The University of Hull

# Exploring Justice in Professional Mediation:

## A Systemic Intervention in Colombia

Being a Thesis Submitted for the Degree of Doctor of Philosophy in the University of Hull

By

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# ABSTRACT

This thesis explores how an action research approach based on a critical systemic perspective can benefit the practice of mediators in dealing with issues of justice during mediation processes. First, methodological reflections on critical systems thinking are presented, and a new development is proposed based on the ethics of Levinas. Also, a new synergy of methods and tools is developed. This brings together boundary critique, action science, statistics, system dynamics, alternative dispute resolution games, and interviewing. A description is then provided of how the methodology was used at a Colombian mediation centre. Here, the staff members and the author began the transformation of their professional mediation practice by reflecting on alternative perspectives on how they currently deal, and might deal in the future, with issues of justice. A critique was developed of several basic assumptions that are deeply ingrained in the mediation literature of the English speaking countries of the western world – in particular, that disputants are primarily concerned with their own private interests, and that mediation should therefore be considered successful if these interests are satisfied. In the mediation centre studied, most disputants prioritised justice principles over personal gain. Additionally, a new way of organising the interpretations of mediation presented in the literature is developed that can help mediation practitioners to be more conscious of the assumptions informing their professional practice. Finally, drawing upon both a literature review and the action research results, reflections are provided on the relevance of the notion of justice to mediation practice.

# Chapter 1: Introduction

## 1.1 The General Aim of the Thesis

The general aim of this thesis is to explore how an action research approach based on a critical systemic perspective can benefit the practice of professional mediation in dealing with issues of justice that arise during mediation processes. This is done by developing a new methodology grounded on critical systems ideas and ethical principles that emphasise an openness towards others and their alien perspectives, attempting to avoid reducing their alterity to the researcher's own thoughts and viewpoints. This methodology is used at a Colombian mediation centre where the staff members and I began the transformation of their professional practice in a collaborative way by being reflexive on alternative perspectives on how they deal currently, and might deal in the future, with issues of justice in mediation practice.

The mediation centre in question is the Mediation and Arbitration Centre of the Bogota Chamber of Commerce of Bogota, Colombia (also called MCBC). As I will explain later on, this centre has had a strong influence on the development of mediation practice in Colombia, as well as in many other Latin American nations where it continues to play a leadership role in the field of mediation. Before discussing the specific aims of this research it is important to shed light on the notion of mediation. I will do this in sections 1.2 and 1.3. A more detailed understanding will be developed in Chapter 6.

## 1.2 A General Description of Mediation

Mediation is described in different ways by diverse schools of mediation. Nonetheless, to make the argument clearer I will first present some definitions of mediation which are widely accepted in the literature:

> "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on the disputing parties." (Goldberg et al., 1992, p.103)

> "Mediation is the intervention into a dispute or negotiation of an acceptable, impartial, and neutral third party who has no authoritative decision-making power, to assist contending parties to voluntarily reach their own mutually acceptable settlement of issues in dispute." (CDR Associates, 1986, p. 1)

Whether mediation should be defined in this way is something controversial that I will explore later on. However, these definitions contain the most usual features commonly associated with mediation:

1. Mediation implies the presence of at least two parties or disputants who have a conflict between them, and a third party (the 'mediator') who assists in dealing with the conflict. Each 'party' can comprise one or more persons who perceive themselves as a team. Mediators can act alone or in teams.

2. The disputing parties are expected to discuss their differences in a peaceful way. In brief, they *negotiate* with each other with the assistance of the mediator. In professional mediation the third party is expected to be knowledgeable in efficient and effective dispute resolution methods.

3. The disputing parties may or may not reach an agreement during the mediation process. The mediator lacks authoritative decision-making power and cannot impose any outcome on the parties (Folberg and Taylor, 1984).

4. Any one of the parties can abandon the mediation process whenever it wants to.

5. In the Western world the mediator's 'neutrality' and/or 'impartiality' towards the dispute between the parties is usually perceived as important (CDR Associates, 1986; Moore, 1986; Gibson et al., 1993). Nonetheless, in other cultures this is not considered vital (Barnes, 1994). In Colombia, professional mediation has been developed guided by the prevailing U.S. schools of mediation. Therefore, in

Colombia 'neutrality' and 'impartiality' are usually considered among the central principles of professional mediation.

6. A mediation process may take several sessions. A session may end because the disputing parties have reached an agreement or because they or the mediator(s) have a reason to postpone the discussions.

## 1.3 On Traditional and Professional Mediation: A Brief Overview

What is known today as mediation in the Western World is the historical product of several approaches to dispute resolution which have evolved in various cultures over a long time-span. Informal practices of mediation have been present in many societies for centuries, and the richness of the elements that have patterned these societies affected the associated mediation schemes (Folberg and Taylor, 1984; Moore, 1986; Merry, 1989; Pruitt and Kressel, 1989; Wall and Blum, 1991; Faure and Rubin, 1993; Wall and Callister, 1995). Mediation practices have been related to values, norms, legal developments, economic and political phenomena, conflict perceptions, religious beliefs, etc. that have manifested themselves in these societies (see Wall and Callister, 1995). In some communities mediation has been considered an alternative to litigation (Folberg and Taylor, 1984).

During the 20th Century a wide array of institutions undertook mediation formally as one of their functions. Thereby "mediation became formally institutionalized and developed into a recognized profession" (Moore, 1986, p.21). In this way professional mediation emerged (see Folberg and Taylor, 1984). The characteristics of professional mediation vary from one country to another. In the next chapter I will present the main characteristics of professional mediation in Colombia.

During the last three decades mediation has been frequently considered as the most popular of the alternative dispute resolution (or ADR) methods in the Western world (Bruch, 1988). ADR designates a field that includes a group of methods (or 'mechanisms') used for dealing with disputes (e.g., mediation, arbitration, and minitrials). They are considered an "alternative" to the formal justice system. In

Colombia and several other countries various voluntary forms of mediation and arbitration are the most employed ADR methods, and their practice has experienced an enormous growth during the last decade (Adler, 1995; Kriesberg, 2001).

## 1.4 Specific Aims of the Thesis

The specific aims of this thesis emerged from a continuous dialogue with the members of the organisation in which I did my fieldwork. They are:

1. To develop, put into action, and be reflexive upon a methodology for achieving the general aim of this research process, based on critical systems thinking (CST). This should be a methodology that can be adapted in future inquiry processes at other mediation centres. This adaptation may require reworking the elements of the methodology depending on the particular circumstances and concerns present in the new situation. This aim involves three subsidiary aims:

   1.1. Developing synergies of methods and tools that have not been used together before within CST interventions.

   1.2. Developing new interpretations of some notions used within the methods mixed within my methodology.

   1.3. Developing new models for creating new interpretations of disputes.

2. To understand how mediators deal with justice concerns that arise during mediation processes. This involves:

   2.1. Exploring if the conceptions of justice of the disputants who participate in a mediation process are relevant or not for understanding their behaviour during that process.

   2.2. Investigating if the mediators allow the free expression of the parties' justice concerns during mediation processes, and if they explore these concerns.

2.3. Examining if mediators' interventions favour some conceptions of justice over others.

2.4. Exploring if the conceptions of justice of the disputants and the mediator may have a substantial effect on the parties' post-mediation interpretations of how just that process was.

2.5. Identifying factors upon which the mediator can have an influence that may affect the parties' overall perceptions of how just the mediation process in which they participated was.

3. To identify alternatives for transforming professional mediation practice so that mediators can deal in new ways with justice concerns that arise during mediation processes. This involves:

3.1. Establishing a way of finding out the assumptions and patterns of behaviour that may constitute an obstacle for enhancing the mediators' sensitivity to the parties' justice concerns.

3.2. Exploring alternatives for overcoming these obstacles and for transforming mediation practice so that mediators can become more sensitive as well as responsive to the parties' justice concerns.

To achieve the above aims of the thesis, the following subsidiary aims are also necessary:

4. To review interpretations of mediation presented in the ADR literature of the English speaking countries of the Western world[1], and to explore if a new way of organising these interpretations can help mediation practitioners to be more conscious about the assumptions of their professional practice.

[1] The literature of these countries is of interest for it is the one that has guided the development of professional mediation in Colombia, where the fieldwork was done. I had evidence of this before initiating this research project and I found more evidence of it during this inquiry.

5. To take advantage of the research findings to challenge basic assumptions deeply ingrained in the mediation literature of the English speaking countries of the Western world.

6. To develop an overall outlook on how the notion of justice tends to be perceived and addressed within the mediation literature of the English-speaking countries of the Western world. This includes establishing if the major interpretations of mediation identified in the literature during this research favour or can be associated with particular conceptions of justice.

## 1.5 The MCBC

As I explained before, the observation of mediation processes was centred at the MCBC, although I also observed several mediation processes at another Colombian mediation centre. The MCBC has had a growing leadership role among mediators and mediation centres in Colombia and other Latin American countries during the last decade. This leadership has had many expressions such as:

1. The MCBC has helped to organise the first professional mediation centres in many of the countries in the region (e.g. Panama, Ecuador, Uruguay, Costa Rica, etc.), as well as in many Colombian cities.
2. It has systematically trained mediators from numerous Latin American countries (e.g., Brazil, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Panama, Peru).
3. It has helped several countries to write the local legislation that regulates the practice of professional mediation (e.g., Colombia, Ecuador).
4. It has co-ordinated the development of programmes for making mediation a common practice among the population of several countries (e.g., Colombia, Ecuador, Bolivia, Uruguay).
5. It has organised the major conferences on mediation in the region (see also Constance, 1998).

## 1.6 Some Comments on the Research Approach

I am conscious that any mediation centre has its own particularities, and that the latter can influence the outcome of the research. However, I do not intend to produce results that can be generalised to all mediation centres. The ability to generalise findings to wider groups and diverse contexts is a common test of 'validity' (external validity[2]) for many quantitative (Maxwell, 1992) and positivist researchers (Hammersley, 1992; Heron, 1996). However, it is not a central concern for many qualitative researchers (Maxwell, 1992), and particularly for action researchers (e.g., Hammersley, 1992; Heron, 1996). Drawing on Heron, I consider that the research process presented in this document is replicable, but not in a crude sense of literal repetition. Instead, it is available for creative metamorphosis: "The original study will be done over again, but in a significantly different way" (Heron, 1996, p. 156). All the elements of the research may be reworked in future inquiry processes, but the follow-up may retain enough of the original to be considered a legitimate development of it. For this reason in writing this document I have been more concerned with information-richness than with representativeness. Representativeness

> "...refers to the question of whether the group of people or the situation that we are studying are typical of others. If they are, then we can safely conclude that what is true of this group is also true of others." (McNeill, 1990, p. 15)

I do not claim that the MCBC is representative of other mediation centres. Moreover, I claim that it is *not* representative in several aspects, such as the leadership role it has played within the Latin American mediation community during the last decade, and the impact it has had on other mediation centres through its mediation training programmes. This is not against the relevance of the research. As Hammersley points out "the setting studied does not have to be typical: indeed, its relevance may derive from its atypicality" (1992, p.86).

I have tried to give enough clues in this document as to how the research process that it describes was developed so that other researchers may rework its elements and

[2] External validity refers to the extent to which the results of a research process can be generalised and hence applied to other populations or settings (Tellis, 1997; Winter, 2000).

draw upon them so as to develop other research processes on issues of justice in other mediation centres. I consider that representativeness is not a useful criterion in this case for other researchers may find it almost impossible to establish the relevant similarities between the MCBC and other mediation centres before they conduct a large part of their own research. Rather, information-richness will provide a useful and solid basis for other researchers who would like to "transfer" the overall approach to other settings (this transfer will require further exploration of its relevance and feasibility in the new setting, and a well supported and informed metamorphosis of the systemic action research process).

This inquiry does not intend to give any *definitive* answers on how to manage issues of justice in mediation processes. It only aims at exploring options. I claim that the answers, if there are any, have to be looked for critically[3] at each mediation centre, though the experience of other mediation centres, such as the MCBC, might help. This comes from a belief that I will discuss in more detail in chapter 3 but that can be summarised by saying that improvement can only be defined locally and temporarily. It is related to *what* and *who* is involved in constructing each particular vision of improvement. Therefore, a research process like the one I carried out can provide no more than options that others can examine critically before deciding what they ought to do in their particular circumstances.

## 1.7 Rationale

I argue that this research has both theoretical and practical significance, as outlined below.

[3] By critical I mean that no assumption held by those involved in the situation would be accepted as beyond question or regarded as absolute (see Ulrich, 1983). "To be critical" entails to become self-reflexive in relation to any presupposition flowing into one's own judgements. It "means to make transparent to oneself and to others the value assumptions underlying practical judgements, rather than concealing them behind a veil of objectivity" (Ulrich, 1983, 20). I will develop the notion of critique further in Chapter 3.

### 1.7.1 Theoretical Relevance

The vast majority of the literature on mediation makes no reference whatsoever to the idea of justice. Although some writers argue that mediation leads to results and processes that both parties see as *fair* and *balanced* (e.g., Pearson and Thoennes, 1985), the latter are merely *assumed* to be results and the meanings of these concepts remain largely unexplored. No deep investigation of the relationship between the practice of mediation and the conceptions of justice of those who participate in the mediation processes has been carried out. Moreover, there are almost no studies on how professional mediators deal with issues of justice that arise during mediation processes, and on how they can reflexively participate in transforming their practices in ways that are respectful of the parties' perspectives and conceptions of justice. Those few studies on mediation that do address the issue of justice (e.g., Grillo, 1991; Menzel, 1991; Parker, 1991; Grebe, 1992; Littlejohn et al., 1994; Zehr, 1995; Bohmer and Ray, 1996):

1. Lack any significant exploration of the notion of justice itself (e.g., Menzel, 1991; Littlejohn et al., 1994).

2. Are based on very simple notions of justice and lack any reference to the main theories of justice which have arisen in the Western world (e.g., Menzel, 1991; Littlejohn et al., 1994).

3. Are largely uncritical. For instance, while some assume that people's conceptions of justice fall into some predefined categories which are accepted beyond question (e.g., Littlejohn et al., 1994), others simply assume a single interpretation of justice (e.g., Grebe, 1992).

4. Do not attempt to explore the notions of justice of the disputants or the mediator, but unilaterally assume that the author's conception of justice will be shared by them (e.g., Zehr, 1990, 1995; Menzel, 1991).

5. Do not view the mediators as participants in the process of establishing how they can understand and later on transform the way they deal with issues of justice during their professional practice (e.g., Menzel, 1991; Littlejohn et al., 1994).

Despite their limitations, however, the results of the aforementioned studies and others suggest that:

1. The mediator's conception of justice might influence the result of the mediation processes implicitly or explicitly, something which calls into question the expected mediator's "neutrality" (Littlejohn et al., 1994; Bohmer and Ray, 1996). During one of these studies, a mediator said "... I am not going to allow an unfair agreement to develop" (Bohmer and Ray, 1996, p.41). This intervention leads to difficult questions: "What is a fair agreement?", "Who defines what a fair agreement is?" Of course, it is extremely difficult for a mediator to decide on issues of fairness or justice and still claim to be "neutral". The new tendencies in mediation theory and practice (see chapters 6 and 7) also challenge the boundaries of the mediator's influence on the parties' conceptions of justice.

2. In some cases mediation may become a struggle over what is fair (Grillo, 1991). However, it is not clear:

   - How these struggles about justice are handled by the disputants.
   - How these struggles influence the outcome of the mediation process.

3. A number of researchers (e.g., Deutsch, 1973, 1975, 1982, 1985; Guth et al., 1982; Fry et al., 1983; Loewenstein et al., 1989; Ochs and Roth, 1989; Bazerman and Neale, 1992a; Messick, 1993; Folger et al., 1995; Tyler and Belliveau, 1995) have found that the influence of the disputants' conceptions of justice might be substantial in some negotiation processes. Therefore, as mediation can be viewed as negotiation carried out with the support of a third party (Goldberg et al., 1992), it shall be expected that the parties' conceptions of justice also affect mediation processes. For instance, they may influence: the acceptability and implementation possibilities of an agreement, the satisfaction it will produce among the parties, how far the parties will honour an outcome, the expectations the parties bring to

the negotiation table, the motivation they have for using a conflict resolution alternative, etc. (Albin, 1992).

4. Disputes that involve incommensurate conceptions of justice have been considered very difficult to resolve by using current mediation approaches (Kressel and Pruitt, 1989a; Littlejohn et al., 1994). Therefore, it is important to find out why current mediation approaches fail to provide help in those situations.

The preceding paragraphs not only suggest that conceptions of justice seem to play a substantial role in mediation processes, but also that there is a clear theoretical gap in the mediation literature concerning how mediators currently deal, and might deal in the future, with issues of justice in their professional practice. The few studies carried out suffer from severe limitations as I have already suggested. Additionally, as Albin (1992) has argued, the vast majority of the available research on the impact of fairness in negotiations is based on laboratory experiments (e.g., Ochs and Roth, 1989; Bazerman and Neale, 1992a; Forsythe et al., 1994; Levine, 1998). Its applicability to 'real' disputes "remains to be explored" (Albin, 1992). The research presented in this document is based on 'real' mediation situations rather than on laboratory experiments.

Filling the aforementioned theoretical gap is particularly important for several scholars and practitioners who conceive of mediation as an alternative to the formal justice system, and who expect it to produce just outcomes, be enacted through just processes, and be perceived as fair by its users[4] (e.g., Wahrhaftig, 1982; Shonholtz, 1987, 1995; Moore, 1994). Therefore, from a theoretical and practical point of view it is important to explore how mediators can understand and reflexively transform the way they deal with issues of justice in mediation processes. Because conditions might change from one mediation centre to another, there are no universal recipes that will work in all situations. Therefore, this research involves developing a methodology that can help groups of mediators engage collaboratively in these processes of

[4] In many countries there is a strong relationship between mediation and the legal apparatus (Folberg and Taylor, 1984; Moore, 1986; Pinzón, 1996a). This contributes to the perception that if mediation is going to be an alternative to the formal judicial system, it should deliver justice to the people. Moreover, in Colombia, several mediation centres, such as the MCBC, have openly promoted mediation as a way of delivering justice to citizens.

reflexivity and transformation, making them locally relevant. In the case presented in this document, the research entailed a deep exploration of a multiplicity of conceptions of justice for my co-researchers and I wanted to be as open and respectful as possible towards others and their alien perspectives. Therefore, our inquiry was informed by a serious study of those historical conceptions of justice that we suspected may have had an impact on our minds and the minds of the service users. To my knowledge this type of study has never previously been undertaken. As far as I know this is the only study of the notion of justice in mediation that is based on an exploration of the major conceptions of justice that have affected the society in which the participants in the mediation processes live (according to a historical analysis), and which is based on a wide interdisciplinary investigation. Insights on the notion of justice are drawn in this thesis from philosophy (e.g., Kant, 1965), social psychology (e.g., Deutsch, 1985), anthropology (e.g., Reichel-Dolmatoff, 1991a), theology (e.g., Gutiérrez, 1983), and decision analysis (e.g., Raiffa, 1997).

Despite the interest that the notion of justice has ignited among a few researchers in the fields of negotiation and social psychology, studies on justice are rare and they tend to be focused only on problems of distributive justice (e.g., Deutsch, 1975, 1985, 1987, 1989; Clark and Mills, 1979; Austin, 1980; Guth et al., 1982; Fry et al., 1983; Loewenstein et al., 1989; Bazerman and Neale, 1992a; Bazerman et al., 1992; Polzer et al., 1992; Valley and Neale, 1992). Moreover, when authors in the negotiation and mediation literature discuss the relevance of conceptions of justice for conflict resolution they tend to attribute justice merely an instrumental role (e.g., Bazerman and Neale, 1992a; Messick, 1993). Albin claims: "... fairness arguments are supposedly used as a cover only, to couch the pursuit of self-interests at the expense of the other side" (1992, p.3). The object of negotiation and dispute resolution is assumed to be the satisfaction of the underlying *interests* of the *parties that intervene* in the conflict[5] (Fisher and Ury, 1981; Moore, 1986; Susskind and Cruikshank, 1987; Bazerman, 1990; Ury, 1991; Roloff and Jordan, 1992). Arguments that regard rationality and moral elements as no more than instruments for maximising interests

[5] In the ADR literature interests are almost always defined in a somewhat fuzzy fashion through the use of largely substitutable terms such as desires, worries, needs, and fears (e.g., Fisher and Ury, 1981; Lax and Sebenius, 1986a,b; Fisher and Brown, 1988; Bazerman, 1990). Some authors (e.g. Raiffa, 1982) substitute the term "interest" with others (preferences, scores, share of a pie, etc.) that also imply "personal preferences or desires".

are common in the ADR literature (e.g., Messick and Sentis, 1983; Messick, 1993). *Interests* are considered to be the unique or almost unique driving force that determine people's actions in dispute resolution processes (see Albin, 1992; Pinzón and Midgley, 2000). Therefore, while the study of strategies and tactics for exploring and satisfying people's interests is considered very valuable for mediators and negotiators in the dispute resolution literature (e.g., Fisher and Ury, 1981; Moore, 1986; Goldberg et al., 1992), the study of justice has been almost completely marginalised.

The absence of a wide and in-depth exploration of the notion of justice in the ADR literature frequently leads to conclusions that reveal the use of a narrow conception of justice and the lack of reflexivity on its basic assumptions. These narrow conceptions of justice are frequently of a utilitarian (e.g., Bazerman and Neale, 1992a; Messick, 1993) and/or functionalist[6] type (e.g., Folger et al., 1995). They are linked to a notion of the individual as someone who is assumed to be rational insofar as he/she follows a rational economic behaviour, i.e. insofar as he/she tries to maximise his/her benefits, motivated mainly by calculations of his/her self-interests (Kim and Maugborne, 1997). For instance, this is the case in the research conducted by Bazerman and Neale, two of the most respected researchers on the relationship between justice and negotiation. Their research focuses on how concerns for justice might produce "effects that deviate from traditional conceptions of rational economic behavior" (Bazerman and Neale, 1992a, p.4). Justice is seen as something that creates a bias that prevents the individual from behaving rationally. Justice is seen as a barrier to efficiency too: "... concerns for fairness also lead to inefficiency, where all the parties are worse off as a result of fairness considerations" (Bazerman and Neale, 1992a, p.5). Because of justice individuals stop being maximisers of individual gains. Additionally, they do not reach Pareto-optimal solutions (or agreements)[7], i.e. solutions with the property that there is no other solution that would make any party better off, without decreasing the outcome of at least one of the other parties. Here Pareto optimality is defined strictly in terms of the parties' interests and ignoring the community. Of course, these visions of justice and rationality are in complete

[6] The functionalist emphasis has its origin in the large influence that Morton Deutsch's work has had among the few researchers that study justice in the ADR field. Deutsch (1975) argued that the principles of justice could be reduced to a small number of ideas about the functional requirements of social life.

[7] They are also called Pareto efficient outcomes.

contradiction with some conceptions of rationality and justice such as the Aristotelian and the Catholic one. For instance, for Aristotle (1963), to prefer the goods of effectiveness (external goods such as money, honours, etc.) to the goods of excellence (i.e. the virtues which include justice) is to *rule out* rationality in action. For Aristotle, to be virtuous, which implies being just, is a *requirement* for rationality.

As mediation practitioners in countries such as Colombia attempt to overcome the deficiencies of the formal justice system and/or to contribute to its goals, they *should not neglect a critical reflexivity on the notion of justice*. This is a central issue for the system they are trying to support and even partially substitute. It has been said that justice is the main virtue concerned with what people ought to give in any transaction (Aristotle, 1949, 1963), that justice involves understanding the kinds of limits that should govern human action (Plato, 1941), and that justice is the main virtue that directs individuals in their relations with others (Aquinas, 1927). Hence, there is an ethical reason to consider justice as an important concern for the practice of mediation.

### 1.7.2 Relevance for Mediation Practice

This research also has practical implications. If its results receive an appropriate diffusion, the research could deeply affect the practice of mediation in Colombia and other Latin American countries given the leadership role that the MCBC has among mediators and mediation centres in the region. The effects of the research on the practice of mediation could be diverse:

- It could contribute to the improvement of the mediation services that the MCBC is offering to the public. This improvement has already begun, as the reader will find in the following chapters. Mediation services can be delivered in ways that are more responsive to the justice concerns of the disputants and that therefore are more just from their perspectives. This research could promote deep ethical reflexivity into mediation practice, largely dominated by instrumental concerns until now.

- Although the formal Colombian judicial system is supposed to deliver justice to all the citizens of the country, it is failing to do so (see Chapter 2). The results of this research could contribute to transform the practice of mediation into an important alternative for dealing with issues of justice within Colombian society.

- The results of the project could contribute to modifying the present dangerous relationship between the practice of mediation and the legal apparatus. It is a dangerous relationship because a very ineffective legal system is trying to co-opt the Colombian practice of mediation imposing upon it its deeply-rooted vices (see Pinzon, 1996a). Critical reflexivity, such as the type that this project seeks to encourage in mediation practice, is arguably one of the best antidotes to protect mediation from the vices and problems that currently affect the Colombian legal system.

- The ideas offered in this research could be used for improving mediators' training programmes so as to help mediators be more sensitive and critically reflexive about justice issues. This might mean a major change in the training and practice of mediation in Colombia, where mediation is experiencing a major expansion.

- Given the substantial influence that the MCBC has over other Colombian mediation centres the results of this research are very likely to have a major influence on many other dispute resolution centres all over the country. The MCBC is the major training institution in the field of mediation in the country.

- The results of this project have a good probability of affecting the practice of mediation elsewhere in Latin America given the large influence that the MCBC has on the training of mediators in the whole region. Hundreds of Latin American mediators look at the MCBC's publications, workshops and training courses in order to improve their professional practice. Therefore, any change that takes place at the MCBC can potentially have a deep impact in the whole region.

## 1.8 Structure of the Thesis

Chapter 1 (which you are reading now) is an introduction to the research. The body of this thesis is organised into four sections and the final conclusions. *Section 1* is made up of chapters 2 to 3.

Chapter 2 shows how the practice of mediation grew rapidly in Colombia during the last decade, and how the MCBC played a leadership role in this process. The MCBC also played and still plays a similar leadership role in several other Latin American countries. Chapter 2 also presents the main characteristics of professional mediation and a broad overview of particularly relevant features of the MCBC's context. The MCBC and its users are situated in a society that is deeply affected by a particularly cruel war, large wealth inequalities and a judicial system in crisis.

In Chapter 3 I present the methodology I used during the research process. It is based in an ethical conception that emphasises the irreducibility of the personal Other, and the need for welcoming the Other by calling into question one's own thoughts and possessions. This ethical conception underpins the use of critical systems thinking (CST), the main approach that guided the research process. I explain why I chose CST by discussing the importance that its main themes had for the exploration of the problematic situation I faced. Among the multiple approaches to CST, I selected the creative design of methods (CDM) for organising the inquiry. I briefly describe the most important methods used during the research, as well as the particular way I chose to put CDM into practice: the Cycle of Critical Distinctions (CCD). I tried to develop a synergy of methods in order to address the aims of the research. As far as I know, the particular combination of methods that I used has not been previously employed in CST interventions. It involves methods and tools from action science, boundary critique, system dynamics, statistics, interviewing, as well as games and negotiation simulations. The use of action science implied that several of the MCBC's members assumed the role of co-researchers during my fieldwork.

*Section 2* of the thesis is made up of chapters 4 to 7. Chapter 4 begins with a description of my interaction with the MCBC to determine which problematic phenomena and roles were going to be explored. For this interaction I drew upon Ulrich's (1983) critical systems heuristics. The interaction was participative and through it we developed some initial boundaries for the research process. For instance, we concluded that I needed to explore multiple interpretations of both justice and mediation. Among the manifold conceptions of justice there are, we decided to explore those that might have had a stronger impact on the conceptions of justice of the MCBC's service users. This decision led me into an exploration of the history of ideas on justice in Colombia in order to discover which theories of justice might have had a substantial impact on the notions of justice of contemporary Colombians. This exploration reveals the strong interrelationship between power and discourses on justice in Colombian history, as well as the frequent use of violence to silence some conceptions of justice and privilege others. The theories of justice identified through the historical exploration were carefully studied. Later on I drew upon them to design the interviews in the fieldwork and to analyse its outcomes.

Chapter 5 outlines those theories of justice that later on I found were most important for making sense of the conceptions of justice of the parties and the mediators whom I observed during my fieldwork. To my knowledge, this research is the first on the notion of justice in mediation informed by such an exploration of conceptions of justice.

Chapter 6 addresses the other topic that the MCBC's staff and I had identified as worthy of more exploration: mediation. A detailed review of the mediation literature was done trying to uncover diverse ways of conceiving of the mediation practice. Many were found, but I concluded that a large proportion of them could be grouped into four accounts (or stories) of mediation practice. Later on, during my fieldwork, my descriptions of these four stories became valuable points of reference for debating and transforming the mediator's interpretations of mediation.

In Chapter 7 I analyse interpretations of justice in the mediation literature. In particular I show how different approaches to mediation can be associated with different conceptions of justice and diverse ways of dealing with justice issues. This

leads me to conclude that mediators can benefit from being critically reflexive on how their particular mediation approaches may favour some conceptions of justice rather than others, and how they affect the way mediators deal with issues of justice.

*Section 3* involves chapters 8 to 11. This section mainly describes the fieldwork. A central part of the fieldwork was the observation of mediation processes and carrying out the interviews of the participants in these processes (disputants or parties, and mediators). This was planned to explore how mediators deal with issues of justice in mediation processes. Unfortunately, as I describe in Chapter 8, my observation of mediation processes had to be postponed as a result of serious difficulties for the MCBC. While these difficulties remained unresolved, I initiated a participant observation of many of the MCBC activities that led to an event that produced major changes in the basic beliefs that many Colombian ADR professionals had about dispute resolution processes. In the meantime, I also finished the design of the interviews with the participation of the MCBC's staff.

As I show more clearly in Chapter 9, I also involved my co-researchers in discussions about the methodology I was using and its main concepts, methods, and tools. I tried to be sensitive to their methodological concerns and preferences. Once the difficulties that caused the delay in my observation of mediation processes were overcome, I began the observation of these processes at the MCBC, and I carried out its associated interviews. In the meantime, based on my readings about justice and morality, I redefined some notions of action science that I perceived as unsatisfactory. Chapter 9 also presents how I discussed with the MCBC's staff the results of the interviews. I used methodological tools drawn from action science, boundary critique, statistics and mediation practice, trying to promote as much critical reflexivity and organisational learning as possible. The aforementioned discussions began to modify the way they perceived mediation practice and the mediator's role.

However, deeper changes in their basic beliefs, moral frameworks and mediation strategies resulted later on from our discussion of mediation cases (see Chapter 10). This required addressing multiple defensive patterns (DPs) that could have hampered our learning process. We found that DPs negatively affected the mediators' ability to be sensitive and deal with issues of justice. As a result, we mixed elements from

action science with elements from CST to address the aims of the research process. We began to understand the factors that affected the ways mediators identified issues of justice. We found that mediators frequently suppressed discussions about justice concerns and/or favoured some conceptions of justice over others. We began to question many of the assumptions that underpinned their theory and practice of mediation. This led my co-researchers to consider that many aspects of the practice of mediation that they used to see as "universal" truths where no more than contingent constraints that resulted from the particular development that mediation practice experienced in Colombia. In this document I show how this encouraged them to begin an exploration of alternatives for transgressing what they used to see as necessary and undiscussable elements of their professional practice. This involved changes in the main values or virtues that they consider should guide mediation practice, as well as other changes that began to transform their mediation practice and the ways they deal with justice issues during mediation processes. In Chapter 11 I present in more detail some of these changes, and in particular I highlight how the mediation approach that we began to develop at the MCBC is different from other mediation approaches discussed in the mediation literature. For instance, it encourages critical reflexivity on justice issues. Chapter 11 also contains a discussion on power and justice in mediation, as well as some methodological comments about the use of some system dynamics and CST tools in the research process in ways that contributed to the overall methodology.

*Section 4* is made up of Chapters 12 to 13. It contains analyses and ideas conceived after the fieldwork ended. Chapter 12 shows that the conception of justice of the disputants who I interviewed were quite diverse, but that some similarities could be found between the conceptions of justice and moral frameworks of many of them. A detailed study of the similarities and differences between the conceptions of justice of the participants in mediation processes led me to identify some elements that if discussed with mediators or would-be-mediators may improve their sensitivity to the disputants' conceptions of justice. Chapter 12 also contains a discussion of a set of factors that seem to have an effect on the parties' perceptions of how just their mediation processes are. Additionally, it presents the results of a statistical analysis that suggests that under the circumstances in which mediation processes were observed during the fieldwork, the larger the differences between the conceptions of

justice of the mediator and a party, the smaller the probability that this party will perceive the mediation process as just. I analyse this finding at the end of Chapter 12. In Chapter 13 I discuss some factors that I consider affect the development of notions of justice in mediation processes, and review some other concepts that I found can help a mediator to enhance his/her sensitivity to issues of justice in mediation processes. For instance, this chapter contains a model that shows the type of elements that may affect the way the participants in a mediation process develop their interpretations in relation to justice issues, as well as the discussion of the dimension of being in people's notions of justice. I end Chapter 13 with some comments on the potential impact of the results of this inquiry.

Finally, Chapter 14 presents the conclusions of the research. I show there how the aims of the research were fulfilled.

# Section 1: the Problematic Situation and the Methodology

# Chapter 2: Mediation, the MCBC, its Practice and its Context

The main aim of this chapter is to present a brief description of the history and practice of the organisation where the fieldwork was carried out and of some elements of its context that are particularly relevant for this research. However, this is preceded by a discussion of some theoretical concepts that are central to the practice of mediation and that will be used during the account of the MCBC as well as later on.

## 2.1 Some Basic Theoretical Concepts for Understanding Mediation Practice

In this section a set of notions that are valuable for understanding the practice of mediation and its relation with ethical concepts are presented. Understanding these notions is useful for comprehending the MCBC's history, the work of a mediator, and the analysis of mediation processes that is presented later on in this document.

### 2.1.1 Distributive and Integrative Dimensions

Several authors have identified two dimensions in conflict resolution processes (Walton and McKersie, 1965; Lax and Sebenius, 1986a): the distributive and the integrative dimensions. One or both of these are said to be present in all negotiations. The distributive dimension involves issues (such as needs and interests) that one "party"[8] can only satisfy at the expense of another party's issues. Therefore, predominantly distributive negotiations are frequently equated to zero-sum games[9], where the disputants mainly use tactics for distributing a 'pie' of fixed size value. A distributive approach to bargaining assumes that the conflict resolution process is mainly about the distribution of a constant amount of resources between the parties (Mayer, 1987).

[8] By "party" I mean a disputant or a group of disputants who consider themselves united by some common interest(s) and/or concern(s), and who participate in a conflict resolution process with or without a mediator's assistance.

[9] In a zero-sum game one person wins what another player loses. The total outcome for both parties is constant regardless of the strategies they choose.

The integrative dimension involves issues that one party may satisfy without it being at the expense of another party's issues. Predominantly integrative negotiations refer to positive sum games, where the disputants mainly engage in tactics for enlarging the pie of available resources (Bazerman, 1990). This is the case, for instance, when two parties have common important interests that they can satisfy through an agreement. This is also the case when the parties attribute different priorities to interests. Then both parties can gain through exchanges by which one party makes concessions in those issues that she values less and the other party values more, in return for concessions in those issues that she values more but the other party values less.

Parties often emphasise only one of the aforementioned dimensions (Walton and McKersie, 1965). In that case they are said to prefer either a distributive or an integrative approach to negotiation. A follower of the distributive approach thinks that his/her only way to get more out of the process is for his/her counterpart to get less (Raiffa, 1982). A follower of the integrative approach assumes that both parties can simultaneously win in the dispute resolution process. While the distributive approach fosters win-lose results, the integrative approach encourages win-win outcomes.

A distributive approach frequently promotes the use of tactics such as starting with an extreme position, obstinately holding to the initial position, overvaluing one's concessions, undervaluing the counterpart's concessions, using lies, and employing time as a means of pressure (Raiffa, 1982; Lax and Sebenius, 1986a; Ury, 1991; Albin, 1993). On the other hand, an integrative approach focuses on identifying the disputants' interests, assessing the relative importance of each party's interests, sharing knowledge about the parties' interests, and making exchanges or finding diverse options to satisfy the parties' interests (Raiffa, 1982; Bazerman, 1990). The predominance of one or the other dimension in a particular conflict resolution process depends on factors such as the nature of the issues involved, the context and structural elements within which the parties operate, the disputants' perceptions of the conflict, their skills and attitudes toward conflict resolution, their relations of power, and the conflict resolution process itself (Mayer, 1987).

In general mediators are supposed to promote integrative negotiations rather than distributive ones, for the former can lead to more beneficial solutions for all the

parties (Moore, 1986). Some modern writers (e.g., Neale and Bazerman, 1991) claim that mediators should have the goal of contributing to Pareto-efficient agreements. An agreement is Pareto-efficient if all the other possible agreements that could increase the benefits for one party would diminish the benefits to the other parties (Lax and Sebenius, 1986a).

### 2.1.2 Interest-based Bargaining

A central assumption of modern mediation and negotiation theory is that "People negotiate because of interests they want to have satisfied" (Moore, 1986, p.187). However, "Parties in dispute rarely identify in a clear or direct fashion what their interests are" (Moore, 1986, p.187). This occurs for several reasons such as:

- The disputants do not know their "genuine" interests.
- They adhere too strongly to a position[10] that they believe satisfies their interests but in this process their interests become unclear and equated with the position. The separation of interests from positions becomes difficult.
- The parties intentionally hide their interests in order to maximise their gains in the negotiation.
- They are not skilled in discovering their interests.

As a result the parties frequently fall into '*positional bargaining*'. This is a "negotiation strategy in which each party adopts preferred solutions or positions that meet his or her needs and exchanges proposals and counterproposals in an attempt to move toward a settlement that will satisfy both sets of interests" (Potapchuk and Carlson, 1987, p.33). Positional bargaining is usually considered a traditional approach to negotiation. It is frequently used by unskilled negotiators and/or by parties who perceive their interests as incompatible with those of their counterparts. However, positional bargaining frequently results in poor decisions, unsatisfactory results and endangers relationships (Fisher and Ury, 1981). Therefore, modern dispute resolution writers tend to recommend replacing positional bargaining by interest-

[10] "Positions are the claimed requirements that parties demand from the other side" (Bazerman, 1990, p.105).

based bargaining. This is an "approach where negotiating parties attempt to meet their interests through jointly developed options, criteria for judging acceptable options, and selection of options" (Potapchuk and Carlson, 1987, p.33).

Interest-based bargaining is more effective when it is perceived that a gain for one party does not necessarily imply a loss, disadvantage or defeat for the other, and when the parties' interests are not incompatible. Interest-based bargaining can be promoted and enhanced by the use of several techniques which are described in the negotiation and mediation literature (e.g., Fisher and Ury, 1981; Lax and Sebenius, 1986a,b; Moore, 1986).

### 2.1.3 Normative Resources

During a mediation process the third party and the disputants can use different types of normative resources to take their decisions. Given the aims of this thesis I will briefly address the one that is most relevant for this research: ethical criteria[11]. Ethical criteria are of particular interest because the notion of justice can be considered part of them. A broad view of normative ethics can be useful for understanding these criteria[12]. Over the centuries hundreds of theories have claimed to have identified the ultimate criteria of moral conduct (they have been presented in the form of single rules, sets of principles, etc.). However, many of these theories involve elements that allow us to identify them as deontological, consequentialist, and virtue theories.

1. Deontological theories base morality on particular, foundational principles of obligation or duty. They are called deontological theories, from the Greek word *deon*, or duty. They are also called nonconsequentialist because the principles are conceived as obligatory, regardless of the consequences. For instance, it is wrong to lie even if lying would result in some great benefit. According to a deontological ethic "certain kinds of actions are right or wrong in themselves,

[11] Other types of resources include juridical and technical resources. For a definition of the latter see (Sousa, 2001).
[12] Normative ethics is concerned with identifying moral standards that regulate right and wrong conduct.

independently of the consequences" (Almond, 1998, p.42). Examples of deontological theories are:

- The categorical imperative theory as developed by Kant (1991a).

- Rights theories. All people have natural rights that everyone is obligated to acknowledge. They include rights such as life, liberty, and the pursuit of happiness (e.g., see the US Declaration of Independence). Rights are frequently assumed to be natural, universal, inalienable and equal for all people.

2. Consequentialist theories. According to these theories an action is morally right or proper if its consequences are more favourable than unfavourable (Almond, 1998; Fieser, 2001). Consequentialist theories frequently involve a cost-benefit analysis of the consequences of actions (e.g., Bentham, 1982). Competing consequentialist theories differ in the way they specify which consequences are relevant, and for whom or what they are relevant. Consequentialist theories can be classified depending on who is taken into account in evaluating the consequences of an action. Table 2.1 presents some examples.

| Name of the consequentialist theory | Relevant group |
|---|---|
| Ethical egoism | Only the agent carrying out the action. |
| Ethical altruism | Everyone except the agent performing the action. |
| Utilitarianism | The community. |

Table 2.1. Examples of consequentialist theories (from Fieser, 2001).

Consequentialist theories are sometimes called teleological theories (e.g., Almond, 1998; Fieser, 2001). However, some authors make a distinction between the two. Teleological theories, from the Greek word *telos*, are called that because the end result of an action is what establishes its morality. This *telos* is usually defined in

terms of happiness and/or human flourishing. The main difference some thinkers identify between other types of consequentialism and teleology involves the association between one's actions and the end they aim at:

> "Consequentialism sees the relation as instrumental: an action is good because it brings about the right result. Teleology sees the relation as constitutive: an attitude is good because it constitutes the desired end. This is where teleology is closer to deontology than to consequentialism." (Dreyfus, 1995)

Teleology assumes a final human purpose and a particular ideal of the good (Sandel, 1982). It differs from deontology for the first principles of deontology are arrived at without assuming any final human purpose or any particular ideal of the good.

3. Virtue ethics or virtue theory: "The essence of virtue theory, then, is a focus on character, and on seeing a human life as a whole" (Almond, 1998, p.110). Advocates of virtue theory argue that other moral theories disregard central aspects of moral life which involve character (Wolf, 1982), and that they frequently disregard in their evaluations of people the consideration of the individual as a whole, as a unity. Virtue theorists claim that many of our moral problems concern the kind of person we are and they have nothing to do with balancing interests, calculating utility, or solving disputes about rights (Pence, 1993). Instead, virtue theorists stress the importance of developing good habits of character and they emphasise moral education. Although recently some philosophers have developed new forms of virtue ethics (e.g., Anscombe, 1958; MacIntyre, 1981), this is the oldest normative tradition in Western philosophy, having its roots in the work of ancient Greek thinkers such as Plato and Aristotle (see Chapter 5). The latter are concerned with the virtues, i.e. those traits of character that make a good person or that "are good for people to have" (Rachels, 1993, p.169). A central question for virtue theorists is "What traits of character make someone a good human being?" (Rachels, 1993, p.160). Virtue theorists (e.g., Anscombe, 1958) emphasise notions such as virtue and character, rather than notions such as duty and obligation which are more often used by deontological writers (Almond, 1998).

Some virtue theorists consider that virtue theory is enough just by itself as a theory of ethics. When this is the case their theories are called 'radical virtue ethics' (Rachels, 1993). However, others argue that virtues are insufficient for constituting a complete theory of ethics (moral principles, rights and other concepts are also perceived as necessary) (Baron, 1985; Pence, 1993). Therefore, they perceive the theory of virtue as part of an overall theory of ethics.

Having clarified some initial concepts relating to mediation, justice and ethics, I will now proceed to discuss the MCBC and its context.

## 2.2 A Brief History of the Practice of Mediation at the MCBC: First Part

My understanding of the history of the practice of mediation at the MCBC evolved as a result of the research process. Now, I conceive it as made up of four phases. The third one began while I was initiating my fieldwork so in this chapter I will present only the first two phases. This account is based on interviews with the MCBC staff, on the review of documents produced by the organisation, and on my direct contact with its members during the last ten years[13].

1. First Phase (1991-1994): The beginning.

Although the MCBC was founded in 1983, during its first years it only handled arbitration cases. In 1990 the Ministry of Justice and the MCBC developed together the first Colombian law for regulating the practice of mediation, which was approved by the National Congress in 1991. This law conceived mediation mainly as an instrument for reducing the congestion and delays that characterised the national judicial system. Thereafter, the director of the MCBC and a group of three psychologists, who worked as consultants, established the guidelines for conducting mediation processes at the MCBC mainly based on a review of the mediation literature. The latter was the basis for developing mediation techniques

[13] Between 1991 and 1996 I frequently worked for the MCBC as an external consultant, mainly helping them with a component of their training programmes that addressed negotiation skills. After 1996 I

for dealing with "civil" and "commercial" disputes[14]. The Bogota Chamber of Commerce (BCC) wanted to offer this service to Bogota's businesspeople as an option to resolve their disputes that was faster and cheaper than the judicial system. It was faster because mediation offered the possibility of resolving within weeks a conflict that in the courts would take from one to five years to be resolved. It was cheaper mainly because it reduced the opportunity costs for business people, and because mediation services were quite inexpensive compared to the usual fees charged by lawyers to their clients.

During this phase there was only one mediator at the MCBC: the director of the centre. In 1991 she began conducting two types of mediation processes: ordinary mediation and contentious administrative mediation. Ordinary mediation is related to labour, commercial, civil, and family disputes. However, family disputes are not handled at the MCBC. Contentious administrative mediation (or "conciliación administrativa") is mediation that deals with contentious administrative disputes. The latter are disputes that involve at least one public institution and one or more individuals or organisations. Contentious administrative mediations require the presence of a representative of the Attorney General's Office.

Between 1991 and 1994 the MCBC helped to create many other Colombian mediation centres. As an external consultant, I participated actively in this process in which we trained hundreds of potential mediators. We taught them what we believed were the basics of mediation theory, a knowledge which during the initial stages of this research process we discovered were the main elements of a particular approach to mediation that I call the Satisfaction Story (see Chapter 6). During this period we emphasised the importance of mediators' promotion of the integrative dimension throughout mediation processes, the convenience of fostering interest-based bargaining among the parties rather than positional bargaining, and the educational and psychoanalytic aspects of mediation. We

have continued my relation with them through the research process I describe in this document.

[14] In Colombia "civil" disputes represent non-labour and non-family disputes between an individual and another individual (e.g., landlord-tenant disputes), or between an individual and an organisation. "Commercial" disputes designate disputes between private organisations or internal disputes within a private organisation that are related to their business practice (with the exception of "labour" disputes). For instance, it includes disputes between companies for the alleged non-compliance with a contract by one of them.

considered ethical criteria important, but we never developed any conceptual scheme for making sense of these criteria.

2. Phase Two (1994-1997): The expansion.

During this period the MCBC experienced a large expansion. A deputy-director was hired, as well as four additional mediators. This made the MCBC a relatively large mediation centre[15]. The quantity of mediation cases also increased dramatically during this period (see Figure 2.1). By 1997 the majority were ordinary mediation cases (83%) (CCB, 1997). All mediators were lawyers except for one psychologist. During my fieldwork she was the de facto co-ordinator of the mediation group. Hence, I will call her the Co-ormg. The conceptual foci of the six mediators were the technical aspects of the procedure for managing the mediation process.

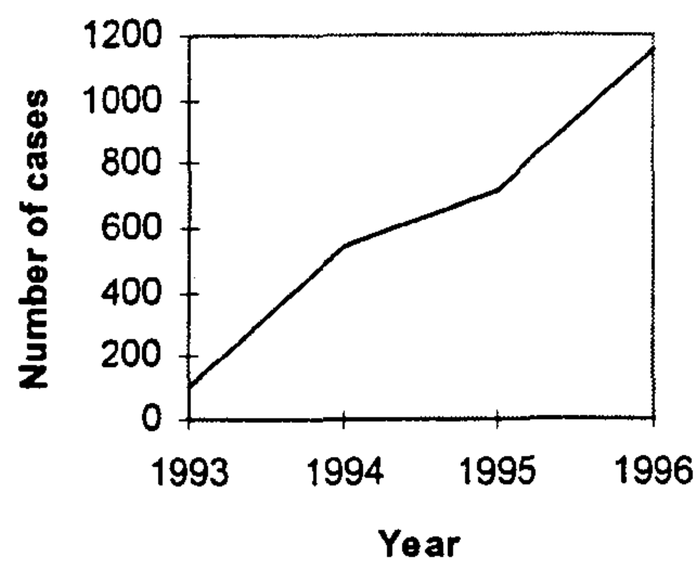


Figure 2.1. Number of mediation processes handled by the MCBC between 1993 and 1996 (source: CCB, 1997, p.4).

The prevailing vision of mediation at the MCBC during phase two was based on the following assumptions:

- The main goal of mediation is to help the parties reach an agreement that leaves them satisfied because it satisfies their perceived interests.

[15] This claim is based on the size of mediation centres in the United States (see McKinney et al., 1996).

- Mediation is also about helping people who have disputes to solve their conflicts quickly and at a low cost for them (in comparison to the judicial system).
- Mediation is going to reduce the congestion, delays and the high costs of the Colombian judicial system by reducing the number of cases that this system will have to handle in the future.
- The mediator's basic role is to facilitate a co-operative and integrative solution of the parties' disputes that leaves the disputants satisfied.

The mediators, two new psychologists, and an industrial engineer (myself) were in charge of delivering all mediation training programmes. Close to one hundred dispute resolution training programmes were organised by the MCBC during this period in many Colombian cities and abroad. The MCBC began to be recognised throughout Latin American as the leading institution in the fields of mediation and arbitration. It trained mediators from several Latin American countries, and contributed to the administrative organisation of mediation centres in the majority of the Colombian regional capitals and several Latin American countries (e.g., Chile, Brazil, Ecuador, Panama, Peru). Since the beginning of the 1990s at the MCBC a variable number of national and international mediators also attended the mediation processes and sometimes acted as assistant mediators.

Between 1996 and 1999 the Inter-American Development Bank (IDB) funded the development of an ADR network in Colombia that included the majority of the country's mediation centres. It was co-ordinated by the MCBC. This network was one of the products of a wider research and ADR training programme conceived by the MCBC and funded by the IDB. The MCBC co-ordinated mediation, arbitration, and negotiation training programmes, which received substantial diffusion throughout the country.

The IDB-financed programme on mediation was so successful that the IDB decided to invest more money into other similar programmes in Latin America. The satisfactory results shown by the MCBC in the Colombian project made this institution very influential in the allocation of the IDB's resources for other countries. The participation of the MCBC was almost required by the IDB in order

to approve conflict resolution programmes in other nations. In this way the MCBC increased its influence in the whole region.

## 2.3 Professional Mediation in Colombia

Contemporary Colombian professional mediation is a product of the adaptation of the USA's mediation approaches to the Colombian context. This adaptation was partly done at mediation centres such as the MCBC, and partly at local universities. The objectives, basic principles, strategies and tactics of mediation recommended by US mediators were adopted, but the laws to regulate mediation practice were locally written.

This research work focuses on the study of one specific type of professional mediation legally called 'general mediation' ("conciliación") in Colombia. General mediation involves ordinary mediation and contentious administrative mediation. This research focuses mainly on "ordinary" mediation because "contentious administrative" cases were suspended while I was doing my fieldwork[16] (see section 9.1.1). General mediation is the most popular type of mediation in Colombia. The other form of professional mediation is called 'equity mediation' ("conciliación en equidad"). The main differences between the two forms of mediation are:

1. A person who wants to act as a mediator in a general mediation process has to be a lawyer and he/she has to obtain an official certificate that entitles him/her to do this type of mediation. This certificate is obtained after completing an approved course on mediation[17]. A person who wants to act as a third party (mediator) in equity mediation needs another type of certificate which requires less training and he/she does not need to be a lawyer.

[16] However, I observed a few contentious administrative cases at the end of my fieldwork, when the law authorised mediation centres to resume this form of mediation. However, ordinary mediation is by far the most usual form of mediation practised in the country, for contentious administrative disputes are quite rare compared to ordinary disputes (see CEJ, 2000).

[17] Due to governmental regulations traditionally only two institutions have been allowed to teach these courses: The MCBC and the University of Los Andes. In both of them I participated as a lecturer in many mediation training programmes.

2. A mediator who carries out general mediation has "jurisdictional authority" ("autoridad jurisdiccional"). In brief this implies that a written agreement, voluntarily reached by the parties with the mediator's assistance, has the same legal status as a judge's ruling after the parties and the mediator sign it. A mediator who assists equity mediation has only the legal status of a witness when the parties reach an agreement. The latter has the legal status of a contract, but not the status of a judge's ruling.

## 2.4 Some Relevant Elements of the Context

### 2.4.1 A Broad Overview of the Context

The MCBC operates in the city of Bogota, Colombia's capital inhabited by approximately 7 million people. It is part of the BCC, the largest Colombian chamber of commerce. By law, all the businesses that operate within the city have to be registered at the BCC. These affiliations represent the largest source of income to the BCC. The law establishes that its annual profits have to be invested in services to the public in general. Mediation is one of these services.

During the last years the BCC activities have been deeply influenced by the major socio-economic and political events that have affected the whole country. Three are of particular importance in terms of their impact on the MCBC: the nation's economic crisis, the increase in inequalities and the Colombian internal war. These are discussed below.

1. The Nation's Economic Crisis. Between 1945 and 1995, the Colombian economy "grew at an annual average rate of almost 5%" (Reid, 2001, p.3). However, this growth momentum changed at the beginning of 1996 due to economic and political factors. By 1999 Colombia suffered a deep recession: the GDP contracted by 4.3%, and the rate of unemployment rose to 20% (Coinvertir, 2001).

2. Poverty and Inequalities. Although Colombia's levels of poverty seem to have been reduced during the last decades (Leibovich and Núñez, 1999), inequalities are large and they have grown during the last few years (Portafolio, 2000; UNDP, 2001). Those Colombians who are poor—approximately 50% of the population (Londoño, 1996; World Bank, 1996; Nina, 1997)—do not even have access to the basic opportunities they would need to live a long and healthy life (UNDP, 1997). Among the World's developing nations, Colombia is considered one of those with larger inequalities in the internal distribution of wealth (World Bank, 1997). According to some researchers (e.g., Sarmiento, 1999), inequality was the most important factor leading to an increase in violence in Colombia during the 1990s.

3. The Internal War. The conflict between the guerrillas, the paramilitary bands and the national security forces that affects the whole country began four decades ago, but it became particularly intense during the last decade. There are two major guerrilla groups: The FARC (Revolutionary Armed Forces of Colombia) and the ELN (National Liberation Army). The paramilitary bands are organised in the AUC (United Self-Defence Forces of Colombia). All these three irregular armies have gained an important military strength as a result of their active participation in the drugs business. The guerrillas claim to be fighting for social justice and for establishing a communist government. The paramilitaries argue that they exist only because of the state's failure to provide security against the guerrillas. Although the paramilitaries seem to have slightly more support than the guerrillas, according to opinion polls all of these informal armies are very unpopular (Ceballos and Martin, 2001; Reid, 2001). The war has fragmented the country. The government controls only about half of the territory, including the large cities (Miami Herald, 1998). The irregular armies control the rest of the country where they practice continuous violations of human rights and international humanitarians laws (Vivanco, 2001). As a result, many Colombians who live in cities such as Bogota feel themselves living in "islands" surrounded by a dangerous countryside where they don't dare to go (Johnson, 1999a). Those who live in the countryside or small towns frequently abandon their homes to escape rural violence. Small towns, inhabited mainly by poor people, are frequently partly or completely destroyed by guerrilla attacks. The guerrillas and the paramilitaries often carry out massacres of civilians to enforce their control of

parts of the territory. As a result of their actions more than two million people have been internally displaced in Colombia (Gómez, 2001), and more than one million have abandoned the country (Reid, 2001). According to an international observer:

> "The biggest humanitarian crisis in the Western Hemisphere is occurring in the dark recesses of Colombia [...]. In dramatically increasing numbers, poor civilians caught in the vice of a prolonged civil war have been torn from their rural homes and sent fleeing." (Johnson, 1999b)

According to Human Rights Watch, thousands of civilians have been killed, kidnapped, tortured, mutilated, and detained arbitrarily by the irregular armies (Human Rights Watch, 2001; Vivanco, 2001). The latter commit atrocities with impunity (Human Rights Watch, 2001). One of the major sources of income of the guerrillas is kidnapping. As a result Colombia has the largest kidnapping rate in the world (Johnson, 1999a).

The Colombian war is not regarded by experts as a civil war, mainly because "On the national level public opinion is not divided into two camps, nor is there any significant popular support for a guerrilla, paramilitary or openly military solution to the conflict" (Ceballos and Martin, 2001). The war is not a war between two sectors of the population, but a war of some small groups against the majority of the population. Because of that international experts prefer to define it as a "war against society" (Pecaut, 2000; Deas, 2002). It is a war in which individuals who speak out in favour of peace and protection for civilians are "eliminated ruthlessly by all sides" (Human Rights Watch, 2001).

Many of us[18], who have been the victims of this war, work now in peaceful conflict resolution processes. During the 1990s a very active community of Colombians interested in peaceful dispute resolution methods grew rapidly. As a consequence Colombia is now well known in Latin America for these people. Some of them have contributed to the programmes that reduced the national

[18] Thousands of Colombians have experienced the effects of violence. In my case, for instance, some of my relatives have been killed by the guerrillas, others have been kidnapped, some friends have died as a result of the explosions of bombs, and my family has experienced terror in the countryside while we witnessed combats between the army and the guerrillas in the area where we lived.

homicide rate during the last years (Ceballos and Martin, 2001), while others have participated in the peace processes with the eight guerrilla groups which have demobilised and whose members have been reincorporated as common citizens.

### 2.4.2 Problems of the Formal Legal System

In Colombia mediation centres have usually been offered as an alternative to the judicial system in order to help common citizens to resolve their disputes. Therefore, for understanding the contexts of mediation it is important to have a look at the main problems of the judicial system because mediation is supposed to overcome many of these problems. I will briefly mention only those problems that are most relevant for understanding the growth of mediation practice in Colombia.

1. Congestion and delays. There are more than four million judicial cases waiting to be handled by the judges (CEJ, 2000). Figure 2.2 shows how the number of cases accumulated in ordinary jurisdiction have rapidly grown since 1996, and how the response of the judicial system has been insufficient to diminish the congestion of the system (see CEJ, 2000).

As a result of the congestion, the average time that a claim has to wait until it is solved is extremely high: 3.2 years in a lower criminal court; 3.9 years in a lower civil court (CEJ, 1997a); and longer times for higher courts (MJD, 1996). By contrast, the average time that it takes to resolve a case using mediation is a few weeks in some mediation centres (CCB, 1997).

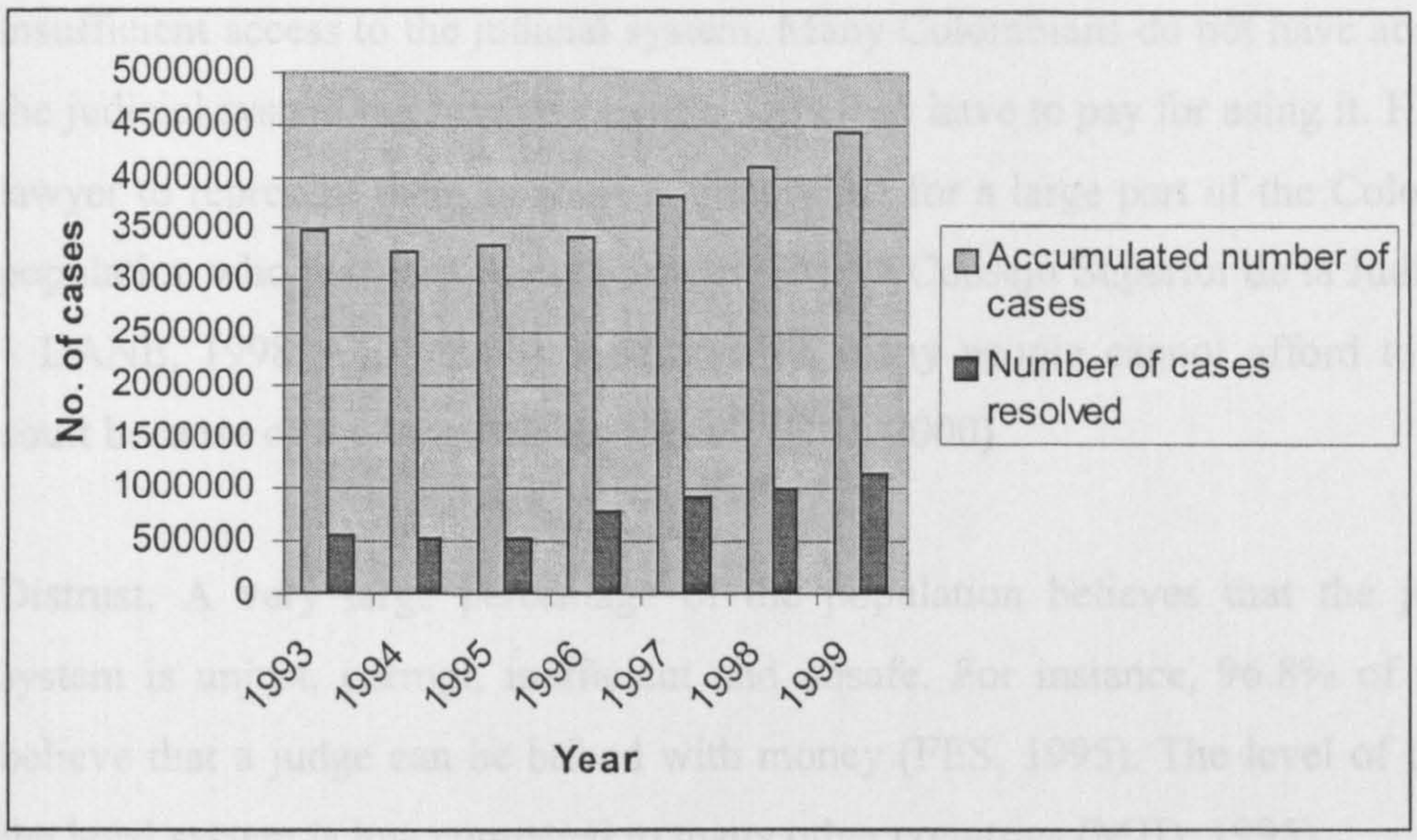


Figure 2.2. Accumulated number of cases and number of cases resolved in ordinary jurisdiction (data source: CEJ, 2000).

2. High administrative costs. During the 1970s and 1980s the cost of operating the judicial system was approximately 5% of the total expenses of the Colombian Government. This percentage has risen radically in recent years. It reached 8.22% in 1994 (MJD, 1995). This increase has basically been the product of augmenting the wages of judges and hiring more people. This has given Colombia one of the highest per capita expenditures in the administration of justice in Latin America (MJD, 1995). Nevertheless, the results of these measures are quite unsatisfactory[19]. Therefore, new alternatives need to be explored. According to data from the Colombian Ministry of Justice, the administrative costs of solving a case through mediation is around 0.5% of the cost of the traditional litigation procedure (CEJ, 1997b).

3. Miscarriages of justice. While innocent people are frequently wrongly jailed, a large number of guilty people are allowed to walk free or are only convicted on lesser charges (MJD, 1996; CEJ, 1997a).

[19] For instance, researchers have found that increases in governmental expenditure in the judicial apparatus appear to have had no positive effects on homicide rate statistics (CEJ, 1997b). Colombian homicide rates continue to be among the highest in the world (CEJ, 2000). On average, they are approximately 50 times higher than those of the Eastern European countries (Vásquez, 2001).

4. Insufficient access to the judicial system. Many Colombians do not have access to the judicial system because of the high costs they have to pay for using it. Hiring a lawyer to represent them in court is impossible for a large part of the Colombian population who just earn enough to survive (see Consejo Superior de la Judicatura – DANE, 1998; CEJ, 2000). Additionally, many people cannot afford to go to court because of the long waiting times[20] (CEJ, 2000).

5. Distrust. A very large percentage of the population believes that the judicial system is unjust, corrupt, inefficient and unsafe. For instance, 96.8% of people believe that a judge can be bribed with money (FES, 1995). The level of trust in the legal system is low compared to many other countries (MJD, 1995).

The previous problems and some others affect the Colombian judicial apparatus (see CEJ, 2000). This explains why mediation has been regarded by many as a practice that should help to bring justice into the realm of dispute management. In fact, during the beginning of the 1990s, mediation was promoted mainly as an option to confront the crisis of the judicial apparatus and in particular, to reduce its congestion (MJD, 1995; CEJ, 1997a).

## 2.5 Final Comments

In a country that has suffered a brutal conflict for several decades, where the citizens are used to experiencing or witnessing a large diversity of atrocities, where the authorities are unable to protect the population, and where it has become dangerous to speak openly about peace and justice, it is important to develop and promote conflict resolution methods that are perceived as peaceful and just by those who use them. This research project intends to be a contribution to this idea. I developed it within an organisation, the MCBC, that has played a leadership role within the Colombian and Latin American ADR field, because I thought that in this way the research was likely to have a substantial impact upon a large number of persons. In the next chapter I will

[20] For example, many poor business people can go into bankruptcy while they wait more than three years in order to collect the money someone else owes them for an unpaid bill. They frequently depend on their little companies for being able to buy their food—this is a question of personal and family survival, not just business survival.

discuss the methodology I used, which was affected by the violence against others that I have witnessed in my country.

# Chapter 3: The Systemic Intervention: Methodological Comments

The research process presented in this document was a learning process about methodologies, as well as an opportunity to develop new insights about the methods I used. It was a journey in which the methodological design had to be changed several times as a result of the practical experience, and a substantial amount of reflexivity was done in relation to its philosophical underpinnings. In brief, philosophical reflexivity, methodology, and practice proved to be mutually supportive areas.

In this research I have used a systems approach to achieve the aims described in Chapter 1. Because there are many interpretations of what a systems approach is (e.g., Checkland, 1981; Klir, 1985), and different authors have proposed different methodologies, in this chapter I will discuss my own interpretation. This implies clarifying many of the onto-epistemological[21] and ethical assumptions I used during my research. Below I present the basic elements of my methodology.

## 3.1 Philosophical Underpinnings

### 3.1.1 Some Comments on 'Systems Philosophy'

The word 'systemic' has been interpreted in numerous ways. To some, systemic means to get the most comprehensive understanding of a phenomenon that it is possible to attain (e.g., von Bertalanffy, 1956). During the 1960s and 1970s most approaches to systems thinking and practice assumed that systems were entities that had an 'objective' existence in the 'real' world (Checkland, 1981). Therefore, the boundaries of the system were given by 'reality' and the researcher was expected to

[21] I speak about 'onto-epistemological' assumptions because of the tight link I perceive between statements about reality and knowledge (see also Fuenmayor, 1991a-c). However, just to clarify the term onto-epistemology I will address the terms ontology and epistemology separately. Guba and Lincoln (1998) argue that the central ontological question is what is the nature of reality and, hence, what is there that can be known about it? Epistemology is concerned with the nature of knowledge. Guba and Lincoln (1998) claim that the central epistemological question can be stated as, 'what is the nature of the relationship between the knower and what can be known?' As even ontology is about our *knowledge* of reality, ontology and epistemology are inevitably connected.

identify them correctly. In contrast, Churchman (1970) argued that the boundaries of a system are not given by 'reality' but are personal or social constructs. Boundaries determine (Churchman, 1970):

1. What knowledge is taken as pertinent in an analysis.
2. Who is seen as producing that knowledge.

In social systems, modifying the system boundaries changes who may legitimately be regarded as a decision-maker. This implies that knowledge is not conceived as being produced just by a small group of 'experts', for no single group can produce all relevant knowledge. On the contrary, a diversity of stakeholders are expected to participate and contribute with diverse relevant perspectives.

Midgley (2000) argues that all forms of systems thinking share the *aspiration* to comprehensive understanding. Even Churchman's approach, which acknowledges the limitations of all human worldviews, regards total comprehensiveness as an *ideal* (see Midgley, 2000). Although full understanding is impossible, greater understanding is desirable. I began the research process believing in this aspiration as if it were a 'fundamental' ideal. However, later on I concluded that it involves a substantial danger. Here it is worth remembering Foucault's words: "My point is not that everything is bad but that everything is dangerous, [...] I think that the ethico-political choice we have to make every day is to determine which is the main danger" (Foucault, 1984a, p.343). Perhaps an unlimited[22] aspiration to comprehensiveness is improper from an *ethical* point of view. This point will be explored in section 3.1.2.

### 3.1.2 Ethical and Epistemological Assumptions, and their Implications for the Idea of a Systems Approach

This research process is based on an ethical conception that mainly draws upon Emmanuel Levinas' work, which affected the methodological design as well as the

[22] Although some authors (e.g., Churchman, 1970; Sterman, 2000) would claim that limits are inevitable for pragmatic reasons (e.g., our knowledge capacity is limited), my point is a different one. I see a danger in the *aspiration* to a total comprehensive understanding for *ethical* reasons.

entire research process[23]. In this section I will discuss some of the main elements of this ethical conception, and some of its implications for the adoption of a systems approach.

I have to clarify that the adoption of this ethical conception is partly the result of having lived in a violent context during the last ten years, where expressing ideas that are different from those defended by the irregular armies and its collaborators is very dangerous. Guerrillas and paramilitaries have large networks of spies to identify people whose ideas can become an obstacle to their actions and objectives. They are sophisticated users of information and military technology that they employ to murder those who think differently from them. As a result peace activists, politicians, priests, Amerindians, trade unionists and university teachers are some of their more frequent military targets (Camacho, 2001; Durán, 2002). Moreover, moral norms, love relations, and all social behaviours are strictly regulated in those large regions of Colombia controlled by the guerrillas and the paramilitaries (Camacho, 2001; El Tiempo, 2001a; Ocampo, 2001). Even simple things such as not having a 'proper' haircut can lead the irregular armed groups to murder people (El Tiempo, 2001a). The irregular armies' cruelty with their victims is enormous, as is their intolerance of anything that is strange in the other, that questions them, that challenges their comprehension and possession of the world (see Camacho, 2001; McGirk, 2001; Sierra and Restrepo, 2001). This type of phenomenon is not unique in Colombian history. As I show in the next chapter, a phenomenon such as this one, but with more devastating consequences, took place when the country was first organised as a nation.

#### 3.1.2.1 Ethics

For Levinas ethics is neither a code of rules nor the reflection on reasoning about how we ought to behave[24]. Rather, it "is an optics" (Levinas, 1998a, p.23).

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[23] However, for formulating this ethical conception I also draw on the work of other authors such as Derrida.

[24] Davis argues that "Levinas' work represents the best example of an attempt to think through the ethical consequences of the postmodern situation, and the condition of postmodern ethics is to be without foundation or universality" (Davis, 1996, p.53).

> "We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into question of my spontaneity, as ethics. Metaphysics, transcendence, the welcoming of the Other by the same, of the Other by me, is concretely produced as the calling into question of the same by the other, that is, as the ethics that accomplishes the critical essence of knowledge." (Levinas, 1998a, p.43)

*The relationship between the Same and 'Other'*[25] *is the locus where both ethics and knowledge are involved.* Ethics is the rise of responsibility that emerges in the encounter with the 'face of the other' (Levinas, 1999). Here 'face' does not mean human face. Face is not available to vision. Face is a *revelation* and not an object that might be perceived or known. It involves the particular encounter with infinity. Infinity designates "the alterity of a thought which thought cannot contain" (Bernasconi, 1992, p.695). The infinite is something beyond knowledge, an alterity irreducible to interiority, to totality (Levinas, 1999). The term infinity represents the otherwise than being, being's other, which eludes any definition because it has no genus in common with essence, it eludes essence. This is a central point and not a flaw. One of the reasons why Levinas' writing is quite difficult (Davis, 1996) is because *it frequently has to 'fail' to be successful.* For instance, it must fail to thematize adequately its main subject (the Other) if it wants to succeed. It must fail to make the step from Same to Other, self to transcendence. The encounter with the Other, infinity, transcendence, alterity, and ethics—concepts that Levinas (1998a, 1999) uses to name the other than Being—is something that may happen in the act of living, rather than something describable with words. Reading can only evoke these encounters.

### 3.1.2.2 Alterity and the Other

The Other comes to challenge my comprehension and possession of the world. Though the I has things in common with the Other, the Other is not just another myself. The Other involves an irreducible alterity: "the other is the other only if his alterity is absolutely irreducible, that is, infinitely irreducible; and the infinitely Other

[25] The 'Other' implies a particular way of conceiving the personal Other that I will gradually present. In Levinas' writings the personal senses of "the Other" predominate over the neutral generic sense of "the Other" (Bernstein, 1991). However, the aforementioned two senses are related (Bernstein, 1991).

can only be Infinity" (Derrida, 1978, p.104). The Other is mainly unknowable, a mystery, never fully seen, known or possessed. The Other is wholly Other[26], but at the same time an ego like me, an alter ego: "the other is absolutely other only if he is an ego, that is, in a certain way, if he is the same as I"[27] (Derrida, 1978, p.127). When I am moved by a desire to fully comprehend the Other, when the aspiration to comprehensive understanding guides me in my relation with the Other (a usual aspiration within systems thinking according to Midgley, 2000), the Other becomes in danger of being violently reduced by me, of being silenced or ignored because I may fail to respect the Other's alterity.

There is a first type of relationship with the other by which I take what is other and make it become a part of myself. For instance, this is the type of relationship people have with the bread they eat, the land in which they dwell, and other similar elements. I "digest" the bread I eat, the music I hear. This self, the self of enjoyment, journeys into the world making things part of itself. Its relation to the other is characterised by its ability to *absorb otherness* into its "own identity as thinker or possessor" (Levinas, 1998a, p.33). However, there is second way of approaching the Other, characterised by a movement toward an alien outside-of-oneself (Levinas, 1998a). The metaphysical[28] desire tends toward the other, but without producing the disappearance of distance. Here 'desire' means a positive attraction towards something other which is not possessed or needed. It is an attraction towards that which transcends me and my categories (Levinas, 1998a). While the first type of relationship with the other produces satisfactions (such as the one produced by the bread we eat), the metaphysical[29] relationship is beyond satisfactions. It is a desire that respects the alterity of the Other. Confronting the Other as a face is the act of transcendence (Levinas, 1987). The distance expressed by this transcendence is part of the way of

[26] The asymmetry of the relationship is based on the notion that the I assumes a responsibility for the Other regardless of whether the Other assumes a responsibility for the I (Levinas, 1985).
[27] Here I depart from Levinas' (1987, 1998a) ideas and embrace some of Derrida's (1978) ideas. Levinas rejects calling the Other an alter ego because he believes that this would neutralize its absolute alterity (see Derrida, 1978).
[28] Levinas claims that a relation is metaphysics when it is "a relationship with the other that does not result in a divine or human totality, that is not a totalization of history but the idea of infinity" (Levinas, 1998a, p.52).
[29] Levinas distinguishes metaphysics from ontology. He calls ontology the "theory as comprehension of beings" (Levinas, 1998a, p.42). Metaphysics implies theory as a respect for alterity.

existence of the other being[30]: "Thus the metaphysician and the other can not be *totalized*" (Levinas, 1998a, p.35). It is impossible to place oneself outside of the relation between the same and the Other and reunite them under one gaze, *so that the absolute distance that separates them is filled*. One may look at one of Escher's prints, Sun and Moon (Figure 3.1), as a metaphor that can help us in understanding this relationship.

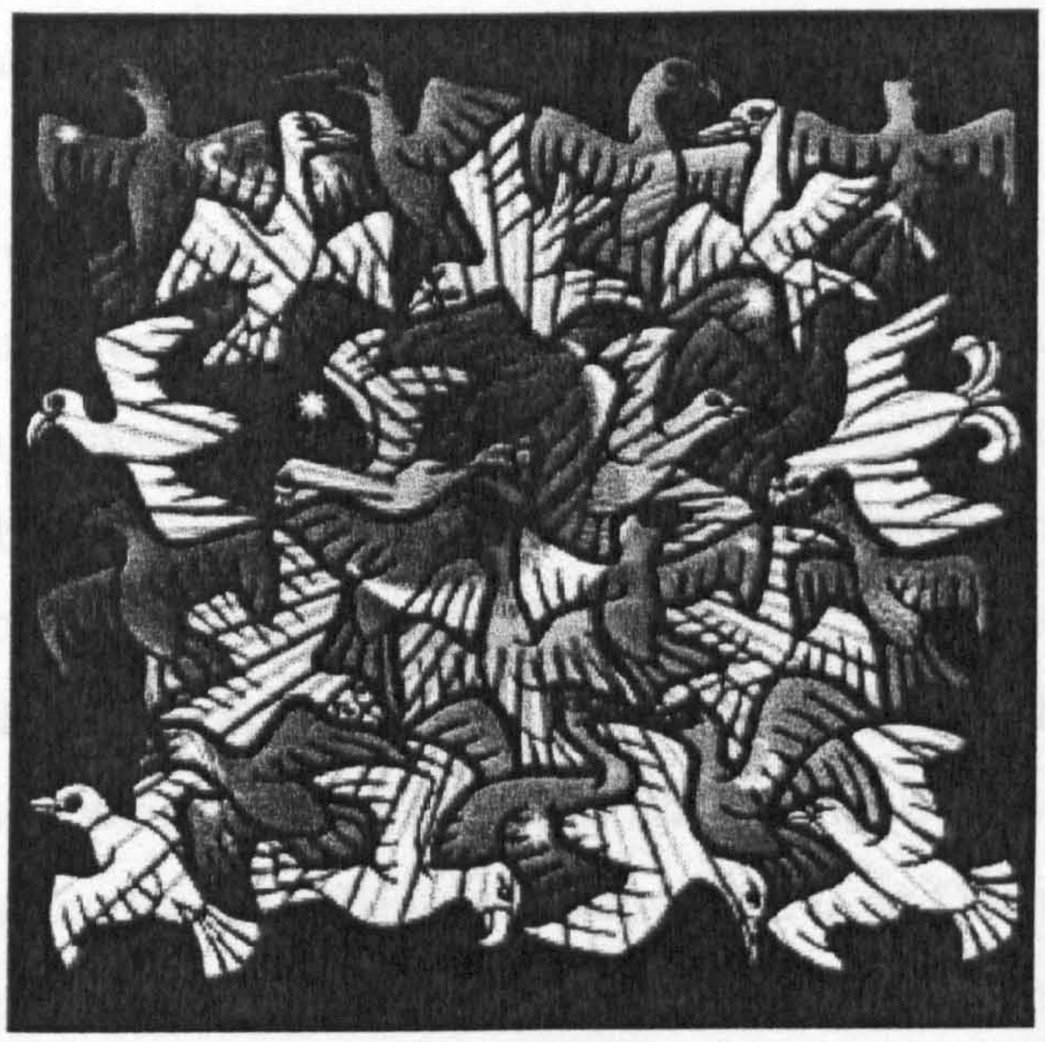

Figure 3.1. Sun and Moon (Escher, 1948).

The print has two sides which cannot be reunited under one gaze without destroying the distance that separates them. Only the viewer can sort the two sides out: "the scene of light colored birds against a deep blue starry night sky must be blinked away and the eyes refocused in order to see the second simultaneous scene of dark birds against a brilliant gold sun" (Schattschneider, 1990, p.265). If one tries to see the whole picture as a unity (as a *totality*), just a flat pattern of birds is evident. None of the two possible backgrounds (that of moon or of sun) is perceived as the backdrop for a flock of birds. Both sides cannot be reunited under one gaze without destroying part of them. However, there is an important difference between Escher's drawing and the relation between the Same and the Other. Escher's drawing might be conceived as a representation. Nevertheless, the metaphysical relation between the one and the

[30] Any being is always engaged in time and history, is overwhelmed by history (Levinas, 1998b).

Other is not a representation, for this would imply that the Other can dissolve into the Same.

The infinite alterity of the other might be revealed when we meet her/his face. The face is the "way in which the other presents himself, exceeding *the idea of the other in me*" (Levinas, 1999, p.50). I may receive from the Other beyond my capacity, "which means exactly: to have the idea of infinity" (Levinas, 1998a, p.51). It also implies to be taught. It is a teaching that brings me more than I contain.

To experience the other in her/his alterity implies being appealed to, and contested by the other. The relation with alterity involves a behaviour called *substitution* (Levinas, 1999). It is putting myself in the place of the other, not to find out how to take advantage of him/her but to answer his/her needs. It implies caring for the Other as a person without expecting any reciprocity (Carrasquilla, 1991). Responsibility and care for the Other should not depend on reciprocity (Carrasquilla, 1991; Levinas, 1998a). I should care for the Other regardless of their values, rights, deserts, possessions or knowledge. This caring for the Other just because s/he is an Other is deeply rooted in the culture of several Colombian Amerindian tribes. This has become evident during the last year when tens of thousands of unarmed Amerindians have repeatedly put at risk their lives in order to protect the lives of policemen while they are being attacked by the guerrilla groups with machine guns (Bohórquez, 2001; Roa, 2001a,b).

### 3.1.2.3 Against the Reduction of the Other to the Same

The reduction of the Other to the Same implies violence (Wyschogrod, 1989). Levinas claims that the non-self cannot be subsumed under the notions of representation and knowledge (Levinas, 1998b). We should not acknowledge the Other just to *suppress* or *possess* him/her, just to incorporate him/her within the expanding circles of the Same. On the contrary, we should be open to receive, to learn from the Other what we do not possess or know (Davis, 1996).

The relationship between the Same and the Other should *avoid the dissolution of either* (Levinas, 1998a). We should be aware of neither privileging the Same rather than the Other, nor the Other rather than the Same. Any of this would reproduce a

totalitarian way of thinking. The Same would be invaded, suppressed by the Other, or vice versa.

### 3.1.2.4 Systems and Infinity

Levinas suggests that Western philosophy has failed to think of the other as Other[31] (Davis, 1996). I claim that something similar has frequently occurred within the systems thinking field. The Other is acknowledged just to be *suppressed, controlled, possessed*[32]. Control and knowledge become frequently basic categories for approaching the system (e.g., Churchman, 1968). The presence of the will to control and possess has been noticed by other thinkers (e.g., Jackson, 1991a; Fuenmayor, 1995). Examples of the will to control and possess can be found in the works of many systems thinkers (e.g., Quade, 1963; Jaffe, 1967; Hall, 1973; Hoag, 1973; Beer, 1986). Other writings provide examples of systems approaches to study organisations and social phenomena that systematically ignore the alterity of the Other, that do not confront the Other as a face (e.g., Wright, 1960; Forrester, 1961, 1973; McDonough, 1963; von Bertalanffy, 1968; Mesarović et al., 1973; Klir, 1985; Sterman, 2000). They ignore alterity or attempt to counteract it. The notion of intentionality implicit in these versions of systems thinking reveals to me a world that is constantly my own *possession*. Even systems thinking approaches that speak of emancipation have sometimes assumed this notion of intentionality. This is for instance the case of the System of Systems Methodologies (SOSM) (Jackson and Keys, 1984). See Gregory (1992) and Midgley (1995) for critiques. This is also the case of Flood (1990) who "succumbs to the dangers of imperialism by subsumption" (Gregory, 1996, p.620).

Moreover, there is another totalitarian aspect of Western systems thinking which is an expression of Westerncentrism. During the last centuries the expansion of Western countries (European and North American countries) has not only been economic but also educational and cultural. In this process the otherness of the former colonies has usually been ignored. Mignolo (2001) and Fals-Borda (1973) have argued that within the social sciences an intellectual colonisation remains in place. Dussell (1998) argues

[31] Levinas is referring to the metaphysical Other, who is prior to all imperialism of the Same (Levinas, 1998a).
[32] Possessing is "suspending the very alterity of what is only at first other" (Levinas, 1998a, p.38).

the same within the field of philosophy. I claim that something similar has happened within the systems field. Intellectuals from Western countries frequently expect others, such as Latin Americans, to address the same problems that are important for them and their contexts. We Latin Americans often follow their expectations by focusing only on their debates and forgetting the debates in our own countries. Mignolo illustrates this with an example: "The 'postmodern' debate in Latin America [...] reproduces a discussion whose problems did not originate in the colonial histories of Latin America but in the histories of European modernity" (Mignolo, 2001). In Latin America I have observed that intellectuals usually prefer to ignore that they are colonised, because decolonising their minds usually reduces their income and makes their intellectual success more difficult within a generally colonised intellectual local community. Therefore, in countries with very limited research resources, intellectuals end up "reproducing or imitating the patterns, 'methods', and above all, the questions raised by the social sciences under different historical and social experiences" (Mignolo, 2001)[33]. Within the systems thinking field the majority of Latin American practitioners and researchers end up using the European and North American methodologies and addressing questions raised within quite different historical and social contexts[34]. Something similar happens within the ADR field[35]. By doing this Latin American systems thinkers frequently ignore the alterity of those who live within their own contexts and contribute to their marginalisation.

The denial of the Other's alterity is a denial of his/her rationality. It is an imposition of my own rationality as the unique and correct one. With the denial of alterity the unity of reason as comprehension and knowledge imposes itself. I oppose this conception that imposes upon the world the products of my mind, that subsumes the Other under the hegemony of the Same and ethics under the notion of knowledge[36]. My rejection of the totality of being is also a rejection of the unity of reason (see also Rosenzweig, 1971). I conceive the world as a multiplicity rather than a totality (the

[33] In my case I have drawn on Western methods but interpreting them through my own methodology.

[34] Some Latin American efforts to create systems perspectives, such as interpretive systemology, frequently suffer from Eurocentrism (for instance, see Fuenmayor's 1991a,b).

[35] As the reader will see later on, this thesis attempts to contribute to the decolonisation of the Colombian mediation field by challenging the sources of colonisation of mediation in Colombia, and by producing knowledge on mediation with and for the local people, valuing their particularities and differences.

[36] Moreover, I claim that all knowledge is partial, provisional and developed within specific historical contexts (see Foucault, 1988).

latter would involve assuming the internal unity of reason) (also see Maturana and Varela, 1992; Taket and White, 1996). The arguments from Levinas that I have highlighted reiterate an important theme of postmodern thought:

> "This is the theme that resists the unrelenting tendency of the will to knowledge and truth where Reason—when unmasked—is understood as always seeking to appropriate, comprehend, control, master, contain, dominate, suppress, or repress what presents itself as 'the Other' that it confronts" (Bernstein, 1991, p.71).

I favour systems approaches moved by a desire, an attraction towards that which transcends me and my categories, that strives towards alterity (a rupturing of totality), that welcomes the Other and promotes the calling into question of the Same by the Other. I favour systems approaches that consider seriously that the "relation between the same and the other is not always reducible to knowledge of the other by the same" (Levinas, 1998a, p.28).

The word 'system' invokes knowledge. 'Approach' invokes ethics. Ethical language "is the very meaning of approach, which contrasts with knowing" (Levinas, 1999, p.193). An approach should ultimately be a substitution, i.e. putting myself in the place of the other, to find out how to answer his/her needs. It implies experiencing the Other as a challenge to the coherence of the world as I conceive it.

At this point I want to clarify that I am not simply in favour of a reversal of priorities whereby infinity abolishes totality, or the Other displaces the Same. I have already argued that neither the Same nor the Other should be privileged. Thus both totality and infinity and Same and Other should be preserved. Rather than using here a logic of "either/or" I use a logic of "both/and". Suppressing one of the terms would lead us to the very totalising thinking that I oppose. In the previous paragraphs I have opposed more explicitly the abolition of infinity, merely because I think that people tend to abolish more frequently infinity rather than totality. However, preserving both totality and infinity is not easy and it implies a permanent tension. In the same way that there is a tendency to incorporate the Other within the expanding circles of the Same, there might be a tendency to incorporate infinity within the expanding circles of totality. We should acknowledge a lack of intelligibility when I and the Other

establish a relation. The Other must not merely become an object of knowledge and/or experience (for knowledge is unavoidably my knowledge, and experience is unavoidably my experience). The Other might be known or experienced as far as we want to preserve totality, but not as far as we want to simultaneously preserve infinity. We shall avoid the diminution of the alterity and infinity of the Other.

### 3.1.2.5 The System and Totality

Temporarily, I may conceive a situation as "a totality" (or whole). However I shall remember that a totality is the product of knowledge, and because knowledge is unavoidably *my* knowledge, a totality is *my* totality, or one of *my* totalities. Moreover, I shall be open to the face-to-face relationship that interrupts all totalities.

In order to grasp how we can preserve both totality and infinity within a systems approach, Levinas' distinction between synchrony and diachrony is helpful. "Synchrony unites all moments and all statements in a single unbroken time sphere where reason asserts its claim to universal validity" (Davis, 1996, p.88). Preserving both totality and infinity appears problematical in that we put them together *in the same* time. We may be tempted to do so because we might consider them from the perspective of logos, which involves thematizing, synchrony. However, the beyond Being involves diachrony, a world that implies speech that takes place in different, irreducible times (see O'Connor, 1988). Thus, we should consider totality and infinity to be *in different times*.

The self requires a separate existence that would disrupt any totality (Levinas, 1998a). This disruption, this discontinuity, is brought about by the impossibility of abolishing alterity from the system. Therefore, any system which involves human beings should not be considered merely as a totality, but as a mental construction that inevitably implies alterity, infinity. A system cannot be identified exclusively with a totality nor a mere part of a totality. The infinity of the Other prevents totalisation. Otherwise, both self and the Other would be the elements of a larger whole or totality that would undermine their separateness (Davis, 1996). Alterity makes separation possible. A system, therefore, implies separation. This separation between the Same and the Other brings novelty and *pluralism*. Pluralism, which implies not subsuming the Other

under the Same, is an ethical demand for a systems approach that does not privilege totalisation over infinity.

### 3.1.3 Critical Systems Thinking

In section 3.1.2 I presented an ethical conception that affected my research process. It affected the methodological choices I made for conducting the research, and the way I interpreted and modified the terms I found in the methodologies and methods I drew on to construct the methodology I used. Therefore, I have presented the ethical conception first so as to help the reader to understand the meanings I attribute to the concepts I will use in this document. Many of the concepts are drawn from Critical Systems Thinking (CST), the approach I used for conducting the research. The main reason for selecting this approach was the relevance that the themes addressed by CST have for my research process, albeit augmented by my reading of Levinas.

It is worth clarifying that there are several approaches within CST, and therefore several interpretations of what CST is and what its main themes are. The approaches to CST include the SOSM (Jackson and Keys, 1984; Jackson, 1987a; Flood and Jackson, 1991a), creative design of methods (Midgley, 1990, 1997a,b), Total Systems Intervention (TSI) (version one) (Flood and Jackson, 1991a), critical appreciation (Gregory, 1992, 1996), TSI (version two) (Flood, 1995a,b), pragmatic pluralism (White and Taket, 1997; Taket and White, 2000), critical pluralism (Mingers, 1997a) and a transformation-competence perspective (Ormerod, 1997). Also, diverse authors have interpreted the main CST themes in diverse ways (e.g. Flood and Jackson, 1991b; Jackson, 1991b; Schecter, 1991; Midgley, 1995). Therefore, for a researcher it is important to clarify his/her interpretation of the main themes s/he perceives as being part of CST. This is what I will do in the next section. I see these as themes for debate that underpin the particular CST perspective I have selected for conducting the research: The creative design of methods (CDM) (Midgley, 1990, 1997a,b, 2000). Later on I will argue why CDM was preferred over other CST approaches.

### 3.1.3.1 Three Main Themes

I perceive CDM as involving three main themes: improvement, critical reflexivity, and pluralism.

#### 3.1.3.1.1 Improvement

During the first years of CST's development, Habermas' (1972) theory of knowledge-constitutive interests was at the centre of CST. Jackson (1985) introduced this theory into CST and it strongly influenced CST's development. In particular, it introduced a commitment to *human* emancipation: "... critical systems thinking is *dedicated to human emancipation* and seeks to achieve for all individuals the maximum development of their potential" (Jackson, 1991b). This commitment was also promoted in later CST writings (e.g., Flood and Jackson, 1991a). Midgley (1995) has cogently argued against Habermas' theory. He claims that adopting Habermas' notion has the risk of perpetuating the idea of the human domination of nature (Habermas, 1972, stated that man has an interest in controlling and predicting nature and the social world). It can be added to Midgley's arguments that Habermas' assumption that human beings have an interest in 'controlling' the natural world seems to be opposed by studies of many Colombian Amerindian tribes whose worldviews and ways of life clearly reject Habermas' assumption (see Reichel-Dolmatoff, 1985, 1991a,b, 1996; Uribe et al., 1992). For tribes such as the Kogi, a notion of human 'emancipation' or of human interest in mutual understanding without actively involving non-human nature (a separation present in Habermas' language) is completely meaningless. It is no emancipation at all because it inexorably leads to the subjugation of non-human nature. Therefore, to assume Habermas' (1972) 'theory of knowledge-constitutive interests' in a research for which the Colombian Amerindians' conception of justice is relevant would be contradictory. This would imply beginning the research reproducing in a small scale one of the most oppressive actions of the invasion of the Americas: The suppression of the Amerindians moral frameworks (see section 4.3). Also, adopting a commitment like the one promoted by Flood and Jackson (Flood and Jackson, 1991a; Jackson, 1991b) that leads to the subjugation of non-human nature is

ethically unsound because it implies subsuming the other under the Same, something I strongly oppose (see section 3.1.2).

Henceforth, I will not adopt a commitment to 'human emancipation'. Instead, the theme I consider important is the one Midgley (1995) calls 'improvement', which allows for a conception of human well-being in harmony with the natural environment. The term 'improvement' is general enough to allow its interpretation in terms of a large variety of value systems (Midgley, 2000).

Following Churchman (1970), I will assume that the idea of improvement is linked to the *boundary* of analysis considered. It is related to *what* and *who* is involved in constructing each particular vision of improvement (Midgley, 1995). Thus, improvement can only be defined locally and temporarily. Because improvement can only be defined locally, choice is locally decidable. Nonetheless, choice has to be coherent and widely informed in order to be meaningful (see also Flood and Romm, 1996).

Adopting a particular boundary judgement[37] may make something appear as improvement that is not considered improvement when other boundaries are chosen. Therefore, to justify a change as improvement, reflexivity on boundary judgements is crucial. Defining the boundaries of improvement is an ethical issue. It also implies adopting a particular rationality at least temporarily, for the notions of rationality and improvement are inextricably intertwined. Moreover, future changes in the boundaries of analysis used for evaluating an improvement may alter the perception that we have of an improvement. Midgley argues that

> "improvement has been made when a desired consequence has been realised through intervention, and a sustainable improvement has been achieved when this looks like it will last into the indefinite future without the appearance of undesired consequences (or a redefinition of the original consequences as undesirable)" (2000, p.131).

[37] Midgley briefly defines boundary judgements as "distinctions of what exists" (2000, p.8). They may also distinguish what ought to exist. I will discuss this notion further in sections 3.1.3.1.2 and 3.1.3.3.4.

Churchman (1979) points out that we should expose our most beloved ideas to the possibility of destruction. Understanding specific improvement requires 'dialectical processes', i.e., finding out the strongest possible "enemies" of our ideas and debating with them. However, I do not agree with Ulrich's (1983) claim that because rationality is dialogical, plans for improvement have to be normatively acceptable to all individuals who partake in a given dialogue. This statement has sense for Ulrich given his adoption of the principle of universalisation. However, if this principle is not accepted, we may notice that different stakeholders who have divergent moral frameworks may be unwilling to normatively accept a plan for improvement although all of them consider themselves rational. Therefore, I consider that the acceptance as improvement of a plan by all the individuals who partake in a given dialogue might be morally desirable but not necessarily ethically required.

#### 3.1.3.1.2 Critical Reflexivity

Levinas (1998a) opposes reducing the Other to the Same. The rejection of this reduction and the arguments presented in section 3.1.2 are important for understanding an aspect of the notion of critique that I use in this thesis. Critique should avoid reducing the Other to the Same, but rather challenge the exercise of the Same. Critique should involve *questioning of any form of 'allergy' to the other which remains Other, a critique of the will to control and possess the Other, to reduce the alterity of the Other to the Same.* Of course, in our daily practice we may sometimes be unable to escape the possibility of reducing or ignoring the alterity of the Other. However, this does not mean that we should avoid the responsibility of acknowledging and welcoming his/her alterity: "We must resist the dual temptation of either facilely assimilating the alterity of 'the Other' to what is 'the Same' (...) or simply dismissing (or repressing) the alterity of 'the Other' as being of no significance" (Bernstein, 1991, p.74). *Critique should aim at uncovering, expressing and challenging the reduction of the Other to the Same that results from the will to control and possess the Other, from seeing the Other as no more than a reflection of myself, or from attributing no significance to the Other.* This implies calling into question the exercise of the Same. This is a critique of 'identity thinking' and

essentialism[38]. It is also a critique of those barriers that prevent individuals from learning from others. Additionally, it is a critique of those factors that hamper substitution (see section 3.1.2). The relationship with the Other cannot be reduced to 'objective' knowledge. We have to challenge this type of reduction. Critique involves reflexivity on knowledge and its limits and the ethics of our approach to others[39].

I will make a distinction between reflection and reflexivity. Reflection makes reference to a mirror image (Cunliffe and Jun, 2002), and self-reflection refers to a mirror self-image and the deliberate setback on the same self. Reflection is based on the notion that there is an outside reality that we can identify and explain. The ego that practices reflection but not reflexivity masters the world by conceiving it as a set of objects and refers these objects back to his/her own absolute perspective. Reflection is based on an objectivist ontology. Reflexivity is not based on this type of onto-epistemological assumptions. On the contrary, it questions and investigates how we might contribute to the *construction* of social and organizational realities, how we construct our actions and being in the world, and how the I approaches the Other.

Reflexivity involves finding out and questioning the basic assumptions that we make and that underlie our practices. It implies questioning our favoured points of view (Flood and Romm, 1996), moral frameworks, actions and practices. In this form it discloses new forms of knowledge and contributes to producing transformations (Cunliffe and Jun, 2002). Reflexivity involves thinking about different possible boundaries, questioning the taken-for-granted assumptions, and questioning the boundaries of knowledge (Midgley, 2000) (see section 3.1.3.3.4). Self-reflexivity implies uncovering and questioning our ways of thinking and behaving. It entails questioning our practices, our ways of approaching others, our relation to our surroundings and the wider context in which we live, our moral frameworks, and who we are (e.g., Gouldner, 1973; Harmon, 1995). Reflexivity can lead to a transformation

[38] By essentialism I mean "the view that all things have essential properties which can be discerned by reason" (Saint-André, 1999). Essentialism affirms the primacy of essences, that are regarded as permanent, unchanging, 'real' identities. "Essentialism assumes that words have stable referents....Words refer to fixed essences and thus identities are regarded as fixed" (De Vos and Teurlings, 2001).

[39] This type of reflexivity may involve other elements. For instance, as I will argue later on reflexivity on knowledge also involves reflexivity on power.

of the self (Midgley, 2000) and our interaction with everything that we perceive outside us. It involves a critical exploration of past, present and future.

Reflexivity entails appreciating the impact of our practices on the processes of constructing knowledge (Cunliffe and Jun, 2002). It involves more than reflection because it implies something more profound than understanding or reflecting about situations, environments, events or beings. Reflexivity implies a dialogue with the self in relation to its basic assumptions, knowledge and ethics. It helps the individual in transforming and going beyond his/her traditional assumptions, knowledge and ethical frameworks. It assist us in comprehending our social world and our place within it, in assessing the ethical implications of our actions, in conceiving and evaluating the transformations we want to produce in the social world and in establishing how we can transform knowledge, power relations and practices in different contexts. Reflexivity involves questioning and reforming social practices (e.g., see Giddens, 1990). It is partial since it is situated within historical processes and circumstances.

Reflexivity may appear as part of our encounters with others. It demands understanding that the alterity of the Other is not a mere reflection of myself. Therefore, reflexivity challenges both who I am and what I think, and it highlights that the world is not my possession. The face of the Other promotes a critical reflexivity upon myself. Through reflexivity my openness to the Other may transform my relationship with myself and with the Other. The reflexivity that the encounter with the alterity of the Other promotes demands me to be critical with myself, to question and challenge my interiority, my identity. In this sense reflexivity involves a turning inside out[40], a disclosure of oneself by putting aside one's defenses. Reflexivity implies receiving from the Other beyond my capacity.

Reflexivity is based on maintaining diversity and tension between different theories, models and methodologies (Flood and Romm, 1996). However, reflexivity also involves an exposure of the self, of subjectivity, in which the self is uncovered to

[40] On the contrary, reflection implies a return upon oneself (Levinas, 1999).

itself (Gregory, 1992). This inevitably requires exposure to the Other (Gregory, 1992; Levinas, 1999).

Critique implies the exploration of different alternative boundary judgements (Churchman, 1970, 1979; Ulrich, 1983; Midgley, 1992b). Boundaries define what and whose views are included in or excluded from analysis. This has already been discussed under the heading of 'improvement'.

Changing the boundaries allows for exploring different forms of knowledge, as well as diverse possible social identities and/or roles for the people involved. When boundaries are drawn looking 'outwards' toward the world, we speak of *first-order* distinctions (Midgley and Ochoa-Arias, 2001)[41]. When boundaries are drawn looking 'back' at the knowledge generating system[42] we call them *second-order* distinctions. *Second-order* distinctions concern the identity and role of the knowledge agent or knowledge generating system that makes first-order distinctions. Several second-order boundaries can be used: a single human being; a group of people; a group of people acting under the influence of their culture and structural relations; an organisation; an animal; etc.

Quite frequently, exploring a new identity may lead to a new form of knowledge, and vice versa. This results in different interpretations of a problematic phenomenon and of people's roles and identities (Midgley, 1997b).

#### 3.1.3.1.3 Pluralism

As I argued before, I consider pluralism, which implies not subsuming the Other under the Same, an ethical prerequisite for a systems approach. Additionally, because I do not only consider it convenient, but also justifiable, to take advantage of several

[41] The vocabulary has been adapted here to make it compatible with the language used in Midgley's (2000) latest work, but the distinctions used are the ones of the initial draft of Midgley and Ochoa-Arias' (2001) paper which I read in 1998.

[42] A knowledge generating system is a system that produces knowledge. Midgley (2000) has cogently argued that that the knowledge and actions of an organism should originate from the organism-environment pairing in interaction. Therefore, the boundary of a knowledge generating system might be wider than it first appears. Agents shall usually be considered as embedded in one or more knowledge generating systems.

boundaries, I regard it as equally justifiable to draw upon those theories that uphold, and are upheld by, diverse boundaries (see also Midgley, 2000). Therefore, I support theoretical pluralism. The latter contributes to a movement towards what is alien outside-of-oneself.

There is a substantial literature in CST justifying *methodological* pluralism against various alternatives (Jackson, 1987a; Flood, 1989; Gregory, 1992, 1996; Midgley, 1992b, 2000). I will not review this here as it is well known. However, I *will* discuss different approaches to pluralism, as some are better than others at avoiding a reduction of the Other to the Same.

I wish to avoid versions of pluralism that are closed to radically alien perspectives. For instance, this is the case with Flood and Jackson's (1991a,b) 'complementarism'. Gregory has pointed out that because of its tendency to "drive for consensus" complementarism "lacks the ability to provide for consideration of radically alien perspectives" (1996, p.606). This "drive" has its origin in the framework used (called the "system of systems methodologies") to align different systems methodologies with different types of perceived problem contexts (see Jackson and Keys, 1984; Jackson, 1987a,b, 1990; Flood, 1990; Flood and Jackson, 1991a). The notion of conciliation is central to the complementarist perspective (see Gregory, 1996), which aspires to integrate diverse strands of systems thinking (e.g., Jackson, 1987a; Flood, 1990). However, this focus on conciliation and consensus minimises the role of ambiguity and difference in a pluralist lifeworld (Gregory, 1996), reduces the possibility for multiple interpretations to flourish, promotes the superiority of one rationality over others, and hampers the welcoming of the Other by the Same, the calling into question of the Same by the Other (see section 3.1.2). As White and Taket argue, "most attempts by OR/systems thinking to deal with pluralism still involve a will to a singular truth, a will to a singular methodology, so as to tame, control or master rather than embrace it" (White and Taket, 1997, p.382).

A pluralist approach recognises and values the differences in multiple methodologies and methods (see White and Taket, 1997; Taket and White, 2000), and considers them complementary because they address different questions and/or involve different perspectives. The legitimacy and desirability of using a methodology or method

depends on our critical understanding of the context in which it is going to be applied, of the research questions being asked (Midgley, 1992a), and on the way the method addresses the needs, wants, moral concerns and feelings of those involved in the situation[43]. The latter is important for I consider it desirable for methodological choices to involve *substitution*.

Midgley (2000) claims that all theories are inevitable partial, and this partiality depends on the purposes and values of their authors and their communities of users. Every theory has to omit considerations that are substantial to other theories. Given that partiality is inevitable, I follow Midgley (2000) in embracing the possibility of working with a diversity of theories, knowing that each one privileges specific viewpoints, purposes and moral frameworks. Diverse theoretical positions are seen as "supplementing one another, rather than competing with one another" (Gregory, 1996, p.619). Being open to a multiplicity of theories allows a researcher to take advantage of more insights during his/her intervention (Gregory, 1992; Flood and Romm, 1996; Romm, 1996), to be more responsive to the concerns and feelings of those implicated in the situation, and to be more open to what is alien to him/her.

However, embracing theoretical pluralism raises two questions (Midgley, 2000):
- How to move between theories that make opposing assumptions?
- How to choose between theories during an intervention?

These questions will be addressed both in this section and in section 3.2. To assume theoretical pluralism has several implications. I consider the following important to my research.

1. Theories should be considered more or less useful in terms of the purposes of the intervention. This makes it possible to work with a theory although we know that it omits certain elements that seem to be relevant. Other theories will be selected to address those elements omitted by the first theory if they are indeed relevant.

[43] Notice that there are no 'objective' strengths and weaknesses of methods.

2. Choices are made in social contexts, where limits frequently have to be negotiated. Here critical thinking and dialogue become important.

3. The standards for making choices could be considered locally and temporarily relevant, instead of universal. Theoretical pluralism does not imply embracing absolute relativism, i.e. the denial of any standards or principles to guide choice and the adoption of the idea that all value systems are equally acceptable independently of the consequences for others (Midgley, 2000), and that therefore 'anything goes'. Absolute relativism assumes that all moral judgements are no more than judgements about undiscussable preferences. On the contrary, I argue that all value systems cannot be regarded as equally acceptable by a knowledge agent who examines them critically, and that moral judgements *should* be examined critically. However, choices are linked to the rationalities of knowledge generating systems. Foucault (1984b,c) proposes that knowledge, power and the identity of the agent are strongly interconnected. Therefore, choice between theories is affected and affects both power relations and agent's identities. Standards and principles of choice emerge from relations between power, knowledge and identities. Therefore, they are local and should be the object of agents' critical explorations through first- and second-order distinctions.

Because methodology is mainly theoretical, and it is desirable to engage in theoretical pluralism, then it is possible to have *methodological* pluralism too. Therefore, a large diversity of methods can be considered legitimate. I embrace methodological pluralism both at the level of methodological ideas, allowing others' insights about methodology to inform my own methodology, and at the level of methods so that we could use a large diversity of methods to achieve our purposes (Midgley, 2000). Different methodologies are conceived as assisting each other to produce an enriching understanding of the problematic situation and roles (see Gregory, 1996). This research is part of a continuous process of learning and reflexivity about methodologies.

### 3.1.3.2 Why CST?

I began the research process by getting in contact by e-mail with the director and some of the staff members of the MCBC. I told them that I was interested in helping them to explore a problematic situation that they considered important. As a result of our interaction we agreed that an interesting topic both for them and for me was the role of people's conceptions of justice in mediation processes. During that initial stage of the inquiry we were particularly interested in the following issues:

1. How do the participants in mediation processes (mediators and parties) deal with issues of justice during these processes?
2. What do people who participate in mediation processes mean by justice within this context?
3. Can this research promote any changes in the practice of mediation at the MCBC that could promote a sense of improvement among the different stakeholders linked to this situation?

The MCBC was particularly interested in the topic of justice within mediation. They have claimed for years that mediation is a way of "bringing justice to the people". This claim was in harmony with the predominant vision of mediation at the Colombian "Ministry of Justice and Law". The latter considered mediation as a mechanism for improving the access of the people to justice (MJD, 1995). Nonetheless, the MCBC staff had not researched whether mediation did indeed improve the access of people to justice. Moreover, they were not clear what "improving people's access to justice" or "bringing justice to the people" might mean. They expected the research process to help them clarify these issues.

However, the aforementioned concerns were not independent of other concerns that were shared by the MCBC's managers and several mediators. During the first half of the 1990s the MCBC was the leading organisation in the field of mediation in Latin America. At that time it perceived only one major rival for its international activities in Latin America: the conflict resolution group based at Harvard University. In Latin America this group was organised into two consulting firms: Conflict Management Inc. (CMI) and Conflict Management Group (CMG). At the beginning of the 1990s the MCBC had two basic advantages over CMI and CMG: MCBC's workers spoke Spanish and they better understood the local cultures. Nonetheless, by the mid 1990s

the MCBC's competitive advantage began to erode, basically because CMI and CMG incorporated Latin Americans in their firms. Moreover, the Harvard based team had an advantage that was difficult to match: a well-known reputation of excellence. In 1995 the MCBC's staff saw that their competitive advantage was disappearing, and considered that they needed to be more *critical* about their theories and practices. They were interested in *finding out and questioning the basic assumptions they were making* in their theoretical considerations and mediation practice. They considered that this type of reflexivity could lead them to develop a new vision of mediation that was "better" for the Latin American people. This was considered beneficial not only for their social effects upon the people, but also because it could help them in maintaining their leadership position in Latin America. They realised that the main weakness of the Harvard-based team was their almost complete lack of research in Latin America, and they also considered that somehow theories developed in North America might not be appropriate within the Latin American culture. Moreover, the MCBC's managers were suspicious of the Harvard-based team's defence of the idea that the principles of good dispute resolution practice are generic for all contexts[44].

At the beginning of 1996, the Director of the MCBC expressed to me her concerns in the following way: "I think we need some sort of deep reflexivity on our theory and probably on our practices as well. It has to be *some sort of reflexivity that is critical of our ideas*, and that can contribute to *improve* them positively"[45] (emphasis added). During this conversation I discovered that she was willing to expose the MCBC's most beloved ideas to the possibility of destruction. Therefore, later on I considered that an approach that emphasised *critical reflexivity* and the notion of *improvement* could be particularly beneficial in this situation. Although my research was expected to be focused only on those aspects of mediation related to justice, the MCBC's managers considered it positive if it could be critical in relation to other aspects of mediation practice too. Moreover, during the initial stages of the research endeavour I talked to the MCBC's Director about the type of critique she was expecting. It became clear to me that they did not just want some sort of instrumental criticism that

[44] This perception by the MCBC's staff was the result of interactions they had with the Harvard-based team as a result of seminars they organised together in Bogota.
[45] My translation of her words during a meeting at the MCBC on February 23, 1996.

assumed some implicit or explicit standards or norms. They wanted to involve critical questioning of implicit and/or explicit standards or norms as well.

As a result of my perception of the problematic phenomena and the way I interpreted that it was perceived by the MCBC's members with whom I had the opportunity to interact, I thought that CST was a good methodological option to guide the research process. Many other methodological options were also explored[46] but CST was preferred because of the importance that the three main themes of CST have for the exploration of this problematic situation. Let me explain this in more detail.

1. *The relevance that critical reflexivity had for this research endeavour.* I considered critical reflexivity to be important for several reasons.

   1.1 As the MCBC's managers and several of its mediators had told me, they were not aware of many of the assumptions they were making in their daily mediation practice. As long as these assumptions remained hidden it was difficult for them to obtain any substantial improvement of their mediation practice. These hidden assumptions operated as a trap:

> "A trap is a trap only for creatures which cannot solve the problems that it sets. [...] We trapped tend to take our own state of mind for granted—which is partly why we are trapped. With the shape of the trap in our minds, we shall be better able to see the relevance of our limitations." (Vickers, 1970, p.15)

The trap in this case was the mediation practitioners' set of assumptions about mediation and conflict that they accepted beyond question or regarded as absolute, that were hidden to them as a trap is for many of the creatures that fall into it. As a result of my interaction with mediators for several years I believed that they could not challenge the foundations of the dispute resolution

[46] They included soft systems thinking (Checkland, 1981; Checkland and Scholes, 1990), system dynamics (Forrester, 1961, 1968; Wolstenholme, 1990; Morecroft and Sterman, 1994), organisational cybernetics (Beer, 1979, 1981, 1985, 1994; Espejo and Harnden, 1989; Espejo et al., 1996), interpretive systemology (Fuenmayor, 1991a-c, 1997a,b; Fuenmayor and López-Garay, 1991; Ochoa-Arias, 1993), critical systems heuristics (Ulrich, 1983, 1996a,b), strategic assumption surfacing and testing (Mason and Mitroff, 1981), interactive planning (Ackoff, 1981), etc.

theories they used mainly because they were unaware of these foundations (I was not aware of them either in my previous mediation work).

1.2 The perception that critical reflexivity was important in this case was not only mine. Several MCBC mediators with whom I have taught mediation courses throughout Colombia and Latin America had also expressed to me their desire to identify and question their assumptions in relation to mediation. They perceived this as an opportunity for finding new ways of practising mediation and transforming their professional practice. Many of them were aware that they had previously adopted ways of practising mediation copied from foreign cultures without being reflexive about their implicit assumptions and the consequences of these.

1.3 I considered critical reflexivity valuable for I thought that it was important for achieving the aims of the research process to uncover and question the assumptions about justice made by mediators, disputants, and those persons who trained mediators at the MCBC.

1.4 A critical examination of the notion of justice was also considered important during the initial stages of the research process given the MCBC's concern with what "improving people's access to justice" could mean for the practice of mediation.

2. *CST's promotion of debates on 'improvement'.* As I argued before, members of the MCBC expected the research process to improve the practice of mediation in the organisation. However, what could constitute improvement was problematical for them, and I was aware that it was necessary to be critical about this during the research process. I considered that CST offers useful ideas for promoting deeper reflexivity on improvement than the one that could be attained by using some other approaches. The connection that CST makes between improvement and boundary judgements offered a path for being reflexive on improvement throughout the whole research process.

3. *CST's adoption of a pluralist approach.* I considered a pluralist approach valuable for two reasons:

3.1 Ethical reasons. Gregory has argued that our lifeworlds[47] are pluralist, i.e. "comprised of many diverse perspectives, which relate to different life-style choices made by individuals within society" (1996, p.606). Exploring conceptions of justice and notions of mediation, tasks that were valuable for achieving the aims of this thesis, implied dealing with a plurality of perspectives. As I argued before, in a case like this pluralism is an ethical demand that involves not subsuming the Other under the hegemony of the Same. Therefore, in this case I considered it crucial to use a methodology that respected the alterity of the other, that avoided ignoring the Other or just acknowledging it to suppress or posses it, and that allowed the Other to challenge my comprehension and possession of the world.

3.2 Pragmatic reasons. Given the complexity that this research involved I considered it valuable to use a methodology that embraced both theoretical and methodological pluralism.

- Theoretical pluralism. I considered it important to work with diverse theories during the research process in order to be able to take advantage of more insights during the intervention than a single theory could provide (Gregory, 1992; Flood and Romm, 1996; Romm, 1996). As Taket and White argue: "There is no one theory providing the ideal plot, but many to choose from, like different soundtracks for different occasions" (1993, p.879). At a theoretical level, the theories I had available (e.g., about justice and mediation) were clearly partial. Each one omitted considerations that were important to other theories. Therefore, it was better to work with a diversity of theories, knowing that each one privileges specific insights, purposes, rationalities and moral frameworks. In this research I had to deal with a wide diversity of knowledges (about

[47] Lifeworld designates "the irreducible fabric of meanings of everyday life, in which the meanings of specialized, constructed or formalized languages are embedded" (Shapiro, quoted in Habermas, 1987, p.viii).

justice, mediation, etc.) related to a large diversity of interlinked elements (social justice, autonomy, impartiality, rationality, etc.). To tackle this set of very diverse elements that are studied in several disciplines (mediation theory, philosophy, social psychology, legal studies, organisational theory, systems thinking, theology, game theory, etc.), I considered theoretical pluralism valuable for enriching the research.

- Methodological pluralism. I also regarded methodological pluralism beneficial for this research for several reasons: 1. It helps the intervener to understand the problematic situation and roles in more depth and from a wide diversity of perspectives (Romm, 1996). 2. It helps the intervener to be more responsive to the changing conditions of the research, to its different requirements and particularly to the concerns of diverse stakeholders. 3. I considered it valuable to mix diverse methods and to have the flexibility to incorporate new methods into the methodology during the research process, depending on changing needs and on the diverse interpretations I and others could develop of the problematic phenomena. 4. Methodological pluralism helps in preventing the marginalisation of some stakeholders. The latter may prefer methodological insights and/or methods which are not the ones initially selected by the researcher. By not being open to the possibility of using the methods preferred by the stakeholders, the intervener may contribute to marginalising them. Some of them may even build up a strong opposition to the researcher. Other stakeholders may feel that they are not heard well by the researcher because of the methods used by the latter, and therefore refuse future involvement. Having enough flexibility to use a large variety of methods may help in these situations.

I preferred CST, and in particular CDM, over other methodological options not only because I perceived that its main themes were particularly relevant and helpful for the exploration of the problematic situation I faced, but also because CST provides concepts, principles and tools[48] that I consider are particularly valuable for pursuing

[48] I conceive tools as bits of methods (Midgley, 2000).

the aims of this thesis. A basic overview of these concepts, principles and tools will be presented below.

### 3.1.3.3 Some Central Concepts, Assumptions and Tools

I will introduce most of the methodological ideas and methods used in the research in this and subsequent sessions. Although it might seem like a long and detailed list, I argue that it is preferable to provide this information in a single chapter than continually interrupt the later narrative about my work with the MCBC by giving methodological explanations.

#### 3.1.3.3.1 Against Both Universalism and Absolute Relativism

My approach involves post-modern and modern elements, avoiding versions of post-modernism that embrace *absolute* relativism (see section 3.1.3.1.3) as well as modern totalising theories. I do not embrace the principle of universalisation, i.e., the notion that a moral judgement can be consistently applicable to all people in all circumstances. The principle of universalisation has been adopted by some systems thinkers (e.g., Ulrich, 1983; Flood and Jackson, 1991b) but not by others (e.g., Flood and Romm, 1996; Midgley, 2000; Taket and White, 2000).

However, to reject universalisation at a methodological level does not imply embracing absolute moral relativism. On the contrary, I adopt an ethics that proposes a moral self who should avoid easy excuses, who ought not to retreat uncritically behind the particular moral codes demanded or proposed by a specific society or community. This type of ethics is more demanding and critical than the one that results from adopting a formal static moral code.

In general, I would avoid claims to universality at a theoretical level. I want to avoid arguing that the only valid way of acting or thinking is the one I have adopted. This would be uncritical. A critical attitude demands permanent openness to the possibility of a better argument or action than the one I have chosen.

### 3.1.3.3.2 Intervention

Because of the strong relationship between knowledge and power (for instance, see Foucault, 1973, 1980, 1984d, 1992a) I argue that an intervention to change or develop knowledge and understanding has the possibility of generating important practical and material changes. I interpret knowledge as basically produced by "acts of distinction" (see Midgley and Ochoa-Arias, 2001). What is distinguished is distinguished from its scene (Fuenmayor, 1991b). Acts of distinction may distinguish between *first-order* phenomena (or phenomena "in the world") and *second-order* phenomena (i.e., phenomena which construct acts of distinction, which are "in the world" and which are called knowledge agents) (Midgley and Ochoa-Arias, 2001)[49]. Knowledge agents may share acts of distinction and co-create new distinctions.

Intervention requires that a knowledge agent consciously facilitates the modification of acts of distinction. Because of the close relationship between power and knowledge, intervention also implies dealing with power. Foucault (1984d, 1992b, 1995) has pointed out that knowledge and power imply themselves reciprocally: while knowledge assumes and constitutes some power relations, the latter carry with them the correlative constitution of fields and objects of knowledge.

### 3.1.3.3.3 Agent-knowledge-power Dynamics

Agents, knowledge, and power are concepts that I consider inextricably linked. The name agent-knowledge-power dynamics is derived from Midgley's notion of subject-knowledge dynamics (Midgley, 1997b). By "agent" I mean any individual or larger social group that has an identity associated with it.

Let me briefly present some ideas, which I will use later on, on the concept of *power*. Foucault conceives of power primarily as something that flows, more than an object one can possess or alienate others from. He points out that power "is never located here or there, it is never in the hands of any individual, it is not an object like wealth or goods" (1992b, p.144). Power refers to the way in which *certain actions may*

[49] "Acts of distinction may be made about either what *is* (or was or will be) the case, what *could* be the

*structure the field of possible actions* (Foucault, 1982). The use of power implies the creation of objects of *knowledge*, but the latter carry with them effects of power (Foucault, 1992a,c). Thus, power and knowledge are inextricably linked. I refer to them as *knowledge-power*. When someone appears to be exercising power over another, what is behind this can be interpreted as a process of knowledge formation which legitimises certain social practices.

In this scheme, the agent that knows, the various forms of knowledge, and the objects to be known, may be seen as effects of knowledge-power and of the historical transformations thereof. Additionally, the conception of the agent-knowledge-power dynamics also points to *the influence that agents have upon knowledge-power formations by making and sharing new acts of distinction* (Midgley and Ochoa-Arias, 2001). Hence, there is no such thing as a neutral intervention.

#### 3.1.3.3.4 Boundary Judgements

I have already discussed the notion of boundary judgements (see sections 3.1.1 and 3.1.3.3.4) and its relation with other notions such as improvement, critique and pluralism (see section 3.1.3). Here I will only discuss issues not previously addressed.

Fostering reflexivity on boundary judgements helps in deciding about issues of inclusion, exclusion and marginalisation. Midgley (1992b) has argued that when we draw the boundaries of a system, we can look for grey areas in which marginal elements lie. The latter are elements that are neither fully included in, nor excluded from, the definition of the system. They are usually recognised as being pertinent or relevant in some sense to the system under consideration, but they are not taken as being within the system's primary boundary (see Figure 3.2). The identification of a marginalised element involves the recognition of an alternative system boundary (a secondary boundary). The marginal area can be recognised only with respect to this secondary boundary, because otherwise we would lack any way to distinguish what is marginal (though probably initially hidden) from what is excluded. Figure 3.2 represents this. Theoretical critique of systems boundaries entails the explicit

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case if things were different, what *ought to be* the case, etc." (Midgley and Ochoa-Arias, 2001, p.628).

formulation of the secondary boundary and making informed and reflexive choices between boundaries (Midgley, 1992b).

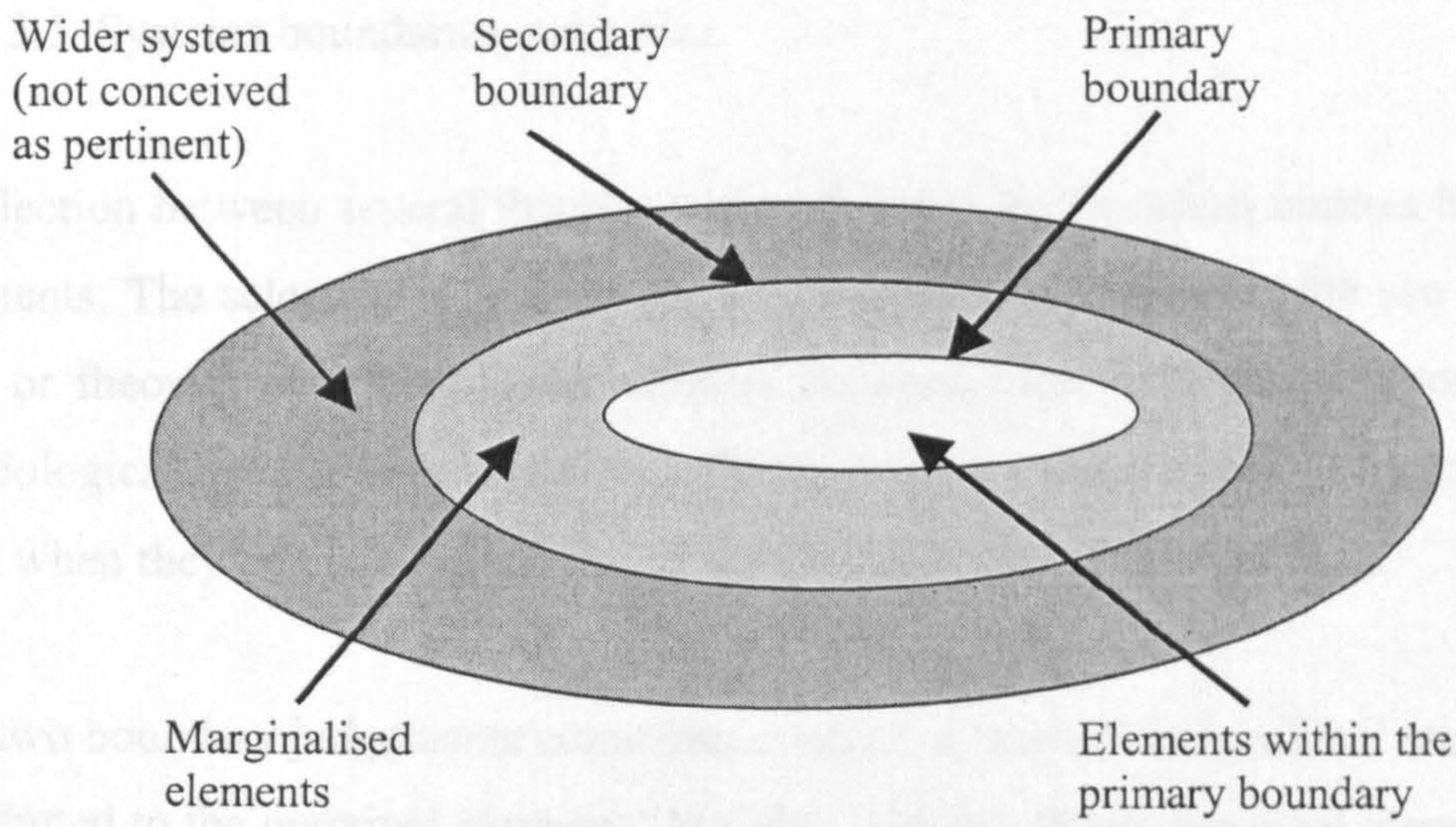


Figure 3.2. Marginalisation (taken from Midgley, 1992b, p.7)

*How issues are perceived and what actions are taken depends on where boundaries are constructed and what moral frameworks guide that construction*[50] (Churchman, 1970; Ulrich, 1983; Fuenmayor, 1990; Midgley, 1992b, 2000). Choosing any specific system boundary affects the ethical stance taken (Ulrich, 1983; Midgley, 1992b). The latter also affects the selection of boundaries (see Figure 3.3). Hence, to select a boundary is an ethical choice[51].

[50] I have changed Midgley's (1992b, 2000) word 'values' for 'moral frameworks' for the latter is much more comprehensive than the former. In fact, 'values' invokes a particular type of moral framework (for more details see the next footnote and Andrew, 1995).

[51] In some writings (e.g., Midgley, 1992b; Ulrich 1996a,b) the terms 'value judgements' and 'ethics' are used interchangeable, as if they were equivalent. I prefer to avoid this for 'ethics' can be considered a much wider concept than 'value'. Andrew (1995) shows that the value-discourse has only a recent origin. Therefore, it is only recently that the notion of justice has been associated with the term 'value'. On the contrary, at least since Aristotle, 'justice' has been clearly associated with 'ethics' (for whom justice was a 'virtue' or 'excellence', something that has a different meaning to the one commonly associated with the word 'value'). 'Ethics' (and 'morality') encompass themes that are crucial for understanding the notion of justice and which are not included in the popular meaning of the word 'value' (see Rachels, 1995). Henceforth, I will prefer the term 'ethics' instead of 'value' or 'value judgements'.

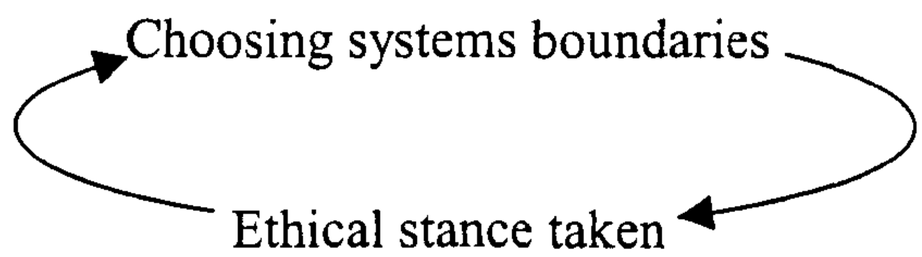


Figure 3.3. Systems boundaries and ethics

The selection between several theories and methods to guide action implies boundary judgements. The selection of boundaries for understanding promotes the use of some theory or theories over others, and choices between these boundaries favour some methodological options over others too. Therefore, researchers have to be particularly critical when they embrace theoretical as well as methodological pluralism.

When two boundary judgements come into conflict, a 'sacred' or 'profane' status may be attributed to the marginal elements (Midgley, 1992b). When marginal elements are considered 'profane', the primary boundary is taken as the main reference point for decision making. Thus, marginal elements are devalued and the secondary boundary is ignored. When marginal elements become 'sacred', they become important and the secondary boundary is reinforced and its ethic receives priority. This implies a social process, and not something done by a lone decision-maker.

Some social rituals can surround this process[52]. Its observation helps us in discovering where sacredness or profanity might lie. The whole process is represented in Figure 3.4. This Figure also shows how conflicting ethics arise from the primary and the secondary boundaries. Moreover, conflicts of ethics that take place at a local level (for instance, between two persons) can frequently be linked to much wider struggles between competing discourses, although this is not represented in Figure 3.4 to preserve its intelligability. See Midgley (2000) for further details.

[52] Ritual is "behavior, in whatever context, that contains certain stereotypical elements that involve the symbolic expression of wider social concerns" (Midgley, 1992b, p.11).

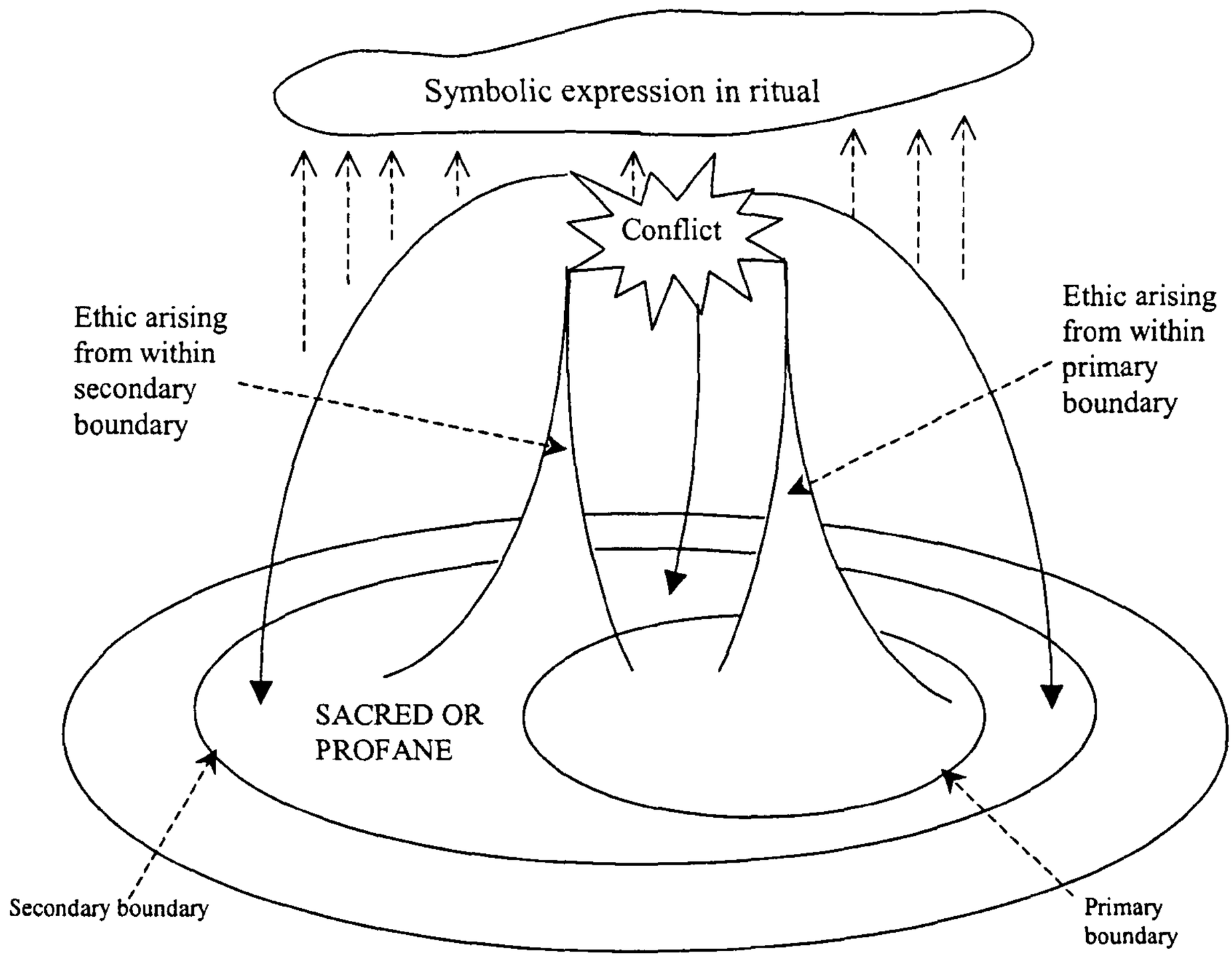


Figure 3.4. Marginalisation, conflict and ethics (taken from Midgley, 1992b, p.12)

Midgley (2000) argues that a consensus between a group of stakeholders on the boundary that they believe should be drawn does not exclude the possibility of this being the result of undetected processes of marginalisation and conflict. Therefore, consensus should not be the automatic stopping point for critical inquiry.

The ethics of stakeholder groups with overlapping concerns may come into conflict. The stakeholders may agree on some issues, be independent in relation to other issues, and disagree on a third group of issues. That is what usually takes place in a negotiation process. Figure 3.5 represents this situation[53].

[53] The presented model is similar but not the same as the most recent model developed by Midgley (2000) and Yolles (2001). In their models only one boundary is associated with each actor's concerns.

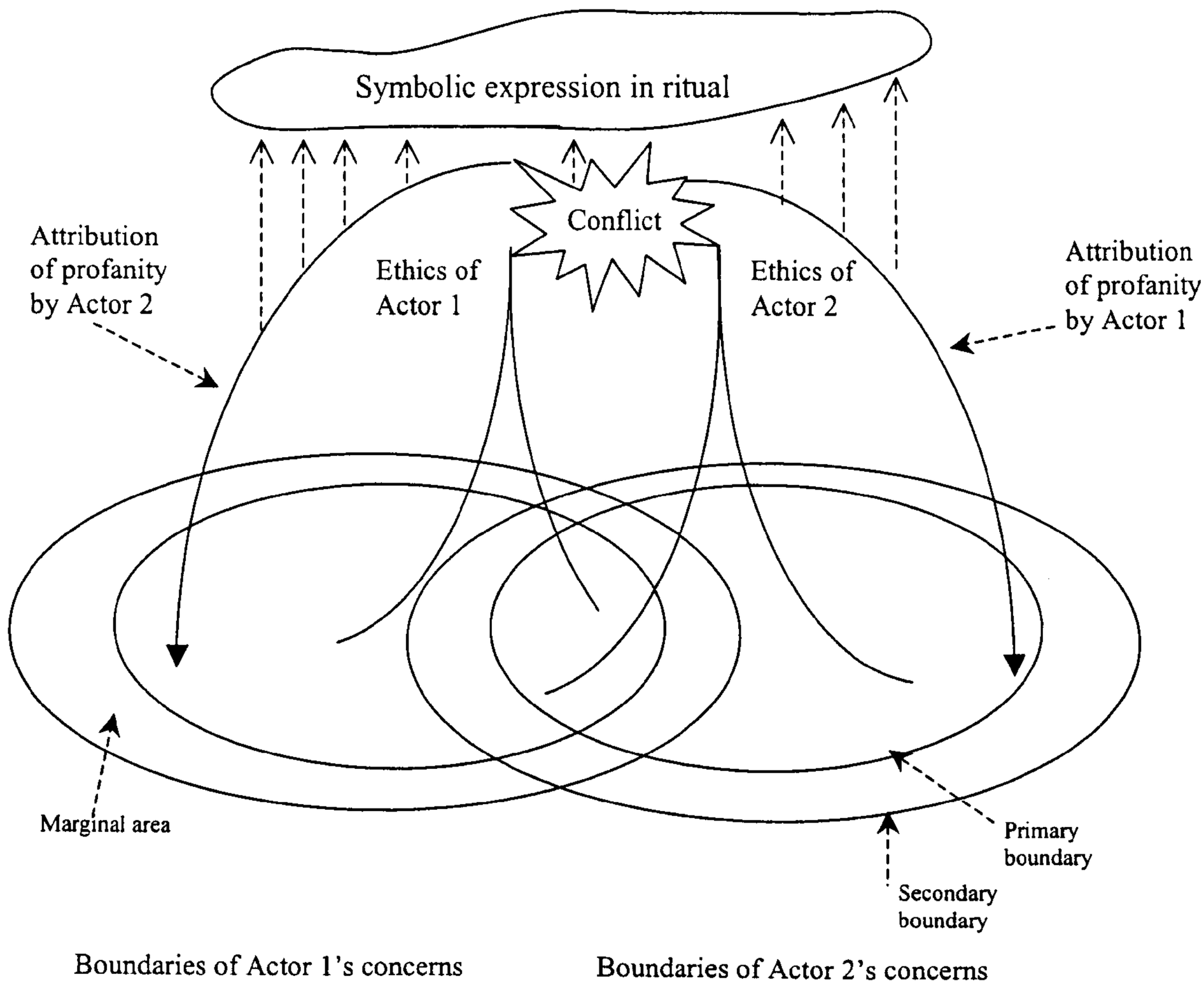


Figure 3.5. Marginalisation and overlapping stakeholder concerns.

Figure 3.5 includes three types of marginal areas. First, overlapping marginal areas remind us of challenging consensus about boundaries agreed by both parties. Second, the independent marginal areas are related to issues considered by one party as marginal, but which are excluded from the other party's considerations. Third, the other marginal areas refer to issues that constitute overlapping concerns for both parties, but which one considers marginal while the other does not. This model was useful for interpreting conflicts between different stakeholders during my fieldwork.

The development of processes of marginalisation can be seen as part of agent-knowledge-power dynamics (see also Lax and Sebenius, 1986a; Yolles, 2001). We are immersed in a dynamic web of boundaries and ethical conflicts that we co-create. Our notions of justice are part of these constructs and they affect their production.

## 3.2 Methodological Design

I will now move on to discuss the particular methodological design developed in this research.

### 3.2.1 Mixing Methods

Methodological pluralism often involves mixing methods, and there are several approaches within CST to this practice (a few were mentioned in section 3.1.3). For selecting among these approaches I took into account several considerations. Arguably the most important was based on the ethical assumptions and concepts discussed in section 3.1.2. Rather than trying to totalize and possess everything, there should be a respect for discontinuities, disturbance, and the impossibility of integrating in a single framework the ideas, viewpoints, moral frameworks, paradigms, etc. of others. We should stop trying to incorporate everything within the expanding circles of the Same. For instance, within CST this has happened several times when CST perspectives propose the existence of *a* meta-methodology that establishes the logic for making choices between other methodologies (e.g., Jackson and Keys, 1984; Jackson, 1987b; Flood and Jackson, 1991a). Several systems thinkers have opposed this (e.g., Gregory, 1996; Taket and White, 1996; White and Taket, 1997; Midgley, 2000).

I selected the creative design of methods (CDM) as the basic approach for conducting the research because it does not propose a meta-methodology and it allows the welcoming of the Other by the Same, the calling into question of the Same by the Other, the respect for the alterity of the Other. CDM assumes that an intervener who faces a complex situation can benefit from using a large variety of methods, and can also develop his/her own methods. Therefore, it is frequently more appropriate to think in terms of *designing* methods than choosing between 'off-the-shelf' methodologies (Midgley, 1997a). CDM involves understanding the problematic situation in terms of a group of systemically interrelated questions that manifest the agent's purposes and these purposes may evolve during the intervention, requiring the adjustment of the methods that are used (Midgley, 1992b).

Methods should not necessarily be conceived as independent. On the contrary, a system of purposes can be addressed through a *synergy* of methods. Therefore, having the purposes of the research in mind, I searched for a synergy of methods that could address them properly.

Several methods were used within the framework of CDM to tackle the variety of issues involved in the problematic phenomena under study[54]. I will present a very basic description of the most important methods used during the research.

### 3.2.1.1 Critical Systems Heuristics (CSH)

Ulrich's (1983, 1996b) CSH is based on the later work of Habermas (1976, 1984a,b) concerning rationality and communication. However, Ulrich (1983, 1996a) considers Habermas a utopian, and he proposes that taking advantage of both the concepts of 'critique' and 'systems' can help us in overcoming some of the limitations in Habermas' thinking. Ulrich (1996a) considers that if citizens get some training in surfacing and questioning boundary judgements, they can contest the uncritically asserted rationality claims of experts in a compelling way. CSH addresses the issue of rationality in planning, that is, how any ordinary citizen "can be 'competent', make cogent arguments as to whether some proposal for improvement is well justified or not" (Ulrich, 1996b, p.11).

CSH is not supposed to be a self-contained 'method' of planning. Rather, it aims at complementing other approaches so as to make them more critical and to emancipate ordinary people from those who practice methods in a dogmatic way. Therefore, I conceived CSH as a good 'ingredient' for developing my methodology.

CSH's conceptual framework includes a set of 24 critically-heuristic boundary questions. They refer to twelve categories derived from the concept of the 'system of

[54] Here I adopt Midgley's (1997a) distinction between method and methodology (see also Checkland, 1981). *Method* is interpreted as a set of techniques that can be used to reach a specific end, while a *methodology* is considered a theory of research practice underpinned by distinguishable philosophical principles. A methodology implies the use of rational decision making to account for the selection of one or more methods that are considered appropriate for some specific circumstances.

concern' that is relevant to identify the meaning of 'improvement'. Ulrich (1983) presents how the questions are derived. The questions, which may be asked both in an 'ought' and in an 'is' mode, are in some of Ulrich's writings (e.g., 1983, 1996b).

I considered the use of CSH as particularly useful within the context of CDM. For instance, the questions promised to be a great tool for critically surfacing ethical options and conflicts, particularly because they could help in exposing to all the people affected the moral implications of any 'practical' improvement proposed by the stakeholders. CSH also provides a good option for involving common citizens in the research endeavour. Ordinary citizens should have a say in what is *just* and *good* for them. Otherwise, this research that deals with the topic of justice might not do justice to the people!

#### 3.2.1.2 Action Science

'Action science' (AS) is a development of Lewinian action research (Lewin and Grabbe, 1945) that "focuses on the problem of creating conditions for collaborative inquiry in which people in organizations function as co-researchers rather than merely as subjects" (Argyris and Schön, 1996, p.50). Inquiry is "the intertwining of thought and action that proceeds from doubt to the resolution of doubt" (Argyris and Schön, 1996, p.11). AS promotes 'productive'[55] organisational learning (Argyris et al., 1985; Argyris and Schön, 1996).

Compared to other forms of human inquiry, such as co-operative inquiry (Heron, 1981a,b, 1996; Reason, 1988) and participative action research (Fals-Borda and Rahman, 1991), AS focuses more on "the implicit cognitive models of practitioners and on their actual verbal actions and the aim is to make these more explicit and congruent such that practice is more effective" (Moggridge and Reason, 1995, p.163). This helps to explain why I preferred AS over other forms of human inquiry. I was interested in how the implicit models mediators use in their work affect the way they handle issues of justice, and I wanted to make these models explicit so that their

[55] 'Productive' has to be defined locally and temporarily bearing in mind all the stakeholders' viewpoints, because the meaning of the term 'productive' is related to *what* and *who* is involved in constructing each particular vision of 'productiveness' (see also Argyris and Schön, 1996).

assumptions could be examined and challenged. I also chose AS for its emphasis on producing organisational learning, that I considered valuable in this case if any transformation of mediation practice was going to take place, and for its intention to consider practitioners also as researchers. In this way, in my research AS was seen as contributing to the creation of a community of inquiry in a community of social practice[56] (Argyris et al., 1985).

How do changes in thinking and acting become "organisational"? There are two complementary ways (Argyris and Schön, 1996):

1. When the results of inquiry become embedded in an organisation's holding environment such as the minds of individual members, organisation's files (which contain its actions, decisions, regulations, policies, etc.), maps and messages, and other physical objects.

2. When it produces organisational knowledge embedded in routines and practices that constitute an answer to many of the organisation's objectives. Knowledge of tasks may be represented as systems of beliefs that underlie actions, as prototypes that guide new actions, or as procedural prescriptions for actions. These are called "theories of action".

A theory of action may take two forms (Argyris and Schön, 1974, 1996):

1. Espoused theory. It is the theory of action that is made explicit to describe or explain a given pattern of activity.

2. Theory-in-use. It is the theory of action that is implicit in that pattern of activity. It must be inferred from the observation of that pattern. Observation might lead to different alternative *interpretations* of the theories-in-use, which are hypotheses to be tested[57].

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[56] A community of practice is made up of professionals—such as mediators—"who share a common language of practice' learned in the course of their education and apprenticeship" (Friedman, 2001, p.160). A community of inquiry is "a special kind of community of practice whose central activity is the creation of knowledge" (Friedman, 2001, p.160).

[57] "Action science attempts to integrate the descriptive, context-rich power of the interpretive approach

Organisational theories-in-use may be tacit and may not match the organisation's espoused theory (Argyris, 1990; Argyris and Schön, 1996). Organisational theories-in-use frequently remain tacit because they are made undiscussable. The organisation's members' changing interpretations of the organisation shape both the theory-in-use of the organisation and the espoused theory.

Organisational learning takes place when the members of the organisation inquire into a problematic situation as agents of the organisation. They perceive a mismatch between expected and actual results of action, and this triggers a process of thought and action that enables them to modify their conceptions of their organisation and/or organisational phenomena, as well as their activities in order to bring outcomes and expectations into line. In so doing they change the theory-in-use. To be 'organisational' the learning that results has to become embedded in individuals' images of organisation and/or in the 'epistemological artifacts' (memories, maps and programs) that belong to the organisational environment (Argyris and Schön, 1996).

Argyris and Schön (1974, 1996) focus both on *single-* and *double-loop* learning (see also Argyris, 1990). While some learning occurs within existing systems of values and the action framework of which the actions are part (single-loop learning), other learning implies modifications of values and frameworks, and requires deep reflexive inquiry (double-loop learning). *Single-loop learning* is instrumental learning that modifies strategies of action or assumptions that lie beneath these strategies without changing the values and norms of a theory of action (see Figure 3.6).

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with the rigorous testing of validity demanded by the positivist framework" (Friedman, 2001, p.161) (see also Argyris et al., 1985). AS followers commonly assume that persons act based on reality images that they construct, and therefore no individual can claim an ultimate knowledge or 'reality' (e.g., Friedman and Lipshitz, 1992; Friedman, 2001). When disagreements arise, people can engage in joint tests of their reality images. All knowledge of 'reality' is regarded as hypothesis rather than fact, and it is assumed to be partial (Friedman, 2001).

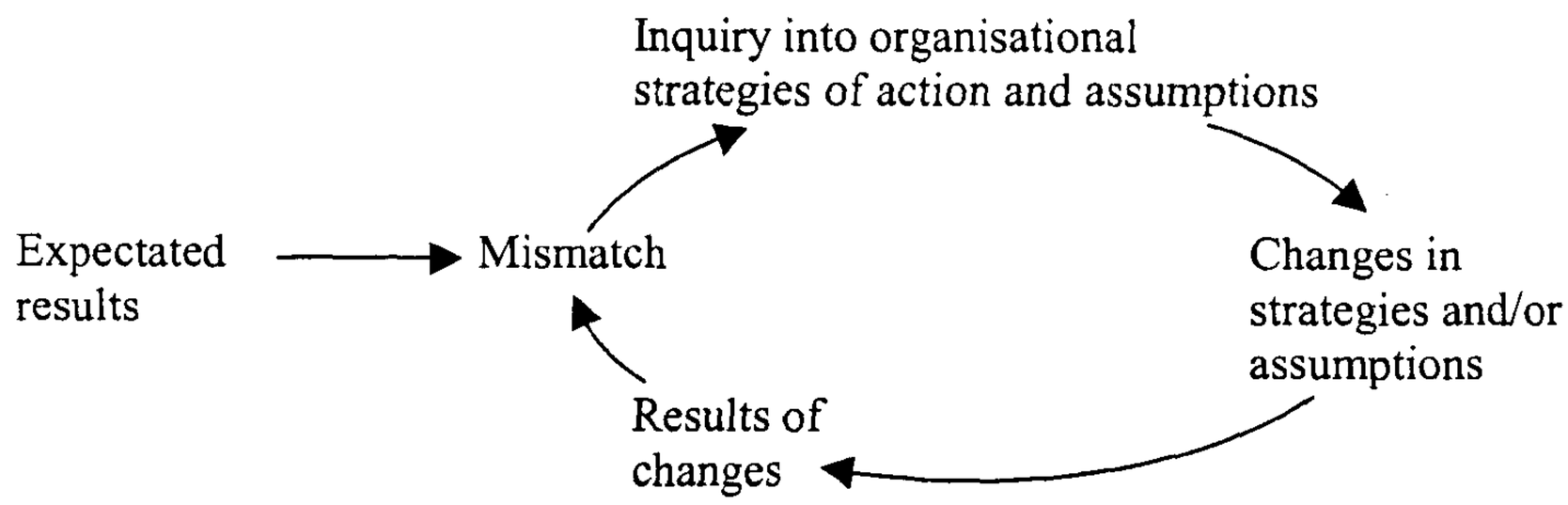


Figure 3.6. Single-loop learning

Double-loop learning is learning that modifies the values of the theory-in-use, as well as its strategies and assumptions. Two (and not just one) feedback loops are active in this case. Strategies and assumptions may change simultaneously with changes in values[58], or the latter may be the cause for modifying the former. While single-loop learning is instrumental and concerned mainly with effectiveness (how best to reach existing goals, maintaining organisational behaviour within existing norms and values), double-loop learning involves modifying the organisation's values and norms.

Theories-in-use are more powerful in explaining and changing behaviour than the theories of action individuals espouse, particularly in relation to double-loop learning (Argyris and Schön, 1996). Many theories-in-use are counterproductive for double-loop learning, and may contribute to make actors unaware of their counterproductive features.

When people find issues that are threatening or embarrassing, their thinking and action generally conform to a type of model of theory-in-use called Model I (Argyris, 1990, 1993a). Model I inhibits double-loop learning. Model I theory-in-use is characterised by the following action strategies (Argyris and Schön, 1996):

[58] As I argued before, in general I prefer to use the terms 'moral frameworks' and 'ethics' rather than 'values'. However, in this section I have chosen to use the term 'values' because I want to give a broad overview of action science using the terms that its original creators (Argyris and Schön) employ to present it. As a result of my research I changed several of the action science concepts substantially. I will discuss these changes later on.

- Unilateral design and management of the environment.
- Own and control the tasks.
- Unilateral self-protection.
- Unilateral protection of others from harm.

Argyris and Schön (1974, 1978, 1996) develop an alternative model (Model II) that they claim helps in reducing the inhibitions to double-loop learning that Model I promotes. The main values of Model II are "valid information, free and informed choice, and internal commitment"[59] (Argyris and Schön, 1996, p.117). Model II promotes double-loop learning through which individuals can challenge the main assumptions behind their own and others' perspectives, and it helps in publicly testing their underlying hypotheses.

I decided to use AS because I considered that it could contribute to the synergy of methods that could advance the purposes of the research. The following are some of my reasons:

- Because double-loop learning involves questioning one's own assumptions and behaviour, I considered it a good tool for supporting the type of critical reflexivity I considered important for this research. It could contribute to enhance our understanding of mediation practice as well as of the role of the mediators and interveners, allowing multiple interpretations to be surfaced.

- Organisational learning, and not merely individual learning, was seen as a tool that could contribute to encourage a long term focus for the organisation, and that may produce long-term results that the organisation could pursue on its own, without the future presence of an external intervener. Because AS promotes the participation of organisational practitioners in the inquiry, it might prepare them for future research work and critical reflexivity.

[59] "External commitment" leads employees to carry out their jobs as specified by their bosses who define the employees' objectives and ways to reach them. By contrast, "internal commitment" comes from the employees themselves and leads them to own the situations with which they are confronted (Argyris, 2000).

- AS could help the researchers to overcome the limitations of purely instrumental learning, which supports a single interpretation of improvement. I conceived double-loop learning as pivotal in the research because I thought that dealing with a multiplicity of notions of justice—which are part of the moral frameworks people have and are connected to their rationalities and basic assumptions—will require the challenging of moral frameworks. Therefore, I envisioned a strong synergy between boundary judgements, CSH and double-loop learning (as promoted by Model II).

- AS was considered as an excellent method for promoting critical reflexivity on the MCBC's theories-in-use, as well as on the patterns of interaction between the members of the organisation and its clients (see Chapters 9 to 11). AS could help practitioners discover for themselves the counterintuitive effects disguised by their sometimes tacit, background models.

- Research on the basic assumptions people have in an organisation could trigger "primary inhibitory loops" (Argyris and Schön, 1996), i.e. self-reinforcing patterns of action strategies that can inhibit productive learning. These loops can promote 'dysfunctional' responses that may reinforce defensive routines[60] and make controversial topics and important issues undiscussable. As this could produce very negative effects for my research, I considered that the use of AS could help me and the other would-be-inquirers to overcome this potential problem.

Action science provides several tools that a researcher can use. One of them is the "ladder of inference", which represents a mental pathway of increasing abstraction that operates in our minds leading us frequently to misguided beliefs (see Argyris et al., 1985; Argyris, 1990; Ross, 1994). Figure 3.7 represents it.

[60] Defensive routines are actions, policies or rules of behaviour that prevent individuals from experiencing embarrassment or threat, and inhibit them from identifying, diminishing, and getting rid of the causes that lead to potential embarrassment or threat. They are usually below people's level of awareness. They are anti-learning, overprotective and self-healing (Argyris, 1990).

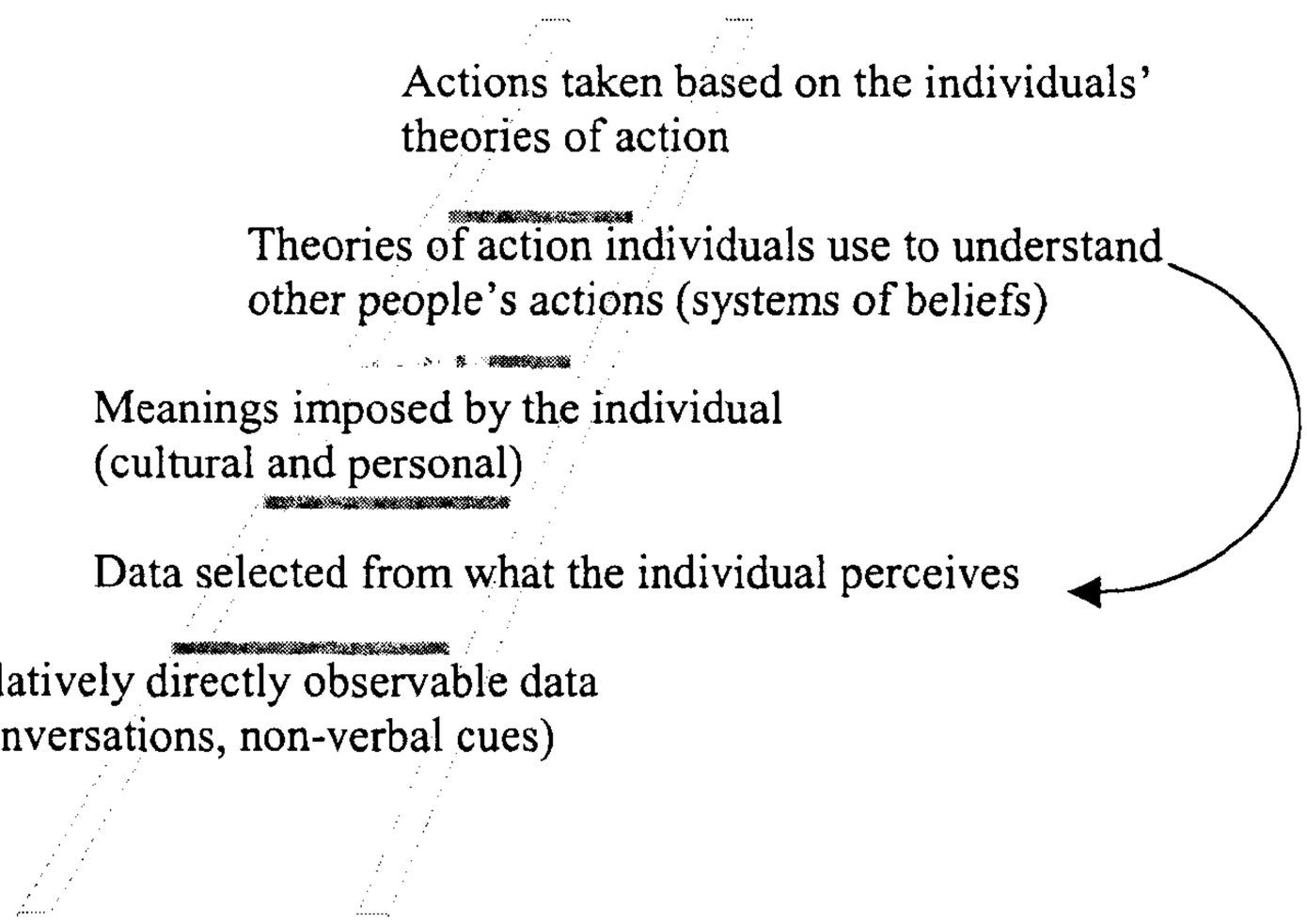


Figure 3.7. The ladder of inference (based on Argyris, 1990; Ross, 1994).

The data at the bottom as well as the actions at the top can be recognised by people's senses. However this is not the case of all the other rungs of the ladder. They are frequently unquestioned and unclear even to the person that generates them. Questioning them is a form of critical reflexivity that constitutes a source of individual and organisational learning. Figure 3.7 shows one feedback loop which is quite important in conflict resolution processes. This loop points out that our system of beliefs influences the data we select, which in turn can reinforce our system of beliefs.

### 3.2.1.3 Interviewing

When the fieldwork was planned, interviews were considered a useful method of data collection for eliciting people's conceptions of justice within the wider context of CDM. Unstructured and semi-structured interviews were considered particularly useful[61].

[61] The fixed schedule required by structured interviews was considered inappropriate for exploring the diversity and complexity involved in the problematic phenomena and roles that were going to be studied. For instance, many aspects of the meaning of the notion of justice would be lost during an interview if the interviewer could not depart from a fixed set of questions.

The interviews of the mediators and the parties were conducted based on real cases so as to be able to contrast respondents' answers with behaviours observed during the mediation process. In general, I considered that the interviews, combined with the observation process, were going to help me to understand the participants' conceptions of justice, the ways mediators deal with issues of justice during mediation processes, and the expectations disputants have of how mediators should deal with issues of justice. I also planned in advance to interview the director of the mediation centre on the official policies of the centre in relation to justice issues, as well as on her personal conception of justice.

However, as a result of the participative nature of the research process, and the reflexivity that it generated, the aims of the interviews changed during the fieldwork. Given the space limits of this document, I will present only the final aims and design of the main interviews.

My purpose in using the interviews was not typical of a large-scale survey (see Oppenheim, 1992). I planned to use the interviews for gathering interpretations about how mediators deal and ought to deal with concerns over justice that arise during mediation process, and for nurturing a debate that could trigger reflexivity and changes at the MCBC. For instance, in relation to the conceptions of justice of the disputants and the parties my purpose was not that of getting an accurate and statistically reliable set of data about the notions of justice of the populations of disputants and mediators[62]. Rather, my purpose was to use the interviews for promoting a debate among mediators about the implications that the existence of a diversity of conceptions of justice has for the theory and practice of mediation. This could help mediators take more informed decisions, and to hear potentially alien perspectives that they may have ignored in the past. In other words, interviews were seen as a tool for promoting an organisational learning process guided by CST and action research ideas that were expected to produce changes in the practice of mediation.

[62] This would require financial resources that I did not have during my research. For instance, it would require hiring and training intensively (on conceptions of justice) a large group of experienced interviewers who would have to work doing interviews for several months. This was not only

I would like to point out the importance of understanding the use of interviews and the study of cases as part of a CST approach mixed with action research ideas. Susman and Evered (1978) argue that action research contributes to the growth of knowledge through the development of "practices". The latter focuses on '*knowing how*' rather than 'knowing that'. Therefore, rather than looking for generalisations that can be applied to a wide population (such as Bogota's population), action research is more valuable when it aims at the generation of principles and guidelines for dealing with situations. The interviews that were conducted and the cases that were observed were not planned to be a source of generalisations about a population, but rather contributions for developing a '*knowing-how*' in relation to the practice of mediation. During their future practice, mediators will be left to decide the relevance to themselves in their own situations of the interviews and cases that were studied. This implies conceiving the professional activities of mediators in terms of an epistemology that sees them not as subjects who do their practice after reflexivity has finished, but as agents embedded in knowledge generating systems that continuously practice *reflexivity-in-action* (Schön, 1983).

The preceding discussion does not imply that the interviews were not rigorously designed and applied. Indeed, the interviews were designed following the advice of 'experts' in the area. Also, a literature review on the topic of interviewing was done in preparation for the fieldwork. For instance, I drew upon McNeill (1990), Oppenheim (1992), Gilbert (1993), Lee (1993), Renzetti and Raymond (1993), Robson (1993), Kvale (1996) and Holstein and Gubrium (1997).

### 3.2.1.4 Study of Cases

The study of cases[63] is one of the main methods in traditional mediation research (e.g., Kolb, 1983; Kelly and Gigy, 1988; Araki, 1990). I planned to observe mediation

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impossible for me during my research, but it was also unnecessary given the objectives of my research.

[63] I talk about the study of cases rather than 'case studies' for I use the word cases not in the same way as many advocates of case studies in the sociology literature have done (see Hammersley, 1989; Stake, 1994, 1995), but rather in the way it is frequently used in the organisational learning literature (e.g., Argyris, 1993b). By cases I understand particular situations experienced by people that one or more inquirers decide to study using information from a diverse range of sources, usually trying to include accounts of all persons involved in the situation or of persons who represent groups of those involved.

cases, a practice which is common among researchers in the ADR field[64]. During the planning stages of the research project, the MCBC's staff and I jointly decided that twenty cases were going to be studied. A case consists of one mediation process that is initiated with the presence of two opposing parties. A case may take one or more mediation sessions, which are scheduled across a number of days.

Cases were expected to be a source of information about the behaviour of the mediators and the parties during a mediation process. In order to avoid unilateral interpretations of what takes place during mediation sessions, I carried out interviews with the parties and the mediator about each case, and debated with the mediators what happened during the case. Therefore, I used different data sources about the same situation. I also used different methods (e.g., statistical techniques, discussions) for analysing the information provided by the diverse data sources, and diverse groups of persons participated in the analysis (the mediators acting independently, I, and a group of co-researchers organised at the MCBC). This implies the use of triangulation within the research (in terms of data sources, tools, and analysing agents). Triangulation is common in action research projects (Fals-Borda, 1991; Meyer, 1993). I perceive it as an expression of pluralism (see Taket and White, 1996; Mingers, 1997b).

### 3.2.1.5 Statistical Methods

Although the interviews were mainly a source of qualitative information, the analysis of the data was also supported by multiple statistical techniques. The decision to use statistical methods was taken during the fieldwork as a result of the enormous amount of information produced by the interviews and the complexity of interpreting it. I would like to emphasise that statistical techniques were used as tools that contributed to the process of qualitatively interpreting the data contained in the interviews, and that revealed 'hints' or 'clues' for interpreting that information. Statistical techniques were put at the service of an interpretation that mainly had a qualitative character. Multivariate techniques (e.g., cluster analysis, logistic regression models) and a wide

[64] The presence of co-mediators who help the main mediator in their work, and researchers who just observe mediation processes without intervening in them is common in mediation practice (see Kolb, 1983; McKinney et al., 1996). For years this has been a common practice at the MCBC, where

variety of bivariate and univariate techniques were used to carry out the analysis of the data (see Chapters 9, 12 and 13).

### 3.2.1.6 System Dynamics Methods

During the early stages of the project I did not plan to use system dynamics. Nonetheless, during the fieldwork some of its methods and concepts proved to be useful. Therefore, I found it justifiable to draw upon those methods.

Although computer simulation models are generally an important element in the application of system dynamics (Sterman, 2000), I did not use these types of models because of the unavailability of data in relation to the problematic phenomenon. Rather, I draw upon a qualitative system dynamics tool (causal loop diagrams or CLDs) that is helpful to make explicit interpretations of some problematic phenomena (first-order distinctions) and organise more informed debates about these interpretations.

A CLD involves a set of variables connected by arrows that represent their relationships (see Figure 3.8). Arrows in causal loop diagrams are labelled with a "+" or a "-". "+" means that when the first variable increases its value, the value of the second one also increases (and when the value of the first variable diminishes, the value of the second variable also diminishes). "-" means that when the first variable increases its value, the value of the second one diminishes (and when the value of the first variable diminishes, the value of the second variable increases).

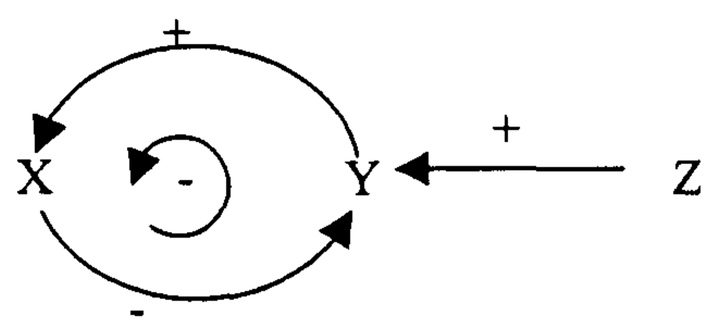


Figure 3.8. Example of a causal loop diagram

mediators are quite used to the presence of external observers during mediation processes.

A set of arrows may represent a feedback loop, as the one constituted by variables X and Y in Figure 3.8. Each loop is labelled with a "+" or a "-." "+" means reinforcing (the relationships within the loop tend to create exponential growth or collapse) and "-" means balancing (the causal influences in the loop tend to keep things in equilibrium). See Sterman (2000) for further details.

CLDs were chosen because:

- They can help individuals to surface and make sense of their mental models about a phenomenon. They provide a way of representing these mental models that can be easily communicated to other people (Senge, 1990; Senge et al., 1994).

- CLDs contribute to the holistic understanding of situations in which multiple variables are interrelated (Sterman, 2000). Therefore, they can contribute to more holistic debates about problematic situations and roles.

### 3.2.1.7 Games and Negotiation Simulations

Games and negotiation simulations with their associated discussions are frequently used as learning tools in the ADR field (e.g., Brett et al., 1985). Initially I did not plan to use them as part of the research process. However, during the fieldwork I found they could contribute to the learning process I was promoting. Therefore, I used them frequently. Although I designed many of the games and negotiation simulations I used, I also drew on a few presented in the ADR literature. However, I employed the latter almost always redirecting them in terms of purposes not usually associated with them and not described in the theoretical underpinnings put forward by their authors. This use is similar to what Flood and Romm have called the "oblique use of methods" (1996, p.207). I interpret this as part of what I have called methodological pluralism. I consider it legitimate to reinterpret a game or simulation through my own methodology and to use it with a new purpose based on my critical understanding of the specific context where I intend to apply the game or simulation.

### 3.2.2 The Cycle of Critical Distinctions

There are innumerable ways of putting into practice the Creative Design of Methods. I used it in this research in the form of the Cycle of Critical Distinctions (or CCD)[65], as Midgley and Ochoa-Arias (2001) have proposed for systemic intervention (see Figure 3.9[66]). CCD has two sides called 'first-order acts of distinction' and 'second-order acts of distinction'. They are strongly interconnected. Each one informs the other.

An intervention can be initiated by the identification of some problematic phenomena, or some problematic roles or identities. Let us assume that we focus first on problematic phenomena. With the help of the exploration of different boundary judgements, diverse interpretations (at least two) of the phenomena can be developed. The initial boundary critique should help identifying those persons who might be affected by the intervention. Those affected by the intervention should be involved in this process as far as possible. The purposes for the intervention should be revealed to those affected[67].

The problematic phenomena should be analysed in terms of what *is* and *what ought to be*. Means for going from the 'is' to the 'ought' should be explored in relation to each interpretation. Means are paths for achieving 'the ought', and they can be formal (such as well-established research methods) or informal. These methods are selected during the phase of choice, which also involves evaluating which theories and methods might be most convenient. During these processes learning might occur and the initial interpretations might be changed. All choices between interpretations and paths for intervention must be justified as well as possible. Knowledge agents are invited to defend their choices through dialogue.

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[65] I have borrowed this name partially from Midgley's (1997b) Cycle of Critical Action.
[66] This figure is similar but not the same as the one developed by Midgley and Ochoa-Arias (2001). The original has been modified based on my field work experience.
[67] This should be done prior to any interaction except if doing this closes possibilities for reflexivity (I will discuss this issue further later on) and/or puts the life of someone in danger. The latter might be the case in some situations in Colombia because of the war.

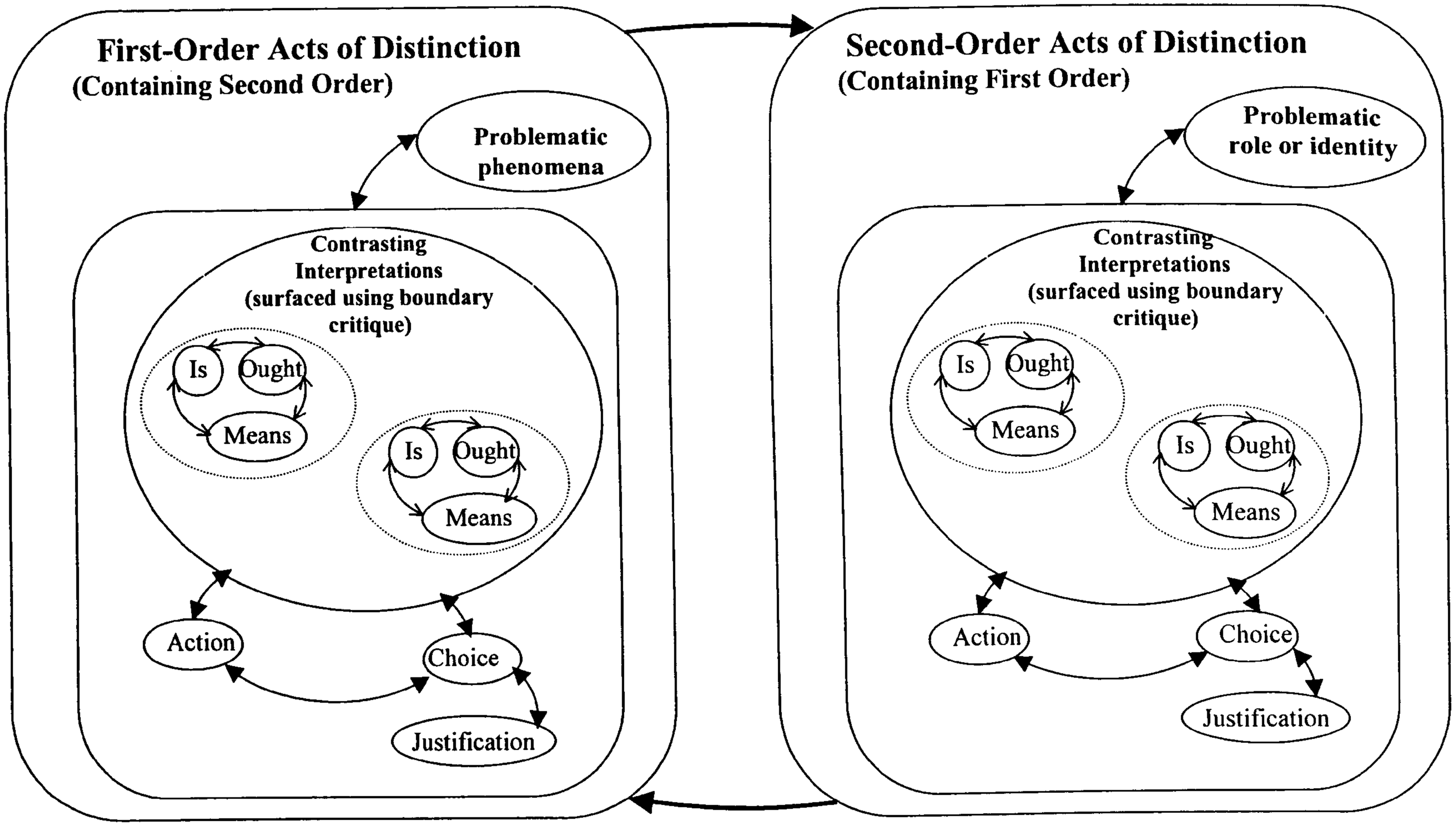


Figure 3.9. Representation of the Cycle of Critical Distinctions (based on Midgley and Ochoa-Arias, 2001).

Choices may feed back further processes of reflexivity (contrasting interpretations), or they may trigger action. Actions, which consist in the implementation of methods in order to achieve improvement, are based on means that are surfaced by boundary critique and other tools considered appropriate.

Let us move to the right hand side of Figure 3.9. As a result of first-order acts of distinction the role and/or identity of the knowledge agent may become problematic. It may also be considered problematic for reasons external to the CCD. The problematic role or identity can be subject to a similar process of reflexivity and action, but this time focusing on second-order interpretations. This may lead to modifications of the role undertaken by, or the identity of, the knowledge agent. The result of these second-order acts of distinction may feed back to inform the understanding and change of the first-order problematic phenomena.

In order to improve boundary critique at the level of first- and second-order acts of distinction, questions taken from Ulrich's (1983) methodology of CSH, or other methods, might be used. The inquirer should be critical in relation to the presuppositions flowing into her/his judgements. S/he should be reflexive on the problematic nature of her/his identity or role, and on the problematic nature of her/his intervention.

There is no predetermined point where a researcher has to start in order to use CCD. S/he can start by making first- or second-order acts of distinction. The way s/he organises her/his use of CCD depends on the changing nature of her/his aims, circumstances and on-going interpretations. CCD involves an on-going reflexivity that helps the researcher to organise her/his thoughts and to be more conscious about her/his interpretations, actions, and choices. The use of CCD can end for several reasons. They include the modification of the interpretations considered relevant, the disappearance of the problematic character perceived in the problematic phenomena or the problematic role or identity, lack of resources, time constraints, etc.

### 3.2.3 A Map of the Investigation

Figure 3.10 provides a schematic map of the investigation beginning with the design of the methodology and ending before the conclusions of the thesis were written. This map is intended to help the reader in understanding how the different parts of the thesis informed each other. The map includes 12 components. A number has been assigned to each component. For instance, component 9 is "Discussing the results of the interviews". Arrows indicate the main relationships between the components depicted in the map. Components are grouped into four phases. Each phase is distinguished by a different colour in the map. The first phase, identified by the yellow colour, includes only one component (component 1). The latter involves designing the methodology (see Chapter 3).

The methodological design led to the second phase of the research. This phase is described in Section 2 of this document. It is mainly concerned with an exploration of the conceptions of justice and mediation. It involves five components that form an integrated whole: doing some up-front boundary judgments, exploring the sources of the concept of justice in Colombia, understanding some relevant theories of justice, uncovering interpretations of mediation, and interpreting justice in the mediation literature. These components are depicted in red in Figure 3.10. The first of these components (component 2) involved making some up-front boundary judgments that were crucial for organizing the initial stages of the research (see section 4.1) and that led to two types of explorations. The first one was an exploration of the sources of the concept of justice in Colombia (component 3) (described in sections 4.2 and 4.3 of this document). Based on this exploration, theories of justice which were considered relevant to the research process were studied (component 4) (see Chapter 5). Additionally, the up-front boundary judgments previously described (component 2) also led to an exploration of multiple interpretations of mediation that were presented in the ADR literature of the English speaking countries of the Western world (component 5) (see Chapter 6). These interpretations, as well as the understanding of diverse relevant theories of justice obtained before (component 4), were useful for exploring how justice was frequently interpreted in the mediation literature (component 6) (see Chapter 7). The exploration of the conceptions of justice and mediation involved in

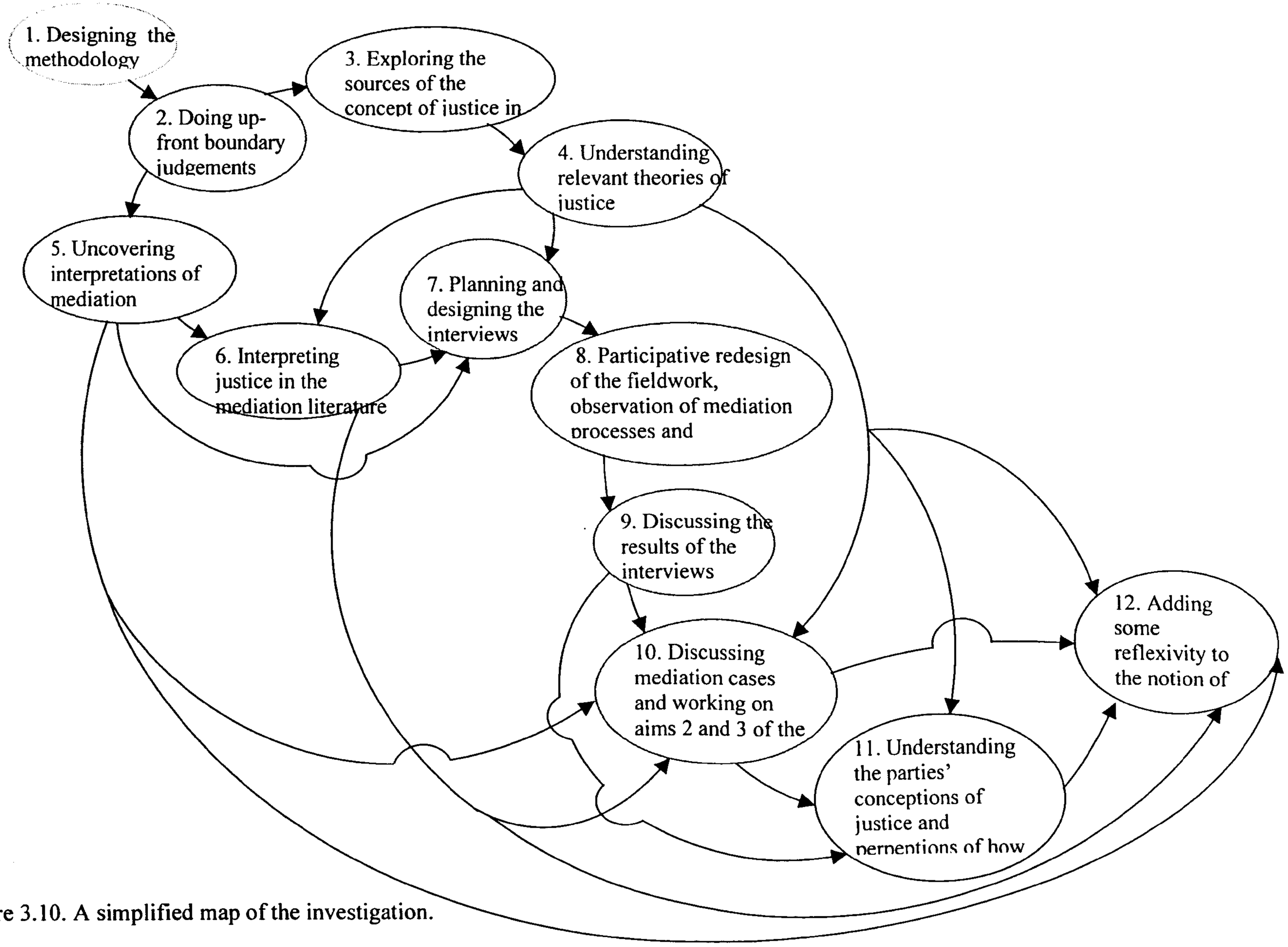


Figure 3.10. A simplified map of the investigation.

phase 2 of the research were crucial for carrying out the third and fourth phases of the research as I will describe below.

The third phase of the research, which involves the fieldwork described in Section 3 of this document, has four large components that are depicted in green in Figure 3.10. This third phase began with planning and designing the interviews that were used during the fieldwork (see Chapter 8). For doing this task the following components of phase 2 were crucial:

- Understanding relevant theories of justice[68].
- Uncovering interpretations of mediation.
- Interpreting justice in the mediation literature.

The planning and design of the interviews was followed by a participative redesign of the fieldwork as well as an observation of mediation processes which was accompanied by interviewing the persons who participated in the mediation processes (component 8) (see Chapter 9). This led to a participative discussion of the results of the interviews (component 9) (see Chapter 9). This discussion, the multiple interpretations of mediation previously uncovered (component 5), the interpretations of justice present in the mediation literature identified beforehand (component 6), and the understanding of relevant theories of justice (component 4) were crucial for discussing mediation cases with my co-researchers and working with them on aims 2 and 3 of the research (component 10) (see Chapters 10 and 11). The latter activities finished the third phase of the research depicted in Figure 3.10.

The Fourth Phase of the research was mainly concerned with further analysis and reflexivity on the notion of justice in mediation. This phase, which is presented in Section 4 of this document, included two major components:

- understanding the parties' conceptions of justice and their perceptions of how fair mediation processes are; and
- adding some reflexivity to the notion of justice in mediation.

[68] For instance, the literature review of theories of justice informed the questionnaire design as it is described in Chapter 8 and particularly in section 8.1.2.

The first one of these two components (described in Chapter 12) was based on the participative discussions of mediation cases (component 10), the understanding of the relevant theories of justice developed beforehand (component 4), and the discussions of the results of the interviews (component 9). Once my co-researchers and I developed a new understanding of the parties' conceptions of justice and their perceptions of how fair mediation processes were, I used these ideas to engage in new critically reflexive processes in relation to the notion of justice in mediation (component 12) (described in Chapter 13). These new processes of critical reflexivity on the notion of justice in mediation were also nurtured by three activities performed during the Second Phase:

- the understanding of relevant theories of justice (component 4);
- the uncovering of multiple interpretations of mediation (component 5); and
- the exploration of interpretations of justice in the mediation literature (component 6).

As this global description of the research shows, the different phases of the research presented in this document were closely interrelated. During the last part of the research process all the components that form part of Figure 3.10 contributed to writing the conclusions of the thesis.

### 3.3 Conclusions

In this chapter I have presented many of the onto-epistemological, ethical, and methodological assumptions that I have used in this thesis. Its main contribution to methodology is probably the relationship that it establishes between the systems approach and an ethical conception based mainly on Levinas' work. The ethical conception I embrace emphasises the strangeness of the Other, his/her irreducibility to my thoughts and my possessions, and the need for welcoming the Other by calling myself into question. This leads me to propose new meanings to some notions, such as the concepts of a systems approach, pluralism and critical reflexivity. It also moved me to develop a methodology that is inspired by a desire to respect the alterity of the other, the strangeness of the Other, the importance of substitution, as well as

preserving both totality and infinity—something which implies a permanent tension that the reader will perceive throughout this document.

In this chapter I also explained why CST was chosen as the main approach for conducting the research process, as well as the way I understand its main themes: improvement, critical reflexivity, and pluralism. I also presented a set of interrelated assumptions, concepts, methods and tools, used through the creative design of methods (CDM). There are arguably two new contributions here. First, the development I have made of the model of ethical and boundary conflicts. Second, the particular combination of methods (synergising action science, boundary critique, critical systems heuristics, interviews, statistical analysis, case studies and system dynamics) which, as far as I am aware, has not previously been used in CST interventions.

# Section 2: Exploring Justice and Mediation

# Chapter 4: Initiating the Research Process and Exploring Conceptions of Justice

This chapter will present the initial use of the Cycle of Critical Distinctions (CCD) for organising the research process. In section 3.1.3.2, I began a description of my interaction with the MCBC to determine which problematic phenomena and roles were going to be explored in my research. In this chapter I will continue with that description and will show how Ulrich's CSH was useful for developing interpretations of several basic boundary questions that I considered central to the research process. The interaction with the MCBC's staff and my previous knowledge of this organisation and its context led me to conclude that I needed to explore multiple interpretations of two important themes: justice and mediation. In this chapter I begin the examination of the first theme by discussing the process by which I decided which interpretations of justice I was going to explore.

Before presenting the aforementioned elements I want to clarify that large parts of this document are going to be written in the form of a narrative[69]. I consider this important to highlight the way first- and second-order acts of distinction continuously affected each other, and particularly the way interpretations of the problematic phenomena and role evolved (see Figure 3.9). A narrative method of presentation allows me to present this process, which I regard as a learning process. Given that the context of the research and the interpretations of the problematic phenomena and roles changed during the intervention, it is important not to pretend that all the theory that is relevant to the research could have been known in advance. That would be to deny the possibility of learning. A narrative method of presentation allows me to present how new methodological and theoretical elements were incorporated into the research process over time.

[69] However, sometimes I will avoid the narrative method for the sake of brevity.

## 4.1 Some Up-front Boundary Judgements

In section 3.1.3.2 I have presented how the staff members of the MCBC and I began to select a research topic. As I argued in the previous chapter, although they were interested in the topic of justice within mediation (for they have claimed for years that mediation was a way of "bringing justice to the people"), it was not clear to them what this might mean. Moreover, the concept of justice was vague for them, and particularly they were aware of the need to be more sensitive to the multiple interpretations that this concept may have for the users of mediation services.

Therefore, we agreed that before any fieldwork was done we had to explore multiple possible meanings of the concept of justice. Additionally we also agreed to explore the multiple possible meanings of the concept of 'mediation'. There was a unanimous agreement on the need to explore the meaning of justice. Nonetheless, at first some of the MCBC's mediators were unsure about the need to explore the meaning of mediation because they considered that they already knew what they meant by it. They practised it on a daily basis, and they have trained hundreds of mediators throughout Latin America. However, as I explained in the previous chapter, the MCBC's Director considered it valuable to be reflexive on the practice of mediation. She was particularly interested in the purposes mediation should serve, and wanted to expose the MCBC's theories and practices of mediation to critique. Once we agreed to explore the meanings of mediation it became clear to us that the role of the mediator had to be considered problematic. We agreed that this role was going to be considered problematic particularly in relation to issues of justice. Two issues became crucial: how mediators deal with concerns over justice that arise during mediation processes, and what new alternatives could they have for dealing with those concerns.

As I explained in section 3.1.3.2, my first contacts with the MCBC to initiate this research process were done by e-mail[70]. However, I had the opportunity to make a one-day visit to the MCBC. During this visit we organised a meeting to discuss the research process. Before the meeting took place I sent them by e-mail some critically-

[70] Although the knowledge that I acquired about the MCBC between 1991 and 1996 helped me in exploring the problem from a distant location during the first stages of the research.

heuristic boundary questions based on Ulrich's CSH (see section 3.2.1.1). I selected CSH during the choice phase of CCD for I considered that:

- At this stage it was appropriate to explore multiple boundary judgements that were crucial to my research (such as 'Who ought to be the clients of the research process?').
- It was helpful in uncovering multiple assumptions that otherwise I may have taken for granted.
- It was useful for starting to develop a participative process with the organisation.

The boundary questions that produced the most productive debate were:

1. Who ought to be the research's *clients*? Several possible answers were debated: the staff of the MCBC as individuals (some of them were personally interested in learning about justice and mediation), the MCBC as an organisation with a predefined identity and mission, the MCBC's service users, and/or the Ministry of Justice.

2. What ought to be the research's *purposes*? This question was perceived as strongly linked to the previous one. Different answers were suggested such as: to produce some knowledge of the effects of people's notions of justice in mediation processes that could later be published; to contribute to the transformation of the MCBC in a 'positive'[71] way; to improve the members of staff's knowledge of mediation theory and practice.

3. Who ought to be the *decision-maker* in relation to issues of justice and mediation? At that moment the staff of the MCBC considered that I should be the primary decision-maker in relation to my research. However, what was really controversial for them was the identification of a decision-maker in relation to issues of justice and mediation. These were some of the options debated:

[71] People expressed that they did not know exactly what they meant by 'positive', but they claimed that they could work on it during the research process.

- The legal system ("it is the one that defines what is just, and what mediation is and ought to be").
- The MCBC's staff ("at the end of the day we are the only ones who have to assume responsibility for contributing to the promotion of 'real' justice in mediation processes, and we are the ones that know best what mediation means in this country").
- The common citizens of Bogota ("they are the ones we work for, and hence we shall hear from them what mediation ought to be and how they understand what justice is").

There was no consensus around this issue among the MCBC's staff. However, the debate about this question opened the door to an exploration to the questions 'What do we mean by mediation?' and 'What is the role of a mediator in relation to issues of justice?'

4. What *expertise* ought to be brought in? What ought to be considered as relevant knowledge? The answers to this question pointed out that the MCBC's staff considered particularly relevant a deep exploration of conceptions of justice. They did not know which ones should be explored, but they certainly expected me to have a good knowledge about conceptions of justice. When I asked "Which conceptions of justice do you consider particularly valuable?" they answered that they did not know exactly, but that they thought it would be worth exploring the conceptions of Aristotle, John Rawls, and "some others of these types of people". They insisted that it was up to me to find out which conceptions could be the most relevant ones.

Although the previous discussion does not show the richness of the debate that the use of the critically-heuristic boundary questions provoked, it is enough to identify some of the issues that later turned out to be quite controversial. At this point I did not try to produce any consensus on the answers to the boundary questions for I considered it unnecessary. Moreover, I saw the diversity in the answers as an opportunity to explore more interpretations, and to remain open to radically alien perspectives, an element that is important in my conception of pluralism (see section 3.1.3.1.3).

Because making up-front boundary judgements is unavoidable in any research, I tried to make them in a reflexive manner by taking advantage of CSH right from the beginning of the inquiry. Nonetheless, despite the usefulness of CSH at this point in the research process, the possibilities for producing good results were reduced because of the limitations of communication I had with the MCBC's staff at that early stage[72].

During this initial stage of the process it was clear to me that the research could benefit from a good exploration of the notion of justice and the notion of mediation. This was going to be part of the first-order acts of distinction of my research. However, it was also clear that the research would involve a second-order act of distinction in relation to the identity and role of myself as a researcher[73] and of the mediators who were making, and were going to make, first-order distinctions. Let us begin by examining the first-order acts of distinction in relation to the notion of justice.

### 4.2 The Notion of Justice

At this point the most important question I tried to answer was: which might be the most relevant theoretical conceptions of justice for the Colombian people? Given that there are no previous studies about notions of justice in Colombia[74], I decided I had to begin exploring *how we Colombians came to be what we are* in relation to our notions

[72] Although I had a meeting with them, later on I considered that it would have been better to have had a closer contact with them, especially on an individual basis. Communication by e-mail was limited given that they all had to use a single computer and a single e-mail address to get in contact with me. The computer they all used was on the desk of the MCBC's director. This certainly restricted the communication we had, and eliminated the possibility of any private messages that could have been important at this point.

[73] Reflexivity in relation to my role as a researcher took place since I got in contact with the MCBC's staff to initiate the research. I will describe some of these reflexive processes during the next chapters. For now it is enough to mention that during the initial stages of the research process a crucial issue was the possible ways in which I could intervene in the situation. Possibilities such as the following were examined: (i) to intervene as an action researcher who facilitates a process of change and who bases his intervention mainly on the knowledge produced by those who form part of the problematic situation; (ii) to intervene as a detached "scientist" who observes mediation processes seeking to be neutral and with the intention of identifying several notions of justice held by the parties and the mediator; (iii) to mix some of the elements of the previous two alternatives; (iv) to construct a coherent theoretical notion of justice and to observe and analyse mediation practice from this perspective.

[74] I dedicated substantial effort to find any study about the notions of justice held by the Colombian people, but there do not seem to be any at all.

of justice. I began a historical inquiry to find out hints that could indicate to me which theories of justice might have affected the notions of justice held by contemporary Colombians. I assumed that any theory of justice that had been substantially divulged in the country during the last centuries could have influenced the contemporary notions of justice. In relation to this effort I would like to point out:

1. I assume that all "history" is history from the perspective of an observer: "All knowledge is rooted in a life, a society, and a language that have a history; and it is in that very history that knowledge finds the element enabling it to communicate with other forms of life" (Foucault, 1974, pp.372-373).

2. I am not a historian, and this research project is not primarily historical. Therefore, I based my research on the work of a wide variety of historians and anthropologists who have a good reputation and who have explored the history of thought in Colombia from a broad diversity of perspectives. Moreover, I also consulted the original writings of many individuals who played an important role in Colombian history.

3. A historical perspective is valuable for it is a good option for building up a critique of the assumptions that originate in our socio-historical heritage. Reflexivity on who we are in the present, and what we shall do and be in the future, is nurtured by interpretations of where we have come from in our past. Historical reflexivity helps us to uncover the dominant regimes of thought that are predominant in our culture, and it helps in developing multiple interpretations of the context in which this research took place.

4. This historical review was also intended to be an instrument during the fieldwork for uncovering subjugated knowledges, i.e. knowledges that are such because they oppose the dogmas of the dominant regimes of thought. I consider that part of my critical effort has to do with the surfacing of these knowledges: "it is through the reappearance of this knowledge, of these local popular knowledges, these disqualified knowledges, that criticism performs its work" (Foucault, 1994, p.21).

The following exploration will highlight, as I see it, the history of ideas and knowledge that constitutes a central part of the context in which contemporary notions of justice have been developed in Colombia. It is an interpretation quite unlike the one that is taught in traditional courses on history at Colombian schools and universities. However, I should be explicit that it has been abridged to conform to the word limit of a doctoral thesis.

## 4.3 A Brief Exploration into the Sources of the Concept of Justice in Colombia

The notions of justice of contemporary Colombians have evolved throughout history. What are considered "facts" and "constructions" related to justice have frequently changed from one time to another and from one place to another in Colombia. I claim that we might focus our attention on at least three different periods. The first period is one in which a large diversity of notions of justice co-existed without any of them prevailing over the others (this period took place prior to the Spanish conquest and during the first years of their invasion). The second period is characterised by an attempt to impose what appeared to be a unified notion of justice in a country in which ideas coming from outside were carefully controlled. During this period the dominant social group systematically used knowledge as an instrument of power. The third period is characterised by the adoption of a diversity of conceptions of justice, many of them coming from outside the country's boundaries, as well as by the uncovering of several local conceptions of justice which previously seemed to have disappeared. A careful review of the historical material available gives the reader the impression that especially the last two periods have left traces on the contemporary notions of justice in Colombia.

### 4.3.1 The Encounter and the New World 'Holocaust'

After the reconquest of Granada in 1492, the Spanish Catholic Kings provided financial support for Columbus' expedition across the Atlantic. Columbus' arrival at the "New World" initiated a brutal domination of the inhabitants of the Americas

carried out by the European conquerors who quite frequently ignored or despised the alterity of the Amerindians (the alien others).

There is clear evidence of the complexity and richness of many of the 15th century Amerindian cultures (Las Casas, 1971; Galeano, 1973; Torres, 1976; Calle, 1992; Uribe, 1992; Rivara De Tuesta, 1994). It is clear that Colombian Amerindians had a diversity of conceptions of justice. Nonetheless, much of the information about those conceptions was lost because of the destructive nature of the Spanish conquest. This was a massive process of genocide and destruction of native cultures (Pérez, 1951; Martínez-Delgado, 1965; Granados, 1980; Pineda-Camacho, 1987; Uribe, 1992; Barona, 1998). Amerindians were turned into oppressed foreigners in their own lands. Technologies of domination were imposed upon them (Friede, 1974; Barona, 1998; Lobo-Guerrero, 2000). Their identities as Amerindians were violently threatened. In the name of the Christian God a large part of the Amerindian culture was banned and millions of Amerindians were killed (Salazar, 1992a). The particular interests of the conquistadors contributed to these phenomena. As the Spanish Conqueror Bernal Díaz del Castillo said, the Spaniards went to the Americas "to serve God and to become rich" (Díaz, quoted in Trevor-Roper, 1965, p.129).

The study of the Amerindian cultures that survived makes clear that:

- Before the Spanish conquest the Amerindians' worldviews were largely different from the ones imposed by the Europeans (see Pérez, 1951; Reichel-Dolmatoff, 1985, 1991a,b, 1996; Langebaek, 1990, 1995; Serrano, 1992; Uribe, 1992).

- There were substantial differences between the conceptions of the world of different Amerindian tribes, although some of them had large similarities (Hernández, 1965; Reichel-Dolmatoff, 1991a,b, 1996; Calle, 1992; Uribe, 1992; Guerra, 1996).

- A substantial number of the Amerindian worldviews experienced large and violent transformations between the 16th and the 18th centuries (Galeano, 1973; Lobo-Guerrero, 2000).

Amerindian cultures, religions, and in general their practices and ideas were largely forbidden and annihilated after the Spanish conquest (the contribution of Colombian Amerindians to the idea of justice will be discussed later). A situation in which a large diversity of cultures co-existed and in which no single vision of the world was dominant over the others[75], was replaced by a social order in which the Spanish ways of thinking, doing and acting became dominant. In 1493 Pope Alexander VI granted the Catholic Kings dominion over the New World (Galeano, 1973). The Kings were declared to be the owners of the lands, but they also considered themselves the owners of millions of peoples' lives who were brutally exploited and abused (Galeano, 1973; Collier, 1992; Brading, 1993). Following contact with the Europeans, approximately 95% of the New World's pre-Columbian population (approximately 100 million people) was exterminated (Sánchez, 1974). By the middle of the eighteenth century this population was reduced to only 0.25 million according to Arnold (1996). The devastating holocaust Amerindians experienced largely destroyed their culture and traditional thoughts (Friede, 1965a,b; Uribe, 1992). However, some of their subjugated knowledges about justice may have survived the holocaust and may have influenced the notions of contemporary Colombians. Nonetheless, the literature does not give any evidence of this. A critical task is to search for these popular and disqualified knowledges, even if only fragmented traces remain of them. Through the reappearance of these knowledges criticism might perform its work (see Foucault, 1994).

The human holocaust seems to have been the result of several factors: Spanish brutality and continuous exploitation of the Amerindian population (see Cook and Borah, 1971; Galeano, 1973; Sánchez, 1974; Salazar, 1992a,b; Brading, 1993; Arnold, 1996); an epidemiological onslaught produced by Europeans (Arnold, 1996); the clash of technologies; famine (Salazar, 1992a); the destruction of large areas of the natural environment (Sánchez, 1974; Arnold, 1996); and demoralisation of the native population leading to the loss of their will to survive (Sánchez, 1974).

[75] However, there seems to have been homogeneity within these local cultures (see Reichel-Dolmatoff, 1991a, 1996; Uribe, 1992).

Such a devastating and long-lasting enterprise of destruction of a population must have affected the notions of justice of those who inhabited the Americas at that time and during the next centuries. For instance, it may have promoted notions of justice that:

- Do not regard all human beings as equal. The same principles or rules of justice were quite frequently not seen as equally applicable to all humans. This hypothesis is supported by a recurrent invocation of Aristotelian ideas by the Spaniards to legitimise their domination over Amerindians, black people and Creoles (Hanke, 1958). These Aristotelian ideas included discriminatory limits over the scope of application of principles of justice. The latter were not supposed to be applicable to those (Amerindians and black people) who were regarded as 'slaves by nature' (see Salazar, 1992a; Brading, 1993).

- Do not respect the alterity of human beings and their differences. The large scale annihilation of those who were regarded as different may have given an important advantage to those notions of justice that were *officially* supported (such as the Catholic notion of justice) or to those which favoured the satisfaction of self-interests.

After the Spanish conquest, the first famous cry for justice and liberty in the Americas was the sermons of the Dominican friar Antonio de Montesinos who condemned the exploitation of the Amerindians in 1511 (Hanke, 1967a). In Spain they caused large debates in which judges, priests and the Spanish rulers participated (see Hanke, 1967a; Vitoria, 1967; Brading, 1993). The latter also confronted Pope Paul III, who wrote against the Spanish King Charles V calling him an "enemy of the human race" for trying to promote slavery among the "Indians of the West" (Paul III, 1995). The King's interests were defended by López de Palacios (1450-1524) who contributed to the constitution of a power-knowledge formation that favoured the Spanish Empire through the subjugation of the Amerindians, who were declared as 'slaves by nature' and in need of Spanish rule and Spanish justice (see Hanke, 1967b; Las Casas, 1971; Brading, 1993). López was successful in legitimating what most people would see as a radical injustice in the name of justice itself!

The aforementioned debates were revived later on by Bartolomé de Las Casas (1484-1566), a Spanish Dominican friar who opposed imperialism and intended to make the Spaniards aware of their guilt for the enslavement and destruction of the Amerindians (Las Casas, 1971). He became a popular figure among the oppressed in the Americas for his concern over issues of social justice (Collard, 1971). He insisted that the Amerindians were human beings and that they had a culture based on 'natural reason' (Las Casas, 1971). His notion of justice was influenced by Augustine, Vitoria, Aquinas, Cicero, St Peter and by the Catholic Church tradition (Las Casas, 1971; Brading, 1993). His ideas about justice gradually and surreptitiously found their way into the minds of the people of the Americas (Brading, 1993). They opposed the dogmas of the dominant regime of thought and thereby they were condemned and silenced by the Spanish rulers. Las Casas' writings were only published more than three centuries later, in 1875 (Collard, 1971). Nonetheless, his ideas became part of local popular and disqualified knowledges. In Colombia, this was possible because some Catholic priests shared many of Las Casas' ideas (Salazar, 1992a).

It has to be pointed out that no Amerindian ideas about justice at all seem to appear in any historical document. The voices of the Amerindians were successfully silenced. Discourse was carefully controlled to favour the prevailing knowledge-power formations. All the cries for Amerindian justice of which we are aware today were the product of a few Spaniards and not of any Amerindian. It is hard to believe that the victims of such a holocaust did not say anything about their situation at the time.

### 4.3.2 The Pacification and Colonial Periods

Several forms of power were used to impose knowledges privileged by the *conquistadors* and the Spanish priests (see Aguarto y Mendieta, 1956; Friede, 1965b, 1974; Las Casas, 1971; Pineda-Camacho, 1987; Calle, 1992; Barona, 1998). A multicultural but repressive society emerged.

The conquest, characterised by depredation, gradually turned into the Pacification period (1550-1600) and the Colonial period (1600-1810). The latter is usually identified with the settlement and exploitation of the land (plants and minerals)

(Salazar, 1992b; Galeano, 1973). However, the annihilation and exploitation of the Amerindians continued during the Pacification and the Colonial periods. Additionally, during the 16th Century the first slaves from Africa arrived in Colombia. Spaniards took them to work there because the Amerindian population was rapidly declining and it was insufficient to carry out the work expected by their Spanish masters. The voices of Amerindians and slaves from Africa were silenced, and apparently their worldviews and conceptions of justice were never reported in writing for fear of the reaction of the Spanish authorities (Castillo, 1981; Friedemann, 1981, 1986, 1993; Mosquera, 2001). Those who reported their viewpoints were quickly repressed by the local authorities (Salazar, 1992b; Maya, 2000). Some members of the clergy denounced this exploitation of human beings generating intense disputes with the Spanish colonisers. The most popular figure who denounced the exploitation of African slaves was Saint Pedro Claver (1581-1654), who considered himself a "slave of the slaves" (John Paul I, 1978; Collins, 2000), who promoted the Catholic conception of justice and who became a very popular defender of the destitute and oppressed against their oppressors (Valtierra, 1980).

Large and growing inequalities in the distribution of wealth and income characterised the society as it is reported by several 16th Century writers (e.g., Diez Venero de Leyva, 1956; Torres, 1976). This generalised level of social inequality is considered one of the basic foundations of the socio-economic development of Colombia (Salazar, 1992b), a country in which social inequalities are still overwhelming in modern society. This point is important for understanding the way in which many conceptions of justice might have evolved in Colombia during the past centuries. The existence of these large inequalities for the last five centuries may have contributed to the citizens' perception that these inequalities *have* to exist, that they are somehow 'natural', and not the product of particular historical events. These perceptions may have become part of the prevailing regimes of thought which are dominant in the Colombian culture.

These large inequalities help to understand why only a small privileged elite of society has played a central role in the formation of knowledge throughout the last centuries. This privileged elite has had an enormous impact on the selection and

adaptation[76] of those knowledges that have received a wide diffusion among the population in general. During the Pacification and Colonial periods Spaniards constituted the elite. However, later on they were gradually replaced by a local upper class who ended up "importing" European knowledges at first, but which have more recently turned their eyes towards the US. I will shortly present evidence of this phenomenon.

The most important intellectual theories that prevailed in Colombia during the Colonial Period were *Scholasticism*[77] *of late medieval Europe* and *Spanish neo-Scholasticism* (Zabalza, 1992). The first type of Scholasticism was influenced by the ideas of Aristotle, Plato, Augustine, Aquinas, neo-Platonist philosophers, and some other thinkers such as Bonaventure, Duns Scotus and Albertus Magnus. Their ideas were discussed at the Colombian educational institutions (Salazar, 1992b), and they may have promoted virtue ethics (see section 2.1.3) among the population.

### 4.3.3 The Enlightenment

The arrival of the Spaniard José Celestino Mutis at Cartagena in 1760 marks the beginning of the Enlightenment period in Colombia (1760-1810) (Marquínez, 1992a). It marks the end of what some Colombians have called "our belated Middle Ages" and the entrance into modernity.

Mutis' disciples were going to become leaders of the Colombian revolution against the Spanish Empire, a revolution that began in 1810. Mutis argued in favour of "imitating" what was being done in Europe in general and not only in his native Spain, which he considered to suffer from stagnation (Mutis, 1976). Mutis' disciples were surprised to suddenly discover a large number of ideas and theories that were well established in Europe but were hidden from them by the Spanish authorities

[76] I speak of selection and adaptation instead of creation, for the knowledge that has shaped Colombian society during the last centuries has mainly come from Europe and the US. The ruling class of Colombia has limited itself to choosing the knowledge that they consider appropriate and adapting it to the particularities of the local environment. Although there have been some independent local thinkers in Colombia, their ideas are not the ones that have guided the transformation of Colombian society during the last centuries.

[77] Scholasticism is grounded on the authority of the Christian Fathers, Aristotle and their followers.

(Torres, 1977). They discovered that the Spanish domination had been based on an overwhelming *control of all the information* that reached the Americas and that was produced there. Mutis, for instance, was the first one in Colombia to openly proclaim that the Earth was not the centre of the Universe (Marquínez, 1992a). The Spanish rulers had kept this idea, well known in Europe, secret from the minds of the Colombians. Mutis was formally accused because of his claims, but the Spanish Inquisition finally absolved him of all blame. Colombia suffered from an isolationist policy established by Spain (see Torres, 1977).

Mutis stressed observation and experimentation as fundamental for the acquisition of knowledge and his ideas ended up promoting political liberalism as part of the "new way" of conceiving the world (Salazar, 1992c). These ideas paved the way for the diffusion of some utilitarian theories of justice in Colombia during the 19th Century. By the end of the 18th century the works of Voltaire, Rousseau and other French writers began to be read in Colombia, as well as the writings of some empirical scientists (Marquínez, 1992a,b).

No wonder that the foundation of the new Republic was going to be characterised by some rejection of the old doctrines taught by the Spaniards until the middle of the 18th century, and the hope that the new positive European writers were going to inspire a renovated Republic. The eyes of those who constructed the new nation were inclined to look to Europe as a whole, not merely Spain, for the answers to their more pressing questions. While in Europe Kant (1724-1804) was promoting an image of persons as autonomous, rational human beings (Kant, 1970), in Colombia the founders of the new nation just wanted to change the masters of their own understanding. They were unable to use their understandings without the guidance of another. They changed their Spanish masters for French and English ones. In this way new theories of justice were introduced to the Colombian people. Nonetheless, because the Catholic Church was still regarded as a central institution to give order to *any* life[78], efforts were made to try to make the new ideas 'compatible' with the Catholic doctrines. These mixtures of frequently incommensurable viewpoints

[78] The reader should be aware of the enormous importance that Catholicism has had in Latin America. European phenomena such as the Reformation and the Enlightenment did not have the same impact in Latin America as they did in Europe and North America. This was due to a large extent to the influence

produced large tensions among the Colombian society of the 19th and 20th centuries. As will become evident in the next paragraphs, these tensions clearly arose with the introduction of English utilitarianism and positivism into Colombian society.

### 4.3.4 The Colombian Independence from Spain and the Republic

Although the war for Colombian independence from Spanish colonialism began in 1810 and ended in 1819, the period of Emancipation is said to begin in 1810 and end in 1830 (Marquínez, 1992b). During the first nine years of this period, intellectuals were mainly concerned with the problems of war. Thereafter, the issue of the organisation of the state became more pressing.

During the 1820s Santander, who guided the political and legal organisation of the new country, made compulsory the teaching of some of Bentham's works in all schools and universities (Marquínez, 1992c). The introduction of Bentham's ideas represented a rejection of Scholasticism, and an expression of the new admiration for England (Martínez, 1965). Nevertheless, Benthamism was adopted with some changes so as not to contradict the Catholic religion and the prevailing morality (Marquínez, 1992c). This implied that two completely incompatible doctrines of justice were expected to coexist. Specifically in relation to justice, Catholic ideas that were considered universal and 'necessary' were challenged by other notions that privileged a conception of morality based on individual choice. This generated large debates taking several decades to unfold (Marquínez, 1992c; Jaramillo, 1996), which can be associated with power struggles between the dominant groups of society. It was the legitimation of certain social practices, especially of an economic nature, that promoted the new processes of knowledge formation based on liberalism. These processes had an important effect on the notions of morality in general and justice in particular (see evidence in Jaramillo, 1996). Knowledge worked as a tool of power, it produced effects of power that later on contributed to further develop the knowledge that produced them.

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of the Spanish colonial government and the Roman Catholic Church (U.S. Library of Congress, 1999).

Bentham and J.S. Mill were going to be the most controversial and influential modern thinkers in Colombia during the 19th century (Marquínez, 1992c). Notwithstanding, the influence of Aquinas, Augustine and the Catholic doctrines never disappeared, as well as the influence of the theories of Plato, Aristotle, Cicero and St Peter (Caro, 1876; Marquínez, 1992c).

In Colombia the ideas developed by the Protestant Reformation had almost no direct influence for several centuries. The Spaniards forbade them. The Christian writers who addressed justice and who were influential in Colombia—e.g., Ignatius Loyola, Francisco Suárez and Francisco de Vitoria (Zabalza, 1992)—drew upon medieval moral theology, especially Thomistic theology. Medieval writers (e.g., Aquinas, Augustine) shaped the course of the Catholic thought on justice until well into the twentieth century (see Zabalza, 1992). Until the last century no new Christian notion of justice appeared that can be considered an important influence on the notion of justice of contemporary Colombian people.

Kant was studied by several 19th Century Colombian intellectuals (Marquínez, 1992c; Jaramillo, 1996). Although some criticised Kant's ideas, others embraced them. (e.g., Caro, 1951).

In the 1920s, socialist ideas reached Colombia (Tovar, 1992; Jaramillo, 1996). The ideas of Marx, Engels, Lenin and other socialist thinkers and their associated notions of justice became popular among some sectors of society (Rodríguez, 1992). They inspired the leftist guerrillas of Colombia, which have become more powerful since the 1980s.

After the 1930s, almost every major contemporary Western theory has been studied in Colombia. Nevertheless, it has to be pointed out that:

- The most influential coherent traditions of thought in contemporary Colombia seem to come from Europe (Marquínez, 1992d). Nonetheless, this does not mean that the history of the ideas in Colombia is equal to the history of the ideas of any particular European country. Paz expresses this point: "North America is a daughter of the Reformation and the Enlightenment, i.e. the modern world. We,

instead, were born with the Counter-Reformation and neo-Scholasticism, i.e. against the modern world" (Paz, cited in Apuleyo-Mendoza, 1998, p.4—my translation).

- After a new school of thought is studied for the first time by the intellectuals of the country, its influence does not seem to affect the beliefs and theories of the common people for several decades. In part, this might be the result of the low levels of formal education in the population.

- The influence of the mass media upon the beliefs and thoughts of a large part of the population should not be neglected. The mass media, which have a significant US influence, might be currently more powerful for spreading ideas than the formal education system.

- The Catholic Church still has a large capacity to spread its doctrine and its ideas.

During the 1960's the Latin American Catholic Church created a new theological, moral and socio-economic insight that affected the theology of the whole Catholic Church (O'Connor, 1972; Wogaman, 1994). The first significant step was taken at the Second General Conference of Latin American Bishops (CELABM) held in Medellin, Colombia.

### 4.4 Conclusion

This chapter has presented the initial use of the Cycle of Critical Distinctions (CCD) for organising the research process. As the reader will discover throughout the document, the CCD was never used as a methodology with a fixed set of phases that I had to develop in a specific order. Rather, it worked as a "map" that I used to organise my concepts and that helped me to move from one point to the other through the "research territory". I began the use of CCD by interacting with the MCBC in order to establish which problematic phenomena and roles were going to be explored in my research, and then to identify different interpretations of these problematic phenomena and roles.

During the first stages of this process Ulrich's CSH was useful in developing multiple interpretations of several basic boundary questions. The use of the critically-heuristic boundary questions was helpful not only for developing some initial boundaries to the research process, but also for developing a participative process with the organisation and appreciating multiple interpretations and expectations the MCBC's members had of my research. From this interaction and my previous knowledge of the MCBC and its context I concluded that I needed to explore multiple interpretations of two important themes:

- *Justice*. I needed to explore conceptions of justice that might have had an impact on the conceptions of justice of the users of the MCBC. I considered this as a crucial first-order act of distinction (FOAD). The perceived problematic phenomenon was developing a basic understanding of multiple meanings of justice in order to develop a sensitivity that I expected was going to help me later on to be receptive to the multiple interpretations that the MCBC's staff and its service users might have of the notion of justice. This FOAD involved a second-order act of distinction (SOAD) because it entailed identifying what a person would have to do to act justly (or unjustly), and/or what his/her identity should be like to be considered a just person (or an unjust one).

- *Mediation*. Multiple interpretations of what mediation is should be surfaced. This FOAD also entailed a SOAD given that surfacing interpretations about mediation also involved surfacing interpretations about the mediator's role.

The initial exploration of the history of ideas in Colombia revealed to me how strongly violence has been exercised at the level of ideas in the history of my country. During long periods of this history, the Other has quite frequently not been welcomed at all but subsumed under the hegemony of the Same. The Other has been reduced to the Same. As a result I became convinced that it was important to explore both the fields of justice and mediation preparing myself for welcoming the Other, for preserving the alterity of the Other, and for allowing it to call myself into question. I understood the literature review as the initial stage in a learning process that began to transform my identity, by unveiling to me many of my assumptions, particularly in

relation to my moral framework. I expected this process to allow me to be more sensitive to the interpretations of others (to a limited extent, of course, for the Other will ultimately always remain a mystery).

To decide which notions of justice it was more promising to explore in terms of the research objectives, I did an initial brief study of the history of the ideas on justice in Colombia trying to discover which theories of justice might have had a substantial impact on the notions of justice of contemporary Colombians. One of the things that struck me most during this exploration, was to discover how much Colombian intellectuals have imitated and adopted the patterns and methods developed in Europe and North America, while they have neglected the exploration and creation of local knowledges. In particular, knowledges from the Western countries have colonised the local social sciences, philosophy, political thinking and many other spaces for ideas in Colombia during the last five centuries.

# Chapter 5: Elements from Diverse Relevant Theories of Justice

The historical exploration presented in the last chapter suggests that the notions of justice of contemporary Colombians have been affected by complex historical phenomena. Of particular relevance are the theories of justice that support these notions at a conceptual level. Their understanding is crucial for building up conceptual tools that can provide assistance for understanding the notions of justice of people during a mediation process.

Therefore, based on the historical exploration synthesised in Chapter 4, I investigated in detail those theories of justice that I considered could have had an important influence on the notions of justice held by contemporary Colombians. In this way I tried to escape the possibility of doing an analysis of justice in the field of mediation based on a single or just a few conceptions of justice. Rather, I adopted a pluralist perspective and was especially concerned with capturing the richness of notions of justice that might be in people's minds, without imposing a particular worldview on justice other than the one developed through my historical research (already presented).

In order not to exceed the word limit this document has to comply with, I will not present here a comprehensive description and critical analysis of the large diversity of theories of justice that I studied during more than a year of work. Rather, I will briefly outline only elements from each theory that are useful for understanding the analysis that is going to be presented later on in this document. Therefore, this presentation includes a selection of elements that was done after my fieldwork was finished. The presentation may highlight aspects of particular theories of justice that might not seem very important in another context, and it may omit elements that appear to be particularly important if the theory is studied independently from the context of this research. I advise the reader who is interested in understanding in a more detailed way the conceptions of justice of the authors I will mention to read their original works.

Another consequence of using the above mentioned criteria for selecting elements for this presentation is that the theories that are most relevant to the discussion (presented later on in this document) will receive more space than others that might be equally respectable, but which are not as relevant. Nonetheless, I want to stress that all the theories mentioned were studied and considered in depth for the preparation of the fieldwork and the analysis of its results. Moreover, the theories of justice of several authors that were studied have been excluded in this presentation due to insufficient space (such as the theories of Hutcheson, 1755; Cicero, 1947, 1967; Sen, 1973, 1992; Nozick, 1974; Blackstone, 1979; MacIntyre, 1981, 1988; Sandel, 1982; etc.).

The theories of justice explored here are associated with the background history of the Colombian culture. They include theories from the following: The ancient Greek tradition[79] (preliterate Greece, Plato and Aristotle), the Christian tradition (the Bible, the 'fathers of the Church', Augustine, Aquinas, several Popes, and Latin American theologians and priests), the Amerindian tradition (several tribes), the utilitarians[80] (Hume, Bentham and Mill), the liberal tradition (Kant and Rawls), and the Marxist tradition (Marx, Engels, Trotsky, Lenin and Che Guevara).

Within each tradition I reviewed those authors who have had most influence in Colombia according to the available historical evidence. As the reader will notice, their conceptions of justice are linked to diverse notions of practical rationality and modes of rational justification, and consider different issues relevant to the notions of justice.

Although the selection of these theories was done in a particularly careful way, I am conscious that my exploration might not have covered all the theories of justice that might be relevant to mediation practice in contemporary Colombia. Nonetheless, the

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[79] I adopt here MacIntyre's notion of tradition. A tradition "is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition" (MacIntyre, 1981, p.207). This implies a view of the self not dissociated from its social and historical roles and circumstances. A human life's story is part of the story of the communities from which that life gets its identity (MacIntyre, 1981). This does not imply that the self has to accept the moral limitations of the particularity of any form of community (family, tribe, etc.). Moving away from those particularities may be part of the search for the good. However, the idea of removing all sign of the particularities into a world of universal maxims that apply to all human beings is an illusion.

[80] Although I could have included the utilitarians under the heading of liberalism (see Almond, 1998), I preferred to consider them separately for this makes it easier to contrast and understand the differences between the manifold conceptions of justice presented. Moreover, in Colombia, utilitarianism has been

wide variety of ideas covered as part of the literature review made me more sensitive to identifying and understanding notions of justice that are outside any formal and/or recognisable theory of justice.

I took particular care in understanding the context in which the theories that I studied were conceived. In addition, when it was necessary to use translations, a careful selection of translations was done reviewing the meaning of the most critical words in their original language at the time the work was produced. However, I am aware that what I present are my own interpretations of the texts I read and by no means 'final' interpretations. As Taket and White (1993) argue, each text has multiple readings and "no interpretation can be regarded as inherently superior to any other" (Taket and White, 1996, p.574).

## 5.1 The Ancient Greek Tradition

Ancient Greeks explored the concept of justice in quite diverse ways. Here I will address only the work of Plato and Aristotle, though an extensive review of work on justice of the pre-Socratic thinkers was also carried out (e.g., Hesiod, 1908a,b; Homer, 1919, 1924; Aeschylus, 1974a,b; Sophocles, 1911, 1987).

### 5.1.1 Platonic Justice

Plato (born around 427 B.C.) began the movement towards a definition of justice as an entity in its own right, with a clear essence, independent of procedures and actions, as well as of persons and gods. Plato's *dikaiosunē*, a word he used as a replacement for *dikē*[81] (Peters, 1967), means both a justice of the community and a justice of the soul (Plato, 1941). It involves a social and a personal morality. At the level of the whole city, Plato conceives of justice as necessary for building a more complex, 'civilised' city. Justice is a quality that contributes to the excellence of the commonwealth.

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clearly distinguished from other liberal tendencies.

[81] This was the word used to identify justice by many pre-Socratics.

Plato (1941) changes the emphasis from just and unjust actions to just and unjust individuals and/or communities. This is an important change, for it confers a completely new dimension to the alleged superiority of justice over injustice. This superiority does not have to be based anymore solely on the consequences of *doing* specific actions, but on *being* a particular type of person and/or on *constituting* a particular type of society. In this way justice is linked to "being" rather than merely "doing".

Plato's (1941) arguments indicate that good things, such as justice, can be conceptualised as: good only for their consequences; or good in themselves; or good in themselves *and* for their consequences (Pappas, 1995). Plato (1941, 1970) attempts to show that justice is good in itself and for its consequences. Justice is profitable in itself, "whether or not anyone knows what manner of man you are" (Plato, 1941, p.140). It is the specific *excellence of character* or *virtue*[82] (*aretē*) of the soul. Therefore, justice is what makes a soul and thereby an individual live well and be happy. On the contrary the unjust person does not live well. Someone who does wrong, such as taking money unjustly, enslaves the best part of his nature to the vilest. Additionally, justice is also good for its social consequences. Just persons receive appropriate social rewards as a result of being identified as such (Plato, 1941). Additionally, being just also brings recompense for the just person after her death because all our lives' deeds are rewarded or punished in the afterlife (Plato, 1941).

Plato claims that without *aretē* (virtue) people cannot be rational, and rationality is absolutely indispensable to *aretē*. Because justice is a virtue, people cannot be rational without justice. The absence of justice precludes anyone from being genuinely excellent and also effective. However, rationality is indispensable to virtuousness, and someone who does not *understand* what virtue is cannot be virtuous (Plato, 1941). Justice is the fundamental virtue because only justice can guarantee the necessary order that allows the other virtues to flourish.

[82] A virtue is a quality of character indispensable for attaining the excellence in an activity (Plato, 1941).

### 5.1.2 Aristotle and the Peripatetic School

For Aristotle (384-322 B.C.) all the activities and knowledge of human beings aim at some good (Aristotle, 1963). Among all goods there is one good which is final and not for the sake of something else. '*The good for Man*' or the highest of all goods, is *eudaimonia*. It "is intense living, or acting, well" (Joachim, 1951, p.58). It is a process and not a state (Aristotle, 1963). Therefore, some prefer to translate it as "flourishing" (Ackrill, 1974; Cooper, 1975) rather than happiness as others do.

The virtues are those qualities that allow an individual to achieve *eudaimonia* and his advancement toward this *telos*. No one can excel in one virtue if she does not possess the others. Virtues are states of character that make persons good and which enable them to excel in their works (Aristotle, 1963). Aristotle (1963) distinguishes between what a person regards as good for her in some specific circumstances and what is good for her as a human being. The virtues aim at this latter good. The just person pursues just actions for their own sake and also because they help in constituting and bringing about the good and best life for persons. People practice the virtues by making choices, and the exercise of their judgement in these choices is not equivalent to the application of a set of values.

Virtue is a mean between two vices, one which falls short and the other which exceeds what is right (Aristotle, 1963; Urmson, 1973). Justice, for instance, lies between suffering injustice and doing injustice. The mean is apprehended by perception and not by reasoning. Moral virtue means that an action is the result of choice. Choice requires a rational principle and thought.

#### 5.1.2.1 Distributive and Rectificatory Justice

Aristotle (1963) divides particular justice into distributive and rectificatory justice.

1. Distributive justice is concerned with the distribution of things (e.g. money). What is just in distribution should be according to merit, although there might be disagreements in relation to the appropriate kind of merit. The just involves at least four terms, for the notion of equality implies at least two persons and the

mean is an average between at least two things. If A and B represent the persons, and C and D represent the portions they receive respectively, then A stands to C as B stands to D. A:C :: B:D, or A:B :: C:D (A/B=C/D). Aristotle (1949) supports the use of a geometrical proportion not only in the context of receiving but in that of contributing. Distributive justice is based on the application of a principle of desert.

2. Rectificatory or corrective justice aims at restoring the just order that was altered by an unjust deed or deeds. Justice in transactions between persons is equality according to arithmetical proportion: "For it makes no difference, nor whether it is a good man or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal" (Aristotle, 1963, 1132a 2-5).

#### 5.1.2.2 Practical Rationality and Justice

For Aristotle (1963) a requisite for rationality is to be virtuous. Without a complete knowledge of the virtues and the virtuous life, rational knowledge, action and justification are precluded. In particular, desires require the virtues in order to be informed by reason. Desires do not constitute an unquestionable starting point, with rational calculation coming afterwards to find out the best means to satisfy them.

The flourishing life is a virtuous life, a life according to reason (Aristotle, 1963). The virtue of justice (*dikaiosunē*) requires the virtue of *phronēsis* (practical rationality) for its application. "*Phronēsis* is the exercise of a capacity to apply truths about what it is good for such and such a type of person or for persons as such to do generally and in certain types of situation to oneself on particular occasions" (MacIntyre, 1988, pp.115-116). However, *phronēsis* also requires *dikaiosunē*. *Phronēsis* demands the ability to take into consideration the appropriate premises in relation to goods and virtues that affect certain situations. Nonetheless, since this ability is part of the virtues, including justice, it follows that being just is a requirement for being rational. Moreover, being just and practically rational also require being part of a *polis* (Aristotle, 1963). Aristotle (1963) assumes that an individual detached from any

social context cannot exercise his/her rationality. The social context, the *polis*, entails a collective conception of what the best life for human beings is.

## 5.2 Catholicism and the Christian Tradition

In Colombia, 96.6% of the population consider themselves to be Christians (El Tiempo, 2001b). Therefore, the study of Christian conceptions of justice is quite important for this research project. Christianity involves a large diversity of conceptions of justice. Nonetheless, taking into account that 81.2% of the Colombian people declare themselves to be Catholics (El Tiempo, 2001b), I will emphasise Catholic notions of justice[83]. However, other Christian conceptions of justice will be considered insofar as all of them are based on the Bible, and almost all of them (in Colombia) draw upon the work of important Christian figures such as Augustine and Aquinas whose works were particularly studied.

### 5.2.1 Biblical Justice

In Hebrew texts (as well as in Greek texts) the same words denote both justice and righteousness (Elliot, 1990; Mafico, 1992). Justice/righteousness implies "being right with God" (Elliot, 1990, p.6). Several elements associated with justice in the Old Testament are particularly relevant for this research:

- The alignment of several prophets (such as Amos, Isaiah, Micah and Hosea) with the oppressed, the underprivileged and the dispossessed of property as well as the promotion of civil and religious rights (for instance, see Isaiah 1:23; Micah 3:1-11). People are expected to protect the dispossessed and the weak (Psalms 12:5; Jeremiah 22:1-4, 13-19). Justice for the poor is a recurring theme, while richness is associated with exploitation of the poor and violence (Amos 5:7-12; Jeremiah 5:26-28).

[83] In Colombia the second largest Christian group is the one called "cristianos". They mix Catholic and Protestant ideas. It has been estimated that they constitute 10.4% of the total population (El Tiempo, 2001b). However, their notions of justice are based on almost the same sources used by the Catholics, with the exception of the most recent Papal writings and the 20th Century Catholic theologians. Other Christian groups are rather small compared to the Catholics and "cristianos".

- The prophets claim that the ground for justice/righteousness is not custom or tradition, but the moral nature of God (Elliot, 1990).

- A person or judge's righteousness is not based on his ability to enforce a code, but in his capacity to recognise *what is due to other people.*

- Justice protects human dignity (Job 31:13-15).

- Social justice, or the one that concerns social relationships (Elliot, 1990), implies protecting the rights of the disfavoured: "Seek justice, encourage the oppressed. Defend the cause of the fatherless, plead the case of the widow" (Isaiah 1:17).

- Justice, peace and love are concepts that are inextricably linked: "Love and faithfulness meet together; justice and peace kiss each other" (Psalms, 85:10) (see also Isaiah 32:16-18, 60:16-18).

- The notion of equality is praised in both the Old and the New Testaments. This implies both equality as human beings (Proverbs 22:2; Matthew 20:25-28; Acts 10:28; Acts 17:26; Galatians 3:28) and equality in relation to justice (Job 31:13-15). The prophets express their indignation for existing inequalities and for the indifference of the rich concerning the needs and conditions of the poor (e.g., Amos 8:4-7). The laws protect the poor and the disadvantaged (Leviticus, 19:13-15) and even favour them in some situations (Leviticus 19: 9-10, 23:22, 25:25-28; 25:35-37).

In the *New Testament* Jesus adopts the prophets' tradition. For instance, Jesus points out that the 'Kingdom of God' is biased in favour of the disadvantaged, who are the measure of justice in a society (see Matthew 19:23; Luke 19:8; Romans 15:26; Acts 9:36; Acts 10:2,4). People's relationships to the disadvantaged are the test of the justice of their conduct and motivation (e.g., see Luke 10:25-37).

Like the prophets, Jesus also favours equality. He asks rich men and those who want to be "perfect" to sell their possessions and distribute the outcomes to the poor (Matthew 19:21; Luke 11:41; Luke 12:33, 18:22). He even claims that being rich

could be a serious obstacle to enter the kingdom of God (Matthew 19:23; Luke 1:52-53, 16:13). And he and his apostles associate religious commitment with helping the disadvantaged (Matthew 25:36; Luke 3:11, 14:12-14; Acts 20:35; Romans 12:13; Galatians 2:10; 1 John 3:17) and protecting them from injustice (James 2:2-9; James 2:16).

Jesus also emphasises that the motivation for righteousness is not an external law, but a concern and love for others. Love appears as the main aspect of God's justice. Hence, a "passion for justice" could contribute to the development of the human spirit within communities.

### 5.2.2 Early Christianity until Aquinas

The following ideas on justice from early Christians who preceded Aquinas (1225-1274) are relevant to this research:

1. Equality is crucial for many early Christians who wrote about justice (e.g., Lactantius, 1871; Ambrose, 1896, 1984a; Gregory of Nazianzus, 1984; Gregory of Nyssa, 1984; Jerome, 1984). Moreover, material goods were frequently conceived as belonging to all people, and not just a few of them. Earth brings its fruits for the use of *all* (Ambrose, 1984a,b).

2. Natural law has priority over human law (e.g., Origen, 1869).

3. Augustine (354-430) states that justice is a virtue "according to which each man receives what is his due" (Augustine, 1964, p.25). However, justice is not regarded just "as the quality which rewards every one according to his deserts" (Origen, 1869, p.98). As Origen (182-251) states justice is strongly related with goodness: "... we may also hold the virtue of goodness and justice to be one and the same" (Origen, 1869, p.103).

4. Justice is frequently seen as a communitarian notion that helps to create society among people (Augustine, 1873, 1972; Ambrose, 1896).

### 5.2.3 Thomas Aquinas

For Aquinas (1225-1274) "*justice is a habit whereby a man renders to each one his due by a consent and perpetual will*" (Aquinas, 1929, p.115), and it directs human beings towards the common good. Aquinas (1929) distinguishes between commutative and distributive justice. Commutative justice is relevant to the mutual dealings between individuals. Distributive justice pertains to the distribution of common goods. Following Aristotle, Aquinas (1929) states that justice is in conformity with the 'real mean'. In distributive justice the mean is followed according to *geometrical proportion* between things and individuals. On the contrary, in commutative justice equality is understood in relation to an *arithmetical mean* that is assessed in terms of equal excess of quantity. Hence, in a deal between two persons one "should pay back to the other just so much as he has become richer out of that which belonged to the other" (Aquinas, 1929, p.161). Restorations belong to commutative justice which is caused because one individual has what belongs to another person with or without his will.

Aquinas claims that the selection of a means to an end is fully rational only if that end is itself a means that leads to the ultimate end of human beings. That ultimate end is happiness (Aquinas, 1970). It constitutes the *archē*, the starting point from which individuals who employ practical reason can reach particular conclusions about how to act justly. A principle of justice can only be valued if it leads people to approach perfect happiness.

"Virtues are praised because of the will, not because of ability" (Aquinas, 1964, p.27). Therefore, if a person lacks the ability to perform well all the actions required according to justice, then her virtue should not be praised less as long as her will has no imperfection.

Something is just if it is right according to the rule of reason and the first rule of reason is the natural law which is the same for all persons (Aquinas, 1966). Therefore, no one has to obey a 'law' that does not flow from the natural law, and hence, that is

unjust and does not deserve to be called 'law'. Aquinas claimed that nothing inherently bad can become good and right. He states: "For anything to be good requires that all its elements be present together in right order" (Aquinas, 1972, p.157). For instance, he claims that every lie is sinful, even if it was uttered in order to rescue someone from a dangerous peril. Aquinas is not a consequentialist. Justice in action requires righteousness in all the elements involved in the action. Otherwise, full justice cannot be reached. People become unjust and therefore incapable of achieving their ultimate end in life.

### 5.2.4 Contemporary European Contributions

During the last 120 years the European Catholic Church produced several documents (such as the Papal encyclicals) that have influenced the moral thought of the Colombian Catholic Church. From this material I will just highlight those points that are useful for understanding the analysis presented later on.

- The main significance of justice in the Bible has been interpreted as the "protection of the weak and of their right, as children of God, to the wealth of creation" (Pontifical Council for Justice and Peace, 1997: section 61). The ancient biblical preference for the poor became widely known as "the preferential option for the poor" (John XXIII, 1995; John Paul II, 1997a,b). Justice demands a differential treatment to compensate for the disadvantages created by previous events (John XXIII, 1995).

- Natural justice has primacy over any agreement even if the latter is reached with the free consent of the parties (Leo XIII, 1995). Paul VI argues: "...when two parties are in very unequal positions, their mutual consent alone does not guarantee a fair contract; the rule of free consent remains subservient to the demands of the natural law" (1967, section 59).

- Social justice and the common good are seen as demanding more equality in the distribution of the world's goods, including those produced by economic and

social developments (e.g., Second Vatican Ecumenical Council, 1965; John XXIII, 1995; Pius XI, 1995; Pontifical Council for Justice and Peace, 1997).

- Social justice is perceived in terms of satisfying the needs of the common good (Paul VI, 1967; John XXIII, 1995). The health of the social body and the health of each single individual can only be achieved simultaneously. Justice involves both the community and the individual.

- The notion of justice is not associated just with giving to each one what is his due or to contribute according to one's capacity (John XXIII, 1995). Justice also involves the notion of guaranteeing each individual a minimum (a "truly human life") which involves an individual notion of good, human nature and destiny in life (John XXIII, 1995).

- Social justice demands that the participants enjoy "a certain equality of opportunity". Otherwise, transactions are neither human nor moral (Paul VI, 1967).

- The notion of "human dignity" is the ground of any right (Tauran, 1998).

### 5.2.5 Recent Latin American Catholic Thought

Latin American Catholics (including priests and liberation theologians) have produced a number of documents that contributed to change the notion of justice of the common people in Colombia. Although many of their messages were those that I have already presented, some are new and the emphasis put on some topics has changed. I will highlight only the relevant new issues.

- "Injustice" refers to a sinful situation linked to individual sins or sins embodied in unjust social and economic structures (CELABM, 1968). The cause of the injustices the poor suffer (extreme poverty, etc.) is not just the product of individual sins but of the "structures of sin" that destroy the common good (CELAMB, 1968; MAEA, 1992).

- A decision to work from "the viewpoint of the poor" (Sobrino, 1984). God loves the poor not because they are good or better than others, but because they are poor: "That is, they are afflicted, they are hungry, and this situation is a slap in the face of God's sovereignty" (Gutiérrez, 1983, p.140).

- Justice is linked to liberation (CELABSD, 1992). The purpose of God's interventions in history is "to liberate, and to make justice reign" (Gutiérrez, 1983, p.7).

- Justice goes beyond obligation, basically because of its connection with the love of God and the poor (CELABM, 1968; Gutiérrez ,1973).

- Those who are responsible for injustices are also the victims of their unjust decisions and actions (Wogaman, 1994). The unjust also need liberation. Liberation is not restricted to a few members of the community but to all. The fracturing of the life of the community is conceived as diminishing life for all its members. Therefore, salvation, liberation and justice are only complete when they reach the whole community and not just a few of its members.

### 5.3 Amerindian Justice

Before the beginning of the Spanish conquest of Colombia several Amerindian native communities who inhabited the country had their own conceptions of justice. Nevertheless, the information about these conceptions is meagre. Several factors seem to contribute to this including: the violent nature of the Spanish conquest and the annihilation of millions of Amerindians; the oral nature of Amerindian societies; the Spaniards' almost complete lack of interest in exploring the culture of the inhabitants of the Americas (see Salazar, 1992a); and the Spaniards' Eurocentricity (Dussell, 1998).

Because almost nothing is known about the ancient Amerindian conceptions of justice, at present the best available option is to explore their contemporary notions, which are orally transmitted (Reichel-Dolmatoff, 1991a; Cerón et al., 1996). Given

that some of the indigenous communities have remained relatively isolated from the dominant culture during the last centuries, it is reasonable to assume that their present notions of justice might share some similarities with their ancient conceptions.

There are around 800,000 Amerindians in contemporary Colombia (Perafán, 1995), a country with a population of approximately 40 million inhabitants. They live mainly in the Amerindian territories and they are part of 428 Amerindian communities that belong to 81 different ethnic groups. Their conceptions of justice seem to be very diverse, and they remain almost completely unexplored by academics. Perafán (1995), author of two of the only three available works about their jurisdictional systems, points out the need to further explore their diverse conceptions of justice. It is quite possible that the Amerindians' conceptions of justice may have influenced a much wider population that is usually not considered part of the Amerindian groups: there has been a great deal of interracial mixing over the centuries, and relatively few Colombians would claim 'pure' Spanish, African or Amerindian ancestry.

Although there is very little information about the Amerindians' conceptions of justice, recent anthropological work has produced some basic findings about these conceptions:

- Each tribe usually has its own notion of justice and its own methods of promoting and enforcing it (Uribe, 1992; Perafán, 1995; Cerón et al., 1996).

- Quite frequently, traditions, ancient customs and/or group deliberations are the grounds for deciding the details of particular compensations (see Uribe, 1992; Cerón et al., 1996). In general under the Amerindian rules of reciprocity goods are given and services are rendered without any commutative price. The opposing party is expected to *contribute in accordance with his or her possibilities*. What is important is not the good(s) that are exchanged but the relationship established between the parties. Economic relationships depend on social relationships (Perafán, 1995). The obligation perceived by Amerindians depends on the present state of their personal relationships. Therefore, Amerindians may not feel the obligation to comply with the conditions of a commutative contract.

- A specific ontology is associated with the ethics of each particular group. Colombian Amerindians' ethics usually take seriously not only human beings but also their natural environments (including plants, animals and minerals), frequently mediated by supernatural beings (Reichel-Dolmatoff, 1990, 1991a; Perafán, 1995; Perafán et al., 1995). Thus, among many Colombian communities the notion of justice is not only associated with human beings, but also with nature and the cosmos in general. A balance that must be obtained between the individuals and their surroundings is frequently closely related to the conception of justice (Reichel-Dolmatoff, 1991a; Uribe, 1992). When the balance is altered injustice is done (Ramírez, 1996).

- The accumulation of wealth is absent in many indigenous communities. In others it is penalised through mechanisms of reciprocity that aim at the redistribution of wealth (Perafán, 1995).

- Punishment is not considered a compensation or a retribution but a contribution to the rehabilitation of the offender (Perafán, 1995; Guerra, 1996). The main sanction usually involves handing over some goods or delivering some services to the group of the offended person (Cerón et al., 1996).

It has to be made clear that not every Colombian indigenous community conforms to the previous generalisations. Different communities have varied traditions, cultural systems and languages. Therefore, the ideas that have been exposed should serve only as a guide to begin an inquiry into the diverse Amerindian conceptions of justice. However, it would contribute to the further marginalization of Amerindian notions of justice if I were to decide not to include them at this stage because there is incomplete information. In my view it is better to include what we do know than to set this knowledge aside.

## 5.4 The Utilitarians

The rejection of Aristotelianism, the controversy between rationalists and empiricists and the emergence of the market economy and the modern state (Polanyi, 1957) are

an important part of the context in which the theories of several Englishmen and Scotsmen, here grouped under the term utilitarians, became prominent after the 17th Century. I studied the conceptions of justice of several utilitarians but particularly the conceptions of three who seem to have been the most influential ones in Colombia: David Hume, Jeremy Bentham and John Stuart Mill.

### 5.4.1 David Hume

Hume (1711-1776) claims that reason "is and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them" (Hume, 1965a, p.179). Moreover, "All morality depends upon our sentiments" (Hume, 1965a, p.227). Reason cannot critically examine the passions or desires. Hume accepts passions, sentiments and feelings as previously specified and unequivocal. He argues that:

- Motivated by the desire to advance self-interests, people accept the regulation of their conduct by an agreement between them (Hume, 1965a). The desire to guarantee a minimum stability in the possession of goods makes people's self-interest restrain itself. The aforementioned agreement involves the renunciation of the *possession* of others' goods. Once this is accepted by all, the idea of *justice* arises. The laws of justice owe their existence to utility and it is because of its utility that we pay high regard to justice (Hume, 1965b).

- Justice arises from human conventions that attempt to overcome inconveniences produced by some qualities of the human mind and some characteristics of external objects: the *selfishness* and *limited generosity* of the human mind; and the *easy change* of external objects as well as their *scarcity* in relation to the desires and wants of human beings. The previous elements are also called the 'circumstances of justice' (Rawls, 1988), or the Humean circumstances of justice.

Hume conceives "justice as almost exclusively concerned with the establishment and maintenance of property rights" (Stroud, 1977, p.202). Justice is conceived as an artifice to guarantee the peaceful possession of property (Hume, 1965a).

Hume (1965b) opposes equality in the distribution of wealth for he considers that differences in industry, care and art among people would quickly destroy any initial equality. Moreover, if industry, care and art were prevented from working, beggary and want would spread throughout the whole society. Additionally, the discovery and punishment of every inequality would require a rigorous inquisition and a very severe jurisdiction that could degenerate into tyranny, exerted with partialities, which would contradict equality.

### 5.4.2 Jeremy Bentham

Jeremy Bentham's (1748-1832) works were studied in all Colombian schools and universities during the 19th Century (see section 4.3.4). Bentham rejects the belief in ideas such as natural law, original contract and natural rights (Mack, 1962; Bentham, 1977). He prefers the principle of utility: "it is the greatest happiness of the greatest number that is the measure of right and wrong" (Bentham, 1977, p.393). It is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question" (Bentham, 1982, p.12). Utility is regarded as "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness" (Bentham, 1982, p.12), or to prevent the opposite (pain, evil, unhappiness, etc.) to a specific party. Utility is the test and measure of all virtue (Bentham, 1977).

Bentham argues that nature "has placed mankind under the governance of two sovereign masters, pain and pleasure" (1982, p.11). They alone can point out what people *ought* to do. The standard of right and wrong depends on them. An action matches the principle of utility when it augments the happiness[84] of the community (Bentham, 1982). This is the type of action that is right, that ought to be done.

Bentham (1982) regarded his 'calculus' of pleasures and pains as the basis for 'the whole fabric of morals and legislation'. The good or bad tendency of an act for a person can be calculated summing up all the pleasures produced by that act and

[84] For Bentham happiness only refers to pleasure and pain (Harrison, 1983).

subtracting from this all the pains. If this procedure is extended to a group of persons, taking all their pleasures and pains into account, the result is an evaluation of the good or bad tendency of the act in relation to all of them.

### 5.4.3 John Stuart Mill

John Stuart Mill (1806-1873), our third utilitarian author, claims that the individual should be granted freedom for self-development according to his own will (Mill, 1972a). He asserts that no one should be compelled to anything because 'it will be better for him', because 'it will make him happier', or because 'it will be right'. The paramount freedom of someone is that of pursuing her/his own good in the way s/he chooses. I will outline some of Mill's notions that are important for understanding the ideas presented in the next chapters:

- Mill embraces the Greatest Happiness Principle which "holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness" (Mill, 1972b, p.257). Happiness is increased by pleasure and reduced by pain. The happiness that constitutes the utilitarian standard of what is right in conduct is the happiness of all concerned and not just the agent's own happiness. All individuals' happiness should be counted equally. The increase of happiness is the test by which all conduct can be evaluated. It is the unique end of human action and *the* criterion of morality. This applies to justice for it is a moral attribute. *Justice grounded on utility* is the main aspect of *all morality* (Mill, 1972b).

- It is unjust to be *partial* in issues where partiality does not properly apply[85]. When rights are concerned, impartiality is mandatory. Impartiality is an obligation of justice. Every individual has "a right to equality of treatment, except when some recognised social expediency requires the reverse" (Mill 1972b, p.320). Mill considers the following the fundamental abstract standard of distributive and social justice: "we shall treat all equally well (when no higher duty forbids) who

[85] Mill points out that there are situations where partiality is not censurable, but what he means by "properly" remains vague.

have deserved equally well of *us*, and [...] society should treat all equally well who have deserved equally of it" (Mill, 1972b, p.318).

- The sentiment of justice involves the desire to punish those who have done harm (Mill, 1972b). This sentiment can turn out to be the 'natural' feeling of vengeance or retaliation. The most attractive rule to the primitive sentiment of justice is the *lex talionis*. Mill (1979) considers punishment more efficacious than reformative-preventive tools or reward.

- The *essence* of the idea of *justice* is that of the *right* of a person. Justice is different from morality in general because it implies something "which some individual person can claim from us as his moral right" (Mill, 1972b, p.305). An individual's right is a valid claim on society to protect the individual in possession of the right. Individual's rights should be protected for they are an *instrument for maximising utility* (Mill, 1972b; Berger, 1984). Rules of justice establish rights and obligations (Mill, 1972d). If rights are taken seriously they are not overridden simply because overruling a right can produce greater utility for a limited group of people.

- Important inequalities of wealth, power and education are wrong and need justification (Mill, 1967). He argued in favour of guaranteeing the greatest liberty of action for people, while promoting a common ownership in the world's raw materials and an equal participation in the advantages of combined labour (Mill, 1981). It should not be allowed that large inequalities force anyone into a very difficult situation. Natural inequalities should be rectified (Mill, 1965).

## 5.5 Liberals

Individualism has been considered the ontological core of liberalism (Arblaster, 1984; Bullock, 1988). From individualism liberals frequently derive some commitments such as the ones to liberty, individual rights and tolerance. Although the term liberalism has several interpretations, they are usually related and overlapping (see Arblaster, 1984; Bullock, 1988; Almond, 1995; Sterba, 1995). They usually imply

conceiving the individual as primary and more important than society or any social formation. The individual comes *before* society in every sense, and particularly in moral matters. Liberalism encompasses different philosophical traditions, such as the Kantian and the utilitarian one (Almond, 1995), which I have preferred to discuss independently given its substantial influence on Colombian culture. In this section I will review the conceptions of justice of Immanuel Kant and John Rawls.

### 5.5.1 Immanuel Kant

Kant (1724-1804) thought that we could only appeal to *reason* as the source of moral goodness. He stressed the importance of the autonomy of the will in determining what is moral: "An action which is compatible with the autonomy of the will is *permitted*; one which does not harmonise with it is *forbidden*" (Kant, 1991a, p.101). The next ideas proposed by Kant are important for understanding arguments presented in the following chapters of this thesis:

- Kant (1956) considered that only reason can determine what is good. He considered an object or a state of affairs to be good "if there is a sufficient practical reason for realizing it or bringing it about" (Korsgaard, 1996, p.226). Good will is the only thing that can be considered good without qualification. Good will is good "through its willing alone" (Kant, 1991a, p.60), and not because of its usefulness for achieving some end. It has value in itself, a value unaffected by the fulfilment or unfulfilment of the purpose of the actions.

- Reason prescribes principles of duty absolutely and objectively (Kant, 1991b). These principles establish how someone ought to act and are a matter of obligation[86]. If an action is done from self-interest or from inclination, such as when it is motivated from the pleasure of giving happiness to others, it has no moral worth. Kant (1991a) claims that the moral worth of an action done from duty depends not on the purpose of the action but on the maxim[87] in accordance

[86] *Obligation* is the necessity of a free action under a categorical imperative of reason.
[87] For Kant a "*maxim* is a subjective principle of a volition" (Kant, 1991a, p.66), or some rule that establishes someone's intentions.

with which the action has been carried out. What matters is its *a priori* principle of the will and not its *a posteriori* motive.

- For Kant, duties are either duties of justice or duties of virtue. The first are distinguished from the second because for the first an external legislation is possible (Kant, 1965). Duties of justice arise from the idea of *external* freedom that requires the respect of everyone's freedom, because someone who is virtuous acts in accordance with freely chosen ends rather than being in the hands of desires, inclinations and/or self-interests. When facing any action people may choose between inclination and duty. Even if you are inclined to commit a fraud and your action cannot be discovered, you should not do it because of the sense of duty. Someone who acts out of a sense of duty is just towards others. A "moral" act is one that is performed only out of the sense of duty, while a purely "legal" act is one that has some external coercion as the only incentive.

- Kant (1965) proposes a principle of legislation that should regulate the whole formal legal structure of society: the Universal Principle of Justice. This principle, based only on pure reason and not on any empirical principles, states: "act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law" (Kant, 1965, p.35). The Universal Law of Justice safeguards the maximum possible freedom for all individuals to achieve their own well-being and happiness. The authority of reason is, according to Kant, the only possible ground for the Universal Principle (see Sullivan, 1994).

- The notion of justice does not consider the end that the individual tries to reach by means of the object that s/he wills, but only the form of the relationship between people's wills insofar as they are free[88] (Kant, 1965). An action is just if in itself or in its maxim it can coexist with the freedom of other people according to the Universal Principle of Justice (Kant, 1965). *Ethics* and not jurisprudence *is what demands me to adopt the maxim of acting justly.*

[88] For instance, in a commercial transaction our concern for justice should disregard whether the parties profited or not from the transaction. On the contrary, what should have our attention is whether or not the actions of each one are compatible with the freedom of the other according to the Universal Law of Justice.

- Justice is much more than strict justice[89] (*jus strictum*). It can be conceived in a wider sense (*jus latum*). *Jus latum* involves the right of equity. When someone appeals to equity, his demand is based on his *right* (Kant, 1965). For instance,

> "when one of the partners of a mercantile company formed under the condition of sharing the profits equally has nevertheless done more for the company than the other members and through various mishaps has thereby lost more than the others, then on the grounds of equity he can demand that he receive more than an equal share" (Kant, 1965, p.40).

How much he should receive cannot be decided solely on the basis of strict law. However, Kant is no more specific than this. He only adds that the demands belong to the court of conscience. Kant considers that equity takes into account "the disposition and aims of the contracting parties, while strict right only looks to the content of the contract" (Vigilantius, 1997, p.326). So, a judge may not decide according to equity. If he decides strictly according to law, his judgement may produce results in which a person does not receive what is due to him (Vigilantius, 1997).

- Kant calls "Categorical Imperative" the law that he considers that is good absolutely and should determine the will. It is not a rule for satisfying people's desires or particular goals. On the contrary, it attempts to satisfy the *requirements of reason*[90] (Kant, 1991a). Kant offers three versions or formulas of it. I found the second one particularly relevant for understanding the outcomes of this research. The second formula is the Formula of the End in Itself or Respect for Human Dignity: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Kant, 1991a, p.91). Kant's second formula of the Categorical Imperative opposes making use of somebody else *merely as a means* in a negotiation or mediation process. We should resist liars because of their methods, and not because of their final purpose (see Korsgaard, 1996). In the second formula Kant stresses the *dignity* of each human being and the *equal* value of persons. *Humanity is an objective end in itself* (Kant, 1991a). In the kingdom of

[89] "Strict justice" is the one that is completely external (Kant, 1965). It involves no ethical elements. It relies on the principle of external coercion that protects the freedom of all in harmony with universal laws.

ends all things have a *price* or a *dignity*. If a thing can be replaced by something else as an equivalent, it has a price. Otherwise, i.e. if it is regarded as above all price, it has a dignity. Autonomy is "the ground of the dignity of human nature and of every rational nature" (Kant, 1991a, p.97).

- Kant (1991a) claims that anything that opposes individual rights is indisputably wrong. Thus, the end cannot justify the means, however good the end might be. The good of an individual or even of mankind cannot be used to justify any injustice.

- Kant is an egalitarian insofar as he considers that every person has the same innate moral status (Kant, 1965). He states that the basic laws of the state should apply to every person equally. He defines the principle of equality as "not treating one side more favorably than the other" (Kant, 1965, p.101). Kant's egalitarianism does not imply pursuing equity in possessions or in power.

### 5.5.2 John Rawls

For Rawls (1988) the primary subject of justice is the basic structure of society because of the major effects it can have. The principles of justice for the basic structure of society are considered the product of an agreement that takes place in an original and hypothetical position of equality. These principles are the ones that free and rational persons concerned to promote their own interests would choose in the "original position" as establishing the basic terms of their association. This way of conceiving the principles of justice is what Rawls calls justice as fairness.

#### 5.5.2.1 Justice as Fairness

Justice as fairness is made up of two parts: An initial situation in which a problem of choice is stated, and some principles which may be chosen by rational persons. In the original position all people are assumed to be behind a 'veil of ignorance' that does not let them know many of the particularities of their lives (e.g. their personal natural

[90] Neither our desires nor the precepts ordered by God are acceptable bases for morality (Kant, 1965).

assets and abilities, their conceptions of their own good, etc). Therefore, because no one can favour his/her particular position in society, the principles of justice that people choose "are the result of a fair agreement or bargain" (Rawls, 1988, p.12). Rawls argues that in the original position people would agree on two principles that are just:

- First: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls, 1988, p.60).

- Second: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (Rawls, 1988, p.83).

The first principle of Rawls' (1988) two principles of justice is prior to the second. Therefore, a departure from the right to the most extensive basic liberties is not justifiable by larger social and economic benefits. The second principle implies that the distribution of wealth and income should be to everybody's benefit, although it may not be equal. Inequalities may be just only if they generate compensating benefits to everyone, especially to the least advantaged members of society. Simultaneously, everyone should have equal opportunity of access to positions of authority and offices of command.

### 5.5.2.2 The Right and the Good

Rawls' (1988) theory supports the idea that society is better organised when it is governed by certain principles that do not presuppose any specific conception of the *good*[91] but that correspond to the concept of *right*. He regards right as a moral category independent and prior to the good. Rawls (1988) argues that what is most important is not the particular ends we select but our capacity to choose. Individual's desires and inclinations (which are part of a person's conception of the good) should not be taken for granted as something that should be maximised. Justice has priority

[91] Rawls conceives the good as "the satisfaction of rational desire" (1988, p.93), because a person's good is "for him the most rational long-term plan of life given reasonably favorable circumstances" (1988, p.93).

over people's desires and interests. The principles of right, and therefore of justice, set limits to those satisfactions of desires which can have value (Rawls, 1988)[92]. The principles of right impose limits on the reasonable conceptions of an individual's good.

#### 5.5.2.3 Democratic Equality

Rawls (1988) calls "democratic equality" his interpretation of the second principle of justice. This interpretation is based on the principle of fair equality of opportunity and the difference principle. The principle of fair equality of opportunity demands that everyone should have a fair chance to occupy positions of authority and offices of command. The intuitive idea behind the difference principle is that the social system should neither allow nor guarantee the advantages and better expectations of the most favoured individual if this does not contribute to further the prospects of those who occupy the least favoured positions. Unless "there is a distribution that makes both persons better off (...), an equal distribution is to be preferred" (Rawls, 1988, p.76).

The difference principle does not hold that to treat all individuals more equally, society must try to favour those with less natural talents or who are born in less advantageous economic or social positions. Moreover, Rawls is not in favour of eliminating the differences between the more and the less fortunate. What the difference principle attempts to improve is the *long-term expectations* of the least advantaged by arranging people's differences so that they favour the good of those who were less fortunate by nature or by social and economic contingencies.

### 5.6 The Marxist Tradition

The Marxist tradition is not a monolithic unity. Among its large diversity we will focus our attention on the work of Karl Marx (1818-1883), Friedrich Engels (1820-1895) and some other socialists who have had a major influence on Colombian contemporary Marxists and communists.

[92] Rawls's interpretation reduces here the conception of the good to the satisfaction of people's desires and inclinations.

Marx claims that moral beliefs and norms are Man-dependent (Marx, 1977). Morality is regarded as a slave of particular interests. There is no universal morality but only particular moralities that mirror the specific interests, circumstances and claims of social classes (Engels, 1988). To think that moral judgements can be deduced from a special "moral sense" is an illusion (Trotsky, 1979). Morality is just relative to a particular stage in the development of the forces of production and it obeys specific class interests (Trotsky, 1979). Morality is the product of class struggle (Trotsky, 1979; Marx and Engels, 1996). Each social class develops its own morality (Engels, 1987).

There is no absolute or eternal justice (Engels, 1987, 1988). Justice and law are no more than ideologized expressions of some particular economic relations (Engels, 1988). False eternal truths, such as justice, will "finally vanish only with the total disappearance of class conflict" (Marx and Engels, 1996, p.19). In the higher state of communism, society will be able to enact the next maxim: "from each according to his abilities, to each according to his needs!" (Marx, 1996a, p.215).

Despite their frequent attacks on the notions of morality and justice (see Buchanan, 1981), the works of Marxists frequently invoke or advocate morality to foster political arguments and struggles (e.g., Trotsky, 1932; Che Guevara, 1964). For instance, Trotsky argues that the "Russian Social Revolutionaries were always the most moral individuals: essentially they were composed of ethics alone" (Trotsky, 1979, pp.42). Marx himself discussed some principles, issues and standards of distributive justice (see Marx, 1996a,b,c), and Lenin (1914) argued in favour of equality. Moreover, the notions of justice and equality are widely used by contemporary Marxist movements in Colombia and many other countries (e.g., Che Guevara, 1964; Peffer, 1990).

Marxist ideas promote a redistribution of property and income (Lenin, 1914; Trotsky, 1938; Che Guevara, 1960; Engels, 1976; Marx, 1998), particularly of modern bourgeois private property because it is based on class antagonisms, on the exploitation of the majority of the people by the few (Marx and Engels, 1996). Marxists consider that the bourgeois subordinates each relation to the relation of exploitation (Marx and Engels, 1977). Additionally, Marxists frequently aim at a

complete (or significantly partial) abolition of private property (Marx and Engels, 1996).

## 5.7 Conclusions

In this chapter I have presented a selection of elements from different conceptions of justice that were chosen given the historical exploration I discussed in Chapter 4. Given the space limits this document has to comply with, in this chapter I have discussed only those elements that I found most useful for understanding the discussions that are going to be presented later. However, I have to point out that more elements of the aforementioned conceptions of justice were used to interpret in detail the parties and the mediators' behaviours and answers in the interviews that were carried out during the fieldwork, and that more theories of justice were reviewed. Therefore, I strongly advise any reader who would like to carry out an investigation of notions of justice in mediation practice to read the original writings of the authors that s/he would find relevant to the particular context where his/her research is taking place. In my case the review of the conceptions of justice of the authors I selected provided me with a basis for designing several tools (e.g., interviews, games) that I used later on during the fieldwork. Additionally, it helped me to enhance my sensitivity to the conceptions of justice of the parties and the mediators that I observed later on during mediation processes. I had observed many mediation processes before beginning this research and before exploring the aforementioned conceptions of justice. Thus, when I began my fieldwork I was struck by the improvement I experienced in my sensitivity to issues of justice during my observations of mediation processes. I attribute this improvement to studying these conceptions of justice.

As the reader might notice, each conception of justice might be linked to a particular rationality. Notice that I assume that there are 'rationali*ties*' rather than 'rationality', and also 'justic*es*' rather than 'justice' (see MacIntyre, 1988). This is the consequence of being open to a multiplicity of moral frameworks that involve the notion of justice, as well as of rejecting ethical absolutism. In the next chapter I will explore multiple

interpretations of the second theme that I found crucial during the initial stages of my research process: mediation.

# Chapter 6: Some Interpretations of Mediation

## 6.1 Introduction

Given the aims of my research and my methodology, and my initial discussions with the MCBC staff (see section 4.1), an important challenge during the fieldwork was understanding different interpretations people have of mediation. The way mediation was presented in Chapter 1 is a particular way of interpreting it. However, uncovering other interpretations was valuable not only for becoming more sensitive to the ways mediation may have been interpreted at the MCBC by mediators and service users, but also for appreciating new possibilities for transforming the MCBC's mediation practice. Given that in Colombia mediation has been developed based on literature produced in the U.S. and England, I considered it important to appreciate and learn from the interpretations of mediation that are presented in the ADR literature of the English speaking countries of the Western world. As a result I conceived a new way of organising the interpretations of mediation which are presented in the ADR literature (or a new way of interpreting mediation interpretations). The review of this literature and my dialogues with experts in the field from several non-English speaking countries (e.g., Russia, France, Chile) suggests that the aforementioned literature is the most influential one in all the Western world, and that its influence reaches other parts of the World as well.

My intention to discover interpretations which were alien to the ones the MCBC's staff and I already knew led me to an extensive literature review that included what I identified as the major publications in the field. Many journals were explored for articles about mediation, but in particular the main journals in the field were reviewed in detail. The latter included: *Mediation Quarterly*, *Negotiation Journal*, *Law and Society Review*, *Family and Conciliation Courts Review*, and *The Journal of Conflict Resolution*[93]. In addition dozens of books on mediation and conflict resolution were reviewed. These books were selected based on:

[93] Articles from other journals were also reviewed: e.g., *Journal of Social Issues, Law and Policy, Harvard Negotiation Law Review, Conciliation Quarterly, Journal of Social Issues, Journal of Contemporary Legal Issues, International Negotiation Journal,* and *Yale Law Journal.*

- Their popularity, measured by how much they are quoted in the literature of the field.
- Their use as textbooks in the most prestigious programmes on conflict resolution.
- Publication lists of the most important books in the field produced by internationally respected scholars.

The mediation literature suggests that there is no agreement on what makes up the theory and practice of mediation. Debates between mediation sympathisers are frequently fiercer than those they wage against the 'adversaries' of mediation. In Colombia those newly coming into the field of mediation tend to ignore these differences of opinion because they are rarely discussed in mediation training courses. As a result they usually enthusiastically embrace one of the current mediation theories or accounts, blithely believing that there are no other options. They commonly assume that the interpretation they know is the only one, and they develop their mediation practice based on it. This is an important consideration if the reader is to understand the purpose of what I present in this chapter and the spirit in which I present it. I will present diverse ways of conceiving mediation that resulted from my reading of the mediation literature. However, I do not pretend that my classification is exhaustive, neither do I pretend that it is the 'best' classification. It is an interpretation that I found particularly valuable within the context of my research to reveal to my co-researchers and I that there are other interpretations of mediation and the mediator's role different from the ones we knew before.

Some mediation theoreticians have attempted to classify approaches to mediation. Among them the most usual practice has been to classify approaches by identifying them as polar opposites (e.g., Kolb, 1983; Silbey and Merry, 1986; Kressel et al., 1994; Schwerin, 1995; Riskin, 1996). Few authors have adopted classifications with more than two categories (e.g., Harrington and Merry, 1988). However, Bush and Folger's (1994) distinction of four mediation stories probably constitutes the classification that has received most attention in the ADR literature of the Western world in recent years. Bush and Folger (1994) argue that the current tendencies in the mediation field can be grouped into four great accounts, or 'stories'. These stories are the Satisfaction Story, the Social Justice Story, the Transformation Story, and the Oppression Story. These are supposed to represent "different approaches to

mediation practice" (Bush and Folger, 1994, p.15). However, during this research I developed a different framework that I think uncovers and highlights more than Bush and Folger's classification the differences between the most common mediation approaches that can be found in the literature. I consider that Bush and Folger's (1984) account has a conceptual problem. The Oppression Story is not a story in the same way that the other three stories are:

1. The Oppression Story is not an approach to mediation practice. While the other three stories give advice on how to practice mediation, the Oppression Story opposes its practice.

2. As Bush and Folger conceive it, this story gathers together an extremely diverse set of independent and frequently contradictory critiques of the theory and practice of mediation (e.g., Abel, 1982a,b; Hofrichter, 1982; Lazerson, 1982; Sousa, 1982; Fiss, 1984; Harrington, 1985; Fineman, 1988; Fitzpatrick, 1988; Matthews, 1988; Pavlich, 1996). Thus, while the other three stories have a deep internal coherence (its followers share a similar worldview and believe that mediation should pursue similar objectives), the Oppression Story has only a superficial coherence. Its coherence is only based on its opposition to mediation, though on a diversity of conflicting grounds.

Additionally, Bush and Folger (1994) focus excessively on establishing the differences between the mediation story they prefer (the Transformation Story) and the one they consider its main rival (the Satisfaction Story). Therefore, they pay very little attention to the literature that does not address these two stories.

My own proposed framework draws upon Bush and Folger's (1984) work, but differs from it in some respects. I would use the term 'story' to identify the different accounts of the mediation movement that can be found in the literature and that recommend a way to practice mediation. Each one of the mediation stories I identify emphasises different aspects of mediation practice, is based on distinct assumptions, aims at different objectives, and recommends particular mediation strategies and techniques.
I consider that what Bush and Folger (1984) identify as the Satisfaction and the Transformation stories may be regarded as two of the major accounts of the

movement. However, I will distinguish two other accounts: the Community Promotion Story and the Reconciliation Story. The Community Promotion story is to some extent similar to the Social Justice story identified by Bush and Folger (1984). The Reconciliation Story is almost completely ignored by them.

For each of the mediation stories I have identified I have developed a description of its main goals, values, basic orientation, and the main set of mediator's strategies, tactics and practices associated with it. I shared with the MCBC's staff my complete description of each story. During the fieldwork these descriptions were useful in multiple ways:

1. To appreciate the diversity of the mediation literature.

2. To appreciate other forms of practising mediation that initially appeared alien to the mediation practitioners and trainers. After the fieldwork finished, the MCBC's staff began to use the descriptions of mediation stories to train new mediators in order to help them to appreciate that there are many ways to practice mediation and that each one of them involves the selection of some goals, values, worldviews, and particular mediation strategies, tactics and practices.

3. To understand within a much broader context the particularities of the mediation practice at the MCBC, and to realise that the interpretation of mediation that prevailed at the MCBC was not a 'universal' interpretation or the 'correct' one, but the result of a particular historical agent-knowledge-power dynamics. During the fieldwork I found that at the MCBC some form of 'trained incapacity' (Veblen, 1973) appeared to be operating whereby mediators, through their training, have become so habituated to one way of interpreting and practising mediation that no other way of practising it seemed possible.

4. To realise that my co-researchers and I could develop new interpretations of mediation and of the mediator's role.

Unfortunately, the word limit of this document prevents me from presenting here the complete description I developed of each mediation story. Therefore, I will only

outline their main goals, values and basic orientations. I hope that this is sufficient to show the differences between them.

## 6.2 The Satisfaction Story

The Satisfaction Story is the most well known and used mediation approach in Western society today (Bush and Folger, 1994). The majority of the writings on mediation that I found during my literature review can be associated with this story (they accept its goals and values, they adopt its basic orientation, etc.).

### 6.2.1 Goals

Moore summarises the goal of mediation according to the Satisfaction Story: "to help the parties reach a mutually acceptable settlement" (1986, p.38). The settlement is regarded as acceptable for the parties if it satisfies their interests. Therefore, the mediator's basic role is facilitating a co-operative and integrative solution of the dispute (Mayer, 1987; Bush and Folger, 1994). This is the only concern of many mediation programmes (Menzel, 1991). Mediation success is equated with the possibility of reaching a final agreement (e.g. Center for Dispute Resolution, Denver, Colorado, 1985; Becker and Slaton, 1987; Mayer, 1987; Walker, 1989; Marshall, 1990; Zaidel, 1991; Whiting, 1993; Adler, 1995).

### 6.2.2 Problem-solving Orientation

Underlying the Satisfaction Story is a problem-solving orientation to conflict (Bush and Folber, 1994). Within the Satisfaction Story a conflict tends to be perceived as the manifestation of a problem caused by a real or apparent incompatibility of the parties' interests or needs. Conflicts are problems that disrupt the desired social harmony (Sarat, 1988; Cloke, 1991). Therefore, the appropriate response to a conflict implies finding a solution that meets the interests of all the parties involved to the largest possible degree, thereby maximising joint satisfaction (e.g. see Goldberg et al., 1985;

Joyce, 1995). Moreover, from a Satisfaction Story perspective, optimal solutions meet *all* parties' interests (Likert and Likert, 1976) and therefore they are seen as 'win-win' solutions. Underlying the notion of problem-solving mediation is "the acceptance of human beings as rational, problem-solving entities" (Grebe, 1992, p.159).

Mediation is said to reduce the expense of dispute settlement both for the parties and the general public. The problem-solving approach offers an alternative to the distributive approach[94] which many feel constitutes a widely used destructive and costly alternative to conflict resolution (e.g. Fisher and Ury, 1981). A large quantity of research publications on mediation (e.g. Silbey and Merry, 1986; Phillips, 1990; Van Hook, 1990; Cloke, 1991; Donohue, 1991; Cooks and Hale, 1994; Kressel et al., 1994; Adler, 1995) and descriptive characterisations of mediation practice (e.g. Kolb, 1983; Goldberg et al., 1985; Kressel and Pruitt, 1989b; Riskin, 1993) show that this problem-solving orientation is deeply ingrained in contemporary mediation.

### 6.2.3 Values

Two values are central to the Satisfaction Story of mediation:

- Satisfaction of the disputants' interests and desires (e.g., Folberg and Taylor, 1984; Goldberg et al., 1985; Moore, 1986; Mayer, 1987; Potapchuk and Carlson, 1987). This is perceived as bringing fulfilment (or happiness) rather than frustration (or pain) to human beings (Bush and Folger, 1994).

- Individual autonomy. The individual is seen as basically free to take the decisions he/she wants in order to advance the interests he/she prefers (see Bush and Folger, 1994; Cooks and Hale, 1994). This is sometimes called self-determination in the mediation literature (e.g. Joyce, 1995). Only the individual can define what his/her interests are, and the latter are accepted in an uncritical way by mediation theoreticians and practitioners—unless they imply breaking the law or the norms that regulate the mediation process. Each individual can define independently what the good is for himself/herself, and his/her definition is not usually

[94] Defined in section 2.1.1.

questioned as long as it can be accommodated without being an obstacle to someone else's good and without violating legal norms and rights.

## 6.3 The Transformation Story

### 6.3.1 Goals

A transformative approach is centred on *empowerment* and *interparty recognition* (Burgess and Burgess, 1996; Fleischer, 1996; Folger and Bush, 1996; Grillo, 1996; Pope, 1996; Rothman, 1996). These are perceived as the main goals of mediation.

Focusing on *empowerment* means identifying moments at which the parties have the possibility of clarifying their goals, resources, options and preferences, and taking advantage of these opportunities to assist the parties' processes of making informed and careful decisions. The 'empowerment dimension' allows parties to enforce self-determination, gain more confidence in their own abilities, and develop more self-respect, self-confidence, and self-reliance (Bush and Folger, 1994).

Focusing on *interparty recognition* implies recognising the moments when each party can decide how much attention to give to the other's point of view, and assisting the parties' efforts to understand each other's perspectives and take decisions at these moments. This 'recognition dimension' gives parties a chance to express, despite their differences, their mutual acknowledgement and concern for each other as fellow human beings who deserve their say (Bush and Folger, 1994). Recognition is not motivated by a desire to advance self-interest, as is frequently perceived by advocates of the Satisfaction Story (e.g. Fisher and Ury, 1981). Consideration of the other is not the product of concern with oneself, of a focus on the self, but of a genuine concern for the other (Bush and Folger, 1994). In contrast with the Satisfaction Story, the Transformation Story is not primarily focused on searching for resolutions of conflicts and does not consider satisfactory settlements as the main indicator of success (Burgess and Burgess, 1996; Grillo, 1996).

### 6.3.2 A Transformative Orientation

Conflicts are not conceived as problems, but as opportunities for transformation. Transformation involves personal growth. Two dimensions of growth are distinguished (Bush and Folger, 1994):

- Strengthening the self. Strengthening one's inherent capacity to tackle difficulties of all kinds by means of conscious reflection, choice and action.
- Reaching beyond the self to interact with others. Strengthening one's capacity for experiencing and manifesting interest and consideration for others.

The ideal response to a problem is not conceived as solving "the problem" but as helping to *transform the individuals* involved. This implies bringing out their inner "goodness" (Bush and Folger, 1994). It is assumed that the transformation of individuals will end up transforming society. A mediation constitutes an intervention into a much larger stream of interaction, that may continue after the intervention ends (Folger and Bush, 1996). The intervention should not be seen as the resolution of the entire conflict.

Bush and Folger (1994) argue that problem-solving mediation overcomes the difficulties of the distributive approach to conflict resolution (see section 2.1.1). However, this move is only a move from a win-lose attitude to a win-win attitude. This is an important change, but one that perceives conflict as mainly concerned with *winning or losing* rather than something quite different: *growing*. The latter is achieved by assuming a transformative view of mediation.

### 6.3.3 Values

Transformation is considered the central value of mediation (Bush and Folger, 1994). Valuing transformation involves valuing behaviour that shows "compassionate strength". Compassionate strength is valuable because it aims at genuine human *goodness*. Strength implies a transition from dependent to autonomous conduct (Bush

and Folger, 1994). Compassion for others implies a transition from selfish to considerate conduct. Respect for the disputants is of great significance (Grillo, 1996). The values of the Transformation Story imply a conception of human beings as both self-interested and responsive to others. Persons are seen at the same time as both individuated and connected to others, as autonomous and linked, as "self-interested and self-transcending" (Bush and Folger, 1994).

## 6.4 The Community Promotion Story (CPS)

### 6.4.1 Goals

Advocates of CPS identify the following goals of mediation:

1. To contribute to the empowerment of communities (Merry, 1982; Wahrhaftig, 1982; Shonholtz, 1987; Herrman, 1993; Thomson and DuBow, 1995)[95]. Community empowerment produces community improvement (it contributes to the common good).

2. To empower the general public to use more effective, less violent, and more participatory conflict resolution options as individuals or collectives (Wahrhaftig, 1982; Shonholtz, 1987, 1995; Herrman, 1989, 1993).

3. To promote the organisation of individuals around common interests, and thereby encourage the creation of stronger ties, interpersonal relations and structures in the community that help to maintain and recreate it (Herrman, 1993; Moore, 1994).

4. To limit exploitation and abuses that powerless individuals may fall prey to. Mediators should promote public dialogue on justice issues (Shonholtz, 1987).

[95] Community empowerment is rarely defined among advocates of CPS. McGillis (1986) suggests that it involves an increased community self-awareness, the development of indigenous community leadership and greater capacity for managing the community. Lowry (1995) points to an increased identification with and attachment to the community, as well as a reduction of people's feelings of alienation and anomie.

5. To make local peace relevant to the common people. This includes elements such as supporting advocacy for the less powerful and teaching people to confront the reasons for anger.

6. To contribute to the development of community systems for the prevention or de-escalation of conflicts (Shonholtz, 1987). Conflicts should be addressed before they become too entrenched or violent (Shonholtz, 1987; Herrman, 1993).

### 6.4.2 A Community-Empowerment Perspective

Advocates of CPS are concerned about improving communities. They follow what has been called a *community-empowerment perspective* (Merry, 1982; Wahrhaftig, 1982). While they perceive some means of dispute resolution as more likely to enable community, others are perceived as more prone to imperil it (Moore, 1994). The followers of CPS claim that mediation is one of those means that can enable us to live in better communities.

Moore claims that "Community exists when people who are interdependent struggle with the traditions that bind them and the interests that separate them in order to realize a future that is an improvement upon the present" (1994, p.199). Communities may emerge in contexts such as neighbourhoods, schools, workplaces or prisons (Wahrhaftig, 1982). A person is viewed as complete when he/she is conceived as part of a community. A genuine community invents the processes of interaction that allow its members to live together. Mediation is perceived as one of these processes. It positively addresses conflict, a main element in creating and recreating the community. Mediation is preferred to litigation because mediation has a higher probability of preserving relationships, and it can provide persons with a sense of belonging or acceptance as members of a community (Moore, 1994). Within CPS a community is perceived as smaller than a city, a region, or a state (Moore, 1994).

CPS authors tend not to perceive individuals as *a priori* individuated subjects whose identities are fixed before they become part of a community. On the contrary, the individual's identity as well as his/her interests are at stake within the community and

they are partly defined by the community to which they belong (e.g., Moore, 1984). Like some communitarians (MacIntyre, 1981; Sandel, 1982), they tend to assume that individuals are socially constructed beings. They do not interpret the good of the community as being constituted by the sum of the benefits its members obtain from co-operating (e.g., Shonholtz, 1987; Moore, 1994). They value elements that confer cohesion to communities and contribute to their transformation, such as shared understanding, peaceful problem-solving techniques, and people's participation.

Within CPS conflict is not seen as a problem, but as a catalyst for social change. It promotes the expression of ideas, new ways of organising and calls for the creation of institutional structures and processes for tackling differences (Shonholtz, 1997). Disputes are thought of within the context of the whole community and not just as isolated events.

Although CPS is strongly linked to community mediation, this does not mean that all community mediation theory and practice is part of CPS. An important part of community mediation is better understood as part of other mediation stories. For instance, some community mediation movements are merely intended to address the delays, costs and lack of access that are attributed to the traditional judicial system (Hofrichter, 1987; Lowry, 1995). Dukes (1990) argues that the majority of research on community mediation is of this kind, focused on dispute processing and ignoring concerns about justice. Instead, CPS specifically promotes dialogue on justice issues (Shonholtz, 1987).

### 6.4.3 Main Values

Three values are central to CPS (see Shonholtz, 1987; Herrman, 1993; Moore, 1994):

1. The promotion of communities.
2. Power equalisation, which implies trying to create balance among the parties before and during the mediation process.
3. Empowerment of the clients to make strategic choices.

## 6.5 The Reconciliation Story

### 6.5.1 Goals

The Reconciliation Story focuses on the following goals:

- Relational reconciliation (Lederach, 1989; Zehr, 1990; Lederach and Kraybill, 1995) and restructuring relationships. This involves the reconciliation of the disputants with each other and with the community to which they belong.

- Pursuing justice (Mennonite Central Committee, 2000).

- Participatory empowerment. Participatory empowerment implies participation in and accountability for the decisions that affect one's own life. Empowerment has to do with helping people to act coherently and purposefully (Lederach and Kraybill, 1995). Empowerment is conceived as requiring people to be integrated into and accountable to their communities. It builds community.

- Forgiveness and healing are important options whenever they are considered appropriate to a conflict (Mennonite Central Committee, 2000).

- Personal and community transformation. New ways of handling conflict contribute to this goal. In particular, reorienting the main normative assumptions about managing disputes held by the common people (Lederach and Kraybill, 1995).

- Introducing questions of values into dispute resolution but attempting to elude creedal approaches to conflict resolution (Lederach and Kraybill, 1995).

- Focusing on issues of structure that brought about and nurture antagonistic interaction, rather than on cycles of action/reaction between the disputants (Lederach and Kraybill, 1995).

### 6.5.2 The Reconciliation Perspective

The Reconciliation Story is based on what I call a reconciliation perspective. This involves a global vision of the relationship between specific conflicts (which can be the subject of community mediation) and much wider social and political phenomena that may require working at multiple levels of a society in order to have a more profound effect (Lederach, 1997; Sampson and Lederach, 2000). Mediation is seen as part of an integral strategy for bringing *peace and reconciliation within a given society* (e.g. Lederach, 1997). In this sense it goes beyond the local community focus of the community promotion story.

A substantial difference between the Reconciliation Story and the other mediation stories is the importance its advocates give to the *reconciliation of the disputants with each other and with the community to which they belong.* To achieve this reconciliation, rather than separate the disputants to reach an agreement, mediators attempt to conduct mediation processes with the participation of other members of the community drawn from outside the initial boundaries of the conflict who contribute with ideas and assume responsibilities (Zehr, 1985, 1990; Lederach and Kraybill, 1995)[96].

Another difference between the Reconciliation Story and other mediation stories is the foremost importance that advocates of the former concede to a particular conception of justice. This is a notion of restorative justice based on Christian ideas (see Chapter 7).

Advocates of the reconciliation perspective emphasise training programmes that contribute to the creation of a "culture of peace" within society (Lederach, 1997). Trained mediators indigenous to the society are indispensable for these programmes, as well as grassroots-level activism and the involvement of local mid-level elites (Lederach, 1997). It is assumed that the participant's 'natural', everyday knowledge is the basic resource for creating appropriate training models.

[96] However, some advocates of the Reconciliation Story (e.g. Umbreit, 1995) seem to forget this wider participation of the community either directly or through representatives in mediation processes.

The Reconciliation Story is based on the idea that the development of the individual and the development of the community require each other. Community is regarded as "a group of people who share a common vision for corporate life and are accountable to each other to live in accordance to that vision" (Lederach and Kraybill, 1995, p.359). Community implies cohesion and connection of its members around common goals and values. A community is much more than a group of individuals who inhabit a geographical area. Lederach and Kraybill (1995) call the latter a "geographic community" and they point out that this is the way community is usually understood by mediation programmes. A community implies people linked by a common core of values and accountable to each other in relation to those values.

Lederach and Kraybill (1995) suggest applying community-justice programmes to communities that constitute established relational networks and not to geographic communities. The model of mediation proposed by the Reconciliation Story assumes the existence of a trust-based network. Thus the goal is not to create a new community but to empower the already existing networks to serve as mechanisms of justice.

Advocates of the Reconciliation Story frequently emphasise that the process of going through mediation should be considered more important than the outcome of this process (Lederach, 1995). Therefore, they do not tend to emphasise outcomes as supporters of the Satisfaction Story do.

### 6.5.3 Mediation Values

The following values are central to the Reconciliation Story of mediation (Zehr, 1985, 1990, 1995; Lederach, 1989, 1995, 1997; Lederach and Kraybill, 1995; Sampson and Lederach, 2000):

- Restructuring relationships so as to build stronger communities in which relations are more just among its members.

- Justice as the restoration of right relationships (I will discuss the Reconciliation Story vision of justice in Chapter 7).

- The validation of the voices of the others, including those members of the community who did not seem to be initially involved in the dispute. Equal weight should be given to each of the parties and the members of the community (the interests of those absent from the negotiation table should not be marginalised).

Other relational values (such as forgiveness and healing) are considered important for the reconciliation ideal.

## 6.6 Final Comments

Based on a detailed literature review I have presented a description of four ways of interpreting mediation that I think uncover and highlight more than previous classifications the differences between the most common mediation approaches that can be found in the ADR literature of the English speaking countries of the Western world. The mediation approaches or stories identified are: The Satisfaction Story, the Transformation Story, the Community Promotion Story, and the Reconciliation Story.

Of course, I do not assume that all mediation theoreticians follow the stories I have described. Other interpretations of mediation practice can be found in the ADR literature, and probably some others have not been reported yet. However, the account I have presented in this chapter has the virtue of presenting in a synthetic way the most common approaches that can be found in a literature that is quite diverse, and where differences and similarities between authors are frequently not easy to identify. This account shows the goals of all the mediation approaches cannot necessarily be achieved at the same time. Mediators have to make choices (they have to make boundary judgements), and in making them they cannot avoid privileging some ethical concerns over others. I have associated each of the mediation stories I have identified with some specific goals, a particular orientation or perspective, and some main values.

I considered the identification of several approaches to mediation valuable, not only as a theoretical contribution to the mediation literature, but also as an input to my fieldwork. It provided my co-researchers and I with new interpretations of what

mediation and the role of a mediator is. This gave my co-researchers and I a broader perspective to understand, interpret and change mediation practice at the MCBC.

The field of mediation is pluralistic, and its practice can have different impacts on society as a result of the choices we make. The more informed we are in making these choices, and the larger the diversity of interpretations we are sensitive to, the better the possibility of transforming mediation in ways that are more responsive to the concerns and moral frameworks of the members of our organisations and their service users.

# Chapter 7: Interpretations of Justice in Mediation Theory and Practice

## 7.1 Introduction

In this chapter I will present an overview of how the notion of justice is seen from the perspective of the mediation literature of the English-speaking countries of the Western world. I will emphasise arguments and findings that informed the fieldwork of this research and that are of particular interest for interpreting its results. This chapter is also a conceptual contribution to the field of mediation, where an overall analysis of the notion of justice in the literature is absent as far as I am aware. The analysis is based on a detailed exploration of the literature, but it also draws upon my previous experience of attending mediation sessions.

Some thinkers (e.g. Menzel, 1991; Cooks and Hale, 1994) have argued that concerns about ethics and justice have been disregarded in the mediation field. Within this field the majority of publications do not address the issue of justice at all. However, I argue that some address it indirectly or implicitly. The careful reader may unearth elements that are parts of the conceptions of justice of some writers. My enquiry revealed that authors of mediation publications hold a large diversity of conceptions of justice. They base them on notions of entitlement (e.g. Kelly, 1995), the good (Dworkin and London, 1989), maximisation of utilities (e.g. Parker, 1991), equality (Grebe, 1992), etc. However, Menzel (1991) and others are right to point out that *explicit* considerations of justice are largely absent in the mediation literature.

This disregard for justice has persisted despite the concern of a few theoreticians that the notions of justice of those present at the mediation table might influence the process and the outcome in substantial ways. For instance, Dworkin and London (1989) claim that mediators' settlement strategies reflect their notions of justice. There is also evidence that both procedural justice factors (e.g., the disputants' participation in the decision) and substantive justice issues (such as the way tangible issues are distributed between the parties) may affect the disputants' perceptions about the fairness of mediation (e.g., Pearson, 1991). While procedural justice is concerned with the fairness of the *process* for reaching an agreement, substantive

justice deals with the question of whether the *content* of the settlement and the *outcome* of the mediation process are fair (Dworkin and London, 1989). However, the results of research comparing mediation with other conflict resolution processes are controversial (Pearson and Thoennes, 1988; Hughes and Schneider, 1989; Pearson, 1991). Indeed far from questioning the fairness of mediation, most researchers have presented empirical evidence suggesting it compares very favourably with litigation (Kressel and Pruitt, 1985; Vidmar, 1985; Evarts, 1988; McEwan and Maiman, 1986, Pearson and Thoennes, 1988; Menzel, 1991; Wissler, 1995). To accept that this is the case, however, says something important about litigation. It should not be taken to mean that justice issues are irrelevant to mediation practice.

## 7.2 Factors that Influence Justice in Mediation Processes

A review of the mediation literature reveals several factors that may affect the way justice is handled and perceived during a mediation process. In this section I will present a summary of the influence of those factors that have received most attention in the literature. Other factors will be examined later on.

1. *Legal rules*. In the absence of an alternative explicit vision of justice, the influence of the legal rules on notions of justice can become paramount in mediation practice (Dworkin and London, 1989).

2. *Mediator's profession*. Mediators' visions of justice seem to be affected by their professional background. For instance, Dworkin and London (1989) argue that mediators who are lawyers have a bias towards favouring a strong role of mediators for guaranteeing procedural fairness.

3. *Power*. Hart (1989) claims that mediation theorists concur that the possibility of constructing a fair agreement requires a relatively equal power balance among the parties, including similar financial skills, as well as verbal and long-term planning abilities (see also Davis and Salem, 1984; Folberg and Taylor, 1984; Stulberg, 1992).

4. *Cultural factors*. People from different cultural backgrounds often take different approaches. For instance, while Filipino mediators feel the need to use their sense of justice as the basis for making strong proposals on how the parties should settle their controversy, many U.S. mediators would not do this for fear of losing their alleged neutrality (Becker and Slaton, 1987).

5. *People's conception about the role of mediation in their society*. This can also vary across cultures. For instance, while in the U.S. mediation is mainly conceived as a method confined to resolving isolated conflicts between particular disputants, in China it is perceived as a method not only for "dispute resolution but for the exercise of political and social values, the creation of a clear idea of social justice, and the normative and political intervention of society in the lives of the individual citizens" (Cloke, 1987, p.69).

6. *Interparty relationships*. Levels of hostility seem to matter. For instance, in studying mediation processes between divorcing couples, Pearson (1991) found that couples who perceive their relationships to be "friendly" have a higher probability of considering their alimony arrangements as "extremely fair" (Kressel et al., 1989; Van Slyck et al., 1992).

7. *Religious beliefs*. While the parties' religious beliefs may affect what they perceive as fair (see Dworkin and London, 1989; Meierding, 1992), mediators' ways of dealing with justice issues may also be affected by their religious perspectives (e.g., Zehr, 1980; Murphy, 1988; Umbreit, 1995).

### 7.3 Procedural and Substantive Issues

In the mediation literature two opposing tendencies can be identified in relation to how a third party should tackle procedural and substantive issues during a mediation process (see Haynes, 1981; Kolb, 1983; Folberg and Taylor, 1984; Moore, 1986; Susskind and Cruikshank, 1987; Maxwell, 1992). Some claim that mediators should basically focus on the process of negotiation, leaving concern for the substantive

content to the parties (e.g. Stulberg, 1981; Bellman, 1982; Haynes, 1992). For instance, Haynes considers that "all mediator actions must be process activities limited to the settlement of the dispute between the clients" (Haynes, 1992, p.33). The mediator should not assume any responsibility for the terms of the agreement (Goldberg et al., 1985). The parties are considered more knowledgeable in the substantive content and therefore it is assumed that they can deal better with it. Advocates of this perspective usually end implicitly or explicitly with a procedural notion of justice centred on the idea of equality in relation to mediation procedures (e.g. Haynes, 1992).

Other thinkers oppose this perspective (e..g. Coogler, 1978; Susskind, 1981; Kolb, 1983; Saposnek, 1983). They argue that mediators should also focus on substantive matters. This view is supported by the idea that the mediator is an 'expert' who can help the parties even on the contents of their dispute. For instance, the parties may not be aware of mutually acceptable substantive options that the mediator may be able to point out to them given his/her experience in conflict resolution. Advocates of mediators' intervention on substantive matters sometimes justify their position in terms of justice (e.g., Coogler, 1978; Moore, 1986; Maxwell, 1992; Kelly, 1995). They claim that an intervention in substantive matters is sometimes required to avoid injustices and to promote more fair outcomes. However, they rarely define what they understand by substantive justice (e.g. Moore, 1986).

## 7.4 Dilemmas Involving Justice and other Mediation Principles and Values

The Satisfaction Story dominates the mediation literature (see Chapter 6 of this thesis) and also the best-known ethical codes of mediation. Cooks and Hale (1994) examined five different codes of ethics. They identified four "cornerstones" of the ethical practice of mediation: disputant self-determination, informed consent[97], mediator impartiality, and mediator neutrality[98]. Although justice does not appear as one of the

[97] Informed consent is conceived as "the extent the participants in the process are cognizant of and fully understand the choices available to them" (Cooks and Hale, 1994, p.62).

[98] Within the Satisfaction Story the mediator's neutrality and impartiality are central assumptions and expectations. However they are frequently not clearly distinguished or are used as synonymous terms. Several mediation organisations have identified impartiality with "freedom from favoritism and bias in either word or action" (Cooks and Hale, 1994, p.63). Impartiality demands helping all parties instead of

cornerstones, it is regarded as a positive value within the mediation field (e.g., ABA, 1984; Academy of Family Mediators, 1985, 1998; Grillo, 1991; Roberts, 1992). However, its relationships with the four "cornerstones" identified by Cooks and Hale is at the basis of several important ethical dilemmas in mediation. Let us examine two major ones.

1. The first dilemma is related with how to maintain 'neutrality' and/or 'impartiality' when justice seems to demand from the mediator different levels of assistance to the parties at a procedural level. This might happen because the parties' relationship is characterised by a "power imbalance" or because there is a substantial difference in their communication, legal or technical skills (Cooks and Hale, 1994). A concern for impartiality and neutrality may be linked with a preference for a notion of justice based on strict or formal equality. The latter implies treating all the parties exactly equally, regardless of their particular history, apparent disadvantages, or general social patterns (e.g. Stulberg, 1981). Some writers oppose this idea and argue that a mediator has the obligation to take a more active role in producing just agreements. For instance, he/she should empower the weaker party to reach a fair and equitable settlement (Laue and Cormick, 1978; Susskind, 1981; Haynes, 1981; Zehr, 1995). Grillo (1991) claims that a strict commitment to formal equality destroys any consideration of the wider context in which people live. Equating justice in mediation with formal equality is at best a distorted fairness on a microlevel, which takes into account only the mediation context itself. It may lead to greater injustices, for mediation may perpetuate or worsen the disadvantages of those who are in worse conditions (such as subjugated women who use divorce mediation processes). However, mediators' attempts to guarantee a *fair* discussion (justice) may frequently be perceived as opposing the freedom of expression (autonomy) of the disputant who is perceived as more powerful (Cooks and Hale, 1994). Actions to promote a balance of power (procedural justice) are sometimes perceived as being against impartiality and neutrality in procedure (see Rifkin et al., 1991). Researchers

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a single one so as to reach a mutually satisfactory agreement. Neutrality is a more problematic concept. It is rarely defined by those who use it (SPIDR, 1987). The next is one of the few clear definitions that can be found in the literature: a "relationship with parties or vested interests in the substantive outcome that might interfere or appear to interfere with the ability to function in a fair, unbiased, and impartial manner" (National Association of Social Workers, 1991).

frequently perceive no clear boundary between activities to empower a weaker party so as to achieve a balance, and unduly intervening, controlling or even manipulating the process.

2. While the first dilemma is basically related to the procedural aspects of mediation, the second is more associated with its substance. Should a mediator try to alter the terms of an agreement because he/she thinks that they are unfair to one of the parties or any other member of society, even if there does not exist any asymmetry between the parties such as the ones described in the first dilemma (e.g., an imbalance of power)? According to Meierding,

> "less directive mediators may give the parties complete freedom in drafting agreements that may be unbalanced, obviously detrimental to one party, and negotiated with obvious power imbalances. More directive mediators may seek to conform the parties' agreements to the mediator's own perception of fairness—regardless of the parties' cultural attitudes and values" (1992, p.304).

Some authors argue that mediators should not attempt to alter or affect in any way the terms of a settlement that he/she perceives is going to be reached by the parties even if he/she regards it as unfair to one of them or a member of the wider community (e.g., Joyce, 1995). However, other authors (e.g., Moore, 1986; Kelly, 1995) oppose this view.

### 7.5 Justice and the Mediation Stories

My inquiry into the mediation literature reveals that the mediation stories identified in the last chapter can be associated with some particular notions of justice. Sometimes they simply favour some notions, while other times they endorse specific notions of justice openly. In this section I will explore aspects of the way justice is understood within each mediation story.

### 7.5.1 Satisfaction Story

Within the Satisfaction Story justice does not receive much explicit attention. The mediator is supposed to assist the parties in reaching agreements that serve standards of justice as *defined by the parties* (e.g., Folberg and Taylor, 1985), with or without the participation of the mediator. The mediator should allow "disputants to achieve their own justice" (Menzel, 1991, p.12). However:

1. Because of the mediators' use of the directive behaviour that characterises the problem-solving approach, in practice frequently the terms of settlement tend to comport with the mediator's own conception of fairness (see Bush and Folger, 1994; Littlejohn et al., 1994).

2. The rationality that underlies the Satisfaction Story, as well as the strategies and tactics that characterise its practice (see Folberg and Taylor, 1985; Moore, 1986; Kressel and Pruitt, 1989b; Tidwell, 1994) favour some conceptions of justice over others, as I will show below.

A conception of mediation "as a social exchange process wherein disputants, with the aid of an impartial third party, focus upon the costs and benefits of proposed courses of action" (Parker, 1991, p.122) (see also Littlejohn et al., 1994; Tidwell, 1994) is common within the Satisfaction Story. The disputants are seen as aiming at satisfying their interests which are thought of in terms of *utility* (Avruch and Black, 1990). Satisfaction refers to the individual's *maximization* of his/her personal *utilities*. A dispute resolution process is conceived as a problem solving exercise of maximising payoffs while cutting losses (e.g., Raiffa, 1982; Neale and Bazerman, 1991). This whole perspective favours a variation of Bentham's (1977, 1982) utilitarian notion of justice. The main difference between the favoured conception of justice and Bentham's notion lies in those whose happiness (or utility) is expected to be augmented. While Bentham (1982) is concerned with the whole community, the Satisfaction Story focuses only on the parties sitting at the mediation table (e.g., Joyce, 1995). I will call this conception of justice a "*bounded* utilitarian" conception

of justice. However, as in Bentham's works, utility is regarded as "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness" (1982, p.12). Utility is the measure of justice (see Bentham, 1977).

A skilful mediator is one who encourages exchange behaviours that are perceived by the parties as reciprocally equitable and that maximise the parties' utilities (e.g. Parker, 1991). Justice is frequently conceived only in an instrumental way, valuable insofar as it helps in the construction of shared formulas for the parties that help them to reach a *satisfactory* settlement (e.g. Moore, 1986).

The perception of mediation as a social exchange process is also compatible with another conception of justice that underlies the work of some of the advocates of the Satisfaction Story. This group (see Kolb, 1983; Kelly, 1995) sees justice as the result of an exchange process and strongly objects to mediator's interventions to alter the product of the party's voluntary exchanges. It emphasises individuals' autonomy and rights, and considers it important to guarantee procedural justice (expressed mainly as neutrality and impartiality).

Menzel (1991) points out that when mediators consider agreement as an end in itself (as many do within the Satisfaction Story), any sense of fairness can be undervalued for several reasons.

1. Mediators might sacrifice many other criteria in order to achieve an agreement (in extreme cases, without caring about its characteristics).
2. Mediation lacks the ability of the judicial system to create a balance of power and relies almost completely on the skills of the mediator. Therefore, mediators who merely focus on achieving an agreement may end up favouring the more powerful parties or those with better negotiating skills (Emery and Wyer, 1987)
3. In a difficult situation in which many people just want an escape, an agreement may offer a way out that is not just or even particularly satisfactory for the party wishing to quit.

When agreement as an end in itself is considered the main goal of mediation, justice tends to be absent from the variables used to measure success in mediation.

Agreement is the predominant measure of success (Walker, 1989; Garwood, 1991; McCarthy et al., 1991).

### 7.5.2 Transformation Story

Folger and Bush (1996) argue that mediators should have no feeling of responsibility for producing specific outcomes in their interventions. This view is assumed by the mediator in order to avoid any disempowering effect on the parties. However, it makes the mediator responsible only for procedural justice and forbids him/her any action in relation to substantive justice. The goals of mediation are considered as *independent of any particular outcome* of mediation processes (Bush and Folger, 1994). Therefore, because reaching these goals is what is important, transformative mediation privileges notions of justice which focus on the process and not the substance of the agreement. For instance, Bush and Folger (1994) consider as preferable a "poor outcome" over a "good outcome" if the first one is reached by the parties' own processes of reflection and choice while the second one is not. By concentrating on their defence of the goal of empowerment, advocates of the Transformation Story explicitly put substantive justice aside and give individual autonomy priority over justice (see Bush and Folger, 1994; Burgess and Burgess, 1996; Grillo, 1996). Moreover, the idea of asking the parties to be fair or questioning them about their fairness is explicitly rejected within the Transformation Story (Grillo, 1996).

The emphasis on procedural justice is also clear in the safeguards that the advocates of transformative mediation suggest for escaping injustice. To avoid practising mediation as a technique to co-opt the powerless and mask injustice, Burgess and Burgess (1996) suggest that it is necessary for mediators to use clear procedures which are considered fair by all the parties. Notice that mediation is seen as a case of pure procedural justice (Rawls, 1988) because no independent criterion for a fair outcome is assumed, but it is assumed that mediation can be designed as a fair procedure that would produce a just result with a reasonable certainty. However, the strategies, tactics and guidelines of behaviour that advocates of the Transformation Story recommend (e.g., Bush and Folger, 1994; Burgess and Burgess, 1996; Folger

and Bush, 1996) leave open the possibility for agreement on substantive issues that others not present may regard as unjust. Apparent fairness at the level of process might not be enough to control the effects of hidden expressions of power that generate injustice at the level of the substance of the conflict.

The mediator's assistance to the parties should be equal. For instance, empowerment should be practised with both parties to avoid a non-neutral stand (Bush and Folger, 1994; Burgess and Burgess, 1996). However, balancing the power of the parties is no more than a side effect of empowerment "and not a conscious objective" (Bush and Folger, 1994). Moreover, the mediators' focus on the here and now of the dispute interaction (something done to take advantage of opportunities for empowerment and recognition), rather than referring to a wider vision (Folger and Bush, 1996), might reduce the mediator's ability to uncover and deal with broader issues of social justice affecting the dispute.

### 7.5.3 The Community Promotion Story

Advocates of the Community Promotion Story (CPS) favour conceptions of justice that take into account the consequences of the decisions for, and the notion of the common good of the community (e.g. Moore, 1994). CPS promotes the identification of community problematic situations that transcend the conflicts directly discussed in mediation sessions, and promotes attempts to improve these situations. This makes possible the realisation of the goals of people who have notions of justice which are impregnated with communitarian values or ideals, and/or notions of justice which assume that structural changes are necessary for achieving higher levels of community promotion (e.g. see Wahrhaftig, 1982). It's not only mediators who should promote public dialogue on justice issues (Shonholtz, 1987), but mediation centres should affect issues of social justice in communities by influencing social change through their programmes (Shonholtz, 2000). Some community mediation programmes carry out mediation processes which are open to the public or to which people with a stake in the conflict (such as neighbours or family members) are invited (Wahrhaftig, 1982). This implies allowing the possibility for a wider set of notions of

justice to be involved in the mediation process (compared to the notions of justice considered by the Satisfaction Story and the Transformation Story).

An emphasis on rights is seen as opposing the values of community. While the legal order is perceived as setting right specific injustices (rectificatory or corrective justice), it does not help in taking into account the common good and justice in more general terms (Moore, 1994). If the mediator perceives an imbalance of power between the parties, he/she should try to create balance among them before and during the mediation process (Herrman, 1993). Before the mediation process different techniques can contribute to this balance: conflict analysis, training the parties in dispute resolution skills, and the consensual development of ground rules for the dialogue.

### 7.5.4 The Reconciliation Story

Justice is a central concept within the Reconciliation Story. Justice is conceived as "the restoration of right relationships, the healing of broken relationships" (Lederach, 1995, p.360). An action is just if it contributes to establish *right* relationships, i.e. relationships that respect mutual human worth, that redress past wrongs insofar as it is possible to do so, and where fear and resentment are both absent. Modern conceptions of justice are perceived as emphasising the individual at the expense of the community. The legal system is seen as having fallen into a justice of individual rights and entitlements that is enacted by an adversarial process (McWhinney and Metcalfe, 1995).

The notion of justice of this mediation story is largely based on a Christian ideal (e.g. Zehr, 1980). Justice is not seen as vengeance. Justice implies "economic fairness in regards to basic human needs, a concern for redress of wrong, protection of the innocent, and the spiritual dimensions of repentance, forgiveness, and accountability" (Lederach, 1995, p.360). The justice of restoration replaces the justice of retribution (McWhinney and Metcalfe, 1995). Justice is conceived primarily as restoration of broken relationships (Lederach, 1995, 2001; Umbreit, 1995). The justice of restoration is based on communitarian values and an obligation to make right the pain.

Indeed, Zehr (1990) argues that restorative justice should frequently be transformative justice. It may demand not only to return situations and individuals to their original condition, but to go beyond this.

The restorative justice paradigm (common in victim-offender mediation programmes) can be presented briefly in the following way:

> "(1) crime violates people and relationships; justice focuses on (2) identifying needs and obligations and (3) making things right; justice is sought through (4) dialogue and mutual agreement in which (5) victims and offenders are given central roles; and justice is judged by the extent to which (6) responsibilities are assumed and needs are met and (7) healing (of individuals and relationships) is encouraged." (Zehr, 1995, p.210)

Table 7.1 compares the basic elements of the restorative and the retributive justice paradigms (based on Zehr, 1995). Advocates of the Reconciliation Story tend to emphasise both procedural and substantive justice (e.g., Lederach, 1995; Zehr, 1995).

| *Retributive Justice* | *Restorative Justice* |
|---|---|
| Violation of rules define crime. | Harm to people defines crime. |
| The state is the victim. | People and relationships are the victims. |
| Offences are defined in legal, technical terms. | Offences are understood in terms of a wider context (social, moral, economic, etc.). |
| Guilt cannot be removed. | Guilt might be removed through repentance and reparation. |
| Blaming is central. | Problem-solving is central. |
| Parties' needs are secondary. | Parties' needs are primary. |
| Imposition of pain is expected. | Restoration is expected. |
| Outcome does not encourage offender responsibility. | Responsibility is encouraged through the process. |
| Justice is evaluated by purpose and process. | Justice is evaluated by outcome. |
| Offender tends to be stigmatised. | Reintegration to the community is offered to the offender. |
| Win-lose outcome is assumed. | Win-win outcome is promoted. |
| Wrongdoing is paid by punishment. | Wrongdoing is corrected by making right. |

Table 7.1. Contrast between the restorative and the retributive justice paradigms (based on Zehr, 1995).

## 7.6 Critics of Mediation

Critics of mediation from different disciplines and backgrounds have questioned the contributions mediation can make to justice. Three main groups of critics can be distinguished in the literature. The first one criticises *some forms* of mediation but it sees these forms as inadequate expressions of a movement that can deliver positive outcomes (such as justice). The second group criticises mediation in general emphasising that it does not have the set of 'positive' characteristics that the formal legal system has (they support the latter). The third group criticises all forms of mediation and informal mechanisms of dispute resolution as well as the formal legal apparatus. I have already drawn upon many of the contributions of the first group of critics (who are frequently advocates of one of the mediation stories, such as Bush and Folger, 1994). Now, I will focus on the second and third groups.

The second group mentioned above has questioned whether mediation can produce substantively fair results and guarantee a fair process. The following are their main claims:

1. Mediation is not strictly regulated by rules, procedures and substantive laws (Bruch, 1988).

2. Mediation lacks the precise checks and balances that are part of the legal system (Folberg and Taylor, 1985). The private nature of mediation and the confidentiality associated with it precludes any public control of the process and results.

3. Mediation harms the community by transforming conflicts involving public concerns into private ones (Fiss, 1984). Because the courts are reactive institutions that wait for people to bring cases to their attention, private settlements can deprive the courts of occasions to render their interpretations (Fiss, 1984). Therefore, when disputants settle, society gets less than what the defenders of ADR methods claim. "Parties might settle while leaving justice undone" (Fiss, 1984, p.1085).

This second group of critics usually compares the results of mediation against what a court would have ordered following trial. The disputants' attitudes toward compromise, their differences in power and in their ability to negotiate, are some of the factors that concern lawyers in terms of contributing to produce an outcome that is "not fair", or that is far away from the one that might be the result of a trial. Notice that these criticisms assume that justice is basically defined by what is legal. In addition, some critics (e.g. Fiss, 1984) seem to be overconfident about the capacity of the formal legal system to deliver justice to a society. This view is also in tension with the large amount of empirical evidence (mentioned earlier) suggesting that mediation is perceived as fair by the disputants more often than litigation.

The third group of critics, against both mediation *and* the legal system, perceives mediation as a tool that allows the strong to oppress the weak. Two different elements are perceived as making mediation accentuate power imbalances between parties:

1. The informality and consensuality of the process denies the weak party the right to a system of checks and balances and favours mediators' biases. Therefore, the mediator's influence might lead to agreements which are not based on the parties' interests and notions of justice. The absence of formal rules of evidence and procedure makes less skilful and/or less powerful parties more susceptible to disadvantage during the mediation process.

2. The self-posturing 'neutrality' of the mediator, which gives him an excuse to avoid applying pressure on the stronger party.

This can make mediation perpetuate past inequalities, oppression, and social differences in power and privilege (Nader, 1979; Fineman, 1988; Bryan, 1992), which may even enable the more powerful to get around legal rights established to protect less powerful parties (Auerbach, 1983; Edelman et al., 1993). Several studies reinforce the perception that mediation allows for justice to be bypassed and/or the mediator's notion of justice to be imposed:

- In a study on conciliation services in London, Davis and Roberts (1988) found that 28% of parties considered that mediators had put pressure on them, and more importantly, that the mediator's perception of the problem dominated the process.

- In a study of divorce mediation in Britain, Davis (1988) reports that some conciliation processes aimed at compromise ignored notions of justice: "...'agreements' were arrived at through weariness, and the quality of justice administered was diminished rather than enhanced" (Davis, 1988, p.181).

- Based on empirical research or on their direct experience, some researchers have argued that current mediation practice may promote outcomes that are unfair to disputants from certain groups (Hermann et al., 1993) such as women (Fineman, 1988; Grillo, 1991).

- The widespread use of agreement rates as the basic measure of success in mediation (e.g. Walker, 1989) may hide deeper problems. For instance, in a small study conducted at the Hull and Humberside Family Conciliation Service a relatively high agreement rate of 78% was found (Walker, 1989). Nonetheless, the same study also reports that after the process 68% of the disputants considered that deeper underlying problems were not discussed in the process, and over 50% claimed that conciliation did not help them understand the other disputant's point of view and did not help the other party understand theirs.

When the parties' needs, interests and moral frameworks are marginalised, settlement may imply not merely dissatisfaction, but more importantly oppression and injustice. Members of this third group of critics of mediation frequently perceive that mediation is an unjustified form of expanding state control over the lives of citizens (e.g. Fitzpatrick, 1988; Matthews, 1988; Sarat, 1988; Dukes, 1990; Pavlich, 1996). For instance, drawing on Foucault, Pavlich (1996) explores mediation as a governmentalization or expansion of state dispute resolution that brings together techniques of discipline and techniques of self in order to generate peaceful individual selves. Probably behind the scepticism that characterises some of these authors there is a conception of justice similar to the one proposed by Thrasymachus in Plato's (1941) *Republic*. Justice may be no more than that which benefits the interests of

those who are established in power, or perhaps it is the result of the battle between their viewpoints and those forces of resistance that challenge the prevailing powers (see Fitzpatrick, 1988).

One of the great dangers of the arguments of these authors is the promotion of social inaction in relation to justice and conflict resolution in general due to the profound scepticism and pessimism they transmit about both the formal legal apparatus and informal practice (such as mediation). Trubek argues: "The critics tell us not to believe in the chimera of justice without law. But they also tell us that they do not believe in justice through law. We seem to be left with no way out" (1984, p.834).

## 7.7 Conclusions

In general, justice issues have been disregarded in the mediation literature despite the concern of a few theoreticians that the notions of justice of those present at the mediation table might influence the process and the outcome in substantial ways. Nevertheless, the research that does exist indicates several factors that may affect the way justice is perceived and handled during a mediation process: legal rules, the mediator's professional background, power, cultural factors, people's conception about the role of mediation in their society, interparty relationships and religious beliefs.

In the mediation literature two opposing tendencies can be identified in relation to how a third party should tackle procedural and substantive issues during a mediation process. While some claim that mediators should focus on the *process* of negotiation leaving concern for the substantive content to the parties, others argue that mediators should also focus on substantive matters (see section 7.3). Advocates of intervention on substantive matters sometimes justify their position by arguing that this is often required to avoid injustices and to promote more fair outcomes. The literature review led to the identification of two major ethical dilemmas for a mediator which are related to issues of justice. These dilemmas, identified in section 7.4, turned out to be important themes for debate with the mediators during my fieldwork.

Although *explicit* considerations of justice issues are rare in the literature, advocates of the various mediation stories nevertheless make implicit assumptions about justice. The only story that deals with it explicitly is the Reconciliation Story. Arguably, mediators who read the literature about this story are in a better position to consciously embrace, reject or modify it. However, when the rationality promoted by a mediation story favours a particular conception of justice but this is not made explicit, mediators may embrace the practice of this approach to mediation without being fully conscious of the consequences in relation to justice issues. As a result mediators may adopt strategies and tactics (recommended by the advocates of the mediation story) that favour some ways of dealing with justice issues with which they would have disagreed had they been aware of the implicit consequences of their behaviour. I observed this phenomenon during my fieldwork. It made me aware of the importance of promoting reflexivity among mediators about how their strategies, tactics and principles of mediation favour some conceptions of justice and ways of dealing with justice issues over others. This type of critical reflexivity also favours awareness of alternatives that may initially seem alien to a mediator.

Finally, some critics of mediation have questioned whether mediation can ever in fact be considered fair. Their arguments are quite diverse and it is worth considering them, particularly if our objective is producing an improvement in mediation practice related to justice concerns (rather than abandoning all attempts to support conflict resolution, as a minority of authors seem to advocate).

# Section 3: The Fieldwork

# Chapter 8: Organising and Starting the Fieldwork

In this chapter I will initiate the description and analysis of my fieldwork at the MCBC. I will:

1. Describe the design of the interviews that were planned as part of the research process.
2. Outline the difficulties that made me postpone my observation of mediation processes.
3. Discuss some initially unplanned results that I achieved while I waited to get permission to initiate the observation of mediation processes.

## 8.1 Planning the Interviews

After finishing the analysis presented in the last three chapters I began to design the interviews that I planned were going to be part of my fieldwork. Initially I developed several alternative designs which I shared with the Co-ormg and her assistant, who I will call Assistant 1[99]. We selected the final set of questions from a set of 112 through a process that took several months and multiple pilot tests. This is discussed later.

In section 3.2.1.3 I explained the rationale for using interviews as part of the methodology. I will not repeat this information here. During the interviews I addressed elements of the mediation process and each party's life that I considered particularly important for getting a better understanding of their situation and their behaviour during the process. The interviews were an invaluable source of information about the mediation processes, a source of feedback to the MCBC, and a key resource for the discussion of the mediation cases I initiated later on (see the next three chapters). They were part of an organisational learning process that I expected could trigger critical reflexivity and changes at the MCBC.

[99] I call him Assistant 1 because occasionally the Co-ormg has other assistants, although on a temporary basis. They help her in particular projects. Assistant 1, instead, works full-time for the MCBC on a permanent basis.

### 8.1.1 Agents and Focus of the Basic Interviews

Given the aims of my research project I intended to observe 20 bilateral[100] mediation processes at the MCBC. Thereafter I planned to conduct:

1. One interview with each one of the parties who took part in the mediation process. I will call these interviews type 1 interviews.

2. One additional interview with the mediator about his/her interpretations of the mediation process (type 2 interviews).

Additionally, I planned to conduct one general interview with each mediator (type 3 interviews). Within the context of the Cycle of Critical Distinctions interviews were considered a useful method for eliciting the respondents' conceptions of justice and their perceptions about:

1. How issues of justice *are* interpreted and handled during mediation processes, and how they *ought to be* interpreted and handled.

2. Critical aspects related to justice which are linked to the mediator's role. This involves understanding what *is* and *ought to be* the mediator's role in relation to those aspects.

During one of my first fieldwork meetings with the MCBC's staff we discussed and modified in a participatory way the main focus of the planned interviews so as to make them more relevant to the organisation while remaining oriented towards fulfilling the goals of my research. Table 8.1 presents the main focus of the complete set of interviews once reviewed. The interviews of mediators and parties were largely conducted based on the mediation processes in which they participated[101].

[100] By bilateral mediation I mean mediation processes in which two parties (each with one or more

| Agent(s) | Main focus |
|---|---|
| Parties | Relevant elements of their personal conceptions of justice.<br>Crucial aspects of the mediator's role related to justice. What is and ought to be the overall role of a mediator in relation to those aspects?<br>Global assessment of the mediator's performance in relation to some criteria.<br>Main aims and basic normative characteristics that a mediation process ought to have.<br>Perception about how issues of justice were managed during the mediation process, and how they should be managed in general.<br>Role of the mediator in relation to moral issues closely related to the notion of justice. |
| Mediators and mediator trainers | Relevant elements of their personal conceptions of justice.<br>Crucial aspects of the mediator's role related to justice. What is and ought to be the overall role of a mediator in relation to those aspects?<br>Global assessment of the mediator's performance in relation to some criteria.<br>Main aims and basic normative characteristics that a mediation process ought to have.<br>Perception about how justice issues were managed during the mediation processes, and how they should be managed in general.<br>Role of the mediator in relation to moral issues closely related to the notion of justice. |
| MCBC's Director | Policies of the mediation centre in relation to issues of justice.<br>Rationale of these policies.<br>What is and ought to be the overall role of a mediator during a mediation process.<br>Main aims and basic normative characteristics that a mediation process ought to have.<br>Role of the mediator in relation to moral issues closely related to the notion of justice. |

Table 8.1. Agents and focus of the basic interviews.

During the research process itself, it was clear that a new law was ready to be approved by the Colombian Congress that was going to cause an extraordinary increase in the number of mediation cases per year in the whole country (I will give details of this later on). Given the responsibilities that the new law attributed to the

disputants) intervene.

[101] Issues of confidentiality will be discussed in section 8.1.3.

MCBC in its implementation, and the role the Chamber of Commerce wanted it to play in the future, the mediation team of the organisation considered that they needed a deeper understanding of the type of phenomena that was being studied in my research. Therefore, during what appeared to be the final stages of my fieldwork, my work was increased substantially. We decided that I was going to observe 10 more mediation processes at another mediation centre and carry out the 40 associated interviews. The mediation centre, which I will call MSUA, was one of the most active ones in Bogota. It is part of the public legal service programme of the University of Los Andes Law School[102]. This programme offers free legal and mediation services to the local community. The strategy of observing disputes at the MCBC and the MSUA allowed me to explore a wider diversity of disputes. Table 8.2 shows the types of disputes observed at each mediation centre[103]. "Civil" disputes were the most common, accounting for 47% of all the cases.

| | | Type of disputes | | | |
|---|---|---|---|---|---|
| | | Civil | Commercial | Labour | Family |
| Mediation centre | MCBC | 13 | 7 | 0 | 0 |
| | MSUA | 1 | 1 | 2 | 6 |

Table 8.2. Type of cases observed at each mediation centre.

In addition, I planned to interview 50 individuals who participated in mediation processes at the MCBC during the last year. These interviews aimed at increasing our understanding of the multiplicity of service users' conceptions of justice. The main focus of these interviews is presented in Table 8.3.

[102] Later I will explain the rationale for selecting this mediation centre.
[103] Civil and commercial disputes are defined in section 2.2. "Labour" disputes include disputes between an employee and her/his employer created by the labour relationship. "Family" disputes include divorce processes, child custody conflicts, and child support disputes.

| Agent(s) | Main focus |
|---|---|
| Citizens who have participated in mediation | Relevant elements of their personal conceptions of justice.<br>Critical aspects of the mediator's role related to justice. What is and ought to be the overall role of a mediator in relation to those aspects?<br>Main aims and normative characteristics of a mediation process.<br>Perception about how issues of justice should be managed in general during a mediation process.<br>What should be the role of the mediator in relation to moral issues closely related to the notion of justice. |

Table 8.3. Agents and focus of the basic interviews.

As a result of the expansion of the fieldwork the following is the complete set of 158 interviews which were done:

1. 40 interviews with the disputants who took part in a mediation process at the MCBC and 20 interviews with the disputants who participated in mediation processes at the MSUA (type 1 interviews). 60 is not a small number given that they were in-depth interviews (Oppenheim, 1992).

2. 30 interviews with mediators about their interpretations of the mediation processes that I observed (type 2 interviews).

3. 12 interviews with mediators focused on their conceptions of justice, their roles, and major aspects of the mediation process (two mediators at the MCBC and ten at the MSUA) (type 3 interviews).

4. 54 interviews with individuals who participated in mediation processes at the MCBC which I did not have the opportunity to observe (type 4 interviews).

5. One interview with the Co-ormg (type 5 interview).

6. One interview with the director of the MCBC (type 6 interview).

Each type of interview contained a different set of questions. Given the space restrictions of this document, I present here only the format of type 1 interviews as an example (see Appendix 1).

It was not easy to get many of these interviews, especially type 1s. The MCBC programmed at most 4 mediation processes per day during Tuesdays, Thursdays and Fridays, and no more than 8 mediation processes per day during Mondays and Wednesdays. Attending a mediation process is voluntary for the parties. I found that 59% of the mediation processes that were programmed never began because at least one of the parties did not attend. Of the processes that began, I was allowed to attend 92% of the cases[104]. 7% of those that began were abandoned by at least one of the parties without any previous notice to the mediators. They just never showed up to a mediation session that they accepted attending after their first session. Not all the parties who ended a mediation process were willing to be interviewed. I was able to interview both parties in only 35% of the cases that I observed. Therefore, I was able to observe a whole process and obtain the associated interviews in only 12% of cases. The observation of mediation processes and the completion of the associated interviews took a substantial amount of time, due to the high level of incomplete observations/interviews.

### 8.1.2 Design of the Interviews

A substantial period of time was used on the construction, and particularly on the refinement, of the interviews and other data-collection techniques used. Initially questions for the interviews were designed based on:

- The theories of justice summarised in Chapter 5.
- A detailed review of the mediation literature.
- My previous knowledge of the unfolding of mediation sessions.
- My initial contacts with the MCBC's staff.

First, each theory of justice was considered a source of concerns that were relevant to a mediation process. Based on those concerns and the review of the mediation literature, I wrote an initial set of questions that were regarded as candidates for

[104] At the beginning of each mediation process, I had to ask the parties and the mediator for permission to attend. 8% of the parties only wanted the mediator to hear their discussions.

forming part of the final interview. However, this set was rather large: It comprised 112 questions, each one connected to at least one major theory of justice. The reduction of this set was based on:

- The relevance of each question in relation to the mediation literature (as assessed by me).
- My discussions with the Co-ormg and her assistant about the relevance of each question. These discussions were informed by our knowledge of mediation practice.

This helped me to reduce the number of questions to 50. However, this was still too many because a number of questions contained several parts. To achieve a further reduction, a pilot test was useful to establish which questions were most valuable for the research given its aims and the focus for the interviews (see Tables 8.1 and 8.3).

### 8.1.3 Pilot Work

Given that six types of interviews were designed, it would take too long to describe how each one was constructed in detail. Therefore, by focusing here on the description of how the pilot study was carried out for type 1 interviews I will indicate the type of concerns that guided the pilot work. Some questions that looked very promising before the pilot work did not work well during the initial tests. Other questions that did not appear to be promising were found to be useful.

During the pilot work I found that it was of great significance to promise anonymity to the individuals who participated in the mediation processes. This was important for several reasons:

- The probability of not getting an interview when anonymity was not clearly guaranteed at its initial stage was particularly high. Therefore, I decided to guarantee anonymity to all respondents right from the beginning.

- The law establishes that any information that is released during a mediation process is strictly confidential. Therefore, it is against the law for the mediator or any external observer to link what happened or was said during a mediation process to a particular individual. There is a good reason for this. For a mediation to be successful it is important for the parties to speak openly about the dispute (Lax and Sebenius, 1986a). However, if after a mediation process one of the parties is not satisfied, he/she can go to a court and sue the other party. In that case he/she might want the judge to call the mediator or an external observer as a witness. This possibility could have a negative effect on mediation because people would be very apprehensive about revealing information during a mediation process if they thought it could be used as evidence in a court at a later date. In order to avoid this difficulty the Colombian law forbids mediators and external observers from revealing any information they obtained during a mediation process that may allow someone to link the process to a particular disputant. Hence, in this document all the names of the people that I observed during mediation processes have been changed.

- During recent years Colombians have developed an increasing fear of their fellow citizens. That fear can be felt in the daily conversations people have and in their behaviours (see Raffo, 1998; Gordon-Bates, 1999; Pécaut, 2000; McDermott, 2001). A comparative study of the basic values and beliefs of the people of more than 60 countries (the World Values Survey) reveals that interpersonal trust is exceptionally low in Colombia with 81% of the population saying that they actively distrust people that they do not know (Cuéllar, 2000a,b). One of the causes of this phenomenon seems to be the dirty tactics commonly used in the Colombian war. Many people might therefore be afraid that the information they provide during an interview could make them the victims of extortion or kidnapping if made publically available. In such a situation complete anonymity is essential. Hence, I never asked for data such as persons' addresses, which could make the respondent feel that someone who had access to the interview could trace him/her.

The pilot work helped me in the selection of those questions that were most relevant for the research, and also to improve their structure and wording. I want to emphasise

that the questions presented in Appendix 1 are an English translation of the Spanish version of the interview that was used and tested. I found that people are very sensitive to the words that are used in questions that address moral issues. Because translation might change the meaning of some questions, I would not wish to claim that the English version would work without further testing.

Piloting helped to reduce the number of questions from 50 to 32. This was then tested with 40 randomly selected respondents. I found that it took people between two to five hours to complete an interview, which was still too long. An analysis of the respondents' answers led to a new version of the interview that was tested in another pilot test with 20 interviewees. This work allowed me to end up with a final interview, which took people an average of one hour and thirty minutes to answer.

### 8.1.4 Type of Interview

The interviews were semi-structured interviews. Whenever I found it relevant to introduce some new questions to deepen explorations, I did so. All the interviews consisted of a series of modules (for instance, see Appendix 1). The order in which the questions appeared was carefully studied during the pilot work. In general within each module questions were organised using a funnel approach: broad questions leading to more specific ones. Personal data questions were asked only at the end of the interviews. For brevity, I will omit many technical aspects of the design of interviews. I just want to mention that in this design process I took seriously the recommendations of professionals in the field (McNeill, 1990; Oppenheim, 1992; Lee, 1993; Renzetti and Raymond, 1993; Robson, 1993; Czaja and Blair, 1996; Kvale, 1996; Holstein and Gubrium, 1997).

### 8.1.5 Interviewing

When and how the interviews were carried out depended on the type of interview.

1. Type 1 interviews. Cases were selected by simple random sampling. The interviews with the parties whom I observed during a mediation process were carried out after the mediation process had ended. Immediately after the mediator asked both parties for some time to write up the agreement (or a document that stated that the parties could not reached an agreement) I invited both parties to be interviewed. Frequently I did both interviews at the BCC headquarters or at the MSUA building. However, some interviews were done elsewhere for the convenience of the interviewee.

2. Type 2 interviews. Interviews with the mediators about their interpretations of the mediation process were all done at the mediation centres within 24 hours of the end of the process.

3. Type 3 interviews. Each mediator was interviewed after I had completed the observation of a pre-defined number of mediation processes facilitated by that mediator. All interviews were carried out at the mediation centre.

4. Type 4 interviews. These interviews were done at a time and place agreed with the respondent.

5. Type 5 interview. The interview with the Co-ormg was done at the BCC headquarters after completing the interviews associated with approximately ten of the mediation processes at the MCBC.

6. Type 6 interview. This pre-planned interview with the director of the MCBC was done at the director's office one week after the type 5 interview was finished.

The mediation cases that were selected for observation at the MCBC and the MSUA were selected using the procedure known as simple random sampling (see Balnaves and Caputi, 2001). Simple random sampling is a method of choosing *n* units (the sample size) out of *N* (the size of the population[105]) so that every one of the sampling

[105] Here population denotes "the aggregate from which the sample is chosen" (Cochran, 1977).

units has an equal probability of being drawn[106] (for more details see Cochran, 1977; Barnett, 1991). For instance, at the MCBC 20 mediation cases where selected out of 341 cases that where handled by the MCBC mediators between January 2000 and September 2000. The latter group of cases constituted the associated population for it was the set of all mediation cases that were handled at the MCBC during that period of time. Particular care was taken so that each one of these cases had an equal chance of belonging to the sample. Because 20 mediation cases made up this sample, the latter contained 40 parties who answered type 1 interviews. Important factors in deciding the sample size were the aims of the research (see Chapter 1), the fact that the observation of mediation cases and its associated interviews mainly pretended to nurture an action research process with my co-researchers, the practical difficulties of carrying out all the interviews associated with each mediation case (see section 8.1.1), and the limited resources I had to take the sample (only 1 observer and less than 9 months during which interviews had to be conducted). Given the exploratory nature of the research, more weight was given to carrying out in-depth interviews and understanding as better as possible each disputant's perceptions than to considerations about the degree of precision of the samples estimates or the desired limits of error[107] (see Cochran, 1977; Barnett, 1991). At the MSUA mediation cases were also chosen using the procedure of simple random sampling and the sample size was established taking into account the same factors that I already mentioned and that were important for deciding the sample size at the MCBC.

Type 2 and type 3 interviews were done to all mediators who participated in those mediation cases selected by the procedure of simple random sampling at the MCBC and the MSUA. Finally, type 4 interviews were also chosen using the procedure of simple random sampling. In this case the sampled population was the set of all mediation cases handled by MCBC mediators during 1999.

[106] In other words, if "a sample of size $n$ is drawn from a population of size $N$ in such a way that every possible sample of size $n$ has the same chance of being selected, the sampling procedure is called *simple random sampling*" (Mendenhall, Ott and Scheaffer, 1971).

[107] However, 40 is not a small number given that the interviews were in-depth interviews (see Oppenheim, 1992).

## 8.2 Difficulties in Starting my Fieldwork and Unexpected Results

As soon as I arrived in Bogota I met with the Director of the MCBC, its deputy-director, and the Co-ormg. I reminded them of the goals of my research project and explained that:

- I wanted the process to be as participative as possible. I wanted them, and also all mediators, to participate in the process.

- I wanted the research process to be open to the voices of the people who use the mediation services.

- Any solutions to problems identified during the research come from the participants, not me.

- I wanted the research process to produce some improvement. Drawing on Ulrich (1996b) I argued that to judge an option for improvement it is not satisfactory for us to think that the option selected is simply better than the status quo. Rather, to call an option an "improvement" requires a reasonable understanding of other conceivable options.

Unfortunately, a contentious administrative mediation process that caused problems to my research took place at the MCBC the week of my arrival. In this process the parties were the Colombian Ministry of Transport and a company called Dragacol. On November 6, 1998, the Ministry of Transport agreed to pay Dragacol a compensation of approximately £8,400,000 (González, 1999). However, it later came to be revealed that fraud and corruption were behind the agreement. The case produced what was probably the major political scandal of 1999 in Colombia. It involved a minister and several former ministers who were put on trial. The case generated debates in the Colombian Congress that were transmitted live by the national television for several weeks (El Tiempo, 1999). This severely affected the Bogota Chamber of Commerce's public image. Additionally, an arbitration case between a North American company (Merck & Co. Inc. or MKCO) and a Colombian company (Tecnoquímicas S.A.) caused more trouble for the BCC. The latter case led to the U.S. government putting

pressure on the Colombian government to resolve the case in favour of MKCO, and the Colombian government put pressure on the BCC to achieve this result (see Dinero, 1999). MKCO sued the BCC for an allegedly procedural error made at the MCBC. The compensatory damages MKCO wanted to claim from the BCC were large enough to produce the BCC's bankruptcy. These cases affected my research for they delayed the authorisation I needed from the BCC to observe mediation processes. At a time when the protection of the public image and the existence of the BCC became a priority within the organisation, the last thing many of its members wanted was someone doing research that they were afraid could create more problems. As a result I had to wait several months until I received permission to observe mediation processes and do interviews related to these processes.

However, during this period I continued visiting the MCBC and talking with its members. I was invited to many meetings and attended several mediation training programmes. This allowed me to engage in participant observation to a limited degree. My interactions provided me with a new understanding of the political and cultural aspects of organisational life at the MCBC, and allowed me to achieve some unplanned results. Given space limitations, I will only discuss two of them.

The first is related to the standard MCBC mediation training programmes for new mediators. After attending several of these programmes the Co-ormg invited me to discuss if the approach to mediation they were portraying in their training programmes could be associated with any of the mediation stories I had identified in the literature. I invited her to do this work together, contrasting the main elements that characterise each mediation story (goals, values, orientations, and recommended mediation practices) with the elements they taught in their mediation programmes. We both reached the same conclusion: their training programmes appeared to be guided by the Satisfaction Story. After talking with Assistant 1 and the consultants who were hired to deliver the training programmes, I concluded that for the members of the organisation it was very difficult to challenge the Satisfaction Story because they were basically unaware that its assumptions were just one possibility among many alternatives. Our dialogues around mediation stories would later generate substantial reflexivity and changes to the training programmes.

The second unplanned result is related to a conflict resolution seminar I designed for experienced professionals in the ADR field. After a dialogue I had with the MCBC's Director about some negotiation games I designed to show the justice concerns in disputants' decision making processes, I was invited to co-ordinate a workshop on conflict resolution. This was part of the last national meeting of professionals in conflict resolution supported by the Inter-American Development Bank's conflict resolution programme (see section 2.2). This meeting was going to be attended by more than 40 so called 'experts' in conflict resolution that represented all the regions of the country. All of them were directors of mediation centres and/or mediators, and many of them were university teachers in conflict resolution in their own regions. The MCBC and the IDB were training them to train other people. My workshop was a two and a half day meeting which I saw as an opportunity to get in contact with a privileged audience that could later on disseminate the results of my PhD project. Therefore, I took one and a half months to prepare the games and negotiation simulations I was going to use[108]. I also wrote a document that could help the conflict resolution professionals replicate the experience we were going to have during our encounter. I included a set of topics that I designed to challenge their ideas on conflict resolution. For brevity I will briefly present only the conceptual and practical results of this meeting which are most relevant to the research process presented in this document.

1. The participants in the meeting tended to assume that the disputants' main objective in conflict resolution processes is the satisfaction of their underlying *interests*, and they generally advocated a problem-solving orientation. These assumptions were highlighted by several hypothetical negotiation simulations that I prepared especially for the meeting. For instance, one presented a conflict that involved four parties who had diverse interests, needs, and moral frameworks. In particular, they had quite different notions of justice. Each of the participants played one of the roles described by the case, and thereafter we analysed the exercise during a whole afternoon. During this analysis the participants tried to explain the behaviour the parties adopted during the exercise basically in terms of

[108] For preparing some games I drew upon the work of Guth et al. (1982), Ochs and Roth (1989), and Forsythe et al. (1994). However, the majority of games and negotiation simulations I designed were based upon the reflexivity I had so far developed during my PhD project.

the interests that were defined in the instructions associated with each role. However, they ignored the relevance of the moral frameworks for explaining the behaviour of the parties. They treated these frameworks as an almost irrelevant curiosity, or reduced them to the language of interests by interpreting their elements as another expression of people's desires. When I began to point out the importance of moral concerns in the situation, some of the participants explicitly interpreted them as a barrier that prevented disputants from undertaking certain types of actions (e.g., "thou shall not steal"). Compared to thousands of non-ADR professionals I have previously trained in different countries, the participants were particularly skilful in identifying the parties' interests, an ability that is usually promoted by ADR training programmes and the ADR literature. However, they found it difficult to make sense of the parties' moral frameworks and their notions of practical rationality. The latter are elements that are usually ignored in the ADR literature and all the training programmes I have known in Colombia and the rest of Latin America.

2. During the meeting we concluded that the notion of interest is insufficient for getting a broad picture of people's decisions and actions. The concepts of moral frameworks and basic human needs (defined in sections 9.3 and 13.2) are also necessary[109]. At the end of the meeting they openly expressed that these ideas implied a profound change in their understanding of the field of conflict resolution, a change that they perceived as "radical" given all the literature they had previously read. In particular, the participants found the notion of moral frameworks quite relevant and they said that it could have an important implication for their future ADR practice. They claimed that they were going to introduce this new conception in their training programmes throughout the country (some of these programmes are postgraduate university programmes).

3. During the evaluation of the whole IDB training programme several participants said that our meeting was the best event they had attended during the three years the training programme lasted. They expressed their desire to hear about new developments of the ideas we had discussed.

[109] This work is a development of a set of ideas that I wrote up during the second year of my doctoral

4. The participants concluded that they wanted to preserve the network on dispute resolution the MCBC has co-ordinated for several years (the IDB's funding of the network was soon going to end). The network is still active and I see it as an opportunity for the future diffusion of the results of my study.

As a result of the success of this meeting, similar meetings were promoted later on by the MCBC in collaboration with foreign institutions during 1999. In Ecuador (Quito and Guayaquil) they were organised by the local chambers of commerce (financed by the IDB). In Bolivia they were organised by the local chambers of commerce in La Paz, Cochabamba and Santa Cruz (financed by the Swedish International Development Co-operation Agency). The main difference between these meetings and the one in Colombia was that those in Ecuador and Bolivia were directed at people who wanted to become professionals in ADR mechanisms in their own regions.

### 8.3 Final Comments

In this chapter I described how I planned the interviews that were carried out during my fieldwork, as well as the difficulties that forced me to postpone the observation of mediation processes for some time. During this waiting period my decision to initiate a participant observation of many of the MCBC activities contributed to the production of some results that I consider valuable in themselves for their large impact on the Colombian community of ADR professionals. These results involved major changes in the basic beliefs many ADR professionals had for understanding dispute resolution processes. Because of the following, I have little doubt that the impact of the ideas we discussed reached thousands of other individuals and affected many mediation processes throughout Colombia:

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studies (Pinzon and Midgley, 2000).

- All the ADR professionals were committed to conduct training programmes in their own regions. In particular, the IDB expected them to replicate the meeting we had with people in their regions[110].

- Many verbally and in writing expressed their satisfaction about the meeting to the IDB's staff.

- Some were lecturers on postgraduate and undergraduate conflict resolution programmes.

I consider this a major contribution of this research project, for the ideas we discussed during the aforementioned meeting were developed while I planned the fieldwork. As I pointed out, the effects of these ideas have already reached other Latin American countries (Ecuador and Bolivia). This result also indicates that other ideas that are presented in this document can have a large impact on Colombian and Latin American mediation professionals, and therefore, ultimately on the users of mediation services.

[110] The IDB actually monitored this, as it had monitored previous similar commitments the ADR professionals have had with the IDB in relation to other events in their training programme.

# Chapter 9: Modifying the Methodology and Starting the Learning Process

Chapters 9, 10 and 11 present a narrative of my progress and reflexivity through the fieldwork. In this chapter, I will first present a brief description of the main changes the MCBC experienced between 1998 and 2000. This will be important for understanding the organisational changes that the new MCBC administration implemented and, given these changes, the way I redefined the fieldwork in a participatory way. Thereafter, I will explain how I conducted the observation of mediation processes at the MCBC and carried out the associated interviews with the parties and the mediators. Finally, I will examine how I performed an initial statistical analysis of the interviews, and discussed its results with MCBC's staff. The other phases of the fieldwork will be covered in the next chapter.

Before beginning the discussion of this chapter I would like to clarify that the use of statistics in chapters 9 and 10 was undertaken through a critically reflexive process to guide and facilitate single- and double-loop learning among the group of co-researchers that we created at the MCBC. The discussion of the data was guided with elements drawn from the action science and the CST literatures, and it contributed to change my co-researchers' ideas about their professional practice. Statistical methods were enacted using principles from the methodology I developed. Empirical data were used discursively to promote productive dialogues and debates with my co-researchers. In this way I carried out a critical use of statistical methods. The data was analysed in a rigorous manner using standard statistical techniques.

## 9.1 A Brief History of the Practice of Mediation at the MCBC: Second Part

In Chapter 2 I argued that the history of the practice of mediation at the MCBC can be understood as made up of four phases. There I presented the first two phases. Here I will present the last two, which I distinguished as a result of my dialogues with the MCBC staff and my observation of the unfolding events during my fieldwork.

### 9.1.1 Third Phase (1998-2000): Major Troubles

Administrative reforms produced a change in the group of mediators during this period. It ended up comprising seven lawyers. Four of them worked full-time for the MCBC. Three, who were called "external mediators", worked outside the MCBC and were paid a fee for each mediation process they managed.

A major crisis began at the MCBC as a result of the two cases I have already mentioned: the Dragacol case and the Tecnoquímicas S.A. vs. MKCO case. These cases put in danger the existence of the BCC and had a negative effect on the MCBC's public image. They also produced other consequences such as:

- A reduction in the number of cases handled by the MCBC (the MCBC's staff estimated this reduction to be approximately 30% during the first months of the Dragacol scandal).

- The suspension of the law that regulated contentious administrative mediations between 1999 and November 2000. The suspension of the law reduced to zero the number of administrative mediation processes in the whole country.

- The resignation of the Director of the MCBC, Ms. Polanía, in June 1999. Ms. Janer, the former Deputy Director of the Centre was in charge of administering the centre between July 1999 and November 1999. Then a new Director was appointed: Mr. Herrera. Ms. Janer and almost all the lawyers who worked full time at the MCBC resigned and left the centre.

During this period the MCBC organised dozens of mediation training programmes. At an international level the MCBC was very active in Ecuador, Uruguay and Bolivia. In these countries it organised national training programmes on mediation, and supported the writing of the drafts of the first laws on mediation in Uruguay.

### 9.1.2 Fourth Phase (2000): A Change in Direction

Between November 1999 and January 2000 Mr. Herrera hired new lawyers who worked in arbitration but not in mediation. The three former external mediators began to handle all mediation cases.

For reasons that I will clarify later on, the new administration focused on increasing the efficiency of the administrative aspects of arbitration processes during the first months of 2000. It also modified the organisational structure of the MCBC. Now it is made up of three divisions:

- The Legal Division is the one that provides the ADR services to the public.

- The Administrative Division administers the resources of the centre and handles its public relations.

- The Social Division deals with research in the ADR field, training programmes, and managing special programmes. The latter are diverse ADR programmes such as organising mediation centres in depressed communities and school mediation programmes. The Co-ormg and Assistant 1 work in the Social Division. They were particularly involved in my research project. The Co-ormg is the co-ordinator of the Social Division.

Given that the fourth phase in which I have divided the history of the MCBC took place while I was doing my research, I will not describe it here in more detail for I will do this in the rest of my narrative of the research process.

## 9.2 Redefining the Fieldwork

By the end of 1999 and the beginning of 2000 three factors produced a reduction in the activities related to mediation at the MCBC:

- The bad publicity created by the Dragacol and the Tecnoquímicas vs. MKCO cases.

- The suspension of all contentious administrative mediation cases in the country (see section 9.1).

- The interest of the new MCBC's Director in reorganising arbitration so as to improve its quality and increase its profitability. Arbitration was perceived as having much higher potential than mediation at a time when the MCBC had a financial deficit.

The new Director and Deputy-Director of the MCBC told me they supported my research and asked me to talk to the Co-ormg for all practical matters related to my work. They explained to me they trusted her completely. They asked me to talk with them about my research only if it was necessary, or if I faced any administrative problem. They were quite busy reorganising arbitration. Additionally they were relatively unfamiliar with mediation, an activity that had never been part of their previous legal practice.

As a result of the downsizing wave that affected the mediation activities I began my research project with only two full-time workers of the organisation to talk to about the details of my research: the Co-ormg (see section 2.2) and Assistant 1 (see section 8.1). I will call this group the *staff team*. The Co-ormg was the co-ordinator of the group of mediators. Her authority was based on her knowledge of mediation and the respect lawyers had for her. However, the mediators were formally under the authority of the MCBC's Deputy-Director. This group of mediators was made up of two lawyers who worked as 'external mediators', i.e. they were paid depending on the number of mediation sessions they facilitated.

My next meeting was with the staff team. During this meeting I wanted to test:

- If they were still interested in the problematic phenomena that was the focus of my research.

- If there was any major, as-yet-unspoken issue that could affect my research or that they wanted my research to address.

However, no new major issues emerged and they both said they were interested in the goals of my research. Then I explored two concepts with the staff team: boundary judgements and improvement. We examined the idea that embracing a particular boundary judgement may make something appear as improvement that might not be viewed as such when other boundaries are chosen. We discussed several examples within the mediation context and I drew a figure showing the interrelationship between these concepts (see Figure 9.1). At the end of this discussion we noticed that:

1. An important issue is to decide what should be viewed as part of relevant systems and what not.
2. There could be many potential interpretations of improvement. Each one is related to *what* and *who* is involved in its construction[111].
3. To consider a mediation process "good" or "just" depends on the boundaries somebody uses to explore it.

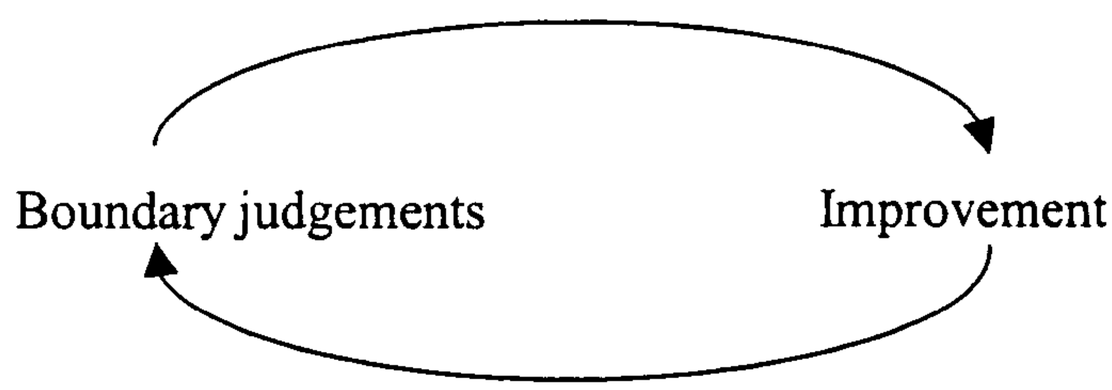



Figure 9.1. Sketch of the interrelationship between boundary judgements and improvement.

Therefore, we decided that during our future work it would be crucial to explore multiple boundaries, taking advantage of our experience and the mediation literature, as well as considering the types of boundaries that the parties and the mediators use to establish whether a mediation process is just or not.

[111] Points 1 and 2 manifest the insights of Churchman (1970).

As this discussion illustrates, I always tried to share my methods with the other participants in the research process. Additionally, I promoted inquiry about them. I perceived this as valuable for creating appropriate conditions for collaborative inquiry in which the MCBC's staff could work as co-researchers of the inquiry rather than merely as subjects (Argyris and Schön, 1996). I also wanted the methods to be challenged, and to enhance the resources of the whole group whenever possible. I explained the methods in plain Spanish and gave the other participants an opportunity to decide against using them. In the next paragraph I illustrate this with an example. I wanted my expertise as well as theirs to be opened up to challenge (see Ulrich, 1983, 1996b).

During a second meeting with the staff team we discussed some of the previous topics in more detail. First I briefly explained in plain Spanish the Cycle of Critical Distinctions (see Chapter 3). I asked them if they have any objection to use it as a guide for our research process. After I answered some brief questions they expressed their agreement to use it. Then I stated that at this point I considered it useful to carry out some first- and second-order acts of distinction that were crucial for defining the research. I reminded them that during a 1997 meeting at the MCBC we used Ulrich's CSH to define how the research was going to be done (see section 4.1). I proposed to use CSH again in order to redefine the research process, and I showed them the questions I was planning to discuss. I asked them if they considered this a good idea or if they wanted to propose another option. They both expressed their desire to use CSH. Hence, we organised the rest of the meeting around Ulrich's questions rephrased to make them specifically relevant to the context. I expected these boundary questions to help me:

- To challenge and eventually redefine the ideas I developed about the research process.
- To uncover assumptions that the Co-ormg and Assistant 1 were making about the research process.
- To involve them in the research process so that they could help me to shape the whole inquiry in a more active way.

I invited the participants not only to think about those involved in the research effort but also all those potentially affected by the research. Given that the whole discussion was too long to be presented here, I will only make a summary of the most important conclusions which emerged.

1. The participants were inclined to consider that three types of clients ought to be served:

   - The MCBC as an organisation. At the end of the process the MCBC should understand better than before how it delivers its mediation services to the public, and this should help it to improve its services.
   - The parties who attend mediation processes at the MCBC.
   - Participants in the MCBC's mediation courses. The research results should help them to improve their future practice.

2. We agreed that the main purpose of the research should be the role that people's notions of justice play in mediation processes and how mediators deal with issues of justice in mediation practice. The MCBC's members expressed that: 1. it is not easy to understand a phenomenon as complex and abstract as the one we were interested in just by working on it during a short period of time. 2. It takes a substantial amount of time to implement and later on to evaluate changes in the practice of mediation. Therefore, we decided that first it would be preferable to gain a good and deep understanding of the phenomenon even if this meant not being able to implement some specific changes in the practice of mediation during my fieldwork. An insufficient understanding of the phenomenon could lead to deficiently grounded changes that could produce more serious problems than those they may resolve. The staff team was sceptical about research processes that aim at producing quick changes. They preferred research processes that were well grounded and could produce a deeper learning for them. In fact, I agreed with them for I thought that they would need some time to pause, be critically reflexive upon the changes to be implemented, and wait for opportunities to test the new ideas gradually before making them a regular element of their daily practice and training programmes (see also Senge et al., 1994).

3. What ought to be the underlying *measure of improvement*? Although several measures of improvement were explored, at the end the participants preferred one that was consistent with the option they chose for the previous boundary question. It was stated that improvement would be reached by the end of the fieldwork if:

   - They could see that the parties and the mediator's conceptions of justice have some clear effect on the way a mediation process evolves.
   - If this is the case, the research would produce an improvement if it can produce some important insights about this phenomenon.
   - The research suggests alternatives on how to modify mediation practice to make it more just from the parties' perspectives.

4. Who ought to be involved as *researcher*? We viewed the Co-ormg, Assistant 1, the MCBC's mediators and I as co-researchers. However, not everyone would participate in the research process in the same way. The MCBC, claimed the Co-ormg, had never done a systematic observation or evaluation of its mediators. A clear understanding about how mediators actually did their work was missing. The Co-ormg claimed that it was important for the organisation to understand how a mediator who was trained by the MCBC handles issues of justice in his/her daily professional practice. Therefore, she wanted the mediators to be actively involved in the discussions of the research process, once the observation of their behaviour during the mediation processes had ended. If the mediators were invited to participate in the discussions from the beginning their behaviour during the mediation processes was likely to change substantially merely in order to fulfil the expectations of our on-going definitions of "good" mediation practice. Therefore, we decided that mediators should participate in the discussions but only after I have finished the observation of mediation processes. They were only going to participate in an initial discussion in which the nature of the research was going to be explained to them and we would agree with them on the necessary arrangements for observing mediation processes. Therefore, while the staff team and I made up the initial group of co-researchers, later on the mediators joined this group.

By asking these questions we were carrying out first- and second-order acts of distinction central for the research. In this case the problematic phenomenon was the research itself, and the problematic roles or identities were those of the researchers. We also discussed who was involved and affected by the research, and we concluded that the purpose of the intervention was going to be revealed to all those affected (in particular, parties and mediators). We focused on exploring the problematic phenomenon and roles in terms of *what they ought to be* (instead of *what they were*) because our main concern was how the research ought to evolve in the next months. The choices we were going to make were expected to trigger some specific actions (see Figure 3.9).

The means to be used during the first part of the fieldwork were clear: observation of mediation processes, interviews with the parties and the mediators, and informal dialogues with the mediators to get a broad perspective of their work and views. As a result of this second meeting I made some changes to the interview questions that I had worked on during the last months. Specifically the boundaries of the inquiry were widened to include some elements that were of particular concern to the organisation (such as concerns about the parties' satisfaction). Thereafter, the Co-ormg and I had a short meeting to verify if the interviews that I was planning to make with the parties and the mediators contained elements the MCBC was interested in. This revision was followed by the last pilot tests of the interviews for the parties (see section 8.1.3).

## 9.3 Observation of Mediation Processes and Methodological Reflexivity

### 9.3.1 Observation of Mediation Processes

During the next months of the research I observed mediation processes and carried out the associated interviews. I also had some discussions about research methodologies with the staff team. I did not want to marginalise their knowledge or their ways of reasoning and testing ideas. As I argued before (see Chapter 3), I consider that it is part of methodological pluralism to be open to the possibility of using the methods preferred by the stakeholders for otherwise the intervener may

contribute to marginalising them[112]. Not only is this important for ethical reasons (I did not want to subsume the others under my 'hegemony') (see section 3.1.2), but also because it enriches the research to enter into discourse with other alien perspectives (Gregory, 1996; Taket and White, 2000).

I discovered that the staff team preferred research based on a detailed observation of the problematic phenomena, followed by a rigorous analysis of the data collected. Therefore, I became more inclined to carry out a detailed analysis of the post-mediation interviews, as well as a comprehensive analysis of the mediation processes. The observation of mediation processes was interrupted by a meeting that was held when I had observed 12 mediation processes and carried out its related 36 interviews. During this meeting I presented a brief statistical and qualitative analysis of the interview data to the staff team. I clarified I would be willing to modify the course of the research process, if necessary, given the provisional findings already obtained. They were quite surprised by the results and encouraged me to go on with my research the way it was planned. I did that until I completed the observation of 20 mediation cases. However, while the observation was in progress I developed some ideas that are important for understanding the discussion of the next research phase.

### 9.3.2 Basic Assumptions about Moral Frameworks

The transformation of moral frameworks is a substantial part of learning. These transformations are a main concern for this research for people's conceptions of justice are assumed to be part of their moral frameworks.

By moral I do not mean only what is perceived as right or wrong, but our deepest understanding of what constitutes a good life and/or goodness of character, what is worthy and desirable, as well as our sense of respect for people's lives. I assume that moral frameworks guide people's conduct so that their moral agency does not collapse to arbitrariness. "Frameworks provide the background, explicit or implicit, for our moral judgements, intuitions, or reactions" (Taylor 1989, p.26). To articulate a

[112] I would make an exception, however, if stakeholders want to use methods that may marginalise and/or oppress others.

moral framework involves explaining what makes sense of our moral reactions or answers, including philosophical and empirical beliefs. In general, our moral frameworks are linked to claims about the nature and status of human beings, society, nature, and the other elements that we regard as being part of the perceptible world. Moral frameworks guide the way we perceive the world and organise our thoughts, feelings, and actions. Additionally they have an expression in language which can be more or less accurate (Taylor, 1985). They constitute the "moral space" within which people's identities take shape and their ideals become intelligible (Taylor, 1987). However, they may not always be easy to articulate. This allows the persistence of a lack of fit between what people claim to believe and even pride themselves in believing, and the implicit beliefs they have as part of their moral frameworks.

Moral frameworks, which involve people's notions of justice, entail three axes (Taylor, 1989):

1. Our sense of respect for and obligations to others (morality in a narrow sense).
2. Our conception of a full and meaningful life.
3. Our sense of human dignity.

The first axis is the only one usually discussed in the ADR literature (e.g., Raiffa, 1982; Bishop, 1988; Silberman, 1988; Murningham, 1992). There morality is usually understood merely in terms of non-infringement of someone's rights or some rules of 'proper' conduct (e.g., not lying). I do not claim that the axes identified by Taylor exhaust all the components of what we might consider a "moral framework", for people's moral frameworks may vary from one culture to another and they constitute constructions people make. Nonetheless, Taylor's axes are a good starting point for understanding the concept.

### 9.3.3 Redefining Double-Loop Learning

As I argued in Chapter 3, *single-loop learning* is instrumental learning that changes strategies of action or assumptions that lie beneath these strategies without changing the values of a theory of action (see Figure 3.6). Argyris and Schön define double-

loop learning as "learning that results in a change in the values of theory-in-use, as well as in its strategies and assumptions" (1996, p.21). I will introduce two changes to this definition[113]:

1. I will replace the concept of "values" by the concept "moral frameworks" for the latter is much more comprehensive than the former. The "value-discourse" has only a relatively new origin (Andrew, 1995). It is appropriate to understand some recent conceptions of morality, but not all these conceptions. For instance, to speak in terms of a set of values is insufficient for explaining conceptions of morality such as the ones of Aristotle, Kant, Aquinas and many other thinkers (see Chapter 5). Their conceptions of morality involve much more than a list of organised values. Double-loop learning can affect any of the parts of the whole set of elements of a moral conception, or moral framework, and not just those that can be described as "values". For instance, it can affect evaluations about what is the moral good, the right, the conception about the sources of moral evaluation (e.g., traditional theism, nature as an inner voice, reason, natural law), the relationship between the good, the right, reason and the order of the universe, etc.

2. I argue that changes in some types of "basic beliefs" are also an important part of organisational learning (and not just changes in values, strategies and undefined assumptions). These are basic ontoepistemological beliefs that constitute a central part of the foundations upon which individuals and groups construct their mental models[114]. They use these beliefs to act in organisations and produce changes

[113] Theories on learning are quite diverse. Several authors have proposed theories that included multiple 'levels of learning' (e.g., Bateson, 1972; Watzlawick et al., 1974; Kitchener, 1983; Mezirow, 1991; Bawden, 1995; Argyris and Schön, 1996). There are similarities and differences in the way these levels are conceptualised. For instance, the first level of learning of Bateson (1972), Watzlawick et al. (1974), Kitchener (1983), Bawden (1995) and Argyris and Schön's (1996) theories include learning to select an appropriate response to reach a desired objective without any elaborate reflexivity on the particular learning strategy in use. However, there are differences between these theories too. For instance, while Bateson (1972) proposes three levels of learning, Argyris and Schön (1996) distinguish only two. It is beyond the scope of this document to describe or carry out a critical analysis and comparison of these theories. However, it is worth mentioning that my interpretation of these theories (particularly Bateson's, 1972, theory) contributed to my decision to modify Argyris and Schön's (1996) original distinction between their two levels of learning to make it more useful for achieving the aims of the research process, and more coherent with the conceptual scheme I am using. Therefore, the two levels of learning I use are similar to Argyris and Schön's levels but not equal as a result of the changes that I introduce in the definition of double-loop learning.

[114] "Mental models are the images, assumptions, and stories which we carry in our minds of ourselves, other people, institutions, and every aspect of the world" (Senge et al., 1994, p.235).

within or between them. They are beliefs about human-nature, society, God, the natural world, etc. They are inextricably linked to people's moral frameworks.

Given these changes I will understand *double-loop learning* as learning that modifies the moral framework and basic beliefs of people's theories-in-use, as well as their associated strategies and basic assumptions. In single-loop learning the underlying moral framework and basic beliefs are not changed (one loop is active). In double-loop learning two feedback loops are active. Figure 9.2 presents a simple model of the basic elements of double-loop learning[115]. This model is different from Argyris' (1990) model (see Figure 9.3), not only because of the conceptual changes presented in the previous paragraphs, but also because Argyris' representation oversimplifies the role of values in double-loop learning for it assumes that they only affect the actions of the decision maker. I claim that changes in our moral frameworks and basic beliefs change more than that for they can modify the distinctions we make about all the other elements which are part of the learning process. For instance, they also affect what we consider relevant facts, and therefore they change both what we consider to be the results of the changes and the expected results, thereby modifying the mismatch we perceive (see Figure 9.2). Additionally, changes in any element of single-loop learning (identified as SLL in Figure 9.2) have the potential to affect our boundary judgements so as to produce alterations in our moral frameworks and basic beliefs. In general double-loop learning can change any element that we consider relevant in single-loop learning, and vice versa.

I would also like to point out another difference between my assumptions and Argyris and Schön's assumptions. While they implicitly assume (e.g., see Argyris and Schön, 1996) that there is *a* correct set of assumptions which, if found, would be beyond question, my commitment towards critical reflexivity leads me to assume that there is no correct set of assumptions that can be considered beyond question.

[115] In a particular situation the model might be more complicated (for instance, involving elements of double-loop learning both at an individual and at a collective level).

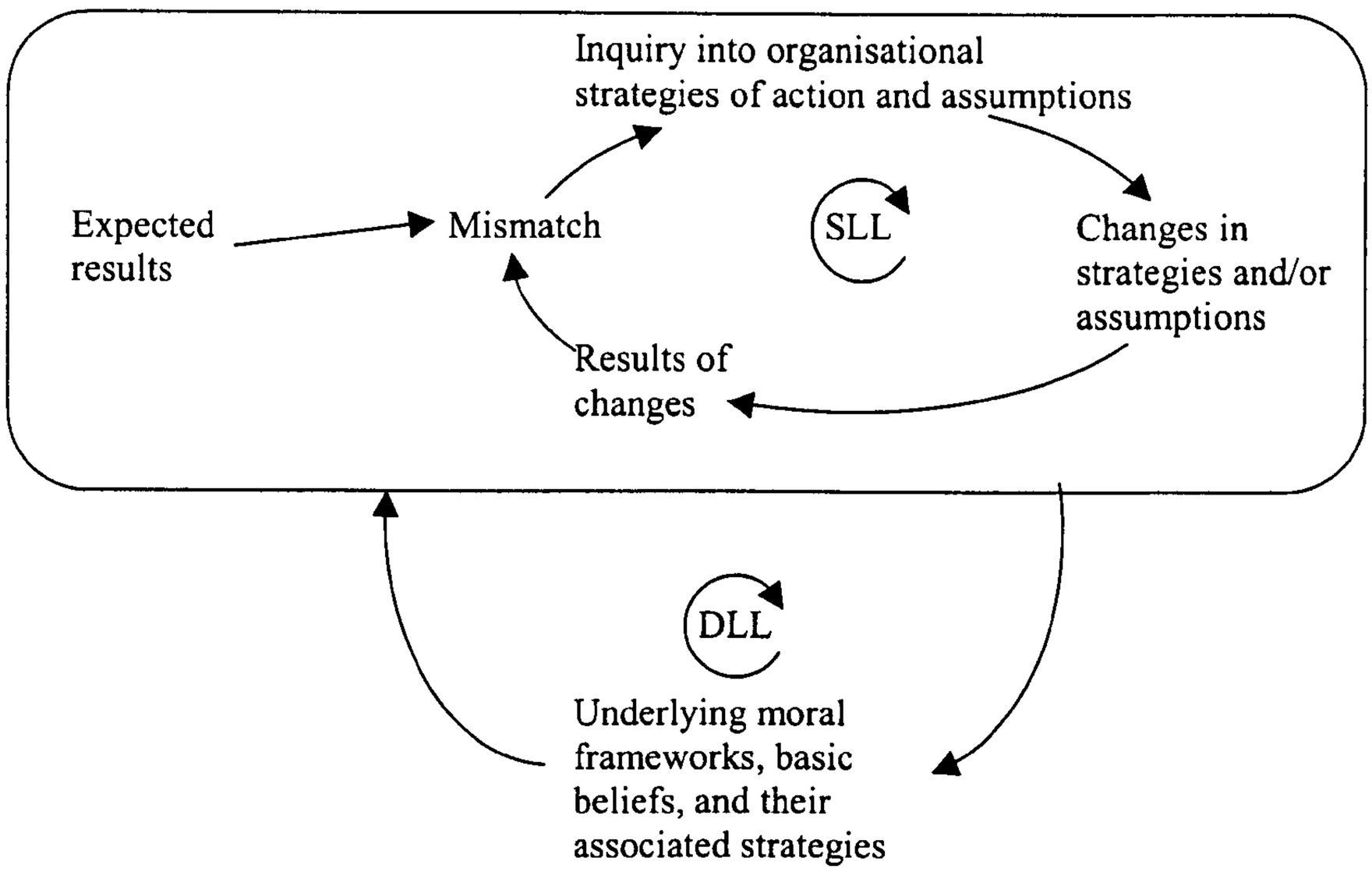



Figure 9.2. Double-loop learning (while SLL identifies single-loop learning, DLL identifies double-loop learning).

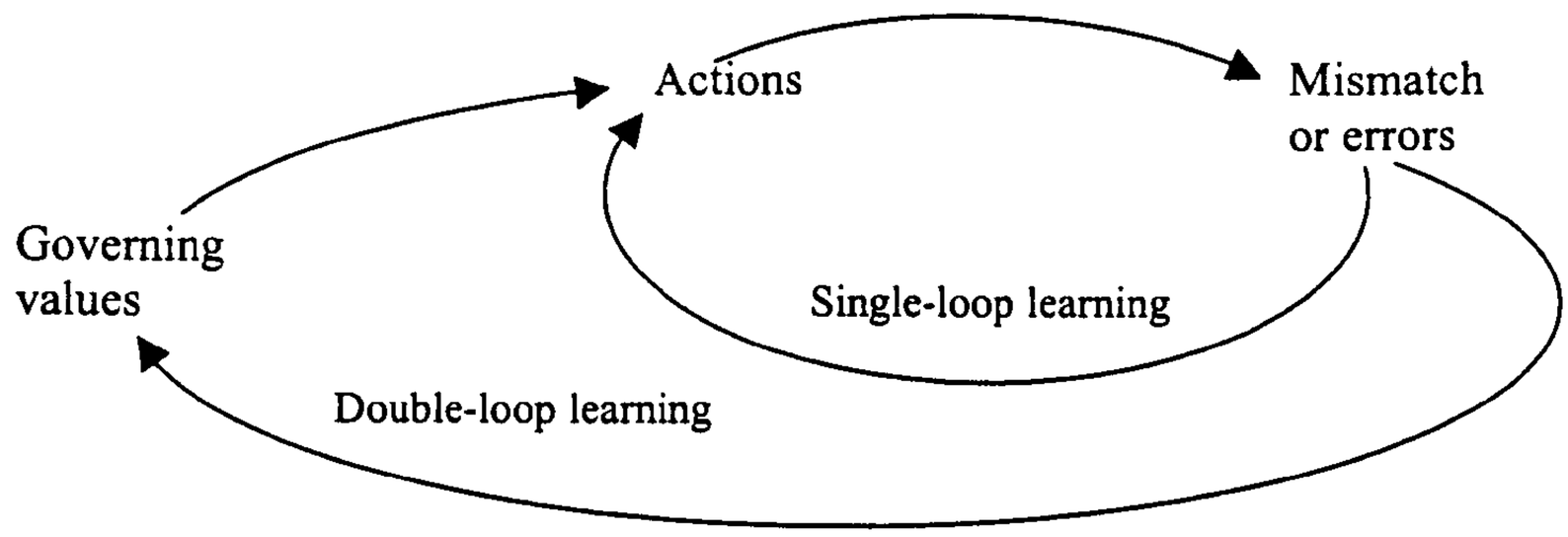



Figure 9.3. Argyris' representation of double-loop learning (adapted from Argyris, 1990, p.94).

## 9.4 Initial Discussions over the Interviews' Results

### 9.4.1 About the Meetings

While I was in Colombia I had just enough time to observe mediation processes, carry out interviews, and participate in the work that resulted from having adopted an action research approach. These were intensive time-consuming activities. As a result I carried out two analyses of the data that resulted from the interviews. A first analysis was done after the observation of 20 mediation cases at the MCBC. A second one was more detailed than the first one and took three months of full-time work to be completed after the fieldwork ended (I will outline how it was done in Chapter 12). While the first analysis was used to trigger a learning process during the fieldwork, the second was done later on to explore some issues in more detail that could help mediators to further improve their professional practice. Given that my co-researchers and I suspected that it would take a very long time to carry out this second detailed analysis, we decided to do the first analysis more quickly together so as to diminish the following dangers:

- Developing an interpretation of the data that was not going to be the fruit of participation with the members of the organisation.
- Treating my co-researchers merely as subjects of the research.
- Interrupting discussions about substantial issues of the research during the long time required for making the detailed analysis of the data. This may have negatively affected the transformative potential of the intervention. For instance, it may have destroyed the interest mediators and the MCBC's staff had in the research.

The initial analysis was enough to set off a discussion that produced important reflexivity in the organisation. By doing this analysis we managed not only to produce some positive changes in the organisation, but also to keep the interest in the research process alive.

The results of the interviews were discussed in several meetings. The first one was attended by the MCBC's Director and Deputy Director, as well as by the staff team. The Co-ormg and the mediators attended two other meetings. The latter were much longer than the first meeting and involved a more detailed discussion of the interviews. At the beginning of the first meeting with each group I discussed the notions of learning and critical reflexivity. I used a game called "arm wrestling"[116]. We used it to discuss how sometimes we are unaware of our basic assumptions and mental models, and how our interpretations of discourses and behaviours are affected by our past and present social interactions. After that I introduced two distinctions: Double-loop learning (see sections 3.2.1.2 and 9.3.3) and critical reflexivity (see section 3.1.3.1.2). I argued that double-loop learning was an important type of learning we could obtain from the research. In this task it was valuable to embrace critical reflexivity, at least temporarily. They agreed to my invitation to try to bring to the surface as many of our assumptions as possible and not place any of them beyond question. I also made an explicit commitment to engage in the critical process myself. In discussing the interview results next, I will use the questions presented in the type 1 interviews (see Appendix 1). I will present a summary of the main elements discussed during the two meetings I have just outlined.

### 9.4.2 Discussing the Results of the Interviews

> "In that state of hallucinated lucidity, not only did they see the images of their own dreams, but some saw the images dreamed by others" (García-Márquez, 1970, p.46).

The discussion of the results of the interviews was a source of surprises to the MCBC staff and mediators. As a result they began to change the way they perceived mediation theory, their practice of mediation, the meaning of justice for mediation practice, and their conception of the mediator's role. I want to point out that the discussion of the results of the interviews was done collectively, and that I encouraged the MCBC's staff to participate in the interpretation of the data. I presented tables and

[116] To save space I will not provide details of this game which is different from traditional arm wrestling, a game that is commonly used for different purposes in ADR seminars (for details see Cairns, 2001).

graphs that summarised the data, but also the original qualitative answers were made available to the participants. Given the space limits of this document I will omit discussing many of the questions we addressed during the meetings at the MCBC. However, I will briefly summarise some of the most important "surprises" revealed by our dialogue.

1. *Unexpected levels of dissatisfaction.* To the question "In general, how satisfied are you with the mediation process in which you participated?" the interviewees gave the answers shown in Table 9.1. In this and other tables the number within parenthesis indicates the code used to identify the answer in the associated graphic (which contains the name of the variable used to codify the answers).

| Very un-satisfied (1) | Unsatis-fied (2) | Not sure (3) | Satisfied (4) | Very satisfied (5) |
|---|---|---|---|---|
| 1 | 12 | 5 | 18 | 4 |

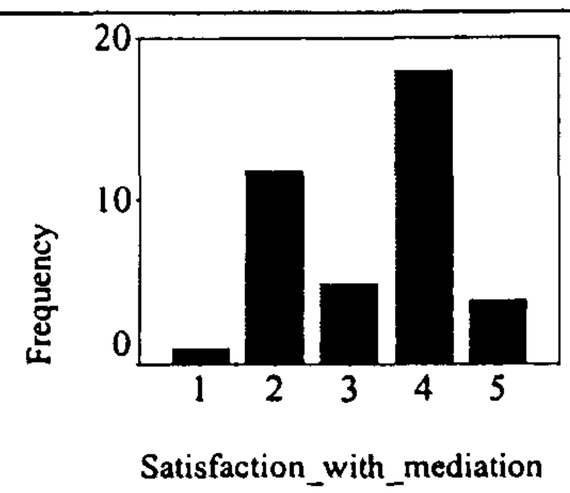



Table 9.1. Level of satisfaction with the mediation process.

The participants in the meetings were struck by what they viewed as a very large proportion of non-satisfied disputants. They were interested in understanding the causes of the dissatisfaction. Thus, we carried out a qualitative analysis of the interviews. This revealed that the causes seemed to be frequently related to perceptions of injustice. Moreover, the participants were particularly concerned about the fact that 6 out of 24 (25%) of the parties *who reached an agreement* claimed not to be satisfied with it. Using a significance level $\alpha$=0.05, a Jonckheere-Terpstra test (Siegel and Castellan, 1988) indicated that there was sufficient evidence to reject the hypothesis that the parties' dissatisfaction with their agreements was independent from their perceptions of fairness about the mediation process. After examining this result and the interviewees' qualitative answers, the participants in the meeting agreed that they had to find ways to

modify their mediation practice so as to make their services more satisfactory and fair according to the service users' perspectives.

2. *Parties' relationships.* The participants were surprised by noticing that mediation processes did not seem to have a substantial effect on the parties' perceptions of their relationships, and it looks as if mediation has the same probability of improving or deteriorating the parties' relationships (see Table 9.2). Later on this data supported a conclusion we reached based on a careful analysis of the mediation cases. Mediators act awkwardly when the parties want to deal with relational issues such as self-worth and trust, and they seem to be merely skilful at dealing with "factual" or tangible issues (such as money). Other researchers have found similar results (e.g., Silbey and Merry, 1986; Sillars and Weisberg, 1987; Lam, Rifkin and Townley, 1989; Donohue, 1991).

| It made it much worse (1) | It deterio-rated it somewhat (2) | It left it the same (3) | It improved it somewhat (4) | It improved it substan-tially (5) |
|---|---|---|---|---|
| 3 | 3 | 27 | 6 | 1 |

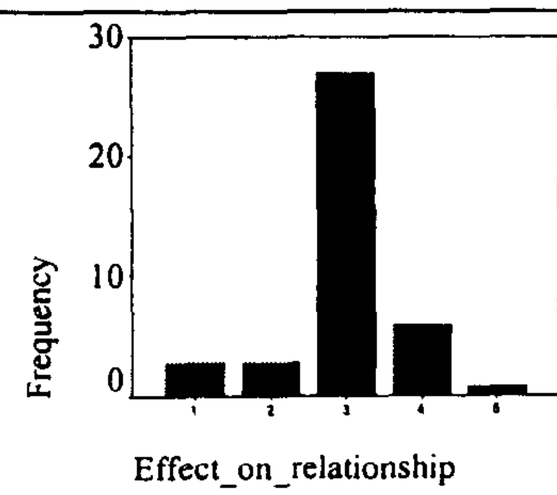



Table 9.2. Effect of the mediation process in the parties' perception of their relationships with their counterpart.

3. *Hostility.* Given that, at the MCBC, 20 out of 40 (50%) parties expressed to have perceived some level of hostility, and more importantly, 8 out of 40 (20%) considered it substantial, we concluded that it was important to study in our future detailed analysis of mediation cases the way mediators were dealing with the parties' expressions of emotions and their emotional concerns. After discussing a statistically significant association between the parties' perceptions of hostility in mediation and their perceptions that the mediation process was unfair[117], the Co-

[117] A Jonckheere-Terpstra test suggests that this relationship is statistically significant (using $\alpha$=0.05) for the MCBC data and also for the complete set of data including the cases observed at the MSUA.

ormg argued that she would like to study carefully the use of mediation techniques that can diminish the negative effects of hostility in mediation processes[118] in those cases where one of the parties felt hostility by his/her counterpart. We did this later on.

4. *Points of view.* Despite the mediators' intention to pay good attention to the parties' points of view and to make them feel that their viewpoints were being understood, 12 out of 40 (30%) disputants argued that their points of view received less than what could be considered good attention. Moreover, according to the interviewees' answers, mediation was not contributing effectively to improve the parties' understanding of their counterparts' arguments (see Table 9.3). This was considered a very disappointing result for it indicates that mediation might not be contributing substantially to the integrative dimension (see section 2.1.1) of the parties' negotiations, because understanding the counterparts' arguments is crucial in developing integrative negotiations (see Fisher and Ury, 1981; Bazerman, 1990). This suggested that distributive negotiation processes (or positional bargaining) might have been taking place more frequently than it was previously thought. Later on, the qualitative analysis of the mediation process revealed that this was the case (see section 10.2.2). Additionally, given that approximately 25% of the 114 interviewed parties considered that to improve the parties' understanding of their counterparts' arguments ought to be one of the three most important characteristics that a mediation process should have, the aforementioned result shows that current mediation practice was failing the expectations of many parties.

[118] They include reframing angry messages in constructive ways, organising separate sessions for the parties, encouraging the timid party to express his/her opinions, and legitimising the expression of self-interest by all the parties.

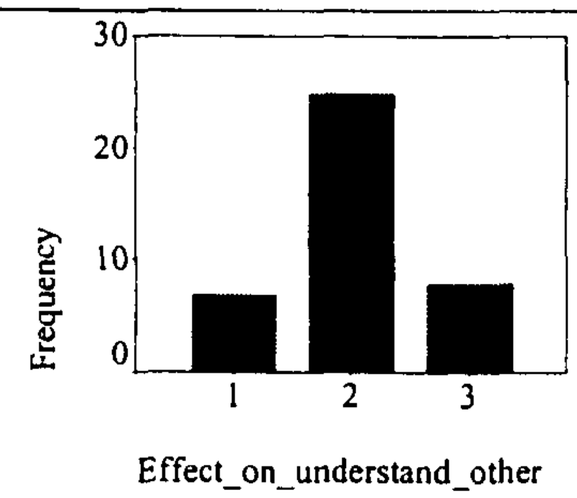
| It worsened it (1) | It left it the same (2) | It improved it (3) |  |
|---|---|---|---|
| 7 | 25 | 8 | |



Table 9.3. Parties' perceptions of how much the mediation process affected their understanding of their counterparts' arguments.

5. *Counterpart's advantage.* We argued that probably mediators could do much more to reduce the parties' perceptions that their counterparts had an advantage over them during mediation. After examining the parties' explanations of the perceived advantage, we found that although in some cases there was little the mediator could have done to reduce it, in others the mediator could have contributed to reduce if not completely eliminate this perception. For instance, this was the case when the party expressed that his/her counterpart's advantage was based on having a lawyer while s/he did not have one. In none of the observed cases the mediator even suggested to the party who experienced the disadvantage that s/he could get a lawyer before continuing with the mediation process.

6. *The relevance of justice to the parties.* Probably as a result of having participated in a training programme mainly inspired by the Satisfaction Story of mediation, mediators expected the parties to consider two goals as the most important ones for mediation. They were to "produce an agreement between the parties" and to "satisfy the interests and needs of the parties". The interviewees did indeed choose these as two of the most important goals of mediation. However, they chose another goal as the *most* important one: to "produce a just result". This outcome and the interviewees' selection of "justice" as one of the two most important virtues for mediation practice (the other was impartiality), surprised the participants in the meeting because they realised that justice was a major concern for the parties that mediators had not sufficiently explored in the past.

7. *Perceptions of justice.* Not only was justice important to disputants, but many actually experienced mediation as unjust. Table 9.4 shows the parties' answers to the question "Overall, was the mediation process in which you participated just or not?" The answers, codified using variable *mediation_justice*, were disappointing to the participants in the meeting. The Co-ormg noticed that we were changing the boundaries of who and what is involved in evaluating mediation practice. We were looking at a new element, justice, because we were taking seriously into account the service users' voices. I pointed out that although these results appeared unsatisfactory to those who were at the meeting, they did not seem to be below the standards of mediation centres in the U.S. During the meeting I mentioned that the parties' perceptions about the fairness of mediation processes are rarely discussed in the literature. I explained that I had been able to find only two studies on family mediation that mention it. One by Chandler (1990) found that 60 percent of couples considered their agreement fair, and another by Meierding (1993) who reports that 73% of men and 78% of women perceived the final agreement to be fair. After debating these results the participants mentioned that they were not very different from the ones I observed at the MCBC, and that they were bad too.

| Very unjust (1) | Unjust (2) | Just (3) | Very just (4) |
|---|---|---|---|
| 3 | 15 | 19 | 3 |

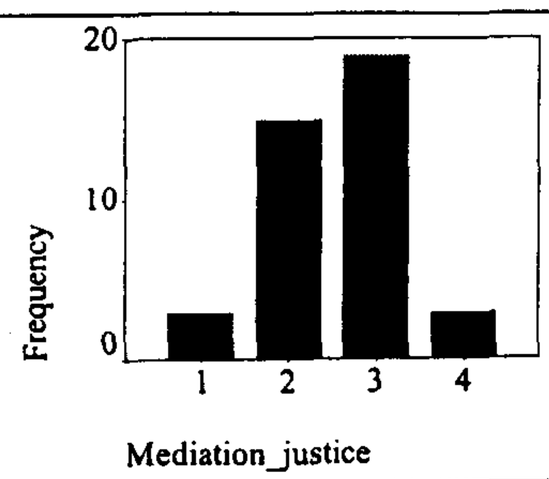



Table 9.4. Parties' perceptions of how just their mediation process was at the MCBC.

### 9.4.3 Second Group of Interviews of Disputants

As a result of the discussion of the interviews of the 40 parties I observed during mediation processes, several broad conclusions were reached.

1. The interviews were a source of surprises for the organisation. These were the type of surprises which were not always pleasant, which frequently contradicted assumptions deeply-rooted in the organisation, but which encouraged them to learn more about their mediation practice and to modify it. As Sterman (2000) has argued, the greatest potential for improvement frequently comes when our methodological tools help to change deeply held mental models.

2. Given that the MCBC is not only a mediation service provider, but also a very influential Latin American mediation training centre, the results of the interviews were expected to contribute to the way mediators were being trained. This was considered even more relevant as a result of Law 640 of 2001 (see section 13.5), which the MCBC's staff expected to be approved soon. On the one hand the MCBC was planning to train the majority of its own future mediators during the next months. And on the other hand, mediators from many other mediation centres were going to be trained at the MCBC. Given the importance that my co-researchers attributed to getting a better understanding of the parties' notions of justice, we decided to increase the number of respondents to the second module of the interview. Moreover, we considered that this goal justified sacrificing an increase of the number of people who answered the first part of the interview. Therefore, a new interview was prepared in which module 1 of type 1 interviews (this is the interview presented in Appendix 1) was eliminated but the questions in the second module of this interview were increased. This produced a new type of interview that I call type 4. We decided to apply the latter to 50 people who were going to be randomly selected among those who had participated in mediation processes at the MCBC during the last year. I saw this as an expression of the MCBC members' willingness to understand their service users' voices. Type 4 interviews were actually answered by 54 persons[119]. This proved to be a very time-consuming task, given the length of the interview[120] and the long waiting and transportation times.

[119] Type 4 interviews included all questions of the second module of type 1 interview. I will draw upon the responses to some of these questions in the next chapters, but I will not be able to discuss the answers to those questions not included in type 1 interviews given the space limitations of this document.

[120] Respondents usually required between two and a half and four hours to complete this interview.

3. The MCBC's influence on other mediation centres through its training programmes drew attention to the relevance of getting a deeper understanding of the way mediation was practised at other dispute resolution centres. Although this was a task to which I could hardly contribute given the limited resources I had, we decided to expand my fieldwork by including the observation of mediation cases at another mediation centre. Given the MCBC staff's knowledge of other mediation centres we decided that a good alternative was the mediation centre of the University of Los Andes (MSUA), because it was one of the most active and influential ones in the country, as well as the oldest university mediation service provider. There my main interest was observing family mediation, the only common type of mediation that was rarely practised at the MCBC and which I had not been able to observe there. It was decided that it would be enough to observe 10 mediation cases at the MSUA.

## 9.5 Summary

In the first part of this chapter I described some changes the MCBC experienced between 1998 and 2000. This description serves to understand in broad terms some important events and changes that took place at the MCBC while I carried out the fieldwork. At the beginning of the fieldwork I argued in favour of giving the research process a participatory nature, and trying to use it to promote changes that the organisation might perceive as improvements. With the members of the staff team, who became my initial co-researchers, I discussed and defined the means to be used during the first part of the fieldwork.

During several months I observed mediation processes and carried out the associated interviews. Simultaneously I held many informal dialogues with the mediators to get a broad perspective of their work, their perceptions of their role, and their views. I organised formal meetings with the staff team to discuss with them the evolution of the research process, so that they could participate in it, be critically reflexive on it, and examine if it could be improved. During this period I became critical about some ideas presented in the organisational learning literature. As a result I introduced some changes in the methodology I was going to use based on the literature review that I

have done during this inquiry, and on my experiences during the fieldwork (observing mediation processes and talking to the disputants). In particular, I redefined the notion of double-loop learning and clarified some substantial differences between my assumptions and those of the researchers who first discussed that notion. I made a special emphasis on the importance that the modification of people's moral frameworks and basic onto-epistemological beliefs have on *double-loop learning*. I consider this redefinition of double-loop learning an important contribution of this research.

After finishing my observation of mediation processes at the MCBC I had several meetings with my co-researchers, the MCBC's administrators, and the mediators, to discuss the results of the interviews I had with the disputants who participated in the mediation processes I observed. During those meetings I used methodological tools drawn from the organisational learning literature, critical systems thinking (CST), mediation practice and ADR training programmes. I tried to promote as much critical reflexivity and organisational learning as possible, promoting inquiry into the concepts we discussed.

Notice that the data from the interviews were not used within a positivistic science nor within a traditional social science mode. I attempted to use statistical data to encourage critical reflexivity and organisation learning, by guiding the discussion of this data with elements drawn from the action science and the CST literatures. Within CST, Gregory (1992) has advocated the use of empirical data as a contributor to dialogue in this manner. Midgley (2000) also argues that to do so means seeing the methods through a critical 'lens' rather than accepting their original positivist methodological roots. However, as far as I am aware, no CST author until now has actually used these methods in this critical manner. For instance, Midgley and Floyd (1990) and Cohen and Midgley (1994) both present their data in a traditional summative report. While the overall research designs they used might be called critical, the process of application of the interview methods and analyses were not changed from a traditional social science mode. I therefore suggest that a contribution of this thesis is to demonstrate one way that a critical use of empirical-analytic methods can be practised.

The MCBC's staff and the mediators were surprised about many of the results that the interviews revealed. They ended this phase of the research process with a desire to enrich their understanding of the results of the interviews and to explore ways to improve their mediation practice. This was the main focus of the subsequent stages of the research process that are described in the next chapter.

# Chapter 10: Some Methodological Contributions and Addressing Issues of Justice

The fieldwork contributed to several aims of the thesis. Sometimes, while my co-researchers and I tried to achieve one aim, we also achieved another. Therefore, it is difficult to separate the discussion of how the different aims were accomplished. In particular, it is not easy to separate the arguments related to the first three aims of the thesis (presented in more detail in section 1.4):

1. To develop, put into action, and be reflexive upon a methodology for achieving the general aim of this research process.
2. To understand how mediators deal with justice concerns that arise during mediation processes.
3. To identify alternatives for transforming professional mediation practice so that mediators can deal in new ways with justice concerns that arise during mediation processes.

However, in this document I will make some separation between the discussion related to the first aim and the discussion related to the second and third aims in order to make clearer to the reader how the different aims were achieved. While in this chapter I will emphasise the first aim, in the next one I will emphasise the second and third aims. However, sometimes I will make reference to the three aims simultaneously.

In this chapter I will describe how multiple methods were mixed to continue with the development of the methodology that is part of this research process. First, I will present a brief description of the overall scheme we used to discuss mediation cases at the MCBC. This will present the scenario where diverse methods were mixed. Thereafter, I will explain what defensive patterns are, illustrate their presence in mediation processes, and discuss how I addressed them. This is required for exploring the next topic: how the parties' concerns about justice were frequently disregarded by mediators, and how they preferred to focus on the exploration of the parties' interests

and what they perceived as the 'facts' of the cases. Moreover, mediators' actions sometimes favoured the moral framework and concerns of one of the parties, giving him/her an advantage during the mediation process. This discussion will show how action science and critical systems thinking (CST) ideas were mixed in a synergistic way. Thereafter, I will discuss some methodological insights developed through the fieldwork. For instance, I will discuss further how a synergy can be achieved between the use of action science and CST concepts, and how I mixed causal loop diagrams with action science and CST ideas.

## 10.1 The Overall Scheme for Discussing Mediation Cases

I organised the discussion of mediation cases by arranging a series of meetings to which the mediators and the staff team were always invited. During the first meeting I clarified that my role in these meetings was the one of a facilitator who was going to use different techniques to promote a learning process that I expected would be valuable for them at an individual level, but also worth while for the organisation. I explained that this was the first one of a set of meetings in which I expected to learn about mediation with them, and particularly about ways of dealing with justice concerns that arise in mediation processes. I suggested we should organise our discussions around the mediation cases I had observed, and the mediators agreed.

In brief, the meetings went on as follows. I read a section of the notes I had taken during the mediation sessions which worked as a description of the session. My notes were usually very detailed and they were written in the form of a conversation that tried to reproduce as best as possible what people said during the mediation sessions. This proved to be valuable for three reasons:

- It avoided as much as possible that my interpretations of what happened during the case would limit or bias the development of different interpretations by other members who participated in the discussions of the cases.

- It reduced my probability of developing defensive routines to defend my own recollections of the case[121].
- It contributed to the credibility of my work in the eyes of the mediators. One mediator told me that my detailed notes on each case proved to them that I was really interested in their work and in helping them.

After reading each section of my notes, I invited the mediator who was involved in the case to comment on any disagreement he had with my description, and asked if there was anything that he would like to add so that the other participants can have a good and rich description of what happened during the mediation session. Mediators almost never expressed any important disagreements with my notes, and they only intervened to clarify some specific issues, usually to explain why they said what they said. After that I invited all the participants in the meeting first to ask questions to clarify the description that was presented to them, and later on to discuss what the mediator did with the intention to:

- Produce both single- and double-loop learning.
- Promote self-reflexivity in all of us.
- Explore issues of justice that arose in the mediation process.

During these discussions I acted as a facilitator of the learning process, encouraging them to disclose as much information as possible, not bypassing their feelings, encouraging self-reflexivity and learning, as well as promoting an open and critical inquiry into my own role. I will provide examples of these actions throughout this chapter. After the discussion of each part of the mediation case finished we continued with the description and discussion of another part, until we finished discussing the case.

During these meetings I asked boundary questions whenever I thought it was appropriate, and mixed them with action science elements. Boundary judgements were used to address the desirability of changes and consequences introduced both by single- and double-loop learning. These questions were useful in promoting diverse

[121] My descriptions were not very high in the ladder of inference (see section 3.2.1.2).

interpretations of the problematic phenomenon and the mediator's role, as well as in exploring them in terms of what they *are* and *what they ought to be*. Whenever choices were made I promoted a reflexive dialogue on them. Formal and informal means for discussing 'the ought' were used. Formal means included well-known tools such as the ladder of inference (discussed in section 3.2.1.2). I also reinterpreted methods produced within other methodologies through my methodology in an expression of methodological pluralism (see section 3.1.3.1.3). Informal means included ad hoc methods conceived for addressing specific issues, such as negotiation games and decision analysis exercises. This approach to the selection and design of methods is typical of the creative design of methods (see section 3.2), the basic approach I chose for conducting the research although (as far as I am aware) the specific set of methods I drew upon has never been used in combination before. The methods helped to promote learning so that we continuously modified our initial interpretations of the problematic phenomenon and the mediators' role.

## 10.2 Identifying and Addressing Defensive Patterns (DPs)

In this section I will show how DPs were identified at the MCBC, how they were associated with the mediators' support of some conceptions of justice and the disregard of others, and I will outline how DPs were addressed. Addressing DPs helped to create an environment where new ways of dealing with issues of justice at the MCBC could flourish.

### 10.2.1 What are DPs?

During the period I waited to initiate my observation of mediation processes I became aware of the presence of defensive routines[122] (Argyris and Schön, 1996) in the MCBC's daily operation. I was worried that by confronting them directly I would

[122] I preferred not to call the defensive routines I observed at the MCBC 'organisational' given that they were the result of observing just two mediators at this organisation. Argyris calls defensive routines organisational "in the sense that individuals with different personalities behave in the same way; and people leave and new ones come into the organization, yet the defensive routines remains intact" (1993c). I considered that the observation of two mediators was insufficient for arguing that the defensive routines were organisational.

trigger a set of very difficult problems. Therefore, drawing upon the organisational learning literature, I conceived a strategy for dealing with these defensive routines based on a careful observation of mediation cases. These cases could be understood as learning devices not only for understanding how justice notions might affect mediation processes, but also for starting a modification of any defensive routines which might appear and might prevent possible changes to improve the situation. Therefore, my plan was to openly explore the mediators' defensive routines with them while discussing the observed mediation cases. Given my experience in several previous projects where researchers had tried to promote organisational learning, I realised that I would have to assume different roles during the course of the intervention. For instance, while at the beginning I would have to assume a very active role in helping the group to identify and learn how to engage the defensive routines in order to overcome them, later on I would have to help them in assuming this facilitative role.

The discovery of defensive routines and fancy footwork[123] made me aware of the presence of Model I theories-in-use that could inhibit double-loop learning[124]. In order to overcome the prevailing Model I theories-in-use, my co-researchers and I needed to gradually develop organisational learning systems that could be used in diminishing the inhibitions to double-loop learning implicit in Model I. This was important because my whole research involved an inquiry into double-loop issues. I needed to develop with the participants Model II learning systems and Model II theories-in-use that could help us to continually question the status quo.

Figure 10.1 shows the main elements of a defensive pattern (or DP). DPs comprise skilled incompetence[125], defensive routines, fancy footwork, and the consequences that arise from them within an organisation[126].

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[123] Fancy footwork involves "actions that permit individuals to be blind to inconsistencies in their actions or to deny that these inconsistencies even exist, or, if they cannot do either, to place the blame on other people" (Argyris, 1990, p.46). A symptom of fancy footwork is the ineffectiveness of people's actions when they are committed to be effective. Fancy footwork implies people's use of defensive reasoning and actions to avoid assuming responsibility for the consequences of their actions. They may not even be aware of the ineffectiveness of their behaviour. Fancy footwork leads to mediocre performance.

[124] Defensive routines, Model I theories-in-use, and double-loop learning are defined in sections 3.2.1.2 and 9.3.3.

[125] This is incompetence that is the product of skilled actions (Argyris, 1990), actions that mediators

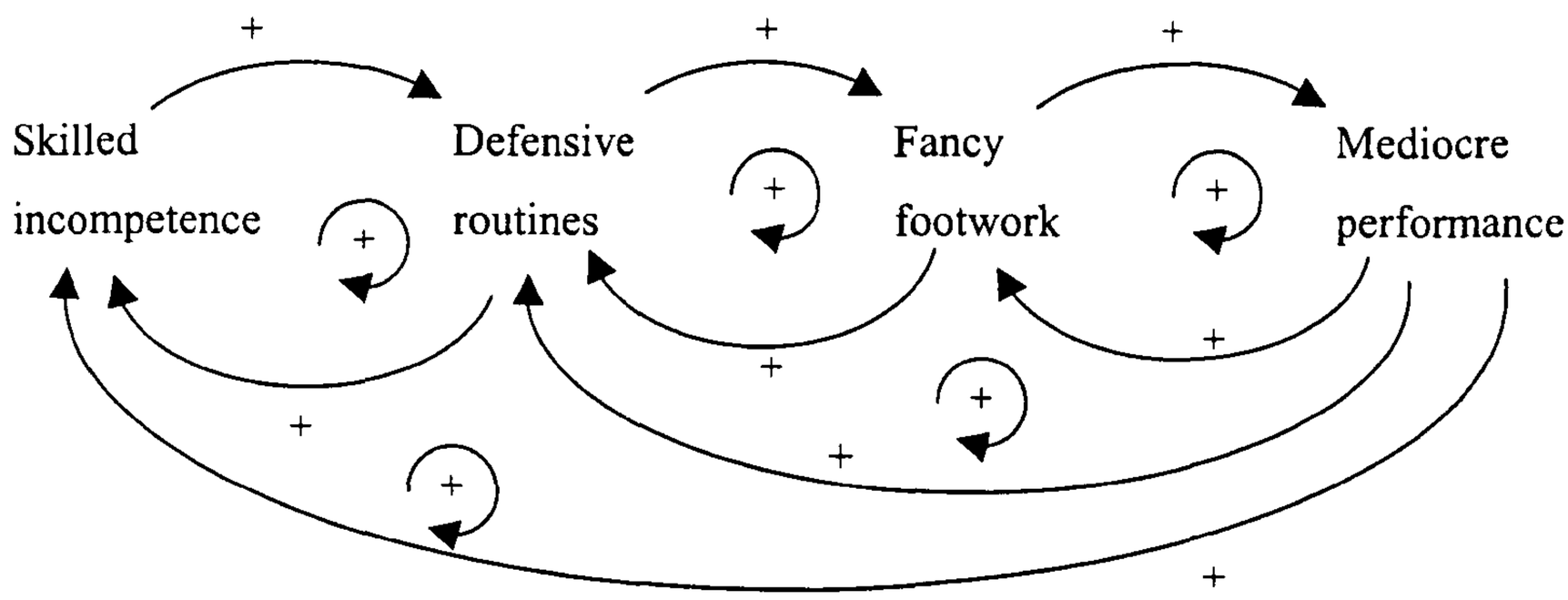


Figure 10.1. Main elements of a Defensive Pattern.

### 10.2.2 Uncovering Defensive Routines

The first meeting to discuss mediation cases serves to illustrate how we uncovered mediators' defensive routines, as well as their associated fancy footwork (see Figure 10.1). We discussed their logic observing some specific cases. One of those cases we analysed, the Scratch Card Case, involved a man (Jaime) and the representatives of a tourism company (Pedro and his lawyer).

> Initially the mediator briefly explained what a mediation process is and he argued that he was going to act as a neutral and impartial third party who was not going to be biased in favour of any one of them. Then he invited Jaime, who had asked for the mediation process, to explain the case. Some months ago, said Jaime, he bought a newspaper where he found a game card. He scratched off the silver area of the card and found he had won a prize that had a value of approximately £32[127]. Therefore he went to the company that was supposed to give him his prize. He expected to collect the money in cash. He argued that there he was the victim of a

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decide to take rather quickly and that they take for granted given their underlying basic beliefs and moral frameworks (see Figure 9.2). However, these actions do not lead them to the type of results they would like to obtain.

[126] A DP can be called an organisational defensive patterns (or ODP) when it is part of an organisation's usual practice and it is deeply-rooted in the organisational rules, common practices, norms, etc.

[127] Converted from Colombian Pesos.

clever salesman who made him buy a holiday package. He did not receive any money in cash, but a discount of £32 on the package he bought. He paid £165 and signed a contract whereby he obliged himself to pay another £463 to the tourism company. In return the company was committed to provide him services of a value of £660. Later on Jaime felt he was deceived by unscrupulous means, and he asked the company to give him back his money. The company refused and asked him to comply with the contract. After failing to resolve their conflict by direct negotiations the parties agreed to try a mediation process at the MCBC. After Jaime's intervention, mediator 1[128] asked Jaime what he wanted. He said he wanted to get his £165 back and to terminate the contract. Pedro argued that Jaime's explanations where unsatisfactory and he proposed to Jaime that the company was ready to forget about the contract only insofar as Jaime accepted that he had lost £165 by making a decision for which only Jaime was responsible. The argument between the parties continued. During this time the mediator focused on understanding the characteristics of the contract. Pedro asked Jaime to accept his proposal and lose £165 because the company was willing to lose the £463 to which it was entitled. Jaime insisted he was the victim of an unfair deception and he wanted his money back. Suddenly the mediator made an intervention that changed the course of the discussion. He said that *legally* they were talking about £660. Looking directly at Jaime's eyes the mediator declared: "I don't want us to get involved in the legal aspects of the process, because we have the non-fulfilment of a contract." Mediator 1 emphasised his last words and added: "Jaime, you have just heard the company's proposal. Why don't you accept it? You lose £165 and the company loses £463. Please Jaime, tell us what you think." Jaime appeared to be intimidated. He asked nervously: "If I continue paying the money the company will provide me with the services?" During the rest of this first session of the case Jaime was intimidated and he conceded easily to Pedro's pressures. After the aforementioned mediator's intervention Pedro frequently reminded Jaime that he had "failed to fulfil a *legal* contract".

The previous description is a summary of the detailed description of the case I discussed with mediators (in this document I will present summaries of the cases

[128] I will call the MCBC's mediators mediator 1 and mediator 2.

rather than the detailed descriptions that were used). The mediation process continued but its summary is enough to show how typical elements of defensive routines operated in this case, and how they had an impact on the notions of justice that were privileged during the discussions.

1. The mediator creates messages that contain inconsistencies. First the mediator argued that he was going to act as an impartial third party who was not going to be biased in favour of any one of them. However, later on he privileged the legal arguments that were convenient to only one of the parties. His discourse contained what can be seen as an internal contradiction. He aligned himself with one party, supporting his boundary judgements and its associated ethics. I claim that this was to some extent the result of the mediator's defensive routine. During our discussion of the Scratch Card case the mediator first denied that he had privileged a particular notion of justice with his intervention. However, later on he admitted that this was not the case and that he made his intervention to drive the mediation process to a space (the legal space) where he could feel safe and could give a definitive direction to the mediation process. Notice that during the mediation process he explicitly denied he wanted the parties to get involved in the legal aspects of the process, but his interventions focused all the participants' attention on precisely the legal features of the process. The mediator's defensive routine privileged a notion of justice that favoured the goals of one of the parties. Moreover, he contributed to suppress Jaime's perspective, and privileged Pedro's perspective. For instance, notice that by putting pressure on Jaime to accept Pedro's proposal, the mediator was assuming that the "loss" of £165 by Jaime had the same character as the "loss" of £463 by Pedro. However, while Jaime would have lost the money because he gave it to Pedro's company, the latter had never paid £463 to anyone. By pointing this out, or Jaime's perception that he was deceived, the mediator could have begun a discussion to address rather than omit Jaime's perspective.

2. The mediator acted as if his messages and actions were not inconsistent. This is illustrated well in the previous example. Frequently during my discussions with the mediators it was not easy for them to realise that they were being inconsistent.

3. The mediator made the ambiguity and inconsistency in the message undiscussable. If Jaime had noticed it at all, it would have been difficult for him to challenge the mediator once the latter had introduced the theme of the unfulfilled contract, which clearly intimidated him.

4. The mediator tried to make this undiscussibility undiscussable in our meetings. I will illustrate this statement and the previous one with another example. During this and several mediation processes the mediator argued that s/he did not want the parties' negotiation process to be reduced to a plain positional bargaining exercise. However, a few seconds later the mediator asked the parties to clarify their positions (not their interests or moral concerns), and forced them into maintaining the type of dialogue and making the kind of concessions that are typical of positional bargaining. By first attacking positional bargaining, the mediators were able to conceal the nature of the process they promoted. Moreover, they tried to make this topic undiscussable even in our own meetings. When I first tried to show that the mediators' utterances led the parties towards positional bargaining, mediators defended themselves by claiming that the latter outcome was not their fault because they had first told the parties that they wanted to avoid positional bargaining! They were resisting the insight and trying to close debate.

Defensive routines were usually difficult to discuss and they grew in underground ways. As Argyris (1993b) has found in other organisations, undiscussability rules became so embedded in defensive routines that they prevented the mediators from discussing many negative features of their behaviour. Much of their skilfulness depended on going along with the routines rather than questioning them.

### 10.2.3 Fancy Footwork in Operation and Mediocre Performance

Fancy footwork (see Figure 10.1) was another element of mediators' defensive patterns. A symptom of fancy footwork is the ineffectiveness of people's actions when they are committed to be effective (Argyris, 1990). Fancy footwork appeared

during the Scratch Card case. Let me illustrate this. At the end of the first session of this case, Jaime was on the verge of conceding everything that his counterpart demanded from him. However, he did not sign the contract that day because he claimed he wanted to consult his wife Teresa about the terms of the agreement. Jaime did not attend the second session. Teresa represented him. During this meeting the conflict escalated and when the relation between the parties was very tense, the mediator left the room for about 10 minutes without giving any explanation to the parties.

During the post-mediation discussion of this case we explored the reason for this mediator's action. With the help of my notes on this mediation process we first discussed what people had said before the mediator left the room. The mediators argued that the parties were using dirty tricks that are "typical" of positional bargaining such as withdrawing offers they had already made. They were doing that in order to advance their self-interests. The mediator was convinced that his interpretation was the "correct" one. I asked him why didn't he try to test this hypothesis with the parties rather than walking out of the room. He said that he couldn't test it because such a test could make the situation worse. For instance, it could upset the parties, something he wanted to avoid (this is a main value of Model I). I asked him what evidence based on previous cases did he have to support his statements. He said he couldn't provide any empirical evidence because he had never tried to test his hypothesis. However, it was "logical" that discussing his assumptions would make the situation worse. He said he learned that from more experienced mediators who preceded him in this work. The use of a self-sealing logic to prove that our points of view are correct, and the avoidance of any public test of our attributions about others is part of the fancy footwork people use (Argyris, 1990). The latter contributed to an inconsistency between the mediator's espoused theory and his theory-in-use. While he claimed that it was important to be sincere to the disputants, he covered up many things he thought about them. Moreover, the fancy footwork also led to the mediator's mediocre performance (see Figure 10.1) as evaluated by the parties after the mediation process ended.

### 10.2.4 Comments on How Defensive Patterns (DPs) were Addressed

In this section I will summarise some of the elements I used to address DPs. I used two main strategies. The first was to share with the MCBC's staff and mediators concepts and skills that I expected to be valuable in dealing with the DPs (for instance, see section 10.3.1). I was clear that I wanted to avoid covering up any element of the DPs. I think this strategy worked because I noticed that mediators began to be more critical of their defensive routines and fancy footwork as our meetings progressed, and they gradually reduced their use of DPs. The second strategy was to promote mediators' self-reflexivity on the way they practice mediation so as to design mediation strategies, tools, and concepts that can help mediators to manage mediation processes in ways that prevent the activation of the mediators and the parties' DPs. This is a task that will take several years. It implies a major redesign of the role of the mediator, and therefore, of the mediation practice. During the fieldwork we initiated it by exploring and questioning many times the mediators' behaviours whenever they seemed to be guided by DPs or they appeared to promote them. For instance, by analysing the mediation cases we found that many of the mediators' actions were counterproductive, not sufficiently informed, and opposed the mediators' declared assumptions (as was shown in the Scratch Card case).

During the meetings we explored statements the mediators could have made to replace the ones they actually uttered. For instance, we did this with the quoted statement of the Scratch Card case mediator in which he said he did not want them to get involved in the legal aspects of the process (see section 10.2.2). I also encouraged mediators to explore inconsistencies in their reasoning and gaps between espoused moral frameworks and the moral frameworks they actually used. As the meetings progressed I promoted them to the mediators as opportunities for learning how to avoid triggering defensive routines in others and how to promote double-loop learning.

During all meetings I took particular care of framing my interventions in ways that contributed to enhance self-reflexivity and productive learning. For instance:

- When I wanted to question inferences or attributions people made about other people's behaviour, I avoided asking them "why" they believed what they did, because this might have triggered espoused-theory explanations which might have been self-serving (Argyris and Schön, 1996). Rather, I preferred to ask questions like: "What did they do or say that led you to conclude that?"

- Whenever possible, I preferred to ask people questions that promoted reflexivity and learning, rather than telling them my answers to those questions (also see Gregory, 1999).

- I tried to test my attributions about the meanings the mediators were trying to communicate with their verbal and non-verbal language by expressing my attributions openly and asking the mediators what they thought about them[129].

- Whenever I considered that some of my co-researchers' assertions were improperly or insufficiently tested, I asked them how did they think it would be appropriate to test those assertions. I tried to help them to be critical about their own assumptions, reasoning, conclusions, and ways of testing ideas. The promotion of self-reflexivity was useful for: diminishing what we thought were inconsistencies in our thinking and gaps between our espoused and actual moral frameworks; to reveal the arbitrary logic of many of our reasoning processes and their contingent status; and for finding new tools that could be used in mediation processes.

- I tried to keep away from using the type of bypass strategies[130] I wanted my co-researchers to avoid in our meetings and mediation processes.

- I promoted the identification of those factors that inhibited learning, as well as the recognition of those factors that inhibited the identification of the inhibiting factors in the first place.

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[129] I did the same during my interviews.

[130] These strategies consist in avoiding communicating information that can be embarrassing or threatening to the other person because of fear of his/her reactions.

## 10.3 Ignoring Justice in Favour of Interests

As I argued before, separating the discussions related to the different aims of this research is difficult for frequently my co-researchers and I worked on several aims simultaneously. Therefore, beginning in this section I will mix discussions related to different aims, although I will separate my conclusions related to them. In this section, first I will illustrate how mediators frequently ignore or fail to explore people's justice concerns during mediation processes, and I will argue that this behaviour is often related to a common belief among mediators that people only act moved by their interests during mediation processes. Second, I will show how mediators' actions sometimes favoured the moral framework and concerns of one of the parties, giving him/her an advantage during the mediation process. Third, I will discuss some methodological insights learned from the analysis of the mediation cases.

### 10.3.1 Disregarding Justice

During the discussion of the Scratch Card case (see section 10.2.3), after the mediator had argued that he left the hearing room because he was annoyed by the dirty tricks that the parties were using, he added that some people rely on these types of tricks for advancing their self-interests (this was part of his system of beliefs) (see Figure 3.7). I stated that during the interviews with the parties they revealed a quite different interpretation of the episode. Teresa argued that she was unwilling to concede much to the other party not merely because of the money she might lose (the self-interest the mediator referred to) but because she wanted justice to be done. She claimed that the tourism company was cheating people like her, poor people who fail to stand up to all the dirty tricks rich individuals use to exploit them. Hence, although she did not want to lose her money, she was also concerned about representing well all those whom the company continuously attempts to deceive. The mediator was very surprised to hear this type of explanation. I said that it was an alternative explanation that I did not claim was "the truth". I invited him to explore the mediation process again and to see whether he found the party's explanation reasonable given her behaviour during the second mediation session. After doing this exercise the mediator found her explanation reasonable. He discovered by himself that as the mediation

process evolved he was more likely to impose upon his observations of the customer's behaviour a meaning he had developed early[131] in the mediation process which was based on his system of beliefs about human nature, conflicts, and the ways the latter are best resolved.

At this point, I introduced my co-researchers to the ladder of inference (see section 3.2.1.2) and pointed out that in this situation the reinforcing feedback loop depicted in Figure 3.7 might have operated. The latter might have prevented the mediator from developing alternative interpretations of what he observed during the mediation process. In particular, his belief that people only act moved by their interests during a mediation process prevented him from noticing that people's notions of justice frequently influence their behaviour as well. His system of beliefs strongly affected the data he selected, which in turn reinforced his system of beliefs. With my co-researchers we discussed how this particular loop has had an important influence in not allowing them to understand the relevance that people's notions of justice have for their work.

The Scratch Card case was also useful for mediators to uncover one of the strongest mechanisms they used as part of their defensive routines: keeping their reasoning and conclusions private and acting as if they weren't. In this way mediators not only avoided controversies with the parties, but also protected their basic underlying beliefs from any challenge. The discussion with the mediator also showed that leaving the room was a way to find protection when confronted with a situation he did not know how to manage. I observed this mediator's defensive routine several times when he faced very difficult and/or awkward situations. For instance, in section 10.2.2 I showed how the mediator's defensive routines contributed to his privileging of a notion of justice that favoured the goals of one of the parties, while marginalising the concerns of justice of the second party.

[131] This early imposition of meanings is a pattern of mediator's conduct observed among mediators who follow the Satisfaction Story (Bush and Folger, 1994).

### 10.3.2 Mediators' Support of Some Particular Moral Frameworks

The analysis of the Scratch Card case was also used to show my co-researchers how mediators' actions can support the moral frameworks and concerns of one of the parties while disregarding the moral frameworks and concerns of the other. For showing this we made use of CST concepts rather than the more traditional mediation concepts which only focus on analysing the parties' interests. Let me illustrate this. During the Scratch Card case the two parties had common as well as dissimilar concerns that changed during the mediation process. For instance, at the beginning of the process both Jaime and Pedro were concerned about the future of the contract between them (concern 1 or C1). However, only Pedro was concerned about preserving his company's public image (C2). Moreover, during the interview it became clear that Jaime never even thought about C2. On the other hand, initially only Jaime and not Pedro was concerned with:

- The perception Jaime's wife would have about any agreement he reached with Pedro (C3).
- The refund of the £165 he had given to the company (C4)[132].
- The additional prizes the company had given him for buying the holiday package (such as three free nights in a Miami hotel [C5]).

C3 was never a concern for Pedro, who attempted to marginalise C4 and C5 from the negotiation. He tried to confer on them a 'profane' status while Jaime regarded them as 'sacred'[133]. During our discussions of the mediation process we tried to link the dynamics of the issues that were central to the mediation process to the parties' moral frameworks. This drove us to consider diagrams such as Figure 10.2, which represents our interpretation of the situation during the first part of the first mediation session. The reader can see that one concern (C1) was regarded as important by both parties, two (C2 and C3) were considered important by one of the parties but not perceived as pertinent by the other party, and two more (C4 and C5) were regarded 'sacred' by one

[132] Initially Pedro was not concerned about C4 but later on he tried to marginalise it.
[133] These concepts are defined in section 3.1.3.3.4.

of the parties (Jaime) but though they were considered pertinent by the other party, the latter attempted to marginalise them. This occurs frequently in mediation processes when one of the parties declares some issues undiscussable.

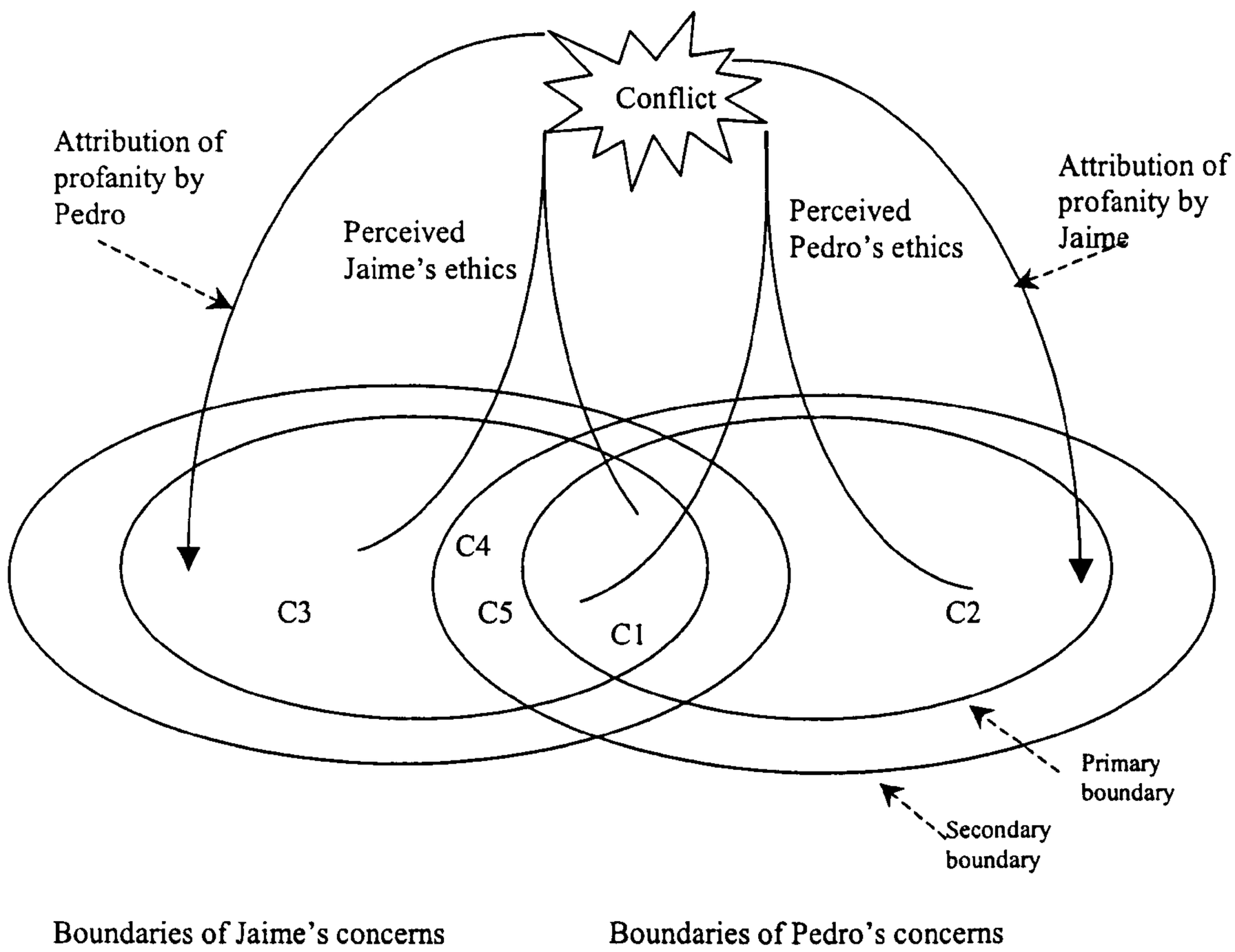


Figure 10.2. Model of parties' concerns during the first part of the Scratch Card case.

Based on Jaime and Pedro's interviews, as well as on the observation of their behaviour (explicit statements, etc.) during the mediation process, the relevant ethics associated with their boundaries of concern seem to be linked with the following basic notions.

1. Jaime's ethics.

   - A contract is only fair if people obliged themselves to fulfil it when they were completely autonomous and well informed.
   - Peaceful methods of conflict resolution are valid mechanisms for changing contracts that do not comply with the previous characteristics.

- A person has to comply with the law.
- Justice, search for the common good, social harmony and solidarity should be the most important virtues in a mediation process.
- A mediator should act to promote justice in a mediation process whenever s/he perceives that an injustice is taking place. Mediators should protect the weak.
- A person should help those who are in need even if s/he is not responsible for their situation.

2. Pedro's ethics.

- A contract is fair if it is legal. Negotiation tactics such as confusing your counterpart are fair as long as they are legal. If your counterpart can use them, why can't you?
- Once you have a contract signed that favours your company, there is no reason to change it unless you are forced to.
- Unless they are physically forced to do something, the parties are autonomous. They can choose better than anyone else can what is good for them. Hence, a mediator should not help them during a mediation process. The parties should defend themselves alone.
- If a party signs a contract, s/he has to comply with it. If s/he makes a mistake in signing the contract, s/he is the only one responsible for this mistake.
- People are not responsible for the disadvantages of others unless they have caused them.
- If being just substantially opposes the satisfaction of a person's desires and interests, s/he should not be just.
- Impartiality, justice and respect for the law are main virtues in a mediation process.

During the mediation process the mediator's emphasis on the importance of respecting the legal aspects of the process, and his implicit endorsement of the legality of the contract signed by the parties, buttressed Pedro's ethics and boundary judgements. By discussing this case and many other cases openly with the mediators, we concluded:

- Mediators cannot avoid having an effect on the evolution of the parties' concerns, and in this sense their interventions cannot be neutral. Their boundary judgements and moral frameworks also participate in the dynamic process that takes place among all those who participate in the mediation process. Therefore, mediators should be critical about their role in this web of interactions.

- The mediators' boundary judgements affect the concerns that are discussed and the way they are discussed, as well as the ethical issues that are taken into account. In particular, they affect the notions of justice that influence the mediation process.

- In many cases mediators unintentionally support the moral framework of one of the parties. This support was sometimes strong (such as in the Scratch Card case).

- The parties are frequently completely unaware of this support, though sometimes they notice it. Those who do not detect this support think that the mediator's deeds are just part of the standard professional actions s/he usually carries out. Other researchers (Silbey and Merry, 1986; Littlejohn et al., 1994) have also found that a mediator's exercise of power frequently goes largely unnoticed by the bargainers: "It appears instead as a simple extension of an accepted logic and practice" (Silbey and Merry, 1986, p.27).

- In some cases mediators favoured outcomes that conform to their moral frameworks, interests, and conceptions of what is rational. In doing this they frequently disregarded the moral framework and the conception of justice of at least one of the parties. In some cases the mediator's actions supported one party's aspirations during the mediation process. One or more basic beliefs that they shared substantially contributed to explain the mediator's support. This similarity between the mediator and the party' conceptions of justice was critical in what happened during those cases. The analysis of multiple mediation cases revealed that inter-party similarities can have a substantial effect in the development of mediation processes and in the parties' perceptions about the fairness of these processes. Moreover, as I will show later, in general, the more similar the notions

of justice of the parties and the mediator, the higher the probability that the mediator's actions will contribute to a process that the parties will perceive as fair.

- In a few mediation cases the legal discourse that surrounds practice seemed to have encouraged the use of an outcome prescribed by the legal codes as the point of reference for establishing what a just settlement is. Despite the fact that it is explicit in the laws that regulate mediation that the parties can ignore the prescribed legal outcome if they want to during mediation processes, mediators sometimes led the parties towards the legal outcome even in cases where the disputants did not consider it just. The emphasis on strict legal justice usually constitutes a unilateral decision by the mediator without considering the parties' notions of justice.

- Mediators should critically examine all the concerns expressed by the *two* parties.

- Power games between the parties might take place during the mediation process. They have an effect on the interaction between the parties' concerns and their moral frameworks.

- Additionally, based on Pinzón and Midgley's (2000) systemic model for the evaluation of conflicts, our experiences dealing with mediation cases, and the conclusions we reached during our debates with a much wider group of Colombian ADR professionals (see section 8.2), my co-researchers and I developed the notion that four types of concerns might be relevant for a party during a mediation process[134]: interests or preferences, basic human needs, moral concerns, and emotional concerns. These four types of concerns are inextricably linked and affect each other. I explain them in section 13.2. Understanding the meaning, the causes, and the evolution of the four types of concerns previously identified is central for comprehending the dynamics of a mediation process.

[134] Our analysis of mediation cases challenged a crucial conception that prevails in the ADR literature which assumes that interests are the unique or almost unique driving force that determine people's actions in dispute resolution processes (see Albin, 1992). People are viewed as participating in dispute resolution processes primarily or even exclusively to satisfy their underlying interests (e.g., Fisher and Ury, 1981; Lax and Sebenius, 1986a,b; Fisher and Brown, 1988; Brett, 1989; Bazerman, 1990; Ury, 1991; Bazerman and Neale, 1992a; Roloff and Jordan, 1992; Susskind, 1993; Greenhalgh and Chapman, 1995). Within this context interests are interpreted as people's desires or preferences.

As a result of mediators' significant influence on the concerns that are discussed and the struggle that might take place at the level of moral frameworks, mediators can contribute to perpetuate previously existing conditions of inequality and oppression between the parties. Foucault pointed out that "knowledge always entailed a 'double repression' in terms of what it excluded, and in terms of the order it imposed" (Miller, 1993, p.199). In the Scratch Card case the mediator marginalised many issues from the discussion and imposed a particular order in the process, thereby privileging some particular concerns and Pedro's moral framework. This was a common feature of several mediation cases I observed.

### 10.3.3 Comments on the Methodology

Although the discussion presented in sections 10.3.1 focuses on issues of justice, it also illustrates: how I used the ladder of inference (an action science tool) as part of my methodology; how a synergy was achieved between the use of action science and CST concepts; and how triangulation was used during the research. They are discussed in more detail below.

1. Using the ladder of inference. This was used several times during my meetings with the mediators and the MCBC's staff to promote critical reflexivity and double-loop learning (challenging the participants' moral frameworks, basic ontoepistemological beliefs, and their associated action strategies). I find it useful for uncovering hidden assumptions people have believed in for years but had never discussed with their colleagues. However, by mixing it with boundary critique I used it for other purposes. For instance, during the discussion of a case we found out that one of the mediators had never tried using the technique of private caucus with the parties because he assumed that by using it he was not going to be perceived as impartial by the parties. During our discussion of his reluctance to use private caucuses we discovered that he was basing his inferences on some untested assumptions. We challenged these assumptions using the ladder of inference and boundary critique. Moreover, we explored the way in which the other mediator had been using caucuses for some time without giving the

impression to the parties that he was trying to favour any one of them. He concluded that he should indeed try to use private caucuses. So, mixing the ladder of inference with boundary critique was useful for mediators to:

- Enhance their awareness about their assumptions and reasoning.
- Question boundaries previously regarded as 'absolute', exploring alternative boundaries, and making choices between them.
- Investigate alternative interpretations of the parties' knowledge and reasoning.
- Explore diverse ideas of improvement different from those they were used to attributing to the parties.
- Share their reasoning with their colleagues and learning from this process.

2. Developing a synergy between CST and action science concepts. During my discussions of cases with the MCBC's staff a synergy was achieved between the use of action science concepts and critical systemic ideas. Action science concepts were particularly useful for (e.g., see section 10.3.1):

- Identifying and dealing with factors that were precluding the free expression of the parties' conceptions of justice.
- Establishing why and how the mediators' interventions were favouring some conceptions of justice over others.
- Finding out alternatives for overcoming the patterns of behaviour that constituted obstacles for transforming the way mediators dealt with issues and conceptions of justice in mediation processes.

On the other hand, critical systemic ideas were particularly helpful for understanding (see section 10.3.2):

- How some parties' concerns were marginalised during mediation.
- How the boundaries of concern of the parties and the mediator were associated with some particular ethics.
- How mediators could develop alternative behaviours for dealing with justice issues during mediation processes.

3. The use of triangulation. The discussion of the Scratch Card case illustrates an important element of the methodology (see section 3.2.1.4) used during the discussion of all cases: Data-source triangulation[135]. The latter "involves the comparison of data relating to the same phenomenon but deriving from different faces of the fieldwork" (Hammersley and Atkinson, 1992, p.198). Triangulation implies "comparing, cross-checking and contrasting data produced through the use of a variety of different methods" (Midgley, 2000, p.350). It is an aspect of methodological pluralism. Each method has its strengths and weaknesses. Therefore, their use in a complementary way enriches the insights and variety of interpretations that can be gained through a research process, as well as the diversity of the research questions that can be addressed. Additionally, the use of multiple data sources is useful for avoiding the risks that stem from reliance on a single source of data and helps to counteract various possible threats to the validity of an analysis[136] (see Fals-Borda, 1991; Hammersley and Atkinson, 1992).

## 10.4 Mixing CLDs with Action Science and CST Ideas

Another original methodological contribution of this thesis was mixing causal loop diagrams (or CLDs), a system dynamics tool (see section 3.2.1.6), with action science and CST ideas. As far as I know, this particular combination has not been used before. We began using CLDs to get multiple broader pictures of the problematic phenomena we were interested in. These models provided us with pictures of several elements that were previously disconnected or not clearly associated in our thinking processes. In this section I will outline a couple of CLDs that we used in order to show how they helped us at a methodological level. They were particularly valuable for making sense of the multiple interpretations we developed about the phenomena and role we were

[135] In this research the sources included interviews, the observation of people's behaviour during mediation processes, participant observation as described in section 8.2, and people's verbal and non-verbal messages during our formal and informal meetings.

[136] Here I am not making reference to a notion of validity derived from positivist research that assumes the existence of an objective and independent reality, and that expects research findings to match it. I define valid knowledge as knowledge that articulates reality and grounds in a coherent way with those features of reality that it is intended to describe or explain (see also McNeill, 1990; Hammersley, 1992; Heron, 1996). By 'articulating reality' I mean "a combination of both revealing and shaping, of finding meaning in and giving meaning to" (Heron, 1996, p.163). Action researchers produce and are produced

interested in. The CLDs I present in this section are part of one of the multiple series of CLD's that I drew. Figure 10.3 shows the first refined model of a series that helped us to uncover why a common strategy that mediators use to satisfy the parties often produced counterproductive results. This model focuses on the mediator's strategy and shows the central components that seem to have guided the behaviour of many mediators during the mediation processes that were observed. Five underlying basic beliefs are central:

- A conflict is perceived as the manifestation of a problem caused by a real or apparent incompatibility of the parties' interests.

- The parties are moved by their desires to satisfy their self-interests. The satisfaction of these interests is a necessary and sufficient condition for the satisfaction of the parties.

- Mediators should facilitate a process that results in the parties' satisfaction and produces a final agreement. Therefore, mediators should help the disputants to satisfy their interests as much as possible. This is the main characteristic of the mediator's role.

- The parties are rational in so far as they try to maximise their interests. They are "maximizers" of their utility.

- The parties are always willing to make trade-offs and substitutions. Each disputant is willing to give up some sufficiently small quantity of a particular good for a sufficiently large amount of other goods as long as the trade-off increases the total satisfaction of her/his interests.

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themselves by what they are studying.

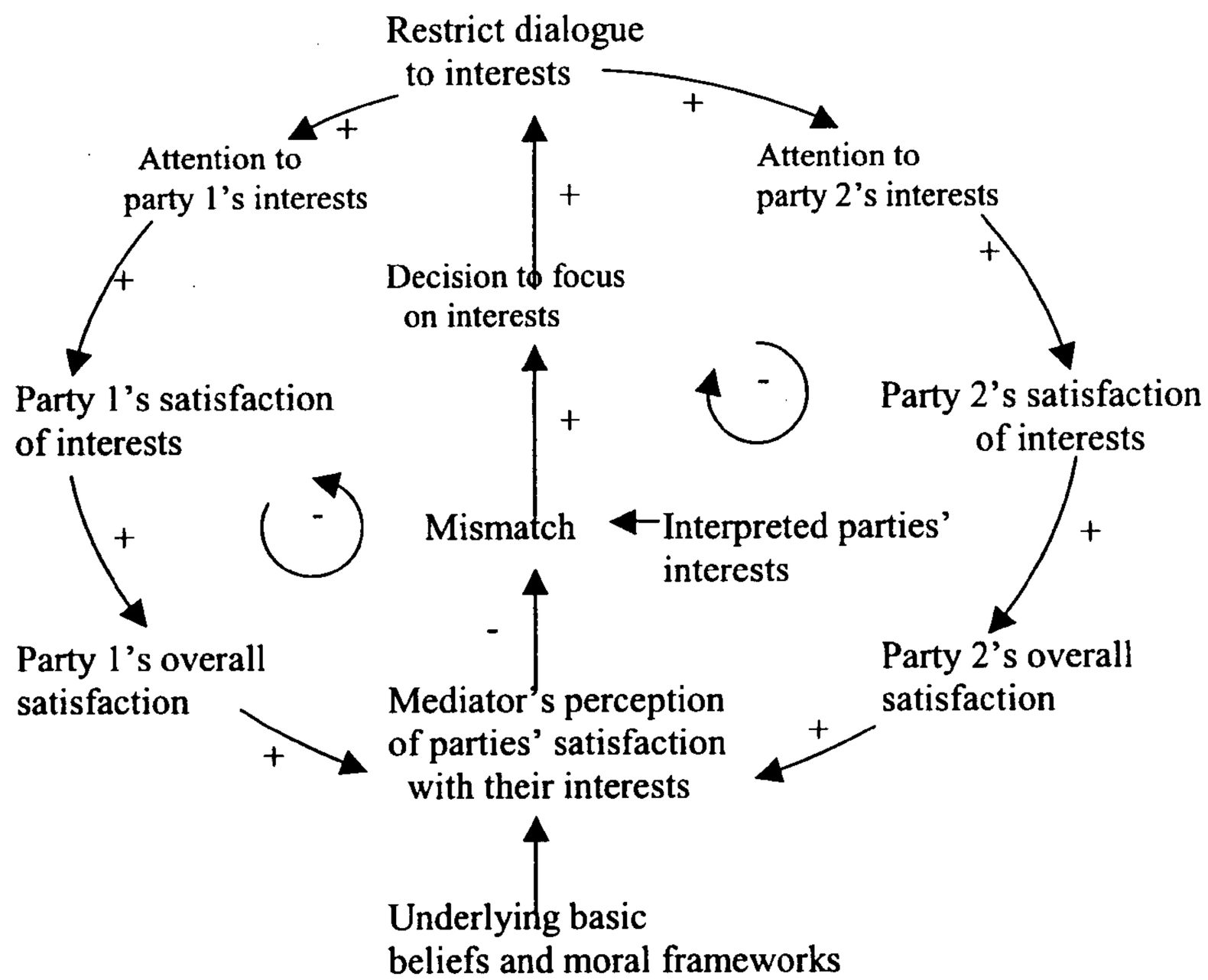


Figure 10.3. Model of the mediators' theories-in-use that emphasises the role of the parties' interests and satisfaction.

Given these assumptions, during the mediation process the mediator attempts to identify the parties' interests when s/he hears the parties' descriptions of their dispute and their main arguments. Then s/he compares the parties' aspirations in relation to their interests with their actual level of satisfaction, and s/he tries to reduce the mismatch between them to a level that the parties find satisfactory (see Figure 10.3). Whenever the mediator regards the mismatch as unsatisfactory, s/he focuses the parties' attention on identifying and exploring options that can fulfil their interests. Depending on the mediator's assessment, s/he restricts the party's dialogue more or less strongly to what the mediator perceives are these interests (as it will be illustrated in a case in section 11.1). If sufficient attention is put on satisfying the parties' interests, the mediator assumes that the negotiations will gradually produce a satisfaction of them, and therefore, an overall satisfaction of the parties. This should end up reducing the mismatch between the parties' interests and their level of satisfaction. This closes my description of the negative feedback loop that the mediators perceive as the main strategy to achieve their major goal: the satisfaction of the parties' interests through the construction of a final agreement that meets the parties' interests to the largest possible degree.

The model just explained (Figure 10.3) is useful for understanding why, when the mediator feels that the parties are expressing dissatisfaction during the mediation process, s/he restricts their dialogue more and more to those interests that s/he perceives are important and can produce a clear solution (as it is illustrated in a case presented in section 11.2). In other words, when things do not work well the mediator tries to apply more and more of the same remedy. However, this frequently does not lead to the satisfaction of the parties, one of the main objectives of the mediator. Mediators are frequently blind to this, and when they discover it they tend to attribute it to external factors they cannot affect in any way (such as bad luck, the "parties' irrationality" or "deviousness", etc.). However, as some thinkers have shown (Argyris, 1990; Sterman, 2000) blaming outside forces for the difficulties is not very helpful, does not provide any leverage to improve and does not help our learning process. Therefore, we reviewed this mental model and produced several others that we considered alternative interpretations of why the strategy that underlines the previous model (see Figure 10.3) did not work well in many cases. Figure 10.4 is an

example of these alternative models. We discussed that it implied a deep change in the underlying basic beliefs and moral frameworks that supported the first model. The main changes that were introduced with this new model in relation to the previous one are:

- The parties do not have to maximise their self-interests in order to act rationally. They can be rational in many diverse ways. Moreover, they do not necessarily *have* to act rationally in a mediation process at all.

- During a mediation process the parties are not moved just by their desires to maximise their self-interests. Their behaviour is also driven by other factors, such as their moral frameworks, their emotional commitments, and their learned patterns of response to conflict and difficult problems. Conflicts can be produced and aggravated by these factors or a combination of them, as well as by external factors that escape the control of the parties. Therefore, the satisfaction of parties' interests is not a necessary and sufficient condition for the satisfaction of the parties.

- Mediators should take into account all these factors when doing their job. In particular they should be aware that the parties' moral frameworks (which involve their notions of justice) may affect their behaviour.

Figure 10.4 offers an interpretation of why the strategy illustrated in Figure 10.3 can be counterproductive in some cases. It shows that the more the mediator restricts the parties' dialogue to what s/he understands are their interests, the less attention might be given to the parties' moral concerns. When the latter are particularly important for the party, s/he experiences a moral uneasiness that diminishes the party's global level of satisfaction. When a mediator who works guided by the underlying basic beliefs of the prevailing theories-in-use (associated with the model presented in Figure 10.3) perceives the party's dissatisfaction, s/he may intensify his/her efforts to satisfy the party. As the model suggests, s/he seeks this by strengthening the old traditional

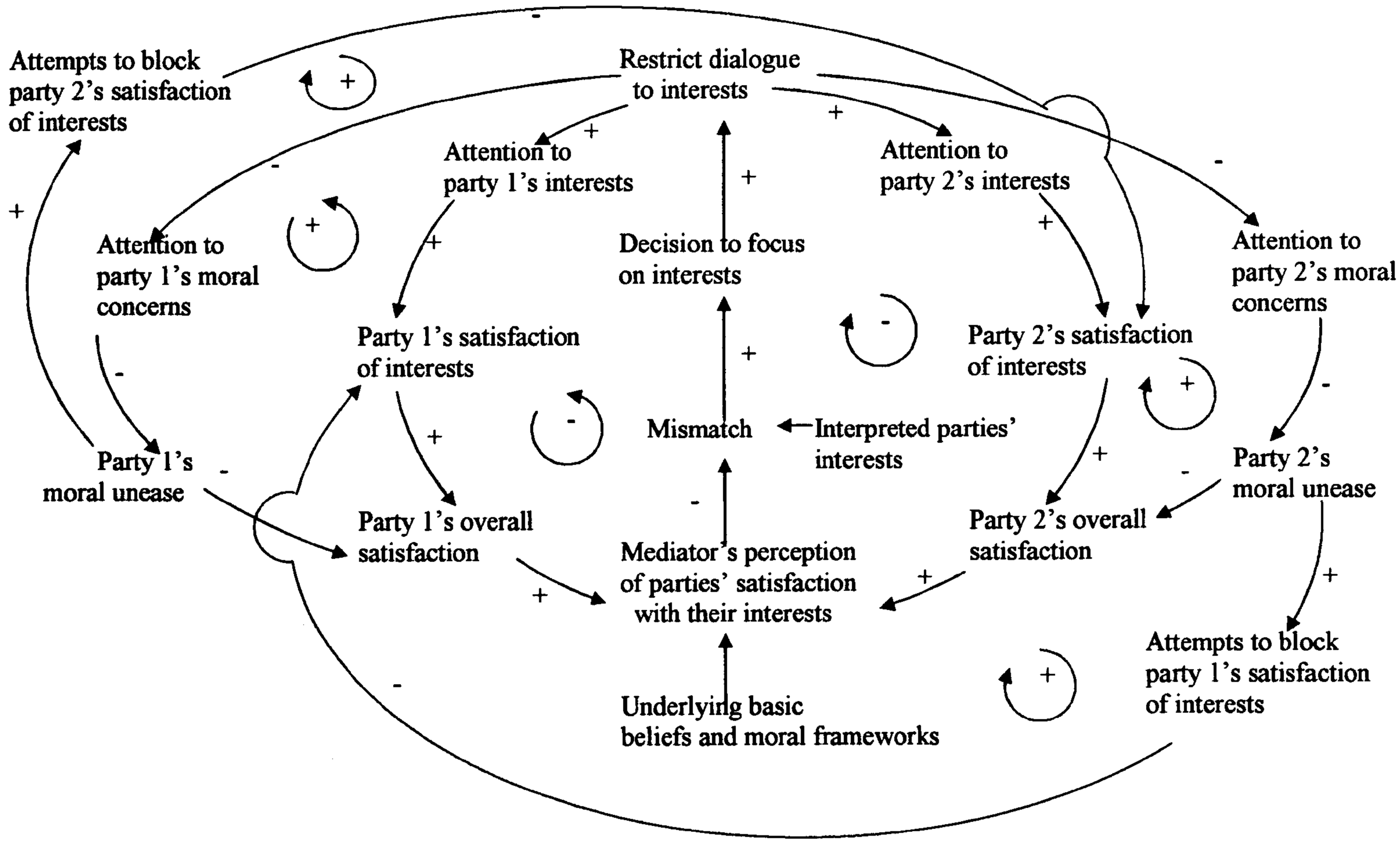


Figure 10.4. A first revision of the model of Figure 10.3.

strategy s/he knows well based on focusing all the attention of the parties on their perceived interests. Figure 10.4 shows that by doing this s/he reinforces a type of positive feedback loop (represented in red) that works against the mediator's desired objective of increasing the parties' satisfaction. This model shows why the mediators' traditional strategy can be called skilful incompetence. The mediator's theory of acting effectively (which considers only the negative feedback loops of Figure 10.4 and ignores the positive loops) contributes to his/her blindness and the generation of counterproductive behaviour.

Additionally, Figure 10.4 shows other relations (depicted in blue) and feedback loops that my co-researchers and I conceived and analysed based on our discussions of mediation cases. I cannot discuss them and the other models we constructed because of the word limit of this document. However, I want to point out that these models were the result of putting together and debating elements that we found in diverse cases[137]. Sometimes we found support for our interpretations in the work of other researchers (e.g., Loewenstein et al., 1989). Nonetheless, what is more important is that:

- We always used CLDs models as tools for learning[138], as instruments for sharing and discussing our conceptions of the problematic phenomena and roles that were our objects of interest.

- We found that CLDs were valuable tools for making sense of the interrelations of multiple and sometimes apparently unrelated elements that came out of our discussions of mediation cases. CLDs helped us to avoid the use of many fragmented explanations, and contributed to the construction of holistic pictures without failing to respect the alterity of others.

- CLDs nurtured critical reflexivity (particularly in relation to the underlying assumptions of our models), and they contributed to our interpretations of

[137] For instance, the relation represented in blue in Figure 10.4 was initially conceived as a result of our interpretations of the Scratch Card case, but later on it was associated with other cases.
[138] Therefore, we did not intend to include in our models all the variables that could be incorporated in them because we were not trying to represent "reality".

defensive patterns[139]. CLDs helped to clarify some boundary judgements, to promote a deeper inquiry into our reasoning processes and theories-in-use, and to learn more from other people's mental models and moral frameworks. Moreover, CLDs were informed by our critical reflexivity and debates on learning at the MCBC. In this sense, CLDs, action science, and CST methods worked in a synergistic way.

## 10.5 Some Comments on Methodological Synergies

I found an important synergy between the use of action science strategies and CST ideas of boundary critique. The use of action science enables people to dig deeper in their used norms and customs of bypass and cover-up. This facilitates them in getting a better understanding of their Model I values and strategies and it empowers them to be more critical and reflexive without getting into defensive routines that may hamper their single- and double-loop learning. It also helps them in the exploration of alternative courses of action that could lead to changes in their underlying beliefs and moral frameworks. I think that on some occasions what might appear as the skilful use of CST tools (such as CSH) could conceivably lead to counterproductive consequences by triggering deeply ingrained defensive routines[140]. Using action science together with CSH could counteract this potential problem. On the other hand, the use of boundary critique increases the possibilities of double-loop learning by providing concepts and tools to challenge in deeper ways people's underlying moral frameworks and basic beliefs, as well as their strategies and basic assumptions involved in single-loop learning. Therefore, action science may be enhanced through the incorporation of boundary critique ideas. Additionally, synergies can be obtained by introducing system dynamics tools (e.g., CLDs) with CST and action science ideas (illustrated in section 10.4).

The combination of different methods was valuable to construct holistic pictures of the problematic phenomena my co-researchers and I faced. It allowed us to take advantage of different perspectives of the phenomena that had never been made

[139] For instance, Figure 10.4 helped us to see as counterproductive the mediator's strategy of merely trying to satisfy the parties' interests.

explicit before, let alone contrasted in the organisation. It was also helpful for constructing diverse interpretations of the types of interdependencies between different elements that contributed to perpetuating inconsistent and counterproductive behaviours. Moreover, it contributed to a redefinition of what we understood by counterproductive behaviour. For instance, at the beginning of the process mediators tended to interpret counterproductive behaviour as what impeded their possibility to forge agreements. At the end of the interventions counterproductive behaviour was associated with other ideas such as preventing learning and critical reflexivity.

## 10.6 Conclusions

In this chapter I presented the overall scheme my co-researchers and I used to discuss mediation cases at the MCBC. We organised our discussions around the study of those cases I observed at the MCBC during my fieldwork. We analysed the cases together and used my detailed notes, the mediator's perceptions, and the parties and the mediator's post-mediation interviews as sources of information about each of the cases. This involved a deliberate use of data-source triangulation during the discussion of the cases that enriched the insights we got from studying the cases, increased the variety of interpretations that we gained through the research process, nurtured our critical reflexivity, and helped us in developing double-loop learning.

I also showed in this chapter how we synergised action science and CST methods to organise the participative dialogue that we used to address the main aims of this research process. For instance, I used the ladder of inference (an action science tool) in tandem with boundary critique to promote critical reflexivity as well as double-loop learning. Boundary critique was also used to assess the desirability of changes suggested by single- and double-loop learning. I found that action science concepts were particularly useful for:

- Identifying and dealing with factors that were precluding the free expression of the parties' conceptions of justice.

[140] For instance, this might happen when the use of CST tools triggers the use of defensive routines.

- Establishing why and how the mediators' interventions were favouring some conceptions of justice over others.
- Finding alternatives for overcoming the patterns of behaviour that constituted obstacles for transforming the way mediators dealt with issues and conceptions of justice in mediation processes.

On the other hand, critical systemic ideas were particularly helpful for understanding:

- How some parties' concerns were marginalised during mediation processes.
- How the boundaries of concern of the parties and the mediator were associated with some particular ethics.

An important synergy between the use of action science strategies and CST tools can be summarised in the following way. On the one hand, the use of action science tools enables people to overcome defensive patterns when engaging in boundary critique so that people can become more critical and reflexive without getting overly trapped into defensive routines. On the other hand, the use of CST increases the possibilities of double-loop learning by providing concepts and tools to challenge people's underlying moral frameworks and basic beliefs in deeper ways, as well as their strategies and basic assumptions involved in single-loop learning.

In this chapter I also showed how DPs were identified at the MCBC, how they were associated with the mediators' support of some conceptions of justice and the disregard of others, and how DPs were addressed. The latter was important for creating an environment where new ways of dealing with issues of justice could flourish. Using boundary critique I showed how mediators' boundary judgements affect the concerns that are discussed (and the ways they are discussed) during mediation processes, as well as the ethical issues that are taken into account. As a result of their boundary judgements mediators may end up unintentionally or intentionally supporting the moral framework of one of the parties. To conduct this analysis I used an original contribution of this research which is a development of Midgley (2000) and Yolles' (2001) models for analysing the overlapping and marginalisation of stakeholders' concerns (see figures 3.5 and 10.2). My contribution

is the introduction of *two* boundaries for analysing *each* actor's concerns, plus a demonstration of the value of this in a mediation context.

Another original methodological contribution of this thesis presented in this chapter is the way causal loop diagrams (or CLDs), a system dynamics tool, were mixed with action science and CST ideas. As far as I know, this combination has not been used before. The use of CLDs can be important for developing critical reflexivity and double-loop learning on the mental models people have. My use of CLDs was affected by action science and CST principles. For instance, while in many system dynamics applications only one CLD is constructed and it is used for building a computer model of the situation, in my case I regarded as crucial the development of multiple CLDs about the same situation to surface and discuss multiple interpretations of the phenomena. This emphasis on developing multiple interpretations was the result of following the ethical principles and methodological guidelines of the methodology I used (see Chapter 3). In this sense, as happened with other methods that I used as part of my methodology (such as statistical methods), CLDs were enacted using principles from the methodology I developed and not necessarily from the methodology where CLDs were created. CLDs nurtured critical reflexivity (particularly in relation to the underlying assumptions of our models), and they were used as learning tools that helped us to overcome some DPs and develop double-loop learning. Moreover, CLDs were informed by our critical reflexivity and debates on learning at the MCBC. In this sense, CLDs, action science, and critical system thinking methods worked in a synergistic way.

As far as I know, CLDs have never been used within the mediation field. They allowed us to replace the type of linear explanations (see Senge, 1990) that are common in the mediation literature by systemic explanations which incorporate feedback-loops and which can account better for the dynamic of the phenomenon of interest.

I consider that the *synergy* of methods I developed contributed substantially to the aims of the research process. It was valuable to construct diverse holistic interpretations of the problematic phenomena my co-researchers and I faced. It

allowed us to take advantage of different perspectives of the phenomena that had never even been made explicit, less alone contrasted in the organisation.

An important observation that I will elaborate further later on is that in some mediation cases, mediators favoured outcomes that conformed to their moral frameworks, interests, and conceptions of what is rational. Sometimes they favoured one party because there were similarities between the conceptions of justice of that party and the mediator's conception of justice in relation to issues that were relevant to the dispute. Occasionally, mediators clearly disregarded the moral framework and the conception of justice of the other party.

Additionally, in this chapter I illustrated how mediators' basic assumptions about conflicts and mediation processes might contribute to their disregard for the parties' justice concerns. For instance, by making reference to a mediation case, I showed how the mediator's belief that people only act moved by their interests during mediation processes, can prevent the mediator from noticing that people's notions of justice might also affect their behaviour. Therefore, double-loop learning is necessary for transforming the way mediators deal with issues of justice in mediation processes, for changes in their basic beliefs, moral frameworks, and action strategies are necessary to make them more sensitive to issues of justice in mediation processes, and to develop behaviours that enable them to be more responsive to the parties' justice concerns.

# Chapter 11: Transforming the Way Mediators Deal With Issues of Justice

In this chapter I will mainly address the second and third aims of the research process. I will develop insights into how mediators at the MCBC currently deal with justice concerns that arise during mediation processes, and I will discuss alternatives for transforming professional mediation practice so that mediators can deal in new ways with justice concerns.

## 11.1 Creating Perceptions of Injustice By Using Defensive Routines and Fancy Footwork

In this section I will explain how, during my observation of mediation processes, in general mediators preferred to deal only with tangible substantive issues which they identified as being part of the parties' interests, and they avoided dealing with the parties' justice and emotional concerns. This led to several undesirable consequences, such as increasing the likelihood that the parties will perceive their mediations as unjust. I will illustrate these issues with a section of a case that I have called the Truck Case.

> The main parties in this case were a man (Carlos), his wife (Carlota) and a lady, Helena. Four other persons were present in the hearing room: the mediator, another mediator who was being trained, a gentleman (whose identity I will discuss later) and I. At the beginning of the process the mediator asked all who were in the room to give their names. First, Carlos gave his name and he presented his wife, Carlota, who he argued owned with him the trucks that were involved in the conflict. Thereafter, Helena mentioned her name. Then the last man present in the mediation room said that his name was Jorge. Carlos strongly opposed Jorge's presence because he argued Jorge had nothing to do with the conflict. Looking at Helena, mediator 2 asked why Jorge was at this meeting. She said he was her lover. Carlos insisted Jorge had nothing to do

with this conflict, and wanted him to leave the room. Mediator 2 quickly argued that they could discuss this issue later on, but first he would explain what a mediation process is. After doing that he asked Carlos to present the case. Carlos explained that shortly after buying two trucks he was forced to put them in a parking lot because they were implicated in a judicial process involving their previous owner. He chose Helena's parking lot because it was close to his house. For 18 months he could not move the trucks from there because the judge forbade him from doing so. While the trucks were in the parking lot they were burgled several times. He spoke about this with Helena, but she did not solve the problem. Carlos showed several photos of damage the trucks allegedly suffered while they were in the parking lot. Suddenly Carlota interrupted the conversation and demanded Jorge leave the room. She said Jorge had been making fun of her husband while he spoke. With a mocking smile Jorge said he had not been doing that. This initiated a bitter argument between the parties which ended when Carlota claimed that she was also willing to abandon the room if Jorge did the same. Overcome by emotion Carlota left the room inviting Jorge to do the same. Jorge did not. Mediator 2 invited Carlos to continue with the explanation of the case. Carlos did so. He said that a few days later he saw the parking lot's employees using a set of tools that were stolen from his truck. He argued about this with Helena, but he received no satisfactory explanation. Mediator 2 asked Carlos to be specific about his claims or demands. Carlos argued that he was willing to pay for the use of the parking lot if his red truck was returned to him and if Helena deducted from his debt the costs of the damages that were made to this truck. He insisted that he wanted a verbal recognition from Helena of the wrongdoings that were done against him in the parking lot. Helena refused. At this moment Carlota entered the room again and with a tremulous tone she demanded that Jorge should leave the room. Mediator 2 ordered Carlota: "Calm down! I am the mediator here. I decide who should stay and who should go." Carlos tried to calm his wife, but she shouted that Helena and Jorge were villains. Helena asked for respect. Mediator 2 asked Helena and Jorge to leave the room for a moment because he wanted to speak with Carlos and Carlota alone. When the other parties left Carlota argued: "This is not a mediation process. This is a plot against us." Mediator 2 asked her to calm down. She argued that her husband was almost killed because of Helena.

She said she and her husband have sued Helena for attempting to kill Carlos a few months ago. She showed a wound in Carlos's hand. She claimed it was produced by a gunshot. Mediator 2 said he was going to take this into account. He asked Carlota to leave the room. She refused. He asked her to leave the room again. Mediator 2 then asked the mediator who was being trained to go out of the room with Helena and take her to drink some tea. They both left the room. Mediator 2 asked Helena and Jorge to enter the room, and he continued calmly with the previous dialogue. He asked Carlos to calculate the value of the damages suffered by his two trucks. For approximately 15 minutes they calculated this value looking at documents that contained market prices. They did not debate at all the issues raised by Carlota. Once they finished, mediator 2 asked Helena to tell her version of the conflict.

Our discussion of this and several other cases led my co-researchers to the following conclusions:

1. In general, mediators prefer to deal only with tangible substantive issues which they identify as being part of the parties' interests. MCBC mediators were quite skilful in dealing with the parties' tangible interests and helping them to reach agreements that satisfied those. However, they avoided dealing and were not skilful in dealing with people's emotional, relational and moral concerns (such as justice concerns). For instance, in the Truck Case the mediator did this several times: when he asked Carlos to be specific about his demands, when he asked Carlota to go out because she did not let the others speak about the substantive issues, when he told Carlota he would address the alleged murder attempt and then did not do so, and when he asked Carlos to calculate the damages. Moreover, although mediators sometimes perceived the mediation process and/or potential agreement to be unjust, they often did not do anything about it. For instance, this happened during the Truck Case. In his post-mediation interview, the mediator told me: "I am very satisfied because I have helped them to reach an agreement... However, I am not completely satisfied because the result was not just. We were accomplices of Helena. We allowed her son to steal Carlos's tools."

2. The mediators' lack of responsiveness towards the parties' justice concerns and towards their emotional concerns contributes to the parties' post-mediation perceptions that their mediation processes are unjust and unsatisfactory. For instance, after the Truck Case Carlos and Carlota's interviews revealed that: they considered the mediation process to be "very unjust"; they were "unsatisfied" with the final agreement and "very unsatisfied" with the mediation process; and they claimed the mediator was biased against them.

3. Other researchers examining emotional and relational issues have found similar results at North American mediation centres (Donohue et al., 1989; Donohue et al., 1994). Moreover, Donohue et al. (1989) found that parties unable to reach agreements focused more often on relational and value-based issues while their mediators marginalised these. They concluded that mediators who adequately identify and tackle emotional and relational issues have a higher probability of helping the parties to forge an agreement. In another study, Donohue et al. (1994) found that during mediation processes mediators generally steer the parties away from discussion of moral and relational issues towards the discussion of interests and facts. They state: "as disputants increased discussion of relational and value issues, mediators failed to recognize the issues and deal with them effectively" (Donohue et al., 1994, p.269). We reached the same conclusion. This suggests that many of the observations we made at the MCBC may be applicable to other mediation centres given that they share very similar theoretical underpinnings and practices (those which are common to the Satisfaction Story of mediation). While mediators' emphasis on facts is consistent with their legal training, their emphasis on interests is consistent with a style of training guided by the Satisfaction Story. Compared to a mere emphasis on facts, the emphasis on interests substantially increases client satisfaction and the parties' probability of reaching an agreement (Moore, 1986; Donohue et al., 1989). However, the emphasis on interests is not enough if mediators continue bypassing emotional, relational and moral concerns. We concluded that the mediators' failure to address these types of issues frequently leads to the escalation of destructive conflicts, increases the perception that the mediation processes are unfair, diminishes the probability of reaching agreements, and reduces the service users' satisfaction. Donohue et al. (1994) argue that mediators may lack the necessary training to deal with relational and

moral issues. We reached the same conclusion, and decided to design training programmes to address this issue.

We concluded that the MCBC should rethink the goals of mediation and the mediator's role. During our discussion of the Truck Case, mediator 2 argued that he avoided discussing Jorge's participation in the mediation process because that might have put at risk the possibility of reaching a satisfactory agreement, something that was "clearly the goal of mediation"[141]. This intervention led us to talk about possible goals of mediation as well as possible mediator's roles (the material presented in Chaters 6 and 7 was helpful in this discussion). The discussion, which became an on-going dialogue nurtured by boundary critique, was crucial in abandoning the Satisfaction Story approach that prevailed at the MCBC and beginning the development of a new approach to mediation at the MCBC that is based on a new set of virtues (section 11.4.1) and that attempts to be more responsive to the parties' justice concerns.

## 11.2 Promoting Double-Loop Learning so as to Transform the Way Issues of Justice are Addressed by Mediators

As the Scratch Card case showed (section 10.2.2) defensive patterns can be behind the suppression of discussions about justice and they can inhibit the type of double-loop learning that is helpful in changing the way mediators deal with issues of justice during their professional practice. Therefore, in order to transform mediation practice so that mediators can deal in new ways with justice concerns, I considered it important to tackle defensive patterns, and to reduce the inhibitions to double-loop learning that Model I promotes. This implies a movement from what Argyris and Schön (1996) call Model I theory-in-use towards Model II (see section 3.2.1.2). First I will illustrate how Model I theories-in-use were deeply ingrained in the organisation when I observed the mediation cases during my fieldwork, and also how my co-researchers and I managed to make what we perceived as a movement towards Model II.

[141] During his interview mediator 2 expressed a strong preference for the goals of the Satisfaction Story.

When I observed mediation cases at the MCBC and I began discussing them with my co-researchers, we found that mediators' theories-in-use shared some of the main characteristics of what Argyris and Schön (1996) call Model I theory-in-use. Their theories in used could be associated with the following action strategies.

- Unilateral design and management of the environment. There was rarely any negotiation on the format of mediation sessions (number of meetings, who attends, etc.). The Truck Case in an example, with the mediator refusing to discuss the boundaries of participation.

- Own and control the tasks. Mediators frequently decide what the parties can discuss and what they cannot. When the parties try to wrest control of the agenda, the mediator is ready to remind them that he is the one who is in control of the situation, because "I am the mediator" (as happened in the Truck Case). Mediators, such as mediator 2 in the Truck Case, unilaterally decide what the goals of the parties are and force the parties into a strategy designed to meet these goals.

- Unilateral self-protection. During mediation processes that become difficult mediators are frequently afraid that by expressing some of the their feelings and thoughts they will add fuel to the fire. Therefore, they hide them and act as if they were not hiding them. They have learned to be skilful in covering up that they are censoring something, but also in covering up their cover-up. Mediators also protect themselves from being vulnerable by not discussing with anyone in the organisation the unfavourable feedback they sometimes receive from the parties. This reduces the possibilities that the organisation has of learning from its mediation processes.

- Unilateral protection of others from harm. Mediators, such as mediator 2 in the Truck Case, sometimes assume that the parties need to be protected and they do not communicate the protection strategy to the parties. As I have already argued, mediators' overprotective behaviour frequently hampers learning.

Model I theories-in-use lead to actions that inhibit double-loop learning. Fortunately after our first meetings with the mediators and the staff team I found them to be willing to change their behaviour as a result of learning. By the end of the intervention I observed what Argyris and Schön (1996) consider a genuine movement towards Model II: mediators' reflexivity on their Model I actions in a way that promoted their learning processes. By the end of the fieldwork the mediators themselves were beginning to encourage inquiry and public challenges to their actions and ideas. They have developed their capacity to produce double-loop learning. During my fieldwork we were able to:

- Develop skills in the organisation to improve its capacity to learn. We shared and explored a set of ideas that we found helpful to enhance our learning processes.

- We worked with each mediator and with the Co-ormg on the extent to which each one of them was contributing to the DPs, and we discussed measures to tackle these individual difficulties.

- We initiated the development of a new espoused theory about mediation practice, which we hope will lead to the development of a new mediation theory-in-use in a few years. Practice, double-loop learning and critical reflexivity will be important in this process.

The whole inquiry implied a change in the mediators' moral frameworks and their basic beliefs, particularly in relation to issues of justice in mediation processes. They became more aware of the diversity of other people's moral frameworks and notions of justice, and they changed their attitude towards the way they should interact with different moral frameworks. This implied a substantial change in their understanding of others, their relation with others, and their role as mediators. Moreover, these changes were crucial in allowing us to transform mediation practice so that mediators could begin to deal in new ways with justice concerns that arise during mediation processes.

## 11.3 Tackling the Parties' DPs

In previous sections (such as the last one) I have argued that DPs can be behind the suppression of discussions about justice and I have shown how mediators' DPs can be addressed so that mediators can become more responsive to the parties' justice concerns. However, the *parties'* DPs might also constitute a problem for tackling issues of justice during mediation processes, and for promoting any type of double-loop learning in general. For instance, a party's DPs can contribute to him/her finding it difficult to hear and understand his/her counterpart's justice concerns. Therefore, my co-researchers and I decided to explore what mediators can do to tackle the parties' DPs in more productive ways. We developed diverse alternatives that we think can help a mediator. For instance, they include:

- Exploring in more detail the parties' reasoning processes and challenging their underlying beliefs. For instance, in the Scratch Card case instead of leaving the mediation room the mediator could have used private caucuses with both parties to find out why they were using what he interpreted as "dirty tricks". During these caucuses he might have explored alternative interpretations of the parties' actions in terms of their own reasoning processes. He would probably have obtained the type of interpretations I heard from the parties, something that would have helped him to avoid his own defensive pattern, and that could have helped him to prevent or at least diminish the parties' resort to DPs. In that case the use of defensive patterns by the parties was to a large extent the result of not being able to understand their counterpart's reasoning processes and interpreting them as threats to their own interests and moral concerns (such as Teresa's concerns about justice). The mediator could have avoided the parties' defensive routines by challenging their interpretations of their counterpart's behaviour.

- Explaining his inferences to the parties about their behaviour (openly or in private caucuses), and explicitly indicating that these inferences are open to inquiry. Thereafter, the mediator could invite the parties to do the same with their own inferences. This will not only help the mediator to avoid his own defensive

routines, but will also contribute to the parties' learning processes on how to avoid theirs.

- Questioning the parties' inferences about their counterparts (and the mediator) not simply by asking "why" they believe what they do, but by using questions framed in ways that invite the parties to ground their reasoning processes with evidence from experience (such as asking "What did the other party do or say that led you to conclude that?").

The reader will notice that the research project was itself a learning laboratory for mediators to develop their skills for tackling the parties' defensive patterns in more productive ways.

## 11.4 Conceiving Some Additional Changes Within Mediation Practice

The preceding sections of this document described many of the major changes that came out of this research process. For instance, they described transformations of the basic beliefs and moral frameworks mediators used to understand mediation processes. However, there are other important changes that I will describe in this section. Before presenting these, I want to point out that the changes were to a large extent the product of questioning what we understood by mediation and the role of the mediator, as well as our realisation that the particular development that mediation experienced in Colombia was only one path it could have taken.

We tried to be reflexive on the history of Colombian professional mediation and of mediation at the MCBC, trying to understand why the practice of mediation at this organisation appeared to be inspired by the Satisfaction Story. We realised that the history of mediation in Colombia was strongly linked to the MCBC's history, and that the latter was closely related to the Colombian Ministry of Justice policies during the first years of the 1990s. At that time the Ministry conceived mediation as an alternative for reducing the congestion and delays that characterised the national judicial system (see section 2.2), as well as for diminishing its costs to the government. In order to achieve this aim, mediation had to resolve conflicts at low

costs, quickly, and in ways that were satisfactory to the public. The Satisfaction Story of mediation, previously conceived in the U.S. to achieve a similar task, was a good alternative and the Ministry of Justice adopted it. Given that businesspersons were very unsatisfied with the operation of the judicial system, the Ministry of Justice established an alliance with their representatives—the chambers of commerce—to achieve its aim (see section 2.2). In brief, it was mainly in this way that the MCBC began to adopt the Satisfaction Story as if this approach was the only one. However, during my fieldwork, once the MCBC's staff began to critically reflexive on many of the assumptions and shortcomings of this approach, as well as realising that there were other alternatives for practising mediation, they concluded that many aspects of the practice of mediation and of the mediator's role that they used to perceive as necessary, as "universal truths", were no more than contingent constraints which resulted from the particular development that mediation practice experienced in Colombia as a result of historical power-knowledge formations. Realising this encouraged the MCBC's staff to explore alternatives for transgressing what they used to see as necessary elements of mediation, such as the goals and values of the Satisfaction Story. This can be seen as a critical reflexivity in relation to the "limits of the necessary" (Foucault, 1984e, p.43) within the theory and practice of mediation.

We realised that the Satisfaction Story discourse had functioned as "true" within our local community to a large extent because it was the type of discourse which was useful to the power relations and policies supported by the Colombian Ministry of Justice. The most important result of the critical attitude we developed at the MCBC was that it allowed mediators and the staff team to think about the possibility of no longer doing or thinking what they were used to. For instance, it allowed the MCBC's staff to rethink the virtues that they thought should guide mediation practice (see below), as well as to conceive some other changes for practising mediation.

### 11.4.1 Some Important Virtues For the Practice of Mediation

Mediators, like many other facilitators (see Taket, 1994), cannot be neutral in relation to values or virtues[142]. Therefore, mediation centres should identify and define their values and virtues in a critical way[143]. Values or virtues can specify *what kind* of mediation service the centre is going to provide and the mediators' *roles*. At the MCBC we worked on a first provisional set of virtues:

- Justice.
- Critical reflexivity.
- Encouraging single- and double-loop learning during mediation processes.
- Empowerment. This implies contributing to the development and personal growth of the parties in conflict and assisting the parties in making informed and careful decisions.
- Interparty recognition.
- Respect for others. This implies avoiding the marginalisation of anyone who participates in a mediation process or might be affected by it. The alterity of others should be respected.
- Nonviolence. Mediators should oppose violent mechanisms for resolving conflicts.

[142] In this section I talk about "values and virtues" as more or less interchangeable terms, despite previously arguing against the values discourse, because I do not want to impose my own view on other mediation centres. It could be that talking in terms of values will be preferable for some people in relation to making their stance explicit. This is the kind of task that can be done, and easily communicated to clients, through a listing of values.

[143] I believe that all mediation centres should take responsibility for telling their potential service users about the types of values that are promoted in their practices.

- Honesty and openness. Mediators should avoid cover-ups and other behaviours that are typical of defensive routines. On the contrary, they should clearly present their basic values and assumptions at the beginning of every mediation process, and promote inquiry about them.

- Respect for the law. Mediators should oppose any agreement or process that would violate the law[144].

The selection of these virtues implies a profound change in the moral framework used by the MCBC's staff. It was a first but a major step in developing a new theory-in-use that involved double-loop learning. It took into account the disputants' opinions which they expressed during the interviews, but also the reflexive and learning process that we initiated at the MCBC. It also implied a profound alteration of what it means to obtain an improvement in mediation practice. While improvement at the MCBD used to be associated with the goals of the Satisfaction Story, now it is associated with practising the above set of virtues.

The aforementioned virtues are strongly interrelated. Promoting one may affect the others in a synergistic way. For instance, the promotion of learning (which involves helping the parties to deal with inhibiting factors), is valuable for developing openness, empowerment and interparty recognition. Only if the parties can overcome the obstacles to their learning can they become masters of their own destiny (empowerment); articulate and be open about their assumptions and reasoning processes; be less concerned with self-defensive attitudes; and be more committed to interparty recognition. A commitment to learning consistent with Model II should help avoid the noncaring consequences that result from Model I (see Argyris, 1990) and that oppose the respect for the other's alterity that mediators wanted to aim at. Moreover, empowerment and interparty recognition support each other. For instance, empowering one party makes him/her more able and willing to consider seriously the situation of the other because it is easier to be interested in the other's situation when the self feels safe and less worried about his/her own situation (Grillo, 1996). In this

[144] This does not imply promoting unnecessary legal interpretations like the one in the Scratch Card Case.

way empowerment can help in developing a sense of respect for others as well as welcoming what is alien in them.

The virtues that were selected were thought to give sufficient coherence to mediation practice. However, because of the need to continue with critical reflexivity and double-loop learning they will be open to future changes. To involve the notion of critical reflexivity in mediation implies a major change to the old practice of mediation at the MCBC. The discourse of the Satisfaction Story that prevailed at the MCBC, as well as the discourse of the Transformation Story, involve the uncritical acceptance of the parties' *preferences* as the central points of departure for moral reasoning (for instance, see Moore, 1986; Bush and Folger, 1994). With the adoption of critical reflexivity as an important virtue for the practice of mediation, this does not have to be the case. Now, part of the mediator's role is to respectfully question the parties' preferences and concerns whenever the mediator considers it appropriate to do so.

Mediators also now have an explicit responsibility at the MCBC to help the parties address their disputes in a way that they can consider just following a procedure that they regard as fair. Notice that the parties' conceptions of justice are the relevant ones. However, if members of the wider society are affected by the mediation in important ways, the mediator also has a responsibility to try to widen participation. If the latter is not possible, the mediator should decide on which of two courses of action to take:

- To act as a witness of the potential notions of justice, interests, needs and moral frameworks of those affected but not involved in the mediation (see Ulrich, 1983, 1996b). To argue the case of those who cannot speak for themselves in the mediation process, in the way some mediators currently do in family mediation when they argue the case of children.

- To stop the mediation process if s/he thinks acting as witness is insufficient and a significant injustice will result from the continuation of a narrowly conceived mediation.

### 11.4.2 Promoting Critical Reflexivity Rather than Satisfaction in Mediation Practice

In the previous section I pointed out that we selected critical reflexivity as one of the virtues that should guide mediation practice. In this section I will highlight why this particular virtue was regarded as so important. To do this I will make reference to a case that I will call the Suspect's Case. This case took place at the MSUA, and therefore no detailed analysis of it was done with its mediator.

> A gentleman rented a flat to a lady who paid the rent in a completely reliable way for 15 months. Suddenly the lady failed to pay the rent for two months and the landowner asked for a mediation process to resolve this difficulty. The landowner wanted her to leave the property (this appeared to be his main interest) and to pay him the money she owed. During the mediation process she explained that she had been unable to pay the monthly rent (£60) during the last two months because she had lost her job. However, she had a new job and therefore she promised to pay him this month's rent soon. She also offered to pay the £120 she owed in instalments of £17.14 per month over the next 7 months. She argued that her salary was only £86 per month and that she was the single mother of three children. She said that she wanted to continue living in the same property. The landowner told her he believed she was going to pay him the money, but he wanted her out of his property anyway. Finally they agreed that she would leave the property in 15 days and also pay her debt in instalments.

After this mediation case ended, from my perspective the result did not appear convenient for *either* party. On the one hand the tenant had to leave a property where she wanted to live. This would imply costs that she could avoid if she was allowed to stay in the same property. On the other hand, given the country's economic crisis, it was not clear that the landowner was going to get a new tenant for his property for several months or even years. Moreover, his tenant was pretty reliable compared with the majority of Bogota's tenants.

The mediator never attempted to find out if there was some missing information that could have explained the parties' behaviours. He took their desires for granted and never questioned them. Therefore, I explored the parties' assumptions and reasoning during my interviews. I found that the landowner was making unjustified assumptions about his tenant's behaviour that he never openly expressed to the mediator or the tenant. He assumed she was not going to pay the rent anymore because she was probably going to try to seduce the landowner's brother in order to create a relationship that would protect her from any attempt to evict her from the property. He assumed this despite the fact that he said that she and his brother were not even friends. I found that another lady had used such a strategy in the past, and this made the landowner suspect that his present tenant was going to do the same. During our talk the landowner acknowledged that his assumptions were unjustified, and that his conduct was unfair to the tenant. Notice how in this case the mediator's acceptance of the parties' expressed interests without a critical attitude led him to accept from the parties a behaviour that was based on insufficiently tested assumptions and which therefore generated what can be interpreted as an injustice in the way one party treated the other. The landowner was confused after my interview because he was beginning to realise that he might have been unfair to the lady and her three children. I created the opposite of what the mediator wanted to produce: dissatisfaction. However, seeking quick satisfaction can be the path to injustice, as this case illustrates.

As a result of analysing this and other cases, my co-researchers concluded:

- Mediators should not assume that it is acceptable to unilaterally decide on what is "good" and what is "right" for the parties (as they sometimes did).

- To have as the main goal of mediation the satisfaction of the parties' unquestioned interests generates several problems. A major one is depriving the parties of opportunities to question their moral frameworks, basic assumptions and actions. This denies them opportunities for double-loop learning and prevents them from taking responsibility for the Other as a human being (in Levinas', 1998a, terms).

- Mediators can choose a critical path, assisting disputants to clarify what is good and right for them, as well as helping them to find alternatives that are "reasonable" for them in terms of their interests, moral frameworks, basic human needs and emotional concerns.

- Mediators do a great service to the parties by helping them to be critically reflexive on their interests, moral frameworks, human needs and emotional concerns. Mediators should also consider providing the parties support for looking at their conflicts in a holistic way, being reflexive on boundary judgements and encouraging them to test their reasoning and assumptions.

### 11.4.3 Developing New Interpretations of Some Virtues

During our discussions about the mediation processes I observed that mediators acted in accordance with some virtues that supported Model I theories-in-use. They are not identical to those that Argyris and Schön (1996) have shown to support these theories. I will make reference to a few of these virtues that are particularly relevant for this research.

1. Concern and caring are interpreted as acting diplomatically and telling the parties what the mediator thinks is good for the satisfaction of their interests given a unilateral interpretation of these interests that the mediator makes during the initial stages of the process. The mediator adopts a paternalistic attitude in relation to the parties. S/he decides what is 'best' for them, as was clear in the Truck Case.

2. Treating others with courtesy. Mediators use good manners, attempting to be perceived as impartial and never confronting the parties reasoning or basic assumptions. Mediators try to keep things calm. However, by doing this they discourage double-loop learning for they avoid questioning, challenging or even addressing the parties' moral frameworks and basic beliefs. The latter also hampers welcoming the other as Other, for the potential richness of the encounter between the Same and the Other is reduced to a problem-solving exercise where

the only important thing is to find a solution (like in a mathematical game) that meets the parties' interests.

3. Strength. Mediators attempt to show complete control of the situation, even if this implies ignoring some of the parties' concerns that they cannot manage (for instance, see section 11.1).

Mediators usually begin by acting in ways that show support, concern, and courtesy. However, when little progress is made on the substantive issues that they think are required for reaching an agreement, they do not hesitate to move toward strength and unilateral control. This control is interpreted to be for the benefit of the parties, whether the latter agree or not. This reveals an important discrepancy between mediators' espoused theories and their theories-in-use. While at the beginning of the process mediators claim that the parties are the only ones with authoritative decision-making power, by unilaterally controlling in a strong way the course of the process mediators end up taking some substantial decisions in relation to the outcome.

In trying to encourage Model II theories-in-use my co-researchers expressed their preference for some new virtues and action strategies (amplifying aspects of those listed earlier) that implied an important change in the mediator's role. I will make reference briefly to the most important ones.

1. Concern and support. Avoid making unilateral interpretations of the parties' interests at the beginning of the negotiation process. Most importantly, be concerned about their moral frameworks, interests, emotional concerns, and human needs, and be prepared to change your interpretation of them throughout the mediation process.

2. Support others in confronting their own assumptions, reasoning, biases, and emotions, as well as in understanding their counterpart's assumptions, reasoning and emotions. Promote individuals' self-reflexivity but also your own self-reflexivity. Promote double loop-learning in the parties, in yourself and in your organisation.

3. Respect. Advocate respect for others and do not try to unilaterally control mediation processes. Respect the other's alterity. Encourage inquiry and the idea that change as a product of self-reflexivity is a sign of strength. In particular, encourage inquiry and self-reflexivity about people's moral frameworks and their notions of justice insofar as they are relevant to the situation.

Putting these virtues into action will require a diverse set of skills and strategies in the mediation arena. Developing these skills and strategies will take some years at the MCBC, just as the advocates of other mediation stories had to develop their action strategies over a period of years.

### 11.4.4 Rescuing Reflexivity on Practical Rationality in Relation to Mediation

The adoption of critical reflexivity as part of mediation practice, combined with our attention to moral frameworks, produced a contribution to mediation at the MCBC that I consider also as a contribution to the mediation literature: rescuing reflexivity on practical rationality in relation to mediation. As I argued in Chapter 2, justice issues have been systematically ignored or downgraded in the mediation and dispute resolution literature. The satisfaction of interests is assumed to be *the* force that determines people's behaviour in dispute resolution processes. Moreover, people's appeals to justice are regarded at best as a subdivision of the tactics people use to persuade or deceive their counterparts (see Albin, 1992). In this form justice is reduced to a tool or an instrument of strategic action (e.g., Raiffa, 1982). Those sceptical of the relevance of notions of justice in conflict resolution have stressed this strategic use of justice concepts (Albin, 1992).

This limitation of the ADR literature is a particular case of a more general phenomenon. The ADR literature often falls into two of the traps of positivism: a lack of reflexivity on its presuppositions and social implications, and equating practical rationality with instrumental reason. I claim that much of the literature on negotiation and mediation falls into these traps (e.g., Fisher and Ury, 1981; Raiffa, 1982; Neale and Bazerman, 1991; Bazerman and Neale, 1992a; Messick, 1993). During our meetings at the MCBC we became conscious of this and wanted to escape these traps.

Given our analysis of mediation cases, we considered the idea that people's conceptions of justice can be associated merely with instrumental rationality to be inappropriate. I argue in favour of rescuing the role of practical rationality in dispute resolution theory where it has been demoted. I consider this as one of the main contributions of this research project.

Practical reason is the type of reason concerned with morals, with claims to normative rightness, with how we ought to act. This means discussing possibilities in relation to the ends of human action, and not just being concerned about instrumental possibilities, i.e. possibilities about the organisation, management and control of the means to given ends (Habermas, 1974, 1984a; Fuenmayor and López-Garay, 1991). This implies that in practice a mediator *may question the parties' ends in relation to a variety of possible ends, and in the light of the parties' moral frameworks.* We preferred doing this to the former situation where mediators often determined the ends the parties could discuss. For instance, in the Truck Case mediator 2 restricted the parties to speaking only about money. Mediators were frequently unconscious of the ways they restricted the ends that the parties could discuss. However, the parties frequently expressed their dissatisfaction and/or moral disapproval of this type of behaviour.

Reaching these conclusions involved the expenditure of a substantial amount of time at the MCBC because the theories-in-use that previously prevailed there were originally incompatible with these ideas. It required uncovering these theories-in-use and developing different alternative *interpretations* of them. It required rethinking mediation, the mediator's role (particularly in relation to moral issues), and their notions of justice.

### 11.4.5 Structural Changes

MCBC's mediators took a course on mediation taught by the MCBC's members before joining the MCBC as mediators. However, after they had taken this course the MCBC just provided the space for them to practice mediation. The mediators did not have to discuss their practice with the MCBC's staff, unless something unusual

happened that forced them to do so. This could be the case if someone contacted the organisation to complain. However, such events were few and far between. Actually, I found that disappointed users of mediation services rarely expressed their discontent to any member of the MCBC, and when they did so, they usually spoke only with the mediator who handled their case or with the secretary who answered the phone. The latter usually told the parties that they have to talk to the mediator to express their dissatisfaction, and habitually did not transmit this information to anyone. Therefore, at the time I conducted my observations of mediation cases at the MCBC, feedback from mediators to the MCBC was rare. This unsatisfactory level of feedback between external mediators and the organisation had several consequences:

1. It contributed to mediators' skilled incompetence.
2. It reinforced mediators' defences. Mediators had the freedom to cover up what they perceived as their errors so as to protect themselves from embarrassment or threat.

In order to address this problem we agreed to apply a basic post-mediation interview among a randomly selected subset of the cases handled by each mediator. The interview will attempt to measure the parties' perceptions on:

- The fairness of the mediation process.
- The effects mediation had on the parties' relationships with their counterparts.
- The satisfaction with the final agreement (if any was reached).
- The level of hostility experienced.
- The mediator's level of responsiveness to the party's concerns.
- The attention received to the party's points of view by their counterparts.
- The mediator's level of impartiality.
- If the party felt able to make informed and careful decisions during the mediation process.
- If the party felt that any important issues were not addressed during the mediation process and why.
- If the mediation process helped the party learn something new and what.

The interviews were planned to be conducted by a new member of the MCBC's staff who would be in charge of continuously evaluating the mediation services. Given that the MCBC plans to have approximately 500 mediators in the future, this is likely to be a full-time job. The information this person collects and organises would feed back to the mediators and the MCBC's staff, so that they can improve their services to the public and their training programmes.

Additionally I talked with the Co-ormg about the possibility of the MCBC's staff randomly attending mediation sessions as observers so as to study the way mediators are doing their job, to gain practical knowledge to enrich their training programmes, and to examine the results of planned changes in the mediation practice. In 2002 the Co-ormg assumed this task and now regularly attends mediation sessions.

We also discussed changes in the BCC's mediation and negotiation training programmes. The most important change was the introduction of some of the conclusions of our research process into the training. I argued in favour of including as part of the training programmes for all mediators the following new elements:

- An exploration and critical examination of different conceptions of mediation and the mediator's role (in the past MCBC training programmes adopted a Satisfaction Story approach to mediation but this was never made explicit in training programmes).

- An examination of some of the potential effects that people's moral frameworks can have on their behaviour during mediation processes. This involves discussing our finding that interests, conceived as desires or preferences, are not the sole driving force of people during dispute resolution processes.

- An examination of diverse theories of justice, so that mediators develop their sensitivity towards issues of justice in mediation practice. This examination should be based on a study of mediation cases similar to the one we did in our participative research process.

- Promoting reflexivity on how our own terms of reference limit our understanding of other people's ideas. This is related to Gregory's (1992) idea that whenever someone listens to others whose thinking is grounded in a different paradigm, s/he can only understand what they are saying through his/her own terms of reference. We also agreed to discuss one's own tendencies to impose upon the world the products of our minds, to subsume the Other under the hegemony of the Same (Levinas, 1998a, 1999).

Unfortunately I had to leave Colombia before we could implement these changes. The reason for the delay in the implementation of these changes was that the MCBC had to postpone their redesign of mediation training programmes until the Colombian Government issued a law that was expected to regulate all mediation training programmes. The law was issued in mid 2001. As a result mediation training programmes are currently more intensive than before and this allows the MCBC to include the new topics we discussed[145].

In 2001 the Co-ormg offered me the possibility of participating in mediation training programmes so as to address the previous issues. I could not accept because I had to travel to England to finish this research. However, I have already planned with the MCBC to co-ordinate some training programmes on the previous issues later in 2002. Our intention is to offer these training programmes for all the MCBC mediators, and to offer them later on to the general public.

At the end of 2000 I presented to the business training programmes staff of the BCC many of the new ideas included in this document. As a result they offered me the co-ordination of a new series of BCC dispute resolution training programmes for managers in which I could share with them these ideas. In particular they agreed on the possibility of in depth discussions on justice issues with managers. Given that these training programmes are frequently attended by managers who are leaders in their industrial sectors, they can have a substantial impact on the local business community[146]. As a result of my travel to England these training programmes were

[145] In the past no minimum number of training hours was required for becoming a mediator. Therefore, mediation training programmes were usually quite short, no more than 36 hours. Now, they have to be a minimum of 104 hours.

[146] I claim this based on my past experience as co-ordinator of other training programmes in dispute

postponed. I plan to organise them at the end of 2002 for they can contribute to an important change in the way local managers conceive dispute resolution.

## 11.5 Conclusions

The discussions I had with my co-researchers about the mediation cases I observed during my fieldwork led us to the following conclusions:

- In general, mediators preferred to deal only with tangible substantive issues which they identified as being part of the parties' interests. MCBC mediators were quite skilful in dealing with the parties' tangible interests and helping them to reach agreements that satisfied those interests. However, although mediators sometimes perceived the mediation process and/or potential agreement to be unjust, they often did nothing about it.

- In general, our analysis of mediation processes led us to conclude that the mediators tended to avoid dealing with emotional and relational concerns. This frequently led to the escalation of destructive conflicts. It also increased the perception of parties that the mediation processes are unfair, diminished the probability of reaching agreements, and reduced the service users' satisfaction. In particular, the mediators' lack of responsiveness towards the parties' justice concerns contributed to the parties' post-mediation perceptions that their mediation processes were unjust. My co-researchers and I decided that this problem might best be addressed during mediation training programmes.

- Tackling DPs and reducing the inhibitions to double-loop learning that Model I promotes were considered important to transform mediation practice so that mediators could deal in new ways with justice concerns that arise during mediation processes. This implies a movement from Model I towards Model II theories-in-use.

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resolution offered by the BCC.

- The whole inquiry implied a change in the mediators' moral frameworks and their basic beliefs, particularly in relation to issues of justice in mediation processes. They became substantially more aware of the diversity of other people's moral frameworks and notions of justice, and they changed their attitude towards the way they should interact with different moral frameworks. This implied a substantial change in their understanding of others, their relation with others, and their role as mediators.

- The *parties'* DPs and not only the mediators' DPs might constitute an obstacle for tackling issues of justice during mediation processes. Therefore, my co-researchers and I developed diverse alternatives that we think can help a mediator to tackle the parties' DPs in more productive ways.

- At the MCBC mediators used to view as part of their role many of the main goals and assumptions of the Satisfaction Story of mediation. For instance, they assumed that the goal of mediation was to help the parties reach a mutually satisfactory settlement, and that the main concern of the parties was always to satisfy their interests or desires. We found out that following the guidelines of the Satisfaction Story of mediation could lead to results that the parties consider unfair. The Satisfaction Story treats the parties moral concerns as mere unquestionable preferences, and does not offer mediation practitioners any satisfactory conceptual framework, tools and strategies for dealing with them. It focuses on satisfying the parties' interests, and disregards the complexity involved in dealing with justice issues. The mediators I observed frequently equated mediation success with reaching a final agreement. They considered several of the Satisfaction Story assumptions as part of what mediation was all about. By questioning all these assumptions the research process questioned the foundations of what mediators actually understood by mediation. Moreover, by promoting critical reflexivity on the MCBC's history, I contributed to initiating a debate that led my co-researchers to conclude that many aspects of their mediation practice that they used to see as necessary "truths" were no more than contingent constraints which were the fruit of particular historical events. This encouraged them to begin a deep transformation of their mediation practice.

- This transformation included the selection of a provisional new set of interrelated virtues that we considered should guide mediation practice. We also discussed other changes that we regarded as necessary for the future of the MCBC. They included establishing feedback mechanisms such as disputants' post-mediation interviews and the regular observation and analysis of mediation sessions. Moreover, we envisioned changes in mediation and negotiation training programmes that I hope will contribute to transform the way mediation is practised in Colombia. The MCBC has also offered to publish a book on this research to contribute to the diffusion of the results among the Colombian and Latin American mediation communities.

- Among the new virtues that my co-researchers considered should guide mediation practice I would like to emphasise critical reflexivity. We concluded that mediators can do a great service to the parties by promoting critical reflexivity in mediation processes. This involves questioning the parties' conceptions of justice.

- A main contribution of this research process is to rescue the role of practical rationality in dispute resolution theory where it has been demoted, and where it has been frequently equated with or reduced to instrumental rationality.

The mediation approach that my co-researchers and I began to develop at the MCBC has several crucial characteristics that distinguish it from others:

- It encourages learning (in particular double-loop learning). Therefore, it promotes the transformation of the parties and the mediators' moral frameworks, basic onto-epistemological beliefs, and their conflict resolution strategies. This may imply transformations of the mediators and the parties' roles and identities.

- It expects critical reflexivity to support these transformations. Unlike some other approaches, it encourages critical reflexivity on the parties' moral frameworks, interests, basic human needs, emotional concerns and reasoning processes. This implies that mediators should not advocate for specific conceptions of what is good, right, just or moral, but rather encourage critical reflexivity on these types of issues. In particular, mediators should promote the parties' explorations of

alternatives to address their conflicts that are reasonable for the parties in terms of their interests, human needs, moral frameworks and emotional concerns.

- Rather than ignoring issues of justice (like many mediation approaches do), our approach aims at promoting justice by encouraging critical reflexivity about it. Unlike some mediation approaches (such as the Reconciliation Story) our approach is not committed to a particular conception of justice, but expects the mediator to work with the parties' conceptions of justice in order to address the dispute in ways that are considered just by the parties and that produce outcomes that they perceive as fair. Of course, this does not imply that the disputants' conceptions of justice should be taken as given because mediation should involve double-loop learning for all the participants.

- Because the transformations that our approach encourages may be hampered by defensive patterns, it draws on action science methods and CST concepts that can assist mediators to overcome the negative effects of these patterns.

# Section 4: Analyses and Reflexivity on Justice in Mediation

# Chapter 12: Understanding Conceptions of Justice and their Impact on how Fair Mediation Processes are Perceived

In the narrative about my fieldwork presented in the last few chapters I touched on findings about the disputants' and mediators' conceptions of justice that were fed into the team's action science reflexivity processes. In this chapter I will provide more details about these findings. I will first outline some aspects of the analysis of the interviews that was carried out. In particular, I will describe some conceptions of justice that were found among the disputants who participated in mediation processes. Thereafter I will study some factors that seem to affect the parties' perceptions of how just their mediation processes were. Finally, I will explore the effect of the differences in the mediators and the parties' conceptions of justice on the parties' perceptions about the fairness of the mediation process.

## 12.1 Analysis of some Variables Associated with the Parties' Conceptions of Justice

> "The world was so recent that many things lacked names, and in order to indicate them it was necessary to point." (García-Márquez, 1970, p.1)

As I explain in section 9.4, during the fieldwork I conducted an initial analysis of the interviews which I discussed with the MCBC's members and mediators. However, later on (in England) I carried out a more detailed analysis of all 158 interviews. Unfortunately this detailed analysis cannot be presented in this document due to its space limitations. Here I will just outline how the analysis was done and its main results.

Information from the interviewees was analysed by means of both qualitative and quantitative techniques. The large amount of data[147] made the use of quantitative techniques necessary, even if not all the information could be handled quantitatively.

[147] For instance, after codifying the answers that could be analysed using statistical techniques type 1 interviews produced 5,700 different values (60respondents*95(variables/respondent)) and type 4 interviews produced 9,666 values (54respondents*179(variables/respondent)).

The interviewees' answers that could be codified for a statistical analysis were basically made up of nonmetric data, although one metric[148] variable was considered (people's age). Nonmetric data were measured using nominal and ordinal scales. Diverse statistical techniques were used to analyse the interviewees' answers. They included:

- Univariate and bivariate techniques (e.g., ANOVA, the chi-square test of independence, the Kolmogorov-Smirnov test, Levene's test).
- A multivariate technique: cluster analysis.
- Descriptive analysis techniques.

A special emphasis was put on the use of non-parametric statistical tests and measures of association given the nature of the information which involved a wide diversity of types of variables. Among the most used non-parametric statistical tests used were the Kruskal-Wallis test, the Mann-Whitney U test, the Jonckheere-Terpstra test, Fisher's exact test, Wilcoxon signed ranks test, and the Friedman test.

The analysis of the interviews provided a useful way to approach the parties' and the mediators' conceptions of justice[149] and to understand that they played an important role in many of the mediation processes I observed. This analysis led to the identification of what appear to be five broad types of conceptions of justice among the 114 parties interviewed[150]. These types were identified based on a qualitative analysis of the interviews combined with the use of cluster analysis, a set of

[148] In a metric scale differences between any two adjacent points on the measurement scale are equal (Hair et al., 1995).

[149] I use the word "approach" because I do not pretend that with an interview (no matter how deep it is) and with the observation of people's behaviour during mediation processes I can fully understand their conceptions of justice. Given that I assume that a "conception of justice" is a mental construct that depends on the observer, I consider that different observers might include different elements within this construct. Therefore, the act of selecting questions to understand this construct inexorably implies establishing boundaries on what this construct might include. Hence, in writing and selecting the questions I tried to adopt some very wide boundaries that would allow the expression of "elements" that may form part of very diverse interpretations of the notion of justice. With these questions I tried to grasp a basic understanding of elements of the interviewees' conceptions of justice that (based on my research) I consider particularly relevant to mediation processes. For convenience I will call BECJM these *b*asic *e*lements of a person's *c*onception of *j*ustice that are relevant to *m*ediation processes. BECJM is no more than a proxy indicator (empirical indicator), which has many dimensions, used to represent the theoretical construct "people's conception of justice relevant to mediation processes".

[150] While 60 of them answered type 1 interviews and were observed during mediation processes, 54 answered type 4 interviews. Given that type 1 and type 4 interviews share all the questions that were used to classify the parties' conceptions of justice, the respondents of both types of interviews could be

multivariate statistical procedures commonly used to create a classification (Aldenderfer and Blashfield, 1984). I used diverse agglomerative clustering methods (between-groups linkage, within-group linkage, centroid clustering, median clustering and Ward's method), which I combined with diverse distance measures (such as the Euclidean distance), and different transformation methods for standardising the variable values (such as z-scores) (see Everitt, 1980; Johnson and Wichern, 1992; Morgan and Ray, 1995). A synergy between the hierarchical cluster method and the k-means cluster method was searched for, taking advantage of Milligan's (1980) demonstration that if an initial starting partition of the data set obtained using average linkage clustering is used, then a superior recovery of known data structures can be obtained. In section 12.2 I present a synthetic description of each cluster. It is based on the analysis of the interviews and the behaviours and statements of many of those parties who were observed during mediation processes. Within the sample, the size of each of the five clusters identified is presented in Table 12.1[151].

| Cluster | Number of members of the cluster |
|---|---|
| Cluster 1 | 10 |
| Cluster 2 | 33 |
| Cluster 3 | 14 |
| Cluster 4 | 46 |
| Cluster 5 | 11 |

Table 12.1. Size of each cluster.

For the following reasons I used statistical techniques to study similarities and differences between the clusters:

included in the classification.

[151] I want to be clear that the relative sizes of these clusters will not necessarily be the same within the overall population. Let me explain why. The population from which the sample was drawn is constituted by the mediation cases that were handled both at the MCBC and at the MSUA during the period I did the fieldwork. Because my intention was to get an initial comprehension of those elements that can differentiate between the parties' notions of justice, I mixed the cases observed at the MCBC and the MSUA for this analysis. However, the contribution of each mediation centre to the sample is not necessarily proportional to the number of cases handled at each one of the mediation centres. Therefore, the proportion of members of each cluster within the sample is not intended to represent the proportion of members who might be part of each cluster within the overall population.

- To avoid some judgmental errors. I found that because of the small sample sizes associated with some clusters it was frequently misleading to reach conclusions based only on an intuitive observation of the data and its measures of central tendency and variability.

- Because this is a practice recommended by statisticians (e.g., Hair et al., 1995) and quite often used by researchers (e.g., Singh, 1990; Larwood et al., 1995).

- Because my co-researchers at the MCBC preferred this type of analysis of the data collected. It therefore conferred legitimacy on the findings within the action research process.

In the next section I will summarise the results of the cluster solution found using the techniques previously described. However, before that discussion I would like to make clear that I do not pretend that the cluster solution found is in any way representative of the general population (in statistical terms) of users of mediation services at the MCBC and the MSUA. My intention in constructing the cluster solution was to describe the data collected so that we could use it for promoting organisational learning at the MCBC. Making inferences about a general population was not the intention of this study for several reasons:

1. Taking into account the exploratory nature of this study, what was really important was to initiate a learning process at the organisation about the relevance of taking into account issues of justice in the mediation practice and the training of new mediators. The effort to obtain some clusters and understand them contributed to this goal in several ways. For instance, it helped us in developing a common understanding of the multiple dimensions of justice that was essential for many of the discussions the research involved.

2. Because, as I will explain later on, the composition of the services users at the MCBC was going to experience changes in the near future.

3. The diversity of the conceptions of justice unearthed by the classification effort was enough to make the members of the organisation think critically about the

type of actions they had to take in the future to respond to this new aspect of the world to which they were previously oblivious.

4. This effort to understand conceptions of justice also had a political benefit. Because the leaders of the mediation group at the MCBC are particularly inclined to respect the type of statistical analysis I used, they expressed their enthusiasm about the results, and their willingness to learn more from these types of studies.

Why is it relevant to mediation practice to find out the differences and similarities between types of conceptions of justice that the service users of a mediation centre may have? Finding some common elements and differences is important for it can help mediators to become more sensitive to the variety they may encounter in future mediation sessions, especially if they are initially unclear about how ideas about justice might differ from one another. This is why I carried out a detailed analysis of each question of the interviews. By grouping the interviews into a small number of clusters I intended to facilitate an initial comprehension of those elements that can differentiate between the parties' notions of justice. Unfortunately grouping implies losing information about some of the detailed diversity I am interested in. However, it is a price worth paying for an initial improvement in our understandability of what we are trying to comprehend. Later on we can focus on what can make each individual's conception of justice different from those of other persons. Only an individual analysis of each person's answers can clearly reveal the differences between them.

Other sets of clusters can be identified based on the data. I do not pretend that my identification of the clusters or my interpretation of their similarities and differences are the 'correct' ones. They are just an interpretation that I have found valuable given the objectives of this research endeavour and which are supported through statistical analysis. However, there are other possible interpretations, and we should not be closed to them but promote them. This is the main reason why I have not put names to the clusters as is usually done when cluster analysis is used (see Hair et al., 1995). In the particular context in which I have worked, using names might discourage new interpretations, particularly those that are different to the one I present here. I think that there is still much to learn from people's conceptions of justice and this depends on developing yet more new interpretations. We should maintain our desire to

welcome what is alien. In the future, it is very likely that we will find more diversity among the conceptions of justice of mediation service users.

## 12.2 An Overview of Justice Conceptions and Cluster Membership

> "every concept originates through equating the unequal" (Nietzsche, 1964, p.179)

I would love to discuss each of the 127 interviews in detail (the parties and the mediators' interviews). However, given the space limitations of this document, I must limit myself to presenting some generalisations about the members of each cluster. However, I need to emphasise that they do not represent the moral framework of any individual that "exists in the real world".

Writing this section implies a tension for I consider that both totality and infinity need to be preserved (see Chapter 3). I have not forgotten that the self requires a separate existence that would disrupt any totality (Levinas, 1998a). This disruption, this discontinuity, is brought about by the impossibility of abolishing people's alterity. I will describe each cluster as if all its members have very similar conceptions of justice as well as perceptions about mediation and the mediator's role. However, I ask the reader to understand that this is only a resource I use to emphasise *differences* (between clusters).

### 12.2.1 Cluster 1

Clusters 1 and 5's members are on average older than individuals from the other clusters. They are associated with lower income groups compared to cluster 3, 4 and 5's members. Cluster 1 members are more likely than individuals from other clusters to be part of the Colombian cultural minorities, i.e. black people, Amerindians or descendants of these groups who have lived a large part of their lives in small towns or in rural areas, in cultural environments different from those of the large Colombian cities.

The notion of the good is central to the moral framework of cluster 1 members. They have a strong tendency to care about the common good, or the good of the whole community. The values that they regard as central to the well-being of a community are values such as harmony, interpersonal understanding and love for others, which emphasise the importance of harmonic community ties. This is consistent with their tendency to consider the modification of the personal relationship between the parties as an important goal of mediation. Additionally cluster 1 is the only group where more than half of its members seem to prefer a restorative notion of justice over a retributive one. This can be viewed as an indication of a possible influence of the Amerindian notions of justice (see section 5.3), but also of liberation theologians who have insisted on healing those fractures of the community that diminish its members' life (Wogaman, 1994).

Cluster 1 members' notion of justice is clearly linked to the concept of human needs. This can be related to the discussions initiated by Deutsch (1975, 1982, 1985, 1987). Deutsch (1975) proposed three principles of distributive justice: equity, equality and need. Folger et al. (1995) argue that equity, equality and need coexist as conflicting standards of justice. Among them, cluster 1 members seem to prefer need more frequently than members of other clusters. Particularly they care about the poor. They associate what is just with what maximises the poor's income and what satisfies his/her needs. In some distributive problems their members' choices coincide with the one that results from using Rawls' "democratic equality" principle. However, cluster 1 members go further because they tend to favour a quick elimination of differences between the more and the less fortunate members of society. Their preferences frequently coincide with those of a person who takes decisions based on the Catholic principle of the "preferential option for the poor" (see section 5.2). Contrary to some liberal thinkers (e.g., Nozick, 1974; Rawls, 1988) cluster 1 members' behaviour and interviews reveal that they are frequently in favour of supporting those with less natural talents or who are born in less advantageous economic or social positions. They are not just concerned with improving the *long-term* expectations of the least advantaged but also their current situation.

Cluster 1 members make a strong association between justice and the protection of non-human living organisms. Although the origins of this are a matter of speculation,

it is nevertheless worth noting that cluster 1 members are the ones with an apparently stronger influence from the Amerindian culture. Like many Colombian Amerindians (see section 5.3), cluster 1 members tend to consider animals and plants as subjects of justice, and they involve them in their discourse about justice. This contrasts with the prevailing attitude in Western civilisation where, according to Derrida (1992), justice and injustice have mainly been considered as concepts that apply only to persons.

Among the virtues that they perceive as most important for a mediation process they emphasise the search for social harmony, solidarity, and the common good. They also favour a conception of a mediator as someone who shall be very proactive in promoting just solutions among the parties.

They conceive a just mediation as one that favours "the good", and in particular "the common good". Moreover, for them the common good forms part of the basic ground for deciding not only what is just but also what is rational. They tend to perceive justice as a main component of rationality. They think that people should act justly even if this is against their desires and interests because justice has priority over other forms of conduct and because people have to do "good" to others. They seem to be more concerned than members of other clusters about the notion of a whole "good life". Some of them made reference to the unity of human life when they spoke about the importance of respecting persons as such. Cluster 1 members, more than members of other clusters, seem to be closer to the notion of virtue ethics (see section 2.1.3), but without assuming that virtue ethics is all that is needed. They tend to see the individual as a whole that forms part of a wider whole, the community. Like several writers (e.g., Aquinas, 1914; Aristotle, 1963; MacIntyre, 1981), some of them appear to believe that a complete conception of justice requires a clear notion of the *telos* of a human life. Justice supports people in their quest for the good. Justice is conceived by many of them as one of those traits of character that makes someone a good human being. Principles of justice seem to be valuable for this group insofar as they lead people to approach the good and/or come closer to being a good human being. Members of this cluster as well as clusters 4 and 5 seem to be the ones closer to Aquinas' (1972) ideas that justice in action requires righteousness in all the elements involved in the action.

### 12.2.2 Cluster 2

Cluster 2 and cluster 4 are the largest clusters among the interviewees. Individuals from cluster 2 are on average younger than individuals from other clusters. They are associated with lower income groups compared to cluster 3 and 5 members.

The conceptions of justice of cluster 2 members are closer to the ones of cluster 1 members than to the conceptions of clusters 3 and 5 members. After cluster 1 members, the individuals from this cluster and cluster 4 are the ones most concerned with satisfying the needs of the community and the poor. They are more concerned with the poor and the needy than members of clusters 3 and 5, though not as much as cluster 1 members. However, when confronted with a hypothetical situation where the satisfaction of a person's basic needs seems to imply affecting other persons, they tend to be concerned about the rights of the others and experience a tension between standards of justice based on needs and others based on individual rights. Additionally, many of them appear to be concerned with equality as well, i.e. with conceiving justice in terms of equal money or benefits for all parties. Many of them consider that a mediation process is just if some form of equality is guaranteed in terms of the results and/or the procedure used in the mediation process.

They tend to perceive the production of a just result and the production of an agreement between the parties as the most important goals of a mediation process. In this, cluster 2 members do not differ much from the average of the whole sample. However, they are particularly concerned with impartiality as a major virtue of mediation practice. They and cluster 4 members are especially concerned with the imbalance of power between the parties during mediation processes. When this imbalance is present, they favour a mediator's intervention that aims at introducing greater balance. They conceive the imbalance of power as a risk to the autonomy of the parties.

They sometimes make references to "the good". However, they do not show the emphasis on the language of "the good" that is so crucial to members of clusters 1 and 4. When they perceive a conflict between guaranteeing autonomy and justice they tend to prefer justice over autonomy.

Their moral frameworks seem to have a stronger inclination towards consequentialist ideas than the moral frameworks of clusters 1 and 4, though not as strong as the inclination towards consequentialism shown by cluster 3 members. They seem to be willing to sacrifice personal liberties, such as freedom of expression, for the possibility of increasing the satisfaction of people's interests.

The majority of the members of this cluster think that a person who seeks a rational agreement should aim at an agreement that is just both to him/her and to his/her counterpart. They marginalise the rest of society from this agreement, something different to what tends to happen among cluster 1 and cluster 4 members. Their reasons for favouring the idea that people have to act justly in a negotiation process are quite diverse (they include a mixture of those reasons invoked by cluster 1, 4 and 5 members). However, they make a stronger emphasis compared to other clusters on the idea that people have to act justly to avoid the negative personal and social consequences which unjust behaviours can produce. A qualitative analysis of the cluster 2 interviewees reveals that this cluster contains two types of individuals:

- Individuals whose ideas about justice reveal a mixture of elements from diverse perspectives that are sometimes even contradictory. The majority of them are young people.
- A few individuals who have a conception of justice that is almost unique but that in general are closer to the other cluster 2 members than to the other individuals.

### 12.2.3 Cluster 3

Their average age is close to the average of the whole sample. They frequently hold administrative jobs. Those of them who have pursued technical or undergraduate studies have studied a career related to management. Clusters 3 members, as well as cluster 5 members, seem to be associated with higher-income groups than other clusters.

Cluster 3 members seem to be guided by moral frameworks that have a strong consequentialist tendency. Achieving the desired objectives is considered enough for justifying conducts such as lying or not acting justly. The notions of autonomy and

the maximisation of self-interests are central to cluster 3 members. The values that they regard as central to the well-being of a community are autonomy and personal development, values that emphasise the individual rather than the community.

They tend to consider that poverty is not relevant for taking decisions in relation to distributive justice. They and cluster 5 members are the less inclined to think that it is correct to sacrifice what they see as individual property rights for satisfying the needs of a community and particularly for satisfying the pressing needs of some of its members. They also appear to be the less inclined to consider correct the protection of the world of non-human living organisms when this protection hampers the production of economic benefits for the parties and/or when it can be seen as conflicting with the individuals' property rights. For them the boundaries of justice seem to include only humans.

The goal that they consider central to mediation is the satisfaction of the parties' interests and needs, i.e. the central goal of the Satisfaction Story of mediation. They make up the only cluster that assigns more importance to this goal than to any other goal. They value substantially less than other clusters the production of a just result. The members of this cluster consider that the mediator's impartiality is the most important virtue that should prevail in a mediation process. They value this virtue more than other cluster members do. Like Mill (1972b) they tend to conceive impartiality as an obligation of justice.

Cluster 3 members think that during a mediation process the mediator should act carefully so as not to endanger the parties' autonomy, even if this implies accepting unfair results. They tend to consider that only the parties should take decisions in relation to the substantive issues of the mediation process. They don't perceive that part of the mediator's role is to promote just solutions among the parties.

They conceive a just mediation as one that produces an agreement that is satisfactory for the parties' interests. They equate justice with the satisfaction of the parties' interests using a consequentialist attitude that resembles what I have called a "bounded utilitarian" conception of justice (see section 7.5.1). They regard as relevant

only the satisfaction of the interests of those parties sitting at the negotiation table[152]. They marginalise the wider society in deciding whether a mediation process is just or not. This marginalisation also operates in relation to other elements that they do not consider directly related to the conflict, such as the natural talents of the parties (e.g., their negotiation skills) and the previous economic or personal situation of one of the disputants (e.g., their level of wealth, their personal troubles). During mediation processes these elements were disregarded as irrelevant to the mediation process when they were mentioned, as well as in some questions in the interviews.

Cluster 3 members are inclined to consider it appropriate to sacrifice the parties' freedom of expression for the sake of increasing their 'tangible' benefits (e.g., money). Cluster 3 members show a stronger tendency than members of other clusters to claim that in order to know that something is just it is enough to establish if it is satisfies or not the desires, preferences or interests of people. In contrast to members of other clusters (particularly cluster 1 members), cluster 3 members tend to assume that desires or interests constitute the undisputed starting point from which rational calculation starts to find out the best means to satisfy them. They seem closer than members of other clusters to Hume's idea that "All morality depends upon our sentiments" (Hume, 1965a, p.227).

They tend to perceive the notions of rationality and justice as independent insofar as they argue that a person can be just without being rational, and vice versa. However, they are related given that they are based on the same ground: the satisfaction of people's self-interests. What is *rational* is what contributes to the satisfaction of the self-interests only of the decision maker, and what is *just* is what satisfies the self-interests of the decision maker and the person with whom s/he interacts to take the decision (such as his/her counterpart in a negotiation process).

Cluster 3 is the only cluster where only a minority of its members claim that people should act justly during a negotiation process, particularly when this opposes their desires or interests. For the majority of them the defence of self-interests has priority

[152] In research on family mediation Dworkin and London (1989) established that law professionals used more narrow boundaries (which involved only those present at the mediation process) than health professionals (who included family members not present at the mediation process) for determining what a fair agreement is.

over justice. They assume the *good* is the *satisfaction* of *desire*. For them the right is identified as that which maximises the latter good. Rationality is linked to maximising this good. The maximisation of the sum of utilities is more important than the distribution of those utilities among individuals. They seem to hold a conception of subjects as governed by self-interested motivations, with little else being of importance to them.

### 12.2.4 Cluster 4

This is the largest cluster among the respondents. Cluster 4 members are associated with lower income groups compared to cluster 3 and 5 members. However, their incomes are on average higher than those of cluster 1 members.

Their conceptions of justice are probably the most similar to those of cluster 1 members, although there are differences. The values that they consider most important for the well-being of a community are justice, solidarity and interpersonal understanding. After cluster 1 members, the individuals from this cluster and cluster 2 are the ones most concerned with satisfying the needs of the community and the common good. They are more concerned with the needs of the community than the members of other clusters, except for those in cluster 1.

Many of them appear to be concerned with equality when it comes to mediation practice. However, they concede less importance to equality than cluster 2 members.

They tend to perceive the production of a just result and the production of an agreement between the parties as the most important goals of a mediation process. In this respect cluster 4 and cluster 2 members do not differ much from the whole group of interviewees. Despite their similarities with cluster 1 members, however cluster 4 members tend to attribute more importance to contributing to the harmony of the community as a goal of mediation practice. They consider justice and impartiality as the most important virtues that should prevail in the practice of mediation, and they attribute more importance to the search for the common good (the good of the whole community) than members of other clusters.

Cluster 4 members are concerned with the imbalance of power between the parties during mediation processes, an imbalance that they regard as a threat to the disputants' autonomy. In the presence of this imbalance they favour a mediator's intervention that is intended to introduce a balance of power between the parties.

They often make references to "the good". This notion seems important for them, though not as much as for cluster 1 members. 40% of them spontaneously argued that a mediation is just if it is good for the community in general, or at least for all of those affected by the mediation. Moreover, the majority of them consider that the common good forms part of the basic ground for deciding what is rational.

Their moral frameworks do not show a tendency towards consequentialist ideas like the one that can be found among clusters 3 members, and among some cluster 2 members. Their moral frameworks seem to be based more on deontological and virtue theory elements. For instance, like cluster 1 members they are particularly concerned with guaranteeing the respect of the individuals' freedom of expression during mediation processes, even if this may imply diminishing the satisfaction of their interests.

Cluster 4 members claim that people should act justly in a negotiation because of a wide variety of reasons. However, their most quoted reasons are that justice contributes to the "common good" and to "the good" of those who enact it, and that justice has priority over other values and interests because justice is good in itself. They also emphasise the good consequences that justice brings (such as preventing future conflicts). Therefore, like Plato (1941), they argue that justice is good in itself *and* for its consequences.

### 12.2.5 Cluster 5

Cluster 5 members (as well as those in Cluster 3) are associated with higher-income groups compared to other clusters. Individuals from cluster 5 and 1 are on average older than individuals from other clusters.

The moral framework of this group can be considered the result of a mixture of deontological and consequentialist elements. Its members stress the satisfaction of people's interests while at the same time emphasising the respect for certain moral principles. Their deontological tendencies appear stronger than those observed in clusters 2, 3 and 4. Their answers are frequently based on the notions of respecting some ethical principles, people's rights, and the law. They consider the values of "autonomy", "personal development" and "respect for the law" important to the well-being of a community. They value comparatively less than other groups "interpersonal understanding" and "harmony". In brief, they give more importance to values directly relevant for the development of the individual rather than the community.

Like cluster 3 members, they regard poverty as irrelevant for taking decisions in relation to distributive justice. Likewise, they are less inclined to think that it is correct to sacrifice what they see as individual property rights for satisfying the pressing needs of some poor individuals, and in particular the needs of a community. People's rights have precedence over people's needs. They also appear to be less inclined to consider correct the protection of the world of non-human living organisms when this protection hampers the production of economic benefits for the parties and/or when it can be seen as conflicting with an individuals' property rights.

"To produce a just result", "to produce an agreement between the parties" and to "satisfy the interests and needs of the parties" are regarded by cluster 5 members as the most important goals of a mediation process. The last goal, which should be the main goal according to cluster 3 members, is important for cluster 5 members but it has no priority among them over the respect for some moral principles that they perceive (which include some not very well-defined principles of justice).

The virtues that they perceive as most important for a mediation process are autonomy, speed in resolving the dispute, and justice. They give particularly low value to the search for social harmony, solidarity and the common good. The majority of them think that mediators should intervene very proactively in a mediation process to promote justice and just solutions if there is an imbalance of power between the parties. However, if this imbalance is absent, they are divided between supporting a

conception of the mediator as someone who ought to be very proactive in promoting just solutions among the parties, and supporting the idea that a mediator has to let the parties reach whatever outcome they can choose.

Although they are concerned with the maximisation of the parties' interests, they are also concerned with promoting equality when confronted with problems of distributive justice. Thus, they sometimes try to strike a balance between these two criteria. However, for them the respect for people's rights (such as freedom of speech) seems to have primacy over increasing the benefits for the parties in a mediation process.

Some cluster 5 answers reveal that, like Aquinas (1964), they praise virtues because of the will of the decision-maker, and not because of his/her ability[153]. For determining whether a mediation is just, the good will of the parties and their freedom to take decisions matters more than the particular results that the mediation process can bring about. Like Kant, cluster 5 members seem to consider good will as good "through its willing alone" (Kant, 1991a, p.60).

They associate rational action in a dispute resolution process with looking for an agreement that maximises the satisfaction of the parties' personal interests, even if the agreement is not fair for the community. They tend to marginalise the community from their decisions about what is just in dispute resolution processes.

They tend to give priority to doing what is just precisely because it is just. They make references to some not very well-defined principles of justice that demand just action from them because justice is good in itself, regardless of any prospective gains or losses. In contrast to cluster 1 members, cluster 5 members appear to value principles of justice in themselves and not because of their contribution to achieving something else, such as the good. In this respect the conception of cluster 5 members seems to be close to a deontological position because they do not interpret the right as maximising the good (see Rawls, 1988) or some particular interests. In opposition to consequentialist doctrines, they tend to view the right as prior to the good. They are

[153] The attribution of moral importance to the quality of the human will has been stressed by Augustine (1873) and other writers such as Kant (1991a).

the ones whose opinions seem closest to Kant's (1965) notion that someone should do what is correct (such as acting justly or telling the truth) for the sake of duty, or just because it is right. However, they adopt a basic utilitarian theory of the good even though they embrace this rather different deontological theory of the right.

## 12.3 Perceptions of Justice in Mediation Processes and their Association with Other Variables

Variable *mediation_justice* represents the perception of how just the parties perceived their mediation processes to be (see section 9.4.2). Table 12.2 presents how fair all the 60 parties observed during mediation processes considered their mediation processes to be. The overall perception of all the 60 parties about the fairness of their mediation processes was very similar at the MCBC and at the MSUA, something which can be deduced by comparing Tables 12.2 and 9.4 (the latter only represents the answer for people observed at the MCBC). Table 12.2 indicates that 26 out of 60 (43%) disputants observed considered their mediation process "unjust" or "very unjust". I consider this result unsatisfactory, particularly because among the 114 service users interviewed "to produce a just result" was viewed as one of the two most important goals of mediation, and "justice" was seen as one of the two most important virtues for a mediation process.

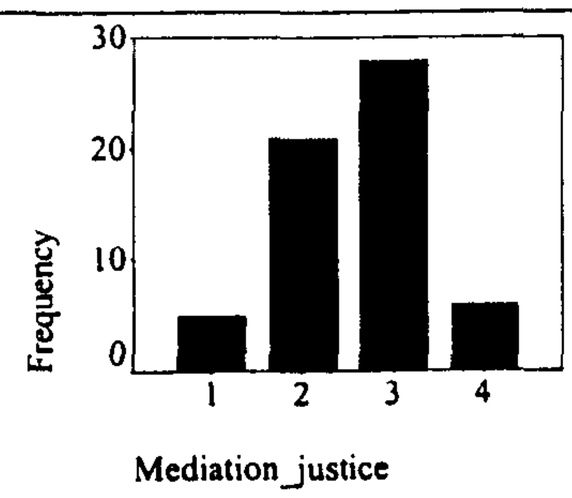
| Very unjust (1) | Unjust (2) | Just (3) | Very just (4) |  |
|---|---|---|---|---|
| 5 | 21 | 28 | 6 | |



Table 12.2. Parties' perceptions of how just their mediation process was at the MCBC and the MSUA.

Therefore, a question arises: "What can a mediator do to facilitate mediation processes that the parties perceive as just or very just?" Very few writings address this question, and many of those that do so do not seem to support their statements with

careful observations and/or studies of mediation processes (e.g. Parker, 1991; Kelly, 1995). In the previous chapters I have presented some ideas to address the aforementioned question (such as being sensitive to the parties' moral frameworks and conceptions of justice).

After the fieldwork finished I developed new ideas based on a detailed analysis of the interviews and drawing on the mediation literature and my discussion of mediation cases at the MCBC. To study the associations between the parties perception of how just the mediation process was and multiple factors explored by means of the interview, I calculated contingency tables, drew diagrams of relationships between the variables (e.g., boxplots), used statistical tests and studied diverse measures of association given the nature of the answers (which were codified using nominal and ordinal variables). The statistical tests used included the Kruskal-Wallis H test, the Jonckheere-Terpstra test, and the Mann-Whitney U test (see Hollander and Wolfe, 1973; Devore, 1982; Siegel and Castellan, 1988). The measures of association used included the Spearman's correlation coefficient for ranked data, the Kendall's Tau-b coefficient, and the Gamma statistic (see Siegel and Castellan, 1988; Howell, 1997). The significance level used in all tests was 0.05. Calculations were done based on the answers of the 60 persons who were observed during mediation processes and interviewed afterwards.

The results of this analysis were statements about the associations found between variable *mediation_justice* and several other variables, as well as a discussion of these associations and ideas on how this knowledge might be used by mediators to deal with mediation processes in ways that may improve the parties' perception of fairness of their mediation processes. These ideas were sent to the MCBC's staff given that they expressed an interest in them. However, because of the word limit of this document I will just summarise in Table 12.3 the most important relationships, and present my recommendations related to only one of the associations as an example.

| Variable | Relationship |
|---|---|
| *effect_on_understand_other* | The higher a party's perception that s/he understood his/her counterpart's arguments, the higher his/her perception that the mediation processes was just. |
| *relationship_with_counterpart* | The better the perceived relationship between a party and his/her counterparts before the mediation process, the better his/her perceptions that the process was just. |
| *effect_on_relationship* | Changes that are perceived as improvements in the relationships between the parties may favour the perception that the mediation process was fair. |
| *hostility_level* | The higher the level of hostility reported by a party, the lower tends to be his/her perception that the mediation process was fair. |
| *attention_received* | The more a party perceives that his/her points of view received attention during a mediation process, the larger the probability that s/he will consider this process to be just. |
| *level_of_concessions* | A party who considers that s/he has made too many concessions to reach an agreement tends to consider his/her mediation process as unfair. |
| *counterpart's_advantage* | The more a party feels that his/her counterpart has an advantage over him/her during the mediation process, the lower tends to be his/her perception that the mediation process was fair. |
| *mediator's_impartiality* | The more a party regards the mediator as impartial, the higher the probability that s/he perceives the mediation process as fair. |
| *pressure* | When a party considers that the mediator applied pressure during the mediation process, s/he tends to perceive the mediation process as less fair. |

Table 12.3. Significant relationships between *mediation_justice* and some variables as measured in type 1 interviews (for 60 interviewees and using $\alpha$=0.05).

As an example I will present the recommendations I gave the MCBC's staff in relation to the first relationship shown in Table 12.3: the higher a party's perception that s/he understood his/her counterpart's arguments, the higher his/her perception that the mediation processes was just. It can be argued that in a dispute the better a person understands the reasoning processes and feelings that contribute to the arguments of his/her counterpart, the more likely it is that s/he will perceive why the other party considers his/her proposals and positions as fair. Sometimes this leads the party to realise that his/her counterpart is not simply trying to impose his/her will on

him/her, something that by itself seems to reduce perceptions of unfairness. Moreover, when a party understands his/her counterpart's arguments s/he may even develop sympathy towards his/her counterpart's conception of justice. The more both parties understand their counterparts' arguments the more likely it is that they can develop an integrative negotiation (Fisher and Ury, 1981; Raiffa, 1982; Bazerman, 1990). Integrative negotiations promote win-win solutions that are more likely to be perceived as fair than the win-lose solutions that are usually produced by distributive bargaining processes (Albin, 1992), and they are more likely to satisfy the conceptions of justice of both parties (Albin, 1992; Messick, 1993). Therefore, mediators who are interested in contributing to the parties' perception that their mediation processes are fair, may promote integrative negotiation emphasising the parties' understandings of their counterparts arguments, particularly in relation to justice issues. Mediators should contribute to helping the parties make explicit why they consider that their proposals are fair, and promote critical reflexivity about this issue.

The above was just one of the many recommendations made to the MCBC. While I would have preferred to have discussed the data as part of an action research process (as I did following my interim analysis), the fact that I returned to England prevented this and required the production of a traditional summative report.

Having discussed associations between a variety of variables and perceived fairness, I will now move onto the final subject of this chapter: the effects of differences concerning justice between the parties and their mediator on evaluations of the fairness of mediation processes.

## 12.4 Effects of Differences between the Mediator's and the Parties' Conceptions of Justice on the Parties' Perceptions of the Fairness of the Mediation Process

An analysis of the data suggests that what seems to be important in affecting how just a party perceives his/her mediation process to be is not the particular conception of justice of that party, but:

1. The parties' perception of how several factors affected the mediation process (see Table 12.3).
2. The *relationship* between the party's conception of justice and the conceptions of justice of his/her counterpart and the mediator.

The latter point is crucial and is discussed further below. The results of the analysis suggest that the parties' perceptions of how just mediation processes are depend on the *interaction* of several elements (such as the interaction between a party's conception of justice and those of the mediator and his/her counterpart). This highlights the importance that the dialogues and non-verbal interactions that occur during mediation processes have on the parties' perceptions of how fair these processes were.

Although I have argued that the way mediators practised mediation seemed to favour certain conceptions of justice over others (mainly by sometimes emphasising legal issues and other times banning certain topics from being discussed), I have also shown that mediators favoured outcomes and conceptions of justice that conform to their moral frameworks, interests, and conceptions of what is rational (see section 10.3.2). Moreover, my observation of mediation cases leads me to conclude that the second tendency is more important than the first one. Evidence of this is, for instance, my observation that mediators' references to legal arguments were not carried into all cases but basically only into those *where the legal arguments supported the mediators' particular conceptions of justice*. Otherwise, mediators preferred to ignore the legalities. Overall, mediators tend to favour conceptions of justice that are similar to their own conceptions, or conceptions with which they share some basic assumptions or beliefs.

On the other hand, a careful analysis of the mediators' interviews leads me to the conclusion that the conceptions of justice of the 11 mediators observed are quite diverse and that they can be viewed as belonging to different clusters (among those clusters identified in section 12.2). This observation was supported by the results of a discriminant analysis[154]. The diversity in the mediators' conceptions of justice, the

[154] Following Dillon and Goldstein's (1984) advice I developed a discriminant model where the dependent variable was cluster membership, and the independent variables were those used in the

diversity in the parties' conceptions of justice, and the observation that mediators tend to favour conceptions of justice that are similar to their own or share some basic elements with them, help us to understand why no association was found between *cluster_membership* and the way the parties assessed the fairness of their mediation processes.

Now I will analyse the relationship between a party's perception about how just the mediation process was (*mediation_justice*) and the differences between his/her conception of justice and those of his/her counterpart and the mediator. My main hypothesis in this case is that under the circumstances in which mediation was carried out at the MCBC and the MSUA during the period that the fieldwork was done, the larger the differences in the conceptions of justice between the persons who came together at a mediation process, the larger the probability that at least one of the parties would consider the mediation process to be unjust. To test this hypothesis I conceived two new variables that point to how different the conceptions of justice between the parties and the mediator are. I will assume that differences in the respondents' answers to questions associated with variables[155] *v2.i* (for *i*=1,...9), *v4*, *v5.11*, *v5.21*, *v5.22*, *v5.31*, *v5.32*, *v6.1i* (for *i*=1,3,4,5,6), *v6.2*, *v7.i* (for *i*=1,...,9), *v8.1i* (for *i*=1,...,4), *v8.4*, *v8.5* and *v10.2*, reflect the differences in their conceptions of justice. This is a reasonable assumption given that these questions were carefully conceived to uncover important elements of the interviewees' conceptions of justice. Therefore, given the previous assumption I conceived a single measure that indicates how different the responses of two different persons to the previously mentioned questions are. The literature calls these dissimilarity measures (Johnson and Wichern, 1992). Taking advantage of Restle's (1961) demonstration that nominally scaled data can be characterised in distance terms, and the fact that several types of scales were used in different questions, I decided to use distance type measures (see also Dillon and Goldstein, 1984). My solution for measuring the dissimilarities between people's answers was to calculate the Euclidean distance between their answers, after standardising all variables first. The Euclidean distance measure was used to calculate two new variables:

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cluster analysis. After refining this model to avoid collinearity, and later cross-validating it (see Tabachnick and Fidell, 1996; SPSS, 1999a; Statsoft, 2001) the model suggested that mediators could be classified into diverse clusters.

[155] These variables are identified in Appendix 1.

- *distance_to_mediator*. It is the Euclidean distance between the answers to the questions mentioned in the previous paragraph given by one party and the mediator who handled his/her case. It points to the dissimilarity between the conceptions of justice of one party and the mediator who handled his/her case.
- *distance_to_counterpart*. It is the Euclidean distance between the answers to the questions mentioned in the previous paragraph given by one party and his/her counterpart. It points to the dissimilarity between the conceptions of justice of one party and his/her counterpart.

These variables were used as the independent variables in several statistical models in which the dependent variable indicated whether a party considered the mediation process as fair or not. Given the small number of observations for *mediation_justice* equal to 1 and 4, I defined a new variable called "*perceived_justice*". This variable is a transformation of variable *mediation_justice*, which takes the value 0 when *mediation_justice* equals 1 or 2, and takes the value 1 when *mediation_justice* equals 3 or 4. In other words, *perceived_justice* takes the value 1 when the individual perceived the mediation process as just, and 0 otherwise. Using this variable as the dependent variable I built several logistic regression models that aim at explaining it in terms of *distance_to_mediator* and/or *distance_to_counterpart*. The models are presented in Table 12.4. They were calculated using data from the sixty interviews associated with the mediation cases observed[156]. The basic equation of all these models can be written as:

$$\text{Prob}(\textit{perceived_justice}) = \frac{1}{1+e^{-Z}}$$

where Z is specified in the third column of Table 12.4. For the models that contain only one independent variable the second column of the table contains a scatterplot of mediation justice against the independent variable. In these cases the fourth column shows the shape of the logistic regression curve. Finally, the last column contains the *Nagelkerke* $R^2$ statistic that indicates what percentage of the variation in the variable *perceived_justice* is explained by the model. Using the Wald statistic (Agresti, 1996) all the coefficients of the independent variables appear to be significantly different

[156] I first included all the 60 cases available in the model. However, when the dependent variable was *distance_to_mediator* one case was found to be an outlier using the next diagnostic tools: the deviance, the Studentized residuals and the Cook's distance (see SPSS, 1999b). Therefore, this case was excluded when *distance_to_mediator* was included in the models.

from 0 (using $\alpha$=0.05). The goodness of fit of the three models was evaluated using diverse methods, such as the likelihood-ratio test (see Agresti, 1996; Tabachnick and Fidell, 1996; SPSS, 1999b) obtaining satisfactory results. An analysis of the models led me to the following conclusions:

1. It seems that the larger the difference between the conceptions of justice of the party and the mediator (measured by *distance_to_mediator*), the higher the probability that the party will view the mediation as unjust, and vice versa. The value of the *Nagelkerke* $R^2$ statistic indicates that 40% of the variation in the variable *perceived_justice* is explained by the logistic regression model. This is a satisfactory result given that not only the differences in the conceptions of justice between the mediators and the parties can affect the parties' perceptions of how just the mediation process was. Other elements can affect these perceptions such as those discussed in section 12.3.

2. The larger the differences between the parties' conceptions of justice, the less likely it is that they will consider the mediation process as just. However, this association is not very strong as it is indicated by the value of the associated *Nagelkerke* $R^2$ (0.215). I consider that this is the case not only because other factors can also affect the disputants' perceptions of how just the mediation process is (see section 12.3), but also because many mediation processes I observed involved the use of distributive dispute resolution strategies[157]. Notice that in predominantly distributive dispute resolution processes, even if the parties have very similar conceptions of justice one person may end up at the end of the negotiation thinking that the result was just while the other might believe the opposite.

3. When the variables *distance_to_counterpart* and *distance_to_mediator* are included as independent variables in the logistic regression model, the *Nagelkerke* $R^2$ indicates that approximately 50% of the variation in variable *perceived_justice* is explained by the model. An analysis of the statistical results of the model and a comparison with the other models included in Table 12.4, indicates that in a

[157] In a strictly distributive dispute resolution process, the more one party wins, the more the other losses.

party's assessment of how just his/her mediation process was, the difference between the party's conception of justice and that of the mediator has in general a stronger effect than the difference between the party's conception of justice and that of his/her counterpart.

These results combined with the observation of mediation processes lead me to emphasise a conclusion I have already stated. Mediators use a directive behaviour—characteristic of the problem-solving approach—to facilitate mediation processes that substantially affects the terms of settlement and the procedural aspects of mediation in ways that strongly reflect the mediators' conceptions of justice. Mediators do not seem to be sensitive enough to the parties' own conceptions of justice. Moreover, their conceptions of justice sometimes seem to be an obstacle for facilitating mediation processes in ways that are perceived as fair by some parties, particularly when they facilitate mediation processes of individuals who have conceptions of justice quite different from the mediators' conceptions. The mediators' practice does not seem to be characterised by a movement toward what is alien outside-of-oneself (see Levinas, 1998a), towards a respect for alterity (see section 3.1.2).

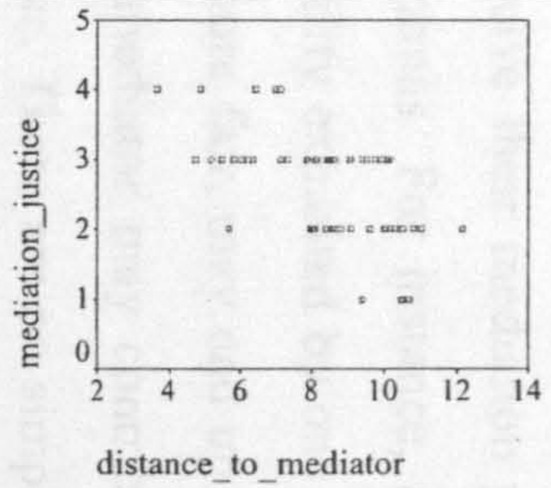
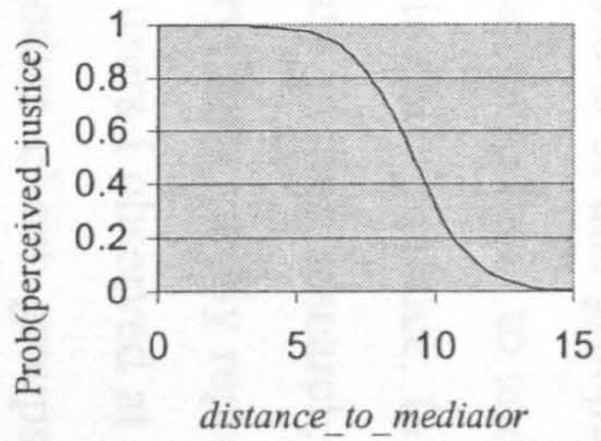
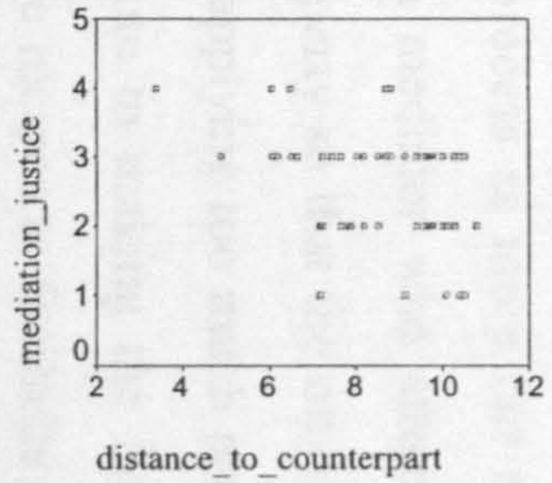
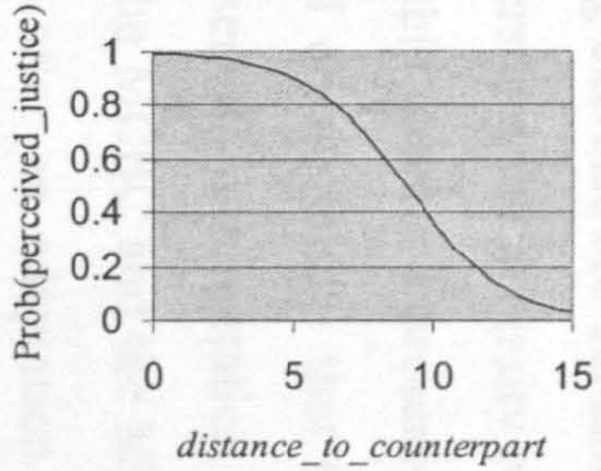
| Independent variable(s) | Scatterplot of *mediation_justice* against the independent variable | Parameter values in the main model equation | Plot of the logistic regression curve | *Nagelkerke* $R^2$ |
|---|---|---|---|---|
| *Distance_to_mediator* |   | $Z$= 8.544-0.932(*distance_to_mediator*) |   | 0.404 |
| *Distance_to_counterpart* |   | $Z$ = 5.082-0.564(*distance_to_counterpart*) |   | 0.215 |
| *Distance_to_mediator* and *distance_to_counterpart* | | $Z$ = 13.563-0.962(*distance_to_mediator*)-0.549(*distance_to_counterpart*) | | 0.504 |

Table 12.4. Summary of some logistic regression models.

## 12.5 Conclusions

1. It is not possible to claim that any two members of the whole set of individuals who were interviewed during the fieldwork have identical moral frameworks or conceptions of justice. However, the interviewees can nevertheless be grouped to understand the differences in their moral frameworks and also their similarities. The results of this grouping exercise are valuable for MCBC's mediators because they can help them to understand the diversity of moral frameworks they can find in their daily practice. In this chapter I presented the five clusters defined using the data in this research. I do not claim that these five clusters have universal validity: they merely represent an interpretation of notions of justice embraced by those users I observed at the MCBC and the MSUA. Replication of this exercise with other client groups, after an adaptation to the local circumstances and concerns, could produce further significant insights of local relevance to other mediation services.

2. In this chapter I also listed a set of factors that seem to have an effect on the parties' perceptions of how just their mediation processes are. I discussed an example of a set of ideas on how mediators can address these factors to increase the probability that the parties will perceive their mediation processes as more just on average that they currently do. However, a mediator who wants the parties to perceive their mediation process as more fair may end up confronting difficult dilemmas. For instance, a mediator who attempts to reduce the high level of hostility exhibited by one party so that the other perceives the mediation process as more fair, may end up applying too much pressure on the first party. Thereby the mediator may contribute to making the first party perceive the process as unfair. There are no simple recipes to facilitate mediation processes so that they will be more just from the parties' viewpoints. However, I suggest that a careful and critical examination of the strategies and tactics that are currently available in the mediation literature can help a mediator find out how to take advantage of the results presented in section 12.3 in order to facilitate mediation processes that are perceived by the parties as more fair. For instance, some mediators may think that nothing can be done about the finding that indicates that the better the perceived

relationship between a party and his/her counterparts before the mediation process, the more likely they will be to say that the mediation process was just. Although the mediator cannot change the previous relationship between the parties, s/he can still take advantage of the aforementioned finding. For instance, researchers have found that when a negotiator is offered a concession by an adversary s/he may devalue it simply because it was offered by that adversary (Oskamp, 1965; Stillinger et al., 1990). Thus the concession is perceived as having less value than if it was suggested as an option by a non-adversarial source. This devaluation process can contribute to make a final agreement appear less fair to the party that receives the concession. Therefore, an alternative is for the mediator to initially suggest this concession so as to diminish the effect of the devaluation bias. I observed an MCBC mediator who actually used this technique with good effect and without creating any perception of partiality or bias among the parties.

3. The analysis suggests that the parties' perceptions of justice are the result of the *interaction* of several factors (such as the interaction between a party's conception of justice and those of the mediator and his/her counterpart). Therefore, mediators who are interested in dealing with issues of justice should try to develop a more holistic vision of the set of factors and interactions that can affect the parties' perceptions of justice. I will address this topic further in the next chapter.

4. Statistical tests suggest that under the circumstances in which mediation was carried out at the MCBC and the MSUA during the period that the fieldwork was done, the larger the differences in the conceptions of justice between the mediator and a party, the smaller the probability that this party will perceive the mediation process as just. My observation of mediation processes suggests that similarities in the conceptions of justice between the mediator and a party sometimes contribute to help the mediator understand that party better and feel more affinity with his/her ideas. Sometimes mediators who share a conception of justice with one party seem biased in favour of ideas proposed by that party. On the other hand, when the conceptions of justice of a mediator and a party are quite different, the mediator may not share many of the ideas of that party and may downgrade them or simply ignore them. It seems that mediators are sometimes unaware that they

are imposing elements of their notions of justice upon the parties. On other occasions it seems that they act as if there was a unique conception of what is just, and they force it upon the parties to avoid an "injustice" regardless of the conception of justice of the parties. I think that mediators should become more sensitive to the parties' conceptions of justice so that they can develop a dialogue with them in terms of the conceptions of justice of all the parties and not just in terms of the conception of justice of one of them or in terms of the mediators' own conception of justice. As I will argue in the next chapter, the critical exploration of conceptions of justice can contribute to the development of this sensitivity during mediation training programmes. During the first part of my fieldwork, the mediators' practice I observed did not seem to be characterised by a desire to welcome what is alien outside-of-oneself (see Levinas, 1998a), to be open to alien conceptions of justice, rationalities, beliefs, and worldviews. Mediators frequently tried to establish relationships with the parties that reduced the Other to the Same (see section 3.1.2). A basic attitude of openness is necessary to enable mediators to take seriously notions of justice different from their own. I argue in favour of developing a practice of mediation guided by a critical desire that challenges *any form of reduction of the Other to the Same, to the mediators' thoughts and possessions*. This implies calling into question the exercise of the Same. By doing this mediators can develop radically new ways of dealing with issues of justice in mediation processes. They need to welcome alien conceptions of justice rather than being deaf to them and/or reducing them to the mediators' conceptions of justice. I claim that if this were done, the differences between the mediator and the parties' conceptions of justice would not be an obstacle for mediators to facilitate mediation processes that are perceived as fair by the parties. I am in favour of mediators respecting differences and taking action so as to help the parties to see the world through the eyes of others (Churchman, 1968); promoting double-loop learning so that the parties can change themselves and change their appreciation of their counterparts perspectives; and inviting the parties to be open to the idea that there can be multiple conceptions of justice on a single issue. Mediators can do this by using multiple strategies and tools, such as those I discussed in relation to double-loop learning; promoting role-reversal exercises that emphasise the exploration of alternative moral frameworks during private caucuses; and debating

partisan perceptions (for more strategies and techniques see, for instance, Mnookin and Ross, 1995; Stone et al., 2000).

# Chapter 13: Some Additional Ideas on Justice in Mediation Processes Based on the Fieldwork

In this chapter I present ideas that emerged as a result of some reflexive processes I initiated based on my fieldwork and on theories of justice from the different disciplines I examined. First I discuss how the conceptions of justice of the participants in mediation processes show the influence of those historical traditions that seem to have prevailed in the Colombian context. Thereafter, I present a model that highlights the type of elements that, according to my observation of mediation processes, might affect the way the disputants interpret what is just or unjust during these processes. I also discuss some observations in relation to three dimensions of justice I distinguish: the procedural, substantive and constitutive dimensions. Then I examine how understanding people's notions of justice requires exploring their conceptions of practical rationality. Some concepts from systems thinking can be useful here. Finally, I discuss the potential impact that my research project may have on the future of the practice of mediation in Colombia.

## 13.1 Theories of Justice and People's Conceptions of Justice

Previous sections have shown how the theories of justice presented in Chapter 5 can inform our understanding of the conceptions of justice expressed by those who participate in mediation processes. In this section I intend to draw upon the aforementioned theories to gain additional insights into the notions of justice of the participants in mediation processes.

Overall, the results of the interviews suggest that it is difficult to associate a particular philosophical theory of justice with the conceptions of justice that are common within the people that made up each cluster. Neither the conception of justice of the majority of the individuals I interviewed, nor the conceptions of justice I associated with each cluster map onto any well-established philosophical theory of justice. However, these theories are a valuable resource for improving our understanding of people's conceptions of justice (rather than a means for classifying people). On several

occasions I found that during the interviews some people's references to desert and other concepts appeared to be no more than a sign of the residual influence of several traditions as MacIntyre (1981) suggests. MacIntyre (1981) argues that contemporary people have inherited discordant fragments of previously consistent moral schemes[158]. In the interviews, elements of diverse and even incommensurate conceptual schemes were frequently mixed. These elements allude to ancient virtue concepts (e.g., the common good) as well as to individualistic and modern notions such as 'rights', 'utility' and 'social contracts'. In general, some individuals do not seem to have a coherent way of thinking and acting in relation to justice issues, but a mixture of social and cultural fragments inherited from different traditions (Catholic, Amerindian, Marxist, etc.). This might be to some extent the result of the uncritical adoption, imposition and discussion of diverse moralities among the Colombian population during the last two centuries (see section 4.3). These cases appear in all the clusters, though are more frequent in clusters 2 and 4. Let me illustrate this point with two examples.

- In one interview question a cluster 3 member briefly claimed that a mediation is just depending on its effects on the "common good". However, in the rest of the interview he disregarded the "common good" altogether, preferring to focus on self-interest.

- When I asked a particular party what justice was, he argued that "justice is done when each one receives what s/he deserves". This idea evokes Aristotelianism (Aristotle, 1949) and Christianism (Aquinas, 1929; Augustine, 1964). Ocassionally, he used this idea to take decisions on justice issues. However, on other ocassions when he *could* have used the aforementioned principle, he preferred to base his decisions on Marx's principle of justice: "from each according to his abilities, to each according to his needs!" (Marx, 1996a, p.215).

I found several people who openly expressed their doubts about selecting answers that were consistent with either their theistic or their secular conceptions of justice and

[158] MacIntyre (1988) claims that an individual's education is composed of a mixture of cultural and social fragments inherited from a wide variety of traditions (I explain this concept in Chapter 5). He argues that traditions only survive in a less fragmented way in certain communities which still have strong bonds with their past.

ontologies. On the other hand, individuals who appear to have grown in communities which still have strong bonds with their past (e.g., rural communities), seem to think more in terms of a tradition that is less fragmented. In brief, while the expressions of some individuals support the hypothesis that they use a fragmented moral language, the expressions of others do not reveal any significant fragmentation.

Among the interviewees' responses it is possible to distinguish the influence of several well-established conceptions of justice. The influences change from one individual to another, but it is clear that people's conceptions of justice are closer to some conceptions of justice from the literature than others. Probably the most important influence comes from Christian moral theories. This influence is clear among many interviewees of all clusters, but particularly in clusters 1, 2 and 4. For instance, among cluster 1 members their concern for the needy and the disadvantaged, and their emphasis on the common good can be seen as an expression of the conception of social justice advanced by the Colombian Catholic Church (e.g., Paul VI, 1967; John XXIII, 1995). Moreover, the majority of cluster 1 members as well as members from other clusters openly expressed their Christian beliefs during the interview. Like some liberation theologians (Gutiérrez, 1973; Sobrino, 1984), cluster 1 members frequently see justice as a communitarian notion that helps to create society among people. Additionally, like Aquinas (1929) and John XXIII (1995) many respondents (particularly cluster 1 and 4 members) tend to conceive justice as directing human beings towards the common good.

The interviews and observations of mediation processes suggest that some liberal ethical theories have had an impact on the notions of justice of the Colombian people. In particular, it reveals what appears to be an important influence from utilitarianism. This influence was clear in the conceptions of justice of members from several clusters, but particularly in clusters 3 and 5. For instance, some respondents, particularly cluster 3 members, assume the *good* as the *satisfaction* of their *desires*. Like Hume (1965a) they accept their desires, interests and feelings as unequivocal. They are particularly concerned with maximising their interests. For them, as for Hume (1965b), utility has primacy over justice and it is only because of its utility that we pay regard to justice. Therefore, when utility is endangered by justice, the majority

of cluster 3 members think that justice has to be abandoned. Like Bentham (1843), they reduce justice to a tool for serving utility.

As I pointed out before, cluster 3 members tend to equate justice with the satisfaction of the parties' interests using a consequentialist attitude that resembles ethical egoism. This conception evokes one of Bentham's definitions of the principle of utility. He defines it as "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question" (Bentham, 1982, p.12). However, from Bentham's writings it is clear that he was concerned with the happiness of the whole society. On the contrary, cluster 3 members tend to be concerned only with the satisfaction of the desires and happiness of those present at the mediation process, of those directly involved in the conflict. Cluster 5 members share the same belief. However, they mix it with deontological principles. They consider the increase of the happiness of those present at the mediation process as the basic test by which a mediation process can be evaluated, but the liberties and rights of the parties have to be strictly respected in the process.

As for Mill (1972b), for some individuals the notion of right is central to their conception of justice. For instance, this tends to be the case with cluster 5 members. Moreover, like Mill (Mill, 1972a,b; Berger, 1984), some of them seem to perceive rights as *instruments for maximising utility* that, nonetheless, have to be applied regardless of utility calculations.

In section 12.2.5 I already discussed some similarities between Kant's deontology and some of the respondents' answers, particularly those who were classified as members of cluster 5. Here I just want to point out that, in agreement with Kant's (1965) arguments about the Universal Principle of Justice, for cluster 5 members the good will of the parties and their freedom to take decisions matters more in determining if a mediation process is just than the ends that the mediation process can bring about.

I also found that the work of several ancient Greek thinkers, research on Amerindian communities, and the writings of some Marxists writers were valuable for

understanding the conceptions of justice of those who participated in mediation processes. Let me give a few examples:

- A young lady who grew up in an Amerindian community found it hard to conceive a personal morality apart from the communal, and viewed what is just or unjust as depending on what the community decides after discussing each particular situation.

- Some parties understood justice in mediation in a way similar to the one presented in the *Iliad*: "as something exchanged between parties, or added to both, in the course of a settlement; or, alternatively, as symbolizing the process of exchange" (Havelock, 1978, p.132).

- Some respondents assumed a position close to Marxism when they rejected the possibility of a universal morality and claimed that morality is the product of the historical development of specific social and economic interests (Marx and Engels, 1977).

The arguments presented in this section and in several preceding ones have illustrated that people's conceptions of justice can be better understood by taking account of formal theories of justice proposed by thinkers whose ideas have had an impact in those societies in which people live. Therefore, I consider that mediators can benefit from studying the theories of those thinkers, asking themselves what do those theories tell us about the conceptions of justice of our contemporaries. However, they should not focus only on what those thinkers say about justice because justice is a notion strongly connected with other ideas that form part of people's worldviews and particularly with those that form part of their moral frameworks[159]. Notions of justice have to be understood within the context of wider moral frameworks, identifying the past and present contexts that gave and can give these notions diverse meanings.

[159] For instance, expressions that connect the notion of justice with that of God and/or the order of the universe are frequent in the interviews, as well as among ancient Greek writers (Dihle, 1994), the Catholic tradition, and the Amerindian traditions.

## 13.2 Some Factors that Affect the Development of Notions of Justice in Mediation Processes

At the level of each of the disputants who participate in a mediation process several elements seem to affect his/her interpretations of what is just or unjust. As a result of the observation of mediation processes and an extensive literature review, I will briefly present a model that contains *only* those elements that I found have the strongest impact on the individual's interpretations of what is just or unjust. I do not claim that my model contains all the elements that affect the disputants' conceptions of what is just. What I claim is that the elements I include in my model are the ones I found more useful for interpreting the influences I saw occurring.

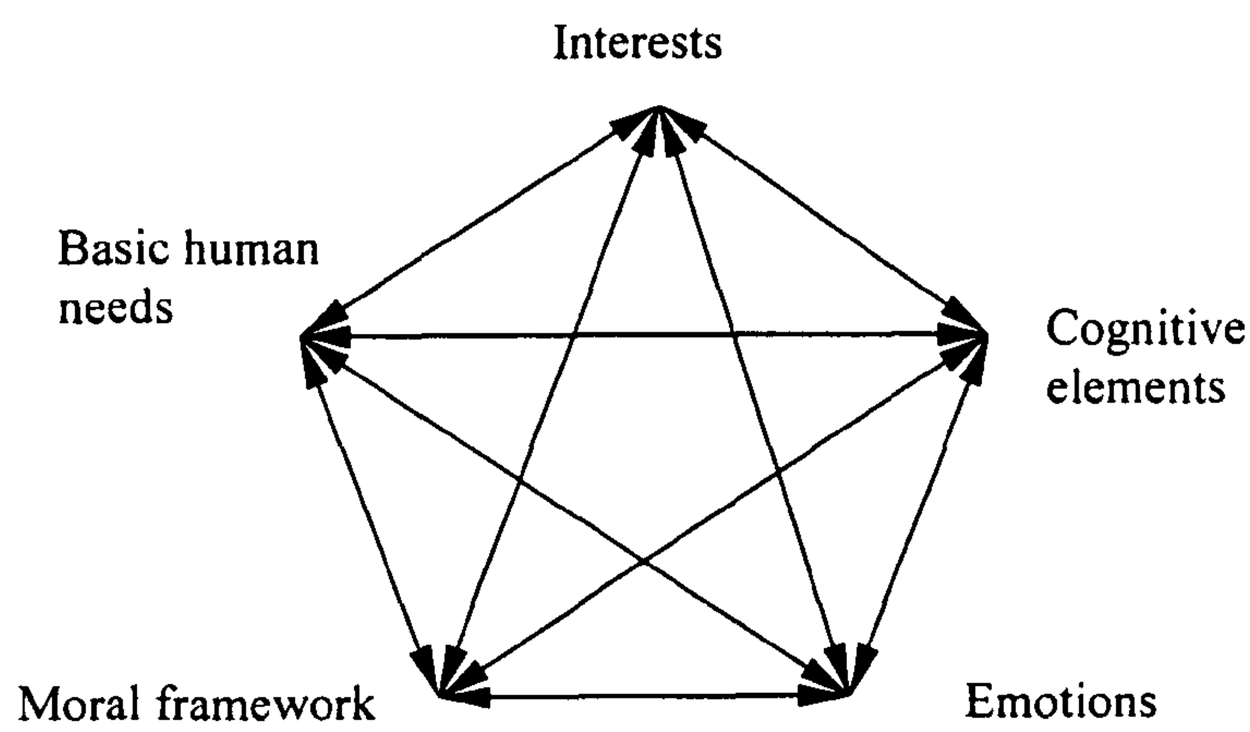



Figure 13.1. First model of the elements that influence people's notions of justice at an individual level.

Interests, basic human needs, moral frameworks, emotions and cognitive elements can be said to be part of the inner world of an individual, although they are strongly connected with the outer world too as I will argue later. I will briefly define these elements since I have discussed them more extensively in previous works (Pinzón, 1996b; Pinzón and Gleiser, 1996; Pinzón and Midgley, 2000):

- *Interests* make reference to the desires or preferences of an individual. For instance, in a mediation process the interest of one of the parties who wants to end

his business with another might be to get a large amount of money in the shortest possible time (see also Fisher and Ury, 1981; Lewicki, 1997). The impact of people's interests on their notions of justice can be quite strong. Sometimes, people even *equate* justice with the satisfaction of the parties' interests (see section 12.2).

- "*Human needs*" refers to basic requirements of the human species grounded in our common biological nature and, in particular, in our genetic inheritance. They establish common minimum requirements for individuals. Some of these requirements are fairly self-evident, such as nutritional minima and those related to the maintenance of health (see Burton, 1990; Sites, 1990; Doyal and Gough, 1992). For an example of the effect of human needs on people's conceptions of justice see Cosmides and Toomby (1992). As Pinzón and Midgley (2000) make clear, what counts as a 'need' is often a matter for debate, but there is wide-spread agreement on *basic* needs (e.g., sufficient food).

- I have already discussed *moral frameworks* and their influence on conflict resolution processes in Chapters 10 and 11. Conceptions of justice do not work independently of the other elements that form part of a party's moral framework. They affect and are affected by those elements. One of the most striking findings of this research is the importance many disputants whom I observed and talked with give to their moral frameworks. It was striking to me because I and the many people whom I have known that teach ADR courses both in Colombian and other Latin American countries used to exclude any discussion of people's moral frameworks during our courses. Moreover, the large importance that many Colombian disputants appear to give to their moral frameworks contrasts with the North American ADR literature which provides explanations of people's behaviour almost exclusively in terms of disputants' self-interests. This contrast might be related to cultural differences. Cross-cultural researchers (Brett et al., 1998) have found that U.S. negotiators have a particularly strong self-interest goal orientation compared to negotiators from other cultures. Probably as a result of the strong collectivist character that the Colombian society appears to have (see Hofstede, 1984, 1991), people in this society seem less driven by self-interests, and their behaviour appears to be guided more by other elements such as moral

frameworks and basic human needs. However, the lack of discussion of moral issues in the North American ADR literature may be the result of other causes, and people's moral concerns may also play an important role in North American dispute resolution processes. Whatever the case, the North American ADR literature exhibits strong limitations when it is used within the Colombian context.

- Several researchers have found evidence of the impact of *cognitive* elements in the determination of principles of justice[160]. For instance, Wu (1996) found that framing (how an object, event or situation is presented) can have an impact on how individuals decide between what is just or unjust (see also Walster et al., 1976; Lind and Tyler, 1988).

- *Emotions* may also influence people's notions of justice. For instance, some researchers (Tyler and Griffin, 1991; Brockner et al., 1990) suggest that procedural justice seems to be of particular importance in cases where difficult socioemotional concerns are present. My observation of mediation processes supports this hypothesis. For instance, I have already described how procedural justice concerns were significant in the Truck Case, while they were not in other cases where emotional concerns were less important.

However, the set of elements that I just presented are not the only ones that may affect people's notion of justice. The elements I have described can be viewed to some extent are part of the inner world of the individual. This invites us to look at what appears 'external' to the individual to find elements that can have an influence on people's interpretations and decisions about justice. I distinguish three types of elements:

- The social world. Power networks, on-going social discourses, cultural patterns, and in general elements from the social world affect the way individuals interpret what is just. The way we interpret the world is mediated by our collective history in the world. For instance, Folger et al. (1995) suggest that the post-communist

[160] The relevance of cognition to our understanding of conceptions of justice should be no surprise given that to speak or think about justice implies making distinctions about the world. This implies that we should not neglect the knower that makes these distinctions and its biological structure (see Llinas and Churchland, 1996; Llinas et al., 1998; Llinas, 2001).

countries of Eastern and Central Europe have a collectivist history that probably makes them well-disposed to egalitarian and need-based norms (see also Tyler and Belliveau, 1995; Douglas, 2001).

- The world of non-human living organisms. For instance, among several Colombian Amerindian tribes changes in the flora and fauna frequently affect what they consider just (Ramírez, 1996).

- The inanimate world. This is the world of objects not endowed with life. The scarcity or abundance of some resources (such as water, money, etc.) in relation to the desires and/or needs of human beings can affect people's perceptions of what is just (see Nozick, 1974).

The five elements that I included in Figure 13.1 and the three types of elements I just described may affect an individual's conception of justice during a mediation process. When a party participates in a mediation process his/her interactions with the other participants contribute to the construction and/or development of particular interpretations about what is just or unjust in the specific situation s/he is facing. This development of interpretations is informed by the elements of the party's inner world (see Figure 13.1) and by the elements of the social world, the world of non-human living organisms, and the inanimate world that make up the context of the situation (see Figure 13.2). The latter types of elements might be affected by the participants interactions. The constructive nature of this process highlights the importance of the mediator's intervention in the parties' perceptions of justice.

## 13.3 Some Comments on Procedural, Substantive and Constitutive Justice

Authors (e.g., Dworkin and London, 1989) who address justice issues within the mediation literature usually make a distinction between two dimensions of justice: procedural and substantive (see section 7.1). This distinction considers justice basically from the perspective of *carrying out actions*, either pursuing specific ends (as consequentialists might prefer) or guided by principles and/or rights that ought to be followed (as deontologists would have us do). However, it forgets the dimension of

*being*, which is central to virtue theory. It forgets that concerns for justice might focus on *the kind of person we are or the type of society we constitute*. I will call this dimension of justice the constitutive dimension, and will make some comments in relation to the three aforementioned dimensions.

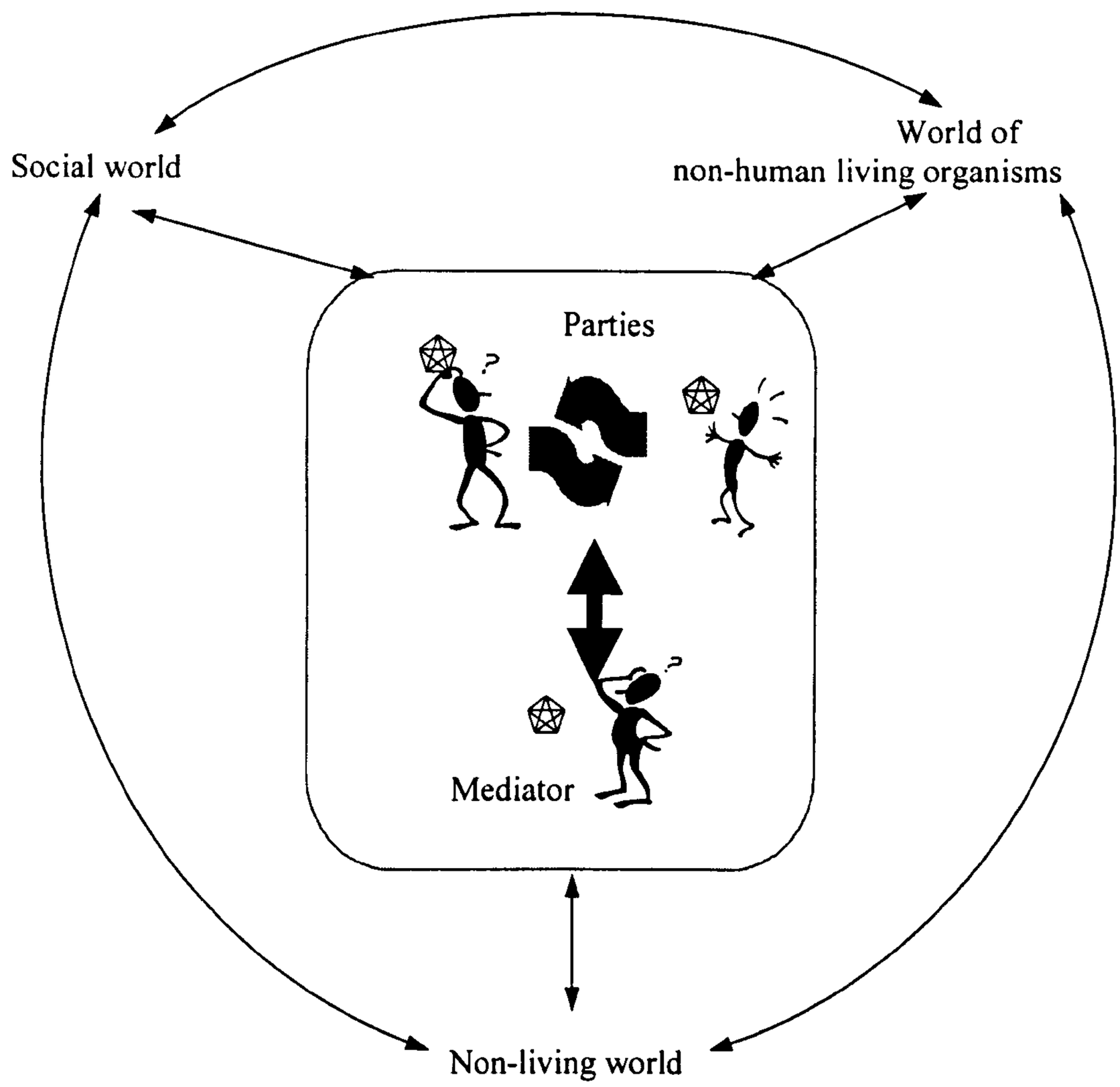



Figure 13.2 – Representation of the elements that participate in the construction of interpretations of justice during a mediation process. The elements represented in Figure 13.1 have been represented using the symbol ⬠.

### 13.3.1 On Procedural Justice

- As I argued in section 7.5.2, some ADR writers have the perception that if the right mediation procedure is followed, a process of negotiation between the parties leads towards justice. Justice is the product of a transaction. Under certain

circumstances, such as when the parties are in very unequal positions, the notion of justice as a transaction opposes the Catholic conception of justice which attributes natural justice primacy over any agreement, even if the latter is reached with the free consent of the parties (Paul VI, 1967). This situation was pointed out by some respondents, particularly from clusters 1, 2 and 4.

- The perception that justice is reached if the correct procedure is followed is also present among some mediators who regard justice as what is prescribed by the legal codes. Mediators who regard justice as what is prescribed by the legal codes sometimes conceive law and morality as independent realms, as happened with three of the mediators I interviewed at the MSUA. Mediators who think this way tend to ignore people's conceptions of justice and give a privileged status to the law[161].

- One sub-division of procedural justice is "pure procedural justice", which is common within the mediation literature. According to this notion the absence of an independent criterion for establishing a just outcome (independent of the one(s) used by the parties) requires mediation to be conducted as a fair procedure that therefore results in a fair outcome (see also section 7.5.2). The procedure is expected to translate its fairness to the result. The morality of the final agreement is derived from its voluntary status. This conception demands that mediators focus exclusively on the fairness of the procedure and be non-judgemental about the outcome. However, it faces difficult problems. On the one hand, as Sandel points out, "actual contracts are not self-sufficient moral instruments but presuppose a background morality in the light of which the obligations arising from them may be qualified and assessed" (1982, p.109). The fact that a contract is agreed in a voluntary way by the parties does not make it just from the perspective of many parties, as my interviews revealed. Also, assuming that the procedure can *guarantee* fairness is perhaps too much, especially considering that a mediation process is part of a much wider network of relationships between the parties, which the mediator may be unable to grasp in its entirety when considering what might constitute a fair process. Therefore, to focus exclusively on the fairness of

[161] I observed this during some MSUA mediation processes. Five out of the six parties who participated in the mediation processes facilitated by these mediators said that their mediation process was "unjust"

the procedure involves many difficulties and limitations. I argue that a mediator should consider other dimensions of justice as well.

- When a mediator uncritically accepts the expressed desires or interests of the parties as the basic ground they use for taking decisions in a mediation process, another problem can arise. The mediator assumes that they represent the parties' conception of the good. Hence, all that is left is finding the most effective means to satisfy them. However, the subject's conception of their expressed desires and interests might be more the product of a *superficial introspection* that *arbitrary* contingencies have happened to put in him/her rather than the result of reflexive choices. Moreover, as I have shown, many parties do not hold an idea of the *good* as the *satisfaction* of *desires or interests*. Therefore, by being open to critically exploring and even questioning the moral frameworks of the parties (their desires, notions of the good, etc.), mediators contribute better to processes in which the parties' moral frameworks are respected.

- The lack of concern that some mediators show in relation to justice issues (see Chapters 10 and 11) may be interpreted as allowing the operation of large power networks in mediation processes which enact relations of exploitation of some individuals over others. These power networks seem to escape the measures mediators take to guarantee a fair process. Therefore, from this perspective if mediation allows or promotes these types of relations (or instrumental, capitalist relations of exploitation in Marx and Engels' (1977) terms), then it can be fostering or supporting unjust relations.

### 13.3.2 On Substantive Justice

- None of the parties that I observed appeared to assume that the mediator's role was to promote exactly those results that were recommended by the law. However, some *mediators* made this assumption, sometimes with unsatisfactory consequences for at least one of the parties. An example is the Scratch Card case, where a legal interpretation dominated the first mediation session.

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or "very unjust".

- I found that the mediators' responses to the parties' moral disagreements frequently showed some of the characteristics of emotivism (MacIntyre, 1981). Emotivism is a moral doctrine that assumes "that all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character" (MacIntyre, 1981, p.11). Emotivism reduces morality to personal preference, and moral judgements about justice to subjective reports of feelings. Emotivism assumes that an agreement on moral differences cannot be achieved by a rational method (MacIntyre, 1981). During mediation processes I observed that mediators most often acted *as if* emotivism were true, despite not necessarily sharing its basic assumptions. They acted as if all moral judgements—including judgements about justice—were nothing more than expressions of personal preferences. Some mediators seemed to assume that an emotivist attitude was an explicit part of their role. They assumed a lack of any rational criteria for evaluating moral arguments and differences.

### 13.3.3 On Being and Justice, or *Constitutive Justice*

- Contrary to what an exclusive concern for procedural and/or substantive justice might produce, justice does not necessarily have to be linked to *doing* specific actions, following some procedures, respecting some principles or rights, or allocating gains and costs in a specific way. Justice can also be related to *being* a particular type of person and/or *constituting* a particular type of society (Plato, 1941). This position was advocated by some of the interviewees, particularly those in cluster 1. Additionally, some of the interviewees seemed to act in the mediation process and respond in the interviews taking seriously an idea advanced by Aristotle (1963) among others. This is the notion that a just person pursues just actions because they help in *constituting* and bringing about the good and best life for persons, and because just actions are a requisite for achieving any good.

- Those who embrace this conception tend to relate the morality of good to the unity of persons and to what connects them. This conception contrasts with alternative moral frameworks such as those based on a morality of rights for the latter is

mainly concerned with the boundaries of the self and its distinctiveness (Sandel, 1982).

### 13.3.4 Procedural Justice, Substantive Justice or Constitutive Justice?

I claim that mediators should take into account all these three dimensions of justice. Whenever they privilege one over the others, they end up marginalising issues that are important for some parties. For instance, when justice is reduced to procedural justice, the dimensions of *being* a particular type of person and/or *constituting* a particular type of society are easily marginalised during the mediation processes.

Mediation, according to the notion of constitutive justice, would have to emphasise learning. For instance, in the Scratch Card case the main thing that one party wanted was for the other to learn a lesson about personal integrity that produced some personal transformation of him.

## 13.4 On Reason and Justice

Understanding the conceptions of justice advanced by famous thinkers is inseparable from explaining the visions of practical rationality assumed by, or expressed in, those conceptions (MacIntyre, 1988). The same is the case for ordinary individuals who participate in mediation processes. Understanding their particular conceptions of justice also implies an effort to grasp their conceptions of practical rationality. This task is an undertaking a mediator should be prepared to carry out if s/he wants to develop a dialogue with the parties that appears rational to them. It can be interpreted as pluralism in the use of multiple rationalities (see Taket and White, 1996). This is crucial particularly when the meaning of practical rationality is quite different for the mediator and the party. For instance, for some parties to be practically rational is to act based on calculations of the benefits and costs to themselves of the alternatives that are discussed during the mediation process and to try to reach an agreement that maximises their own utility or that at least is superior to their BATNA[162]. Other

[162] The BATNA or "Best Alternative to a Negotiated Agreement" (Fisher and Ury, 1981) establishes a

parties may assume that to be practically rational is to act during the mediation process in such a way as to approach the ultimate good of human beings (or, alternatively, the common good).

The way the parties and the mediator interpret the rationality of a proposed agreement or a mediation strategy may be quite different. For instance, I observed that several mediators enacted 'textbook' strategies based on the idea that the larger the tangible 'benefits' the parties receive in a dispute resolution process, the better the results are for them (e.g., Raiffa, 1997). Moreover, they understood these 'benefits' in utilitarian terms regardless of the individuals' particular conceptions of the good. However, when the parties do not equate an increase in tangible assets with an improvement in their good, problems arise. For instance, this is the case when the parties understand their good as human beings as one and the same as the good for those people who form part of their community (as frequently happens among cluster 1 members). In these cases, while the mediator perceives the mediation process as 'benefiting' the parties, the latter interpret it as neglecting elements more important than the tangible issues that they have discussed.

Therefore, I argue that mediators should develop a basic understanding of the rationality of each party if s/he is to develop a fruitful dialogue with them based on their rationalities and not on the mediator's own rationality. Only in this way can the mediator adopt a client-centred approach and develop with each party a relation of *substitution*, i.e. a relation in which the mediator puts himself/herself in the place of the other, not to find out how to take advantage of him/her, not to subsume him/her, but to answer to his/her needs, interests and moral frameworks (see section 3.1.2).

The mediator should be able to grasp what each party's rationality requires of him/her, as well as the specific mode of rational justification that a party expects of an agreement to consider it legitimate. Only if a mediator is sensitive to parties' practical rationalities and modes of rational justification can s/he respect the parties' rationalities, help the latter reach agreements that make sense in terms of those rationalities, and promote critical reflexivity as well as double-loop learning about

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"lower bound for the minimum requirements of a negotiated agreement" (Neale and Bazerman, 1991, pp.18-19) (for more details see Bazerman, 1990).

those rationalities. In cases where the parties express diverse rationalities it may not be possible to reach a consensus on a single rationality, neither is it desirable to press the parties to reach such a consensus. Reductions of the Other to the Same should be avoided. However, calling into question the exercise of the Same is possible, particularly when oppressive relationships, discriminatory relationships, or major injustices in the relationship between the parties or between the parties and their contexts are suspected (see also Taket and White, 1996).

The mediator's imposition of a unique form of practical rationality or his/her inability to understand other rationalities than his/her own rationality, may reduce his/her capacity to understand multiple conceptions of justice. This may led him/her to facilitate mediation processes that are seen as unjust by the parties because they are not responsive to their concerns about justice. My idea of multiple rationalities explicit in the previous paragraphs implies a major difference between the way I address the issue of justice in mediation and the way it has been addressed by some of the most internationally respected scholars in the ADR field. While many of them have privileged a particular form of rationality which considers rational only what maximises the parties' interests (see Chapter 2) and have stressed the superiority of this form of rationality by claiming that it is the only correct one (e.g., Raiffa, 1982, 1997; Bazerman and Neale, 1992a), I argue in favour of being open to multiple rationalities and not claiming the absolute superiority of any one of them over the others.

Mediation processes can sometimes operate as forums where major disagreements about practical rationality can be explored and debated. To assume that the parties cannot do this is to underestimate them, and thereby to deny opportunities for interparty recognition, critical reflexivity, double-loop learning and the recognition that human transcendence disrupts totality (see Levinas, 1998a, 1999). Actually, the interviews revealed that many parties have a substantial ability to engage in complex debates about practical rationality.

In his/her work the mediator should be critical of the idea that there is an "objective", "neutral" and/or "impartial" rationality from which all rationalities can be examined and evaluated. S/he should not ignore the "inescapably historically and socially

context-bound character which any substantive set of principles of rationality, whether theoretical or practical, is bound to have" (MacIntyre, 1988, p.4). Also, mediators should be able to move between levels of rational discourse[163]. Disagreements in relation to justice and practical rationality should not be treated as irresolvable issues that depend only on arbitrary personal opinions, but as a matter of inquiry, taking into account the fact that standards of rational justification and justice are not universal. Rather, they are the product of historical and social processes that may form part of particular traditions and can be made explicit during debate.

### 13.4.1 Comments on Rationalities and Systems Thinking

During my discussions with my co-researchers at the MCBC we considered that "respect for the other" could be an important virtue for the practice of mediation (see section 11.4.1). Although we discussed this concept based on some of Levinas' ideas (section 3.1.2), I consider that several ideas from the systems thinking field may also be incorporated in this discussion.

My point is that mediators should try to avoid subsuming the parties under the hegemony of the Same, which is something I observed them doing several times. They should attempt to be more respectful of the alterity of the other (see section 3.1.2). I think that in this task notions such as the "constellation" metaphor and "discordant pluralism" (see Gregory, 1996) may be quite helpful. The "constellation" metaphor may be useful to invite mediators to consider the idea that our "appreciation of alien perspectives should be dynamic and contingent, like any constellation" (Gregory, 1996, p.618). The notion of "discordant pluralism" can be valuable for dealing with the parties' conceptions of justice. It can be presented as an alternative to the vision that in a conflict there is *a* unique just or fair result or process[164]. When mediators study diverse notions of justice (as we plan they will do in the future), there might be the danger that some mediators will consider one of these notions the correct

[163] For instance, whenever appropriate a mediator should be able to identify in a specific discourse not only its particular and unique characteristics, but also those that make it part of a much wider class (or classes) of discourses on practical rationality.

[164] It shall be noticed that discordant pluralism is one of the systemic versions of pluralism which explicitly appears more respectful of the Other's alterity: it "pays tribute to the differences, otherness, and alterity of alien paradigms or traditions" (Gregory, 1996, p.623).

one that they should impose upon the parties (as followers of the Transformation Story frequently do). To challenge this tendency an alternative conception based on discordant pluralism could be offered to mediators. The diverse theoretical conceptions of justice may be presented as usually irreconcilable, though sometimes capable of supplementing one another. To highlight incompatibility at a theoretical level between conceptions of justice is important for it can help prevent the dangers of imperialism by subsumption (Gregory, 1996) during mediation processes. A discordant pluralist perspective can help a mediator to explore how he can use discordant moral frameworks that the parties express during mediation processes to *critically challenge* and *supplement* one another, rather than trying to suppress these moral frameworks or attempt to reconcile them. In this way the mediator can avoid attempts to reduce the alterity of the parties during mediation processes (either his/her attempts or attempts initiated by the parties), can respect their differences, and can help them to learn from their differences and similarities.

The notion of discordant pluralism can also be supplemented by some of the models from the theory of boundary critique, such as the one I presented in section 10.3.2. This enables us to map the concerns of the parties in relation to their different ethical conceptions, including conceptions of justice.

## 13.5 Notes on the Actual and Potential Impacts of the Research Results

The results of the research have already had an impact in the organisation in which I did my fieldwork. Because of the large influence that this organisation has on Colombian and Latin American mediation practice through its training programmes and the leadership it exerts on other mediation centres, I expect the results of this research to have a much broader impact on Latin American mediation practice. Those mediators and members of the MCBC's staff who participated in the first part of the research process can already share their experience with the new mediators that are joining the organisation. For instance, they can make them aware of the relevance of people's moral frameworks and notions of justice during mediation processes. Moreover, they can begin to develop with the new practitioners a new way of practising mediation, grounded on a new set of virtues. This development process

could lead to results different from the ones we obtained during my fieldwork for they will be the result of a participatory endeavour in which new people enrich the process. My last months with the mediators and the MCBC staff indicate to me that the process will be influenced by our previous experience. Practices associated with new concepts such as critical reflexivity, double-loop learning and interparty recognition have become so embedded in the organisation that it is hard to imagine that they will not inform the new process. That is what happened with the old set of values and practices for years. New mediators adopted them. However, in that case their adoption was undertaken in an uncritical way. This is something I expect to be avoided in the future.

I think that the process that my fieldwork initiated will continue producing a mediation practice based on a new paradigm. I intend to participate in this process very actively by diffusing the results of my research, and in particular those analyses and reflexive processes that I undertook after finishing the fieldwork. I have tried to keep a dialogue about them with the MCBC's staff through electronic mail, but we are planning to have a much closer interaction again upon my return to Colombia. I have agreed with the Co-ormg that we will organise a series of meetings with both the old and the new mediators in order to discuss the results of my research, and to use these results as part of their learning programme on the practice of mediation. I hope this will end up making mediators more sensitive to justice issues in mediation processes, and to develop alternatives for dealing with these types of issues.

A new law favours this transformation process: Law 640 of 2001. The MCBC actively supported the approval of this law. It states that after January 5th 2002 an extra-judicial mediation process is required before presenting any family, civil, labour or administrative suit before the formal judicial system. According to the estimates of the Ministry of Justice, this will require mediation centres to handle over 1,200,000 new cases per year. This quantity exceeds the current capacity of mediation centres (MCBC, 2001). Approximately 360,000 of these cases will take place in Bogota. The MCBC (2001) estimates that it will handle 30% of these cases, i.e., 108,000 cases per year. After consulting a large number of lawyers, the MCBC arrived at the conclusion that this will require approximately 322 mediators. Hence, the MCBC will experience a major expansion between 2002 and 2003. The new law also demands massive

training programmes for mediators and the building of new facilities for mediation practice.

The large increase in mediation cases and resources assigned to them that these laws promote will increase the impact of any change that is introduced in the MCBC's mediation practice. The changes may have an impact on thousands of people in a short period of time. Therefore, I am pretty confident that the process initiated with my fieldwork will end up helping many Colombians to solve their conflicts in ways that they will perceive as more just and as more responsive to their particular circumstances and moral frameworks than if the fieldwork had never taken place.

### 13.6 Conclusions

1. A review of the conceptions of justice developed by the different traditions I discussed in Chapter 5 is a quite useful aid to developing one's openness and understanding of the disputants' and mediators' conceptions of justice who participate in a mediation process. Although in general it is difficult to associate a single formal theory of justice with the conceptions of justice of particular individuals, in their statements and behaviours it is possible to discern the influence upon them of several theories of justice. Therefore, mediators can benefit from being critically reflexive about these theories and asking themselves what they can tell us about the conceptions of justice of our contemporaries.

2. The results of this study suggest that Catholicism has had a strong influence upon ordinary Colombians' conceptions of justice. Additionally it reveals the substantial impact that some liberal ethical theories (such as utilitarianism) have had. The impact of Amerindian notions of justice upon the Colombian population is unclear. It seems to be important among some parts of the population, but the lack of basic research on these notions precludes any clear assessment of their impact. Other notions of justice, such as the Marxist one, seem to have had a smaller impact, although they are used by individuals on occasion.

3. I presented a model that highlights several elements that can affect the way the participants in a mediation process develop their interpretations in relation to

justice issues. I do not argue that the model contains all the elements that might affect these interpretations but only those that, according to my experience during the fieldwork, might have the most significant impact.

4. I found that the distinction between procedural and substantive justice that is used in the mediation literature is insufficient to address some concerns over justice that I found among the disputants. Therefore, I introduced the notion of constitutive justice. I argue that being aware of this dimension, which might be part of some disputants' conceptions of justice, can help mediators to be more sensitive and approach in more respectful ways a set of conceptions of justice that are usually undervalued and misunderstood in the ADR literature. In particular, s/he can be more sensitive to the dimension of *being* in people's notions of justice. The idea that concerns about justice might focus on the kind of person we are is important for understanding the conceptions of justice of many users of mediation in Colombia. Mediators should care about procedural, substantive, and constitutive justice. Whenever they privilege one over the others, they may marginalise issues that are important for some parties. This marginalisation implies disrespect for the parties' moral frameworks and human dignity.

5. Mediators should try to avoid subsuming the parties under the hegemony of the Same, which is something I observed them doing. They should attempt to be more respectful of the alterity of the other. I think that notions taken from the systems thinking literature such as the "constellation" metaphor, "discordant pluralism" (Gregory, 1996), and boundary critique could help mediators in this task.

6. Understanding the conceptions of justice of the participants in a mediation process implies an effort to comprehend their conceptions of rationality in general, and practical rationality in particular. The mediator's imposition upon the parties of a unique from of practical rationality or his/her inability to understand the parties' rationalities may reduce his/her ability to understand and be responsive to their conceptions of justice and concerns over justice issues. This may lead the mediator to facilitate mediation processes that are seen as unjust by the parties. Rather than assuming that mediation processes are spaces where practical rationality should be ignored or taken as given, they can be viewed as forums

where major disagreements about practical rationality can be explored and debated. This can open up opportunities for interparty recognition, critical reflexivity and double-loop learning.

7. Mediator training programmes should invite mediators to be reflexive on the idea that all conceptions of rationality and principles of justice have an inevitably historical and socially contingent character. Additionally, I would recommend training programmes to share with mediators the main findings of this research process, and invite them to be critically reflexive on both this process and its results.

8. This study reveals the limitations of many major assumptions common in the ADR field. For instance, the opinions expressed by a substantial number of the parties and interviewees challenge three major assumptions of the majority of writers in the mediation literature (see Chapter 2):

   - The *uncritical* attitude to the parties' interests.
   - The notion that *interests* are the unique or almost unique driving force that determine people's actions in dispute resolution processes.
   - The conception that for disputants justice has merely an *instrumental role* to conceal the pursuit of self-interests at the expense of their counterparts.

   These ideas and others already presented indicate that new approaches for practising mediation should be developed, based on assumptions that should be continuously open for questioning.

9. Given the large influence that the MCBC has on mediation practice in both Colombia and many areas of Latin America, I expect the results of this research to have a substantial impact. This inquiry, initiated with a critical systemic approach, is contributing to the development of a new way of practising mediation that is grounded on a new set of virtues and a greater awareness of its basic assumptions. For years those of us who have participated in the development of ADR methods in Colombia have noticed some of the difficulties of using mediation approaches developed outside Latin America in our own context. All we had been able to do

in the past was to make some minor adaptations to mediation approaches developed in the US. Although we tried, we never did anything more mainly because we were unaware of many of the implicit assumptions that underpin the mediation approaches we were using. We could not escape from the trap those assumptions constituted for us. One of the major contributions of this project has been to make us aware of many of these assumptions, so that we can become more critical of our contribution to processes of making up the world[165]. As a result we are now able to challenge some of our previous assumptions and propose a new set of principles (including critical reflexivity) that I believe can support a new way of conceiving and practising mediation. The new approach to mediation that we are developing is more sensitive to the particularities of the Colombian context. Specifically, it can be more responsive to the moral frameworks that coexist locally, and to the demands they make upon the community of mediators.

[165] Taket and White have pointed out to the importance of "reflecting continually on this process of making up the world" (1996, p.580).

# Chapter 14: Conclusions

In this chapter I will explain how I achieved the aims of the research that were explained in Chapter 1 (see section 1.4). I will present the outcomes that I achieved during the research and show how each outcome contributed to the aims of the inquiry.

1. In this thesis I developed a methodology for achieving the aims of the research process that is based on an ethical conception which, as far as I am aware, has never previously been used in the systems thinking field. I drew upon the works of thinkers such as Levinas, Derrida and Carrasquilla (see Chapter 3). This constitutes an original contribution to CST. The methodology is based on the idea that the personal Other involves an irreducible alterity, and therefore the Other is mainly unknowable. I argue in favour of practising a way of approaching the Other during systemic interventions which assumes that the Other is not just an object of knowledge (for knowledge is always *my* knowledge), that the Other cannot be fully understood using concepts. I argue in favour of approaching the Other guided by a desire to receive from him/her that which is beyond my current capacity, which involves being taught by the Other, as well as being appealed to and contested by him/her. As a result, learning, critical reflexivity and pluralism become central elements of the methodology. The development of this methodology contributed to aim 1 of the research.

2. The research involved a combination of methods and tools, guided by the creative design of methods (Midgley, 1990, 2000), that has not been tried before with CST interventions. It included methods and tools from CST and action science primarily, but also from statistics, systems dynamics, ADR, interviewing and the study of cases. Diverse combinations of methods were tried at different moments in the research process. I want to point out that important synergies were obtained by combining concurrently methods from the following fields:

   a. CST (particularly boundary critique) and action science. During the fieldwork my co-researchers and I synergised action science and boundary critique

methods to organise a participative dialogue (see chapters 9 to 11). In my view, the combination of CST and action science has significant transformative potential (see chapters 9 to 11). Let me illustrate this by making reference to some ways in which action science and CST can support each other. Action science can promote double-loop learning and the reduction of defensive patterns (DPs); help an organisation and its members to question the status quo; and create conditions where critical reflexivity, pluralism and reflexivity on improvement can be better practised. To complement action science, boundary critique can support more in-depth explorations and transformations of people's moral frameworks, basic beliefs and their associated strategies. Additionally, CST and boundary critique can enrich the practice of action science by questioning any form of reduction of the alterity of the Other to the Same, by encouraging people to welcome the Other as Other, and by promoting both theoretical and methodological pluralism.

b. CST, action science and statistics. Statistical data were used to encourage critical reflexivity and organisational learning, and the data were interpreted in group discussions as part of that learning. To give the members of the organisation the opportunity to participate collectively in the interpretation of the data through a dialogue process is something that has been suggested in previous CST research (e.g., Gregory, 1992). However, as far as I am aware, this study contains the first example of its explicit practice within CST. I used statistical methods in a critical manner and showed one way that a critical use of empirical-analytic methods can be practised.

c. CST, action science and system dynamics. Causal loop diagrams (CLDs), a system dynamics tool, were mixed with action science and boundary critique (see Chapter 10). I am not aware of a previous use of this combination of methods within other CST interventions. CLDs were useful for conceiving multiple models for interpreting the potential effects of mediation strategies and tactics, for developing critical reflexivity and double-loop learning in relation to people's mental models, and for assisting the co-researchers to overcome their DPs. This particular combination of methods contributed to achieving sub-aim 1.3 of the research.

The combination of diverse methods discussed above contributed to achieving sub-aims 1.1, 3.1 and 3.2 of the research. It provided my co-researchers and I with a useful means of finding out the assumptions and patterns of behaviour that constituted an obstacle for enhancing the mediators' sensitivity to the parties' conceptions of justice. Additionally, it helped us to explore alternatives for overcoming these obstacles and for transforming mediation practice so that mediators could became more sensitive as well as responsive to the parties' justice concerns

3. By developing new interpretations of the following notions I contributed to sub-aim 1.2 of the research:

   - The systems approach (Chapter 3).
   - Pluralism (Chapter 3).
   - Critical reflexivity (Chapter 3).
   - Double-loop learning (Chapter 9).

4. During the research I developed new models for creating new interpretations of disputes. This contributed to sub-aim 1.3 of the research. Specifically I made an original contribution by:

   a. Producing a development of Midgley (2000) and Yolles' (2001) models for analysing the overlapping and marginalisation of stakeholders' concerns (see chapters 3 and 10).

   b. Using this model to interpret the way the participants in a mediation process deal with the parties' concerns in mediation. This original contribution produced insights which, in my view, would have been quite difficult to reach by using traditional ADR tools for analysing the parties' concerns.

   c. Developing a new model that might be used in mediation processes to understand the way the participants in the process develop their interpretations in relation to justice issues (Chapter 13). This model is a contribution to a debate that can help mediators become more aware of how diverse factors can

affect the disputants' conceptions of what is just in mediation processes. It is an original contribution of this thesis to the dispute resolution field. Additionally it contributes to sub-aim 3.2 of the research because it can help mediators to become sensitive to the parties' justice concerns.

5. The research showed that the disputants' conceptions of justice were important for making sense of their behaviour in many of the observed mediation cases. In cases where the parties were not concerned, or were only marginally concerned, with justice issues, the impact of their conceptions of justice was not apparent. However, in several cases where the parties were significantly concerned with justice issues, their behaviour was strongly affected by their conceptions of justice (see Chapter 10). This outcome contributed to achieve sub-aim 2.1 of the research.

6. My co-researchers and I found that mediators tended to act awkwardly when the disputants addressed justice issues. In general, they preferred to deal with tangible substantive issues that they identified as being part of the disputants' interests. Mediators tried to avoid discussions about justice issues and even tried to shift the agenda to "factual" or tangible issues (such as money). In general, we found that mediators at the MCBC and the MSUA were skilful in dealing with facts and interests, but not with justice issues (as well as relational, emotional and moral issues). Additionally, in the workshop with more than 40 Colombian ADR professionals (many of whom were mediators and/or directors of mediation centres) I found very similar results, although in this case we worked with dispute resolution simulations rather than actual cases. The mediators' failure to allow the parties to explore and address justice and relational issues can lead to the escalation of destructive conflicts, increase the disputants' perceptions of unfairness, reduce service users' satisfaction, and diminish the probability of producing agreements. We observed all these effects during the fieldwork. The mediators' difficulty in dealing with justice issues is even more striking when we consider that, according to the interviews, the disputants attribute the highest priority to justice in mediation. This outcome contributed to sub-aim 2.2 of the research.

7. Mediators' interventions sometimes favour some conceptions of justice over others (see Chapter 10). This finding contributed to sub-aim 2.3 of the research. Several factors help to explain why mediators tend to favour certain conceptions of justice over others: the similarity between the mediator and the party's conceptions of justice, mediators' defensive routines, and mediators' training and their approach to mediation (see below).

   - Similarity between conceptions of justice (see chapters 10 and 12). Similarities in the conceptions of justice of a mediator and a party frequently contributed to helping the mediator understand that party better than a second party whose conception of justice was quite different. This sometimes resulted in the mediator taking actions that favoured the first party over the second.

   - Mediators' defensive routines. They may lead him/her to resist recognition of the above problem.

   - The training given to mediators affects what they look for in mediation processes. This training involves two basic elements: legal training and mediator training. In some cases the legal discourse seems to encourage the outcomes prescribed by the legal codes as important points of reference for determining what constitutes a just outcome. The mediation training received took for granted the Satisfaction Story. This story favours strategies and tactics that above all lead mediators to disregard issues of justice (see Chapter 11), although the logic promoted by these strategies and tactics could theoretically favour a "bounded utilitarian" conception of justice (see Chapter 7).

8. Under the conditions in which I observed the mediation processes during the fieldwork, the disputants' and mediators' conceptions of justice have a substantial effect on the parties' post-mediation perceptions of how just their mediation processes were. In general, the larger the difference between the conceptions of justice of the mediator and a party, the smaller the probability that this party would perceive the mediation process to be just. This occurs to a large extent because the mediators I observed are guided more by their own conceptions of justice than by the disputants' conceptions of justice, and by their use of a

directive behaviour that substantially affects the terms of settlement and the procedural aspects of mediation. Sometimes mediators act as if there is a unique conception of what is just, and they then force this upon the parties to avoid what they perceive as an injustice, regardless of what the parties think. I found that this promoted feelings of injustice among the parties. These results contributed to sub-aim 2.4 of the research.

9. Different parts of the research process allowed my co-researchers and I to identify several factors that the mediators can modify so as to affect the parties' overall perceptions of how just their mediation processes are. The identification of these factors contributed to sub-aim 2.5 of the research. Here I will briefly mention the factors which are discussed in this thesis:

   a. The way the mediator identifies, makes sense of and deals with issues of justice, as well as with the parties' practical rationalities and modes of rational justification (see Chapters 9 to 13).

   b. The way the mediator addresses his/her own DPs and those of the parties (see Chapter 10).

   c. How much the mediator promotes integrative rather than distributive bargaining (see Chapter 12).

   d. The extent to which the mediator is sensitive to and the way s/he affects the parties' perceptions about (see Chapter 12):

      - Their understanding of their counterpart's arguments.
      - Changes in their relationships with their counterparts.
      - Hostility experienced during the mediation process.
      - The attention paid to the various parties' points of view.
      - The concessions s/he makes to reach an agreement.
      - His/her counterpart's advantage during mediation.
      - The mediator's impartiality.
      - Pressure applied by the mediator.

During this research we began to make changes to the mediation practice in the MCBC taking into account the above factors.

10. My co-researchers and I identified several alternatives for overcoming the obstacles mediators have for enhancing their sensitivity to the parties' conceptions of justice and for transforming mediation practice so that mediators can become more responsive to the parties' justice concerns. This result contributed to sub-aim 3.2 of the research. The next are some of the identified alternatives:

- Exploring with mediation practitioners multiple conceptions of justice, especially those that appear to have had a strong influence in the society where the mediation centre operates, but also to be open to diverse interpretations of justice from service users. This involves exploring their practical rationalities, and avoiding the tendency to reduce the Other to the Same. These explorations constitute an original contribution of this thesis to the mediation field where justice in particular, and moral issues in general, have been largely neglected.

- Incorporating the discussion of justice issues in mediation training programmes. The latter should contain discussions about conceptions of justice, about barriers that may prevent mediators from dealing with justice issues in ways that are responsive to the disputants' concerns, and about alternatives for dealing with justice concerns in new ways. Practising critical reflexivity with mediators about this research process and its main findings may be a source of ideas on how to become more responsive to the disputants' justice concerns.

- Tackling DPs and reducing the inhibitions to double-loop learning that Model I theories-in-use may promote. Double-loop learning requires identifying and changing those theories-in-use which are counterproductive, and embracing theories-in-use which can help mediation practitioners overcome DPs. Becoming more responsive to the disputants' conceptions of justice may require changes in the mediators' moral frameworks, basic assumptions and action strategies. Action science provides concepts and methods that can help in this task. In this particular research I found the use of two main strategies to

encourage a reduction in the DPs particularly valuable: 1. to share up-front with the members of the organisation action science concepts and skills that can be useful in dealing with DPs. 2. To promote mediators' critical reflexivity on the way they practised mediation so as to design with them strategies, tools, and concepts that can help mediators to manage mediation processes in forms that prevent the activation of the mediators' and the parties' DPs.

- Developing diverse alternatives for tackling the *parties'* DPs so as to reduce them (see Chapter 10).

- Developing mechanisms for assessing the impact on mediation practice of changes that are made to transform the way mediators deal with justice issues that arise during mediation processes (see Chapter 11).

- Promoting critical reflexivity in mediation processes, and particularly in relation to issues of justice (see Chapter 11).

- Encouraging mediators to identify, explore and be responsive in a critical way to the parties' concerns over justice issues, and not merely to identify and work with 'facts' and interests during mediation processes. Mediators should explore and be responsive to other types of disputants' concerns during mediation processes including moral concerns (which include justice concerns), emotional concerns, and concerns over unsatisfied human needs. This proposal implies an original contribution to the mediation literature which has historically focused mainly on addressing the disputants' interests and exploring the 'factual' elements of mediation cases.

- Becoming more aware of other people's moral frameworks and conceptions of justice. By providing a description of some similarities and differences between the conceptions of justice of disputants who attended mediation processes (see Chapter 12), this thesis offers Colombian mediators a valuable starting point for exploring the plurality of the conceptions of justice of their service users. This is also an original contribution to the mediation literature, where no such exploration has been published before as far as I am aware.

- By identifying multiple factors that a mediator can affect in order to influence the parties' perceptions of how just their mediation processes are, this thesis provides valuable clues to mediators that they can use to modify their mediation practice so as to become more responsive to the disputants' concerns about justice issues (see Chapter 12). The thesis also illustrates with examples how mediators can take advantage of these clues.

- A mediator should be able to develop dialogues with the disputants in terms of the conceptions of justice of all the parties, and not just in terms of the conceptions of justice of one of them or in terms of the mediator's own conception of justice. By welcoming and working with the disputants' conceptions of justice, mediators may diminish the negative effect that the differences between their conceptions of justice and those of the disputants might have on how just disputants perceive their mediation processes to be. Moreover, mediators can also invite the parties to welcome their counterparts' conceptions of justice and assist them to understand those conceptions, helping them to see that there might be multiple interpretations of what is just, and that they can be critically reflexive on those interpretations. Notions such as the "constellation" metaphor and "discordant pluralism" (Gregory, 1992, 1996) might be helpful in this task.

- Distinguishing between the procedural, substantive and constitutive dimensions of justice in mediation processes can also help mediators to be more responsive to the diversity of the disputants' conceptions of justice. Mediators should care about these three dimensions in order not to marginalise issues of justice that are important for the parties. The identification of the constitutive justice dimension is an original contribution of this thesis to the mediation field. It challenges one common assumption within the mediation literature: the notion that the distinction between procedural and substantive justice is enough to address all concerns over justice that could arise in mediation processes. These two dimensions of justice are insufficient for addressing some people's justice concerns that are better understood if the constitutive dimension of justice is considered. This research result contributes to aim 5 of this thesis.

- During mediation processes, exploring how the parties view practical rationality can help mediators to understand and be responsive to the parties' conceptions of justice and their concerns over justice issues. This is because notions of justice and practical rationality are linked (see Chapter 13).

11. This thesis is a small but significant contribution to the decolonisation (see Chapter 3) of the minds of ADR researchers and practitioners who inhabit countries such as Colombia where colonisation remains in place. This implied an encounter with multiple and sometimes marginalised local groups (the Amerindian, the Creole, etc.) to receive from them what was beyond our capacity, and not to accept as sufficient encounters with Western thinkers, though these encounters are necessary. I advocate here a logic of "both/and", not of "either/or". This implies trying to be open both to the voices of the disputants and local population, as well as to the voices of Western thinkers, so as to develop new ways of conceiving dispute resolution methods. In this research my co-researchers and I began to develop a new way of conceiving mediation with its own set of virtues (see Chapter 11). I consider this an original contribution of this thesis to the mediation field, and it helped in reaching aims 3.2 and 5 of the research.

12. I developed a new framework for organising different interpretations of mediation that helped the MCBC members to become more conscious about the assumptions of their professional practice, and to appreciate new possibilities for transforming this practice (see Chapter 6). This framework contributes to aim 4 of the research. Currently it is being used in the training of new mediators to help them understand the plurality of the field; that they have to make choices when they practice mediation (about the goals of mediation, its orientation, etc.); and that they can contribute in the construction of *new* choices. I consider that the framework I produced highlights more than previous frameworks (e.g., Bush and Folger, 1994) the differences between the most common mediation approaches discussed in the literature (see Chapter 6).

13. The research led my co-researchers and I to challenge five basic assumptions of the prevailing mediation literature of the English speaking countries of the Western world:

- The notion that *interests*, understood as desires or preferences, are the unique or almost unique driving force that determines people's actions in dispute resolution processes. Given our experiences with mediation processes and our review of diverse research findings, my co-researchers and I concluded that other elements are also very important in moving people to act in particular ways when they deal with their conflicts. These elements include people's moral frameworks (including their justice concerns), emotional concerns, basic human needs, and cognitive capabilities (see Chapter 13).

- The *uncritical* attitude to the parties' interests. Usually the parties' interests are taken as given. This generates several effects we considered undesirable such as depriving the parties of opportunities for questioning their moral frameworks, basic assumptions, and action strategies. It denies the parties opportunities for personal growth that result from double-loop learning, and prevents them from taking responsibility for the Other as a human being (see Chapter 11).

- The notion of the good recurrently implicit in the mediation literature is one that assumes that the good is the satisfaction of the parties' desires or interests. This conception is implicit in many of the main strategies and tactics recommended in the mediation literature. These strategies and tactics are conceived to help mediators in assisting the parties to find effective means to satisfy their interests. However, many parties do not hold the aforementioned conception of the good (see Chapter 12 and 13). Hence, by promoting it exclusively or by enforcing it, mediators may neither respect nor be responsive to the parties' moral frameworks, their conceptions of the good, and their notions of justice. Mediators should be open to other conceptions of the good by exploring and being responsive to the parties' moral frameworks.

- The conception that disputants attribute justice no more than an instrumental role that conceals the pursuit of self-interests (see particularly Albin, 1992). During this research we found that many disputants attach great importance to their moral frameworks, and do not view justice instrumentally at all. A

contribution of this research is to rescue the role of practical rationality in dispute resolution theory.

- The assumption that morality refers basically to a set of restrictions that distinguish what is right from what is wrong, and that help to protect some disputants from the wrongdoings of others. By showing that disputants may hold a wide diversity of moral frameworks that depart from this conception of morality, this thesis also makes an original contribution to the field of mediation, where the multiplicity of people's moral frameworks remains largely unexplored.

Questioning the aforementioned assumptions, and conceiving alternatives to them is a contribution to aim 5 of the research. It is also one of the main contributions of this thesis for it poses a challenge to some of the basic underpinnings of a large part of the mediation and ADR literatures, especially work based on the Satisfaction Story of mediation. The development of alternatives to the aforementioned assumptions represents a contribution to the process of decolonising the Colombian mediation field (the assumptions challenged were previously accepted within my country without any critical examination).

14. This thesis presents an overall analysis of the notion of justice in the mediation literature (see Chapter 7), something which is absent in this literature as far as I am aware. The analysis presented in Chapter 7 reveals that the literature contains and favours, explicitly or implicitly, a diversity of conceptions of justice that go largely unnoticed. I summarise several factors that, according to the literature, may affect the way justice is handled and perceived during mediation processes, as well as debates and dilemmas that are of interest for they address issues that have an effect on the way mediators deal with issues of justice in their daily practice. I also show how some mediation approaches explicitly embrace specific conceptions of justice, while others seem to favour particular conceptions of justice in a more implicit manner. Given this situation, I argue in favour of promoting critical reflexivity among mediators about how their strategies, tactics and principles of mediation favour some conceptions of justice over others, as well as about alternative ways for dealing with justice issues.

## 14.1 FINAL WORDS

After finishing this research I plan to continue working on the development of peaceful methods of conflict resolution in Colombia, a country largely devastated by violence. In particular, with the MCBC's staff, we plan to continue with our work on mediation. The experience that we obtained during our research on professional mediation will be valuable for addressing other forms of mediation in which the MCBC is now beginning to work more intensively (such as community and school mediation programmes). I hope that this work will contribute to reducing the levels of violence in our society by offering people dispute resolution alternatives that take account of their views of justice, and which they experience as fair.

# Appendix

# Appendix 1 - Type 1 Interview

## A1.1 Introduction

This interview combines three modules. The first module is about the interviewees' perceptions of the mediation process. The second module is about their notions of justice. The third module contains personal data questions. The next is a version of the interview that was originally written in Spanish. In those cases where the answers to the question were codified using a variable I have put the name of the variable in grey colour close to the question. However, these variable names were absent in the original interview.

## A1.2 The Interview

**INTERVIEW**

This interview has exclusively academic purposes and it is part of a research process in which I am involved. I would like to thank you for answering the questions of this interview. I want to also guarantee you that your answers are strictly confidential. Your answers will help us to understand the characteristics of the mediation services that are being offered to the general public.

There are no correct or incorrect answers to the questions of this interview. Above all we would like to know what you think about them. Your answers are very valuable for us. Therefore, we would appreciate if you answer the questions in a sincere way.

*SATISFACTION WITH THE MEDIATION PROCESS*

*satisfaction_with_mediation*

In general, how satisfied are you with the mediation process in which you participated?

__ Very unsatisfied __ Unsatisfied __ Not sure ___ Satisfied __ Very satisfied

Specifically, what produces you this satisfaction or dissatisfaction?

If you and the other party did not reach an agreement, why do you think this happened?

*satisfaction_with_agreement*
If you reached an agreement, how satisfied are you with the agreement?

__ Very unsatisfied __ Unsatisfied __ Not sure ___ Satisfied __ Very satisfied

If you are unsatisfied with the agreement reached, why were you willing to sign that agreement?

*RELATION*

*relationship_with_counterpart*
Which of the following terms better describes your relationship with the counterpart just before the first mediation session?

___ Awful ___ Bad ___Not to bad __ Good __ Excellent

What was the nature of your relationship with your counterpart before the mediation process?

*effect_on_relationship*
Do you think that the mediation process changed your relationship with your counterpart?

___ It made it much worse ___ It deteriorated it somewhat ___ It left it the same ___ It improved it somewhat ___ It improved it substantially

Why?

Did the mediation process modify your emotions in relation to your counterpart? If your answer is "yes", how did these emotions change and how much did they change?

*hostility_level*
Did you felt hostility from your counterpart or from someone else during the mediation process?

___ Much hostility ___ Some hostility ___ Little hostility ___ No hostility

If you felt hostility, who was hostile towards you? How was he/she hostile?

If you felt hostility, do you think that the way the mediator behaved in the presence of that hostility was appropriate?

**Appendix 1**

*Level_of_intimidation*
Did you feel intimidated during the mediation process?
__ Very intimidated __ Somewhat intimidated ___ Not intimidated at all

*Effect_on_understand_other*
How do you feel the mediation process affected your understanding of the other party's arguments?
___ It worsen it ___ It left it the same ___ It improved it

*POINTS OF VIEW*

*attention_received*
How much attention did your points of view received during the mediation process?
__ No attention at all ___ Little attention ___ Not too bad attention ___ Good attention ___ A lot of attention

If something limited you in expressing your points of view, what was it?

*expression_of_emotions*
Were you able to express your emotions freely during the mediation process?
__ Never __ Little ___ Enough __ Much ___ Always

*level_of_concessions*
Do you think that you had to make too many concessions to reach an agreement?
__ Yes ___ No __ Somewhat

*THE MEDIATOR*

*satisfaction_with_mediator*
Are you satisfied or unsatisfied with the mediator who handled your case?
__ Very unsatisfied __ Unsatisfied __ Not sure __ Satisfied ___ Very satisfied

Please, judge in the given scale the following statements:

*counterpart's_advantage*
- "I felt that the other party had an advantage over me during the mediation".

| I always felt it | I frequently felt it | I rarely felt it | I never felt it |
|---|---|---|---|

- If your previous answer was affirmative, could you please explain this advantage? Was it a large or small advantage?

*mediator's_impartiality*

- "The mediator was impartial when he/she tried to resolve the differences between my(our) counterpart and me(us)"?

| Always was impartial | Not always impartial | Rarely was impartial | Never was impartial |
|---|---|---|---|

*PRESSURE*

*pressure*

Did you experience any pressure from the mediator during the mediation process?

___ No ___ Yes

If your answer was yes, please answer the next question. Otherwise go to the section called *JUSTICE.*

*pressure_strength*

a. How strong was this pressure?

___ Weak ___ Moderate ___ Strong ___ Very strong

b. In which way did the mediator apply that pressure?

Was it correct or incorrect for him/her to apply that pressure? Why?

*JUSTICE*

*mediation_justice*

Overall, was the mediation process in which you participated just or not?

___ Very unjust ___ Unjust ___ Just ___ Very just

Why?

1. Please, help us to establish what a good mediation process is by assigning priorities to the most important characteristics that a mediation should have. Please, assign the number 1 to the most important characteristic, the number 2 to the second one in importance, and the number 3 to the third more important characteristic.
A good mediation process should:
__ Contribute to the community's harmony. *v1.1*
__ Produce a just result. *v1.2*
__ Contribute helping the parties to take decisions in a more informed and conscious way. *v1.3*
__ Contribute to the development and personal growth (empowerment) of the parties in conflict. *v1.4*
__ Produce an agreement between the parties. *v1.5*
__ Contribute to the parties' understanding of the other's perspective. *v1.6*
__ Satisfy the interests and needs of the parties. *v1.7*
__ Produce satisfaction and benefits for all those who are affected by the mediation process but who are not present at this process. *v1.8*
__ Help to reduce the number of people who go to the courts. *v1.9*
__ Modify the personal relationship between the parties. *v1.10*
__ Contribute to the community's skills for resolving its own conflicts. *v1.11*
__ Save time and money to the parties. *v1.12*
__ Other. Which one? _____

Why do you consider more important the one to which you attributed number 1?

_____

_____

_____

2. Which ones should be the three most important virtues that should prevail in a mediation process? (Please, assign the number 1 to the most important one, the number 2 to the second one in importance, and the number 3 to the third more important one).
___ Impartiality *v2.1*
___ Justice *v2.2*
___ Pursuit of the common good *v2.3*
___ Pursuit of social harmony and solidarity *v2.4*
___ Speed in resolving the dispute *v2.5*
___ Respect for the law *v2.6*
___ Equity *v2.7*
___ Neutrality *v2.8*
___ Autonomy *v2.9*
___ The parties' complete comprehension of their options in the mediation process. *v2.10*
___ Other. Which one?

Why do you consider more important the one to which you attributed number 1?

_____

_____

_____

3. Please, complete the next sentence:
"For a mediation to be just it basically depends on ... _____

_____
_____
_____
_____
_____

4. During a mediation process the mediator realises that the two parties are heading towards one of four possible agreements. Let us call these agreements A, B, C and D. The mediator thinks that among the latter the agreement that is more just and more promotes the good is clearly A, then B, then C, and finally D.
The norms of the mediation centre establish that the mediator should reduce her/his intervention to the minimum that is required for the parties to reach an agreement. However, the mediator thinks that taking into account what is happening in the mediation process and the great imbalance of power that exists between the parties, if she/he reduces her/his intervention to the minimum the parties will probably reach agreement D (the party who has been more powerful since the mediation process began would prevail).
On the one hand the mediator's consciousness tells her/him that she/he should reduce her/his intervention to the minimum leaving the parties to express themselves freely and allowing them to reach agreement D. But another part of her/his consciousness tells her/him that she/he should intervene to promote a balance of power between the parties so that they can reach an agreement that is more just and better for them such as agreement A.
In her/his reflections the mediator thinks that to reduce her/his intervention to the minimum is what is correct because in this way she/he does not affect at all the autonomy or freedom of the parties. However, a more active intervention can be good because in this way justice and a balance of power between the parties are promoted.
What do you think the mediator should do?

_____
_____
_____
_____

Why?

_____
_____
_____
_____

If you decided that the mediator should reduce her/his intervention to the minimum, don't you think that the imbalance of power between the parties is putting the weakest party in a situation in which he/she has to negotiate in the absence of equity and justice? Why?

_____
_____
_____

If you decided that the mediator should intervene to try to achieve a balance of power between the parties, don't you think that by doing this the mediator acts against the autonomy that the parties should have to reach an agreement during the mediation process? Why?

_____

_____
_____
_____

5. Armando and Julián are two peasants who have their farms located one besides the other. Water is equally scarce on both farms. Suddenly they discover a well that can produce 100 litres per minute of water between the two farms. Currently each of the two peasants requires 80 litres per minute of water.

   1) First assume that Armando is a very poor peasant, while Julián has no financial difficulties at all. Armando has been a poor person all his life.
   According to your best estimates Armando needs at least 60 litres per minute of water to have enough resources to overcome poverty. Julián, whose financial situation is good, hopes to obtain the maximum quantity of water possible.
   What do you think is a fair distribution of the 100 litres per minute of water?

   _____
   _____

   ____ Armando *v5.11*
   ____ Julián

   Why?

   _____
   _____
   _____

   2) Let us now assume that both Armando and Julián enjoy a good financial situation, and that neither of them has ever made any contributions to their community. Instead, their community has enormous needs that could be largely solved with new sources of water (for instance, more water is necessary to increase the agricultural production required for resolving the starvation problems of many community's members). You have estimated that the community urgently needs 50 litres per minute of water for satisfying pressing and vital nourishment needs of many of its members.
   What should be a fair distribution of the 100 litres of water that are produced by the well located between Julián and Armando's farms? (How much water should be given to each one?)

   _____
   _____

   ____ Community *v5.21*
   ____ Armando *v5.22*
   ____ Julián

   Why?

   _____
   _____
   _____

   3) Let us now assume that both Armando and Julián enjoy a good financial situation, and that both have been equally good citizens. Currently the community has no water shortages or needs at the moment. Armando and Julián would like to use the water to increase the agricultural production of their farms.
   You know that a small forest covers part of the land of Armando and Julián's farms. This forest contains several endangered species of plants and animals for which the

forest constitutes the last shelter in the World. In the past the lack of water that affected both Armando and Julián (and that did not allow them to increase their crops) was what saved this forest from being completely destroyed. If they have had the water to increase the cultivated area, they would had destroyed the forest and cultivated in that land.
Now you know that each one of them still has a small area of his farm that he can cultivate and that is not covered by the forest. To cultivate this small area completely each one needs 20 litres per minute of water. If any of the peasants has available more water he would cut down the forest and begin to cultivate in the area that is now covered by the forest.
Which would be a right use and distribution of the 100 litres of water per minute?

_____

_____

____ Forest *v5.31*
____ Armando *v5.32*
____ Julián

Why?

_____

_____

_____

6. E1 and E2 are two businessmen who have began a negotiation to resolve a disagreement between them.

E1 is a very rich businessman.
E2 is a poor businessman.

E1 and E2 can reach different agreements. These agreements are shown in the following table. The table shows how much money would E1 and E2 earn (expressed in millions of pesos) if any of the agreements is reached. The last column of the table shows the sum of the earnings of the two parties.

| Agreement | Money for E1 | Money for E2 | Sum of the earnings of E1 and E2 |
|---|---|---|---|
| A | 30 | 31 | 61 |
| B | 40 | 37 | 77 |
| C | 55 | 45 | 100 |
| D | 59 | 47 | 106 |
| E | 65 | 49 | 114 |
| F | 72 | 47 | 119 |
| G | 75 | 42 | 117 |

1) Which of the previous results do you consider more just? _____
*v6.1i* (for i=1,3,4,5,6,7)

Why? _____

_____

_____

_____

2) Please, answer this question only if in the previous question you argued that you needed more information to take a decision. Otherwise, please answer part 3 of this question.

v6.2

What type of information do you need to answer the previous question?

_____

_____

_____

3) Let us assume that a mediator intervenes in the negotiation that we have just discussed. The mediator thinks that if the process goes on as it is the parties will reach agreement G[166] (E1 would receive 75 y E2 would get 42). The mediator thinks that this is not a just result and that she/he could promote another result by modifying the process without losing her/his neutrality.
Do you think that it would be correct for the mediator to modify the mediation process in the name of justice to favour a different result? Why?

v6.3

_____

_____

_____

_____

7. ¿Please, which of the following values are more important for the well-being of a community? Assign the number 1 to the one that you consider more important, the number 2 to the second one in importance, and so on.

___ Fraternity
___ Solidarity
___ Justice
___ Interpersonal understanding
___ People's autonomy
___ Personal development
___ Harmony
___ Respect for the law
___ Love for others
___ Another. Which one? _____

8. Hugo and Camilo begin a negotiation process to resolve a dispute between their companies. Hugo finds out that only one out of five possible agreements can take place. Each one of these agreements seems better than the others in one aspect but worse on others. Hugo realises that given his better negotiation skills, he can make the negotiation evolve so that one of the following options becomes the final agreement:

A. This is the agreement that is most favourable to Hugo's personal interests, although Hugo does not consider it just.
B. This is considered by Hugo as the most just feasible agreement between he and Camilo.
C. This is the agreement that best satisfies the personal interests of both parties (Hugo and Camilo), but not of the community (the agreement is not fair for the community).

[166] Note: If the party claimed that option G was the most just in the first part of this question, then the interviewer replaces "G" by "B" in this question.

D. This is the most favourable agreement to the common good, the one that contributes more to the good of the community in which Hugo and Camilo inhabit.
E. According to Hugo this is the agreement that best satisfies God's precepts (but neither the preferences nor the desires of the parties and the community).

If Hugo wants to act in a perfectly rational way, which agreement should he try to reach?
Agreement ___ *v8.3 (for i=1,...,4)*

Why does Hugo act in a perfectly rational way by doing this?

_____
_____
_____
_____
_____

Can a person be rational without being just in the resolution of a dispute? (Please, explain your answer.)

_____
_____
_____

Can a person be just without being rational?
__ Yes__ No __ It depends (Please, explain.)
Why?_____
_____
_____
_____

Should people act justly in a negotiation? __ Yes __ No *v8.4*

Why?

_____
_____
_____

Do you think that people should act justly even if the latter is against their desires and interests? Why "yes" or why "not"? *v8.5*

_____
_____
_____
_____
_____

9. Let us assume that you are helping two persons to resolve a dispute between them. Suddenly they ask you a question about something that happened in a similar case which had already been resolved. They know that you are perfectly well acquainted with that case. You know that your answer will favour that your friends reach either agreement 1 or agreement 2, because they have already agreed that their decision only depends on what happened in the previous case.
In your opinion agreement 1 is a just agreement while agreement 2 is an unjust agreement (you know that the parties share this opinion with you).
You know that if you strictly answer the truth they will select the agreement that you and them consider unjust (you all consider that this agreement is biased in favour of one of the

parties).
However, if you tell them a "merciful lie" they will select the agreement that both you and them consider just for all.
Should you tell them the truth or them a "merciful lie"? v9

_____

_____

Why? _____

_____

_____

_____

10. After a party Alfredo hit María with his car when she was crossing a street. Alfredo's car was exceeding the established speed limit. According to the law, Alfredo is responsible for the accident. As a consequence of the accident María lost one leg that was amputated at a hospital.
María sued Alfredo. Some days later he invited her to resolve this problem through a mediation process. Alfredo is worried. He thinks that he might end up in jail. María has very strong feelings against Alfredo. Additionally she experiences a strong depression as a result of losing her leg.

Do you think that it would be correct for María and Alfredo to reach an agreement through a mediation process?

_____

_____

_____

Which mechanism do you think is more adequate for addressing a case such as this one: a court or a mediation process? Why?

_____

_____

_____

Let us assume that Alfredo and María participate in a mediation process and both decide to reach an agreement. How do you think could be a just agreement between them?

_____

_____

_____

_____

What makes this agreement a just agreement?

_____

_____

_____

Who benefits from this agreement and how?

_____

_____

_____

_____

_____

_____

If in your answer to the previous question you did not mention Alfredo, do you think that the agreement should benefit or not benefit Alfredo? Why?

_____
_____
_____
_____

Do you think that for justice to be done Alfredo should be punished? If your answer is "yes", what should be this punishment be?

_____
_____
_____
_____
_____

11. Let us assume that in a mediation process in which two parties, *A* and *B*, intervene two sets of events can take place. (note: both A and B are interested in maximising their income):
    - *Set of events 1.* An agreement is reached that produces the following benefits for the parties (in millions of pesos):

| | *A* | *B* |
|---|---|---|
| Benefits | 20 | 30 |

During the mediation process the mediator limits *B*'s interventions because all others consider them "annoying". Frequently the mediator does not allowed *B* to say what he wants despite his protests and dissatisfaction because he is not allow to express himself freely. The mediator does this in order to achieve a settlement that maximises the benefits for both *A* and *B*.

    - *Set of events 2.* An agreement is reached that produces the following benefits for the parties (in millions of pesos):

| | A | B |
|---|---|---|
| Benefits | 12 | 20 |

During the mediation process B's interventions are never limited in any way although all others consider them "annoying". He is allowed to say what he wants. The mediator does not limit him in any way to participate freely in the process despite the fact that the mediator feels that this is going to reduce the benefits for both parties.

Which of the two **processes** can be considered more just? _____ *v11.1*
Why?

_____
_____
_____

Which of the two **results** can be considered more just? _____ *v11.2*
Why?

_____
_____
_____

If your answer to the previous two questions was different, which of the two sets of events do you consider more just globally? _____
Why?

_____
_____
_____

The result 1 favours more the interests of both *A* and *B*. Do you think that in order to know that something is just it is enough to examine if it satisfies or not the desires and preferences of the people? Why?

_____
_____
_____

Personal data about the interviewee:

Age: _____ years *age*

Highest educational degree achieved: _____
*level_of_education*

*subject_specialisation*
Subject specialisation (for persons who have an undergraduate degree) _____
_____

Type of job: *type_job*
_____
_____

Income group (1, 2, 3, 4, 5 or 6): _____ *income_g*

Gender: ☐ Male ☐ Female *gender*

Race: _____
*cultu_gr*

Where did you grow up? _____
_____
_____
_____

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