alternatives mandatory, the ability to choose forums is being transferred from individual disputants to the institutions that assign cases to particular forums, and this very process transforms the scope of the conflict.

4. Conclusion

Mediation has grown increasingly popular in the Netherlands, and this has caused a growth of the 'industry' involved. One of the most visible outcomes of this development is the increase of literature on mediation. The bulk of this literature is non-theoretical in nature, and conspicuously lacks any legal research perspective. This article has shown that there is a comprehensive legal anthropological literature on disputes and disputing processes that can be usefully applied to mediation. First, legal anthropology teaches us to turn the legal paradigm upside down. Thus, instead of looking at different ways that laws can be applied to conflicts, legal anthropologists examine the ways conflicts are resolved, with law representing only one possible approach. This paves the way for a scholarly perspective of mediation, as part of a set of alternative dispute resolutions, on the part of an established legal discipline. Second, legal anthropological studies on disputing afford the important insight that there is a dynamic interaction between dispute resolution and social practice. Legal anthropology thus shows that dispute settlement is a dynamic process, embedded within a structure of social relationships, practices of handling conflict, and normative principles, within which positions become transformed in the course of that process. Consequently, mediation should not be seen as an isolated process, disconnected from the outer world, and instead it should be studied in relation to the social reality in which it takes place. Legal anthropology can therefore be viewed as providing a clarifying prism that allows scholars who study mediation to draw empirically and theoretically grounded conclusions as to what it really means for people, why it sometimes provides effective and sustainable solutions, and in which cases its results prove unsatisfactory. It is hoped that this paper might spur continued exploration of the potential of applying legal anthropology to the development of a theory of mediation. ▌

83 M. Simon Thomas, 'Access to mediation' (2015), blog on <http://blog.montaignecentre.com/index.php/en/> (last visited 15 July 2015).
84 Merry, supra note 26, p. 2066.