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ORIGINAL PAPER

Role of mediation for justice reforms and an increased access to justice

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Abstract:
The unrestricted access to both the courts of law and alternative dispute resolution (ADR), as judicial and extrajudicial means to resolve disputes are fundamental and equally important for facilitating better access to justice. This is related to the larger context defined by the European Union's policy to establish an area of freedom, security and justice. To this end, the European Parliament and the Council of European Union adopted on May 21st 2008 the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. This Directive became a key instrument for the promotion, the availability and the competence of mediation services in the European Union Member States.
As defined by its first article, the objective of the Directive is to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings". Fourteen years since its adoption, the Directive has not yet solved the "EU Mediation Paradox". Despite its benefits and savings related to time, costs and stress, unfortunately, mediation in civil and commercial matters is not used in more than 1% of the cases in the EU, as determined by the Study "Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU", issued by the European Parliament in February 2014.
This study shows that this disappointing performance results from weak policies promoting mediation in almost all 28 Member States. To serve the same goal of promoting mediation through legislative measures, the Romanian Parliament adopted in 2012 legislation based on the plaintiffs' mandatory attendance of an information session regarding mediation benefits before going to the court with a correlated sanction of case inadmissibility. The Romanian Constitutional Court found in 2014 that this model failed the constitutionality check, and mediation seized to exist practically in Romania ever since. The article analyses options for the next steps.
Keywords: *Mediation; access to justice; effective mediation policies; alternative dispute resolution.*

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Introduction

The Buckminster's Law derives from the 20th-century inventor and visionary R. Buckminster Fuller, who dedicated his life to "making the world work" (Buckminster Fuller Institute, 2022). His principle was based on changing paradigms rather than fighting realities. Simply put:

> *"You never change things by fighting against the existing reality. To change something, build a new model that makes the old model obsolete."*

It is common knowledge that litigation is costly in terms of costs, risks, energy levels, stress, and duration. This is not only the case in Romania and the European Union, but it cuts across continents and legal system models (i.e. civil law, common law). While some judicial systems encourage mediation, for example, through training, professional obligations on lawyers, and cost sanctions for failure to mediate in good faith, others leave less prescriptive in terms of adopting legal frameworks or connecting it with the courts' system. Some work to some extent, most do not. Due to most jurisdictions' strong procedural resistance, mediation remains a "*less frequently used alternative*" to traditional litigation (Thomas, de Wolde, Schutte, Schonewille, 2018: 59-63; D'Urso, 2018: 56-58). We have not yet succeeded in establishing a balanced relationship between mediation and litigation, as indicated by the EU Mediation Directive (European Parliament and the Council of the European Union, 2008). If this were achieved, mediation would be attempted much more often (De Palo, 2018: 11).

As per the examples mentioned above, there is a lot of talks nowadays about the apparent failure of mediation to live up to its potential. Reports published on paper and online, presented before institutions or at various conferences, point to the relatively low number of mediation cases compared to the number of lawsuits filling the logs of the courts and then draw the inevitable conclusion that mediation has missed the opportunity of (be)coming mainstream. Many specialists are not optimists about mediation given that in most countries there are no policies that mandate the attempt or the use of mediation before filing for litigation. Such required efforts to mediation become the norm in terms of expectations for effective mediation policies.

Our esteemed colleagues correlate an apparently low number of mediation cases to the principle of voluntary use and see the solution by reversing this principle. Simply put, their thesis can be summarised like this: if voluntary use of mediation results in a low number of mediation cases, then it is only logical that mandating people to use mediation will increase the number of mediation cases. They point to examples from certain countries that have introduced required efforts related to the use of mediation (or pre-action protocols) and, consequently, the quantitative dimensions of mediation practice has increased substantially.

No reason to wait any longer, they say, the numbers show mandatory measures a success; therefore, we should all press the legislators in all countries to introduce them as the only safe and sure way to make mediation function at the level of its true potential.

Such an approach was attempted in Romania in 2012; specifically, the plaintiff's requirement to attend a mediation information session prior to filing a lawsuit. This policy had not only (un)intended but disastrous consequences. Some may question the wisdom of drawing a general conclusion from just one particular situation, and we agree with them. Our aim is not to prove mandatory measures as an inept strategy for

promoting mediation, but only to, again, invite caution when numbers look good. Many other perspectives should accompany numbers to make mediation work for all.

The new legislation

A new demand-enabling legal framework for mediation came into force in Romania in July 2013. According to this new development of the mediation legislation field in Romania, the Claimant was required to prove that, before filing certain types of casesin court, s/he has attended an information session with a professional mediator where mediation advantages would be presented to ensure an informed choice for litigation or mediation. For informed decisions, the defendant was invited to this meeting and was free to accept or ignore such invitation. This requirement applied to severaltypes of cases like family, commercial, civil and, to a limited extent, criminal cases. The evidence of attending such a session was to be made in a certificate released by the mediator who provided the information session. According to the law, for their professional services related to the organisation of the information sessions regarding mediation benefits, the mediators could not ask for professional fees.

This development created a boost of optimism in the Romanian mediation community, and not only. At that time, a little over four thousand mediators were authorised by the Romanian Mediation Council to deliver professional mediation services in Romania. The community was about to triple in size to more than ten thousand mediators by 2014. One can see that a group of this significant size can be very effective in lobbying for better legislation.

Hence, a new piece of legislation (Governmental Emergency Ordinance no. 90/2012) adopted in a matter of urgency by the Romanian Government, to enter in effect starting August 2013, introduced the sanction of case inadmissibility if the Claimant failed to participate at the information sessions regarding mediation benefits. As a result, many mediators received requests to hold such information sessions, lawyers and their clients began to use mediators, and the judiciary supported this new way of filtering litigation. Undoubtedly, Romanian mediators began to be present in people's daily lives as a pre-trial protocol. Of the more than three million legal disputes in Romania, anecdotal estimates showed that parties would "consider" mediation in 1.5 million cases, increasing their average chances of settling their cases each year.

The Mediation Council created standards, the mediation providers started investing in infrastructure, and mediation came alive suddenly. At the same time, questions arose regarding costs, duration, accessibility, and quality, in short, about how successful this new policy can be with cases settled and decreased court dockets.

The actual implementation

One of the primary functions of the legal framework for mediation adoptedin 2012 and 2013 based on the mediation information session was to make citizens aware of how mediation can help and persuade them to follow this process, when appropriate, to prevent lengthy and costly litigation.

In reality, this was what actually happened in Romania, starting in August 2013. First, the Government and the Mediation Council had no data gathering system in place to understand the qualitative and the quantitative dimensions of the newly adopted model. Without reliable, ideally real-time statistics, any analysis of the attempted policy was based on opinions and not factual data.

Anecdotally, in addition to a few cases where it worked very well, the process of mandatory information sessions regarding mediation benefits became formal and created barriers for most cases. Because it was mandatory, the parties would not attend out of the needto make informed decisions regarding mediation. Instead, it was mostly to get the relevant proof from the mediator that allowed litigants to access the court.

Another perspective refers to the costs. Although the model was supposed to be free of charge according to the law, the process involved resources investedby the mediators as invitation letters had to be sent to the Defendants, and in-person meetings had to be organised by mediation providers. Further, documents were received, released and archived. While some mediators did not charge fees, most mediators found "creative"solutions to go around such a legal obligation under the form of additional services like conflict assessment or mediation preparation. However, the policy was created to be accessible and easy to be organised.

This is what happened, again, anecdotally, given the lack of data.The Claimant, directly or through their legal advisors, would submit the request for mediation; the mediation provider would invite the defendant to his/her office at a certain day; the defendant would usually not accept the invitation or even send a response to it; the mediator would meet the Claimant, provide information regarding mediation benefits and finally release the precious certificate that allows access to the court system.

Many complaints were filed with the Mediation Council and other authorities about the professionalism of the mediators and the effectiveness of the system. The most common concerns about mediators were that they would solely aim for financial advantages in exchange for certificates that they were also the lawyers of the same parties to the dispute, therefore not having the independence needed by a mediator. The parties often reproached to the judges that the process was not free of charge, as provided by law, leading to less trust in the whole system by different ADR actors and so on. In short, most litigants and lawyers started to be united by one concern – how to get around the system in the most effective way (comply with it formally, but with no intention to take benefit of mediation).

The vast majority of cases (due to lack of data, it is not clear how "extensive" it is) that went through the information session phase did not proceed to mediation; therefore, the worst effects began to emerge. At this point, more confusion ensued. People began to confuse mediation for these information sessions related to the its use. To make things more confusing, according to Law No. 214/2013, in addition to the mediators, the information procedure on the benefits of mediation could also be carried out by a judge, prosecutor, legal advisor, lawyer or notary.

This led to a new, even more complex debate regarding the finesse of the law, the dimensions of the rights created, the interpretation of the language used in the legal documents and about other formal things – essentially things that have nothing to do with what mediation should be – a voluntary choice of the parties to the dispute to enter in negotiations to avoid the dispute becoming a legal dispute, hence spiralling out of control.

Finally, before any conversation about the law's constitutionality, growing questions and concerns appeared about its functionality, if it does any good in the first place.

The constitutionality checks

Of course, as one could imagine, the Romanian Constitutional Court was asked to undertake the constitutionality check of the policy – referring to both the mandatory obligation to attend the information session regarding mediation benefits and the correlated sanction for the plaintiff with case inadmissibility for failure to attend such session. It was just a matter of time until people would say that, although full of virtues, mediation became anunnecessary barrier of time, money, and other resources in the litigants' attempt to access the courts. Therefore, a petition was submitted to the Romanian Constitutional Court. In its decision No. 266 of May 7, 2014, the Romanian Constitutional Court found that both the obligation of the plaintiff to participate in the information session on mediation services and the related sanction of inadmissibility were unconstitutional.

From the court's decision, we quote:

"[…] Mandatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings' inadmissibility, this right is not just restricted, but even prohibited.

23. […] Free access to justice is the faculty of the individual to apply to a court to defend their rights or legitimate interests' capitalisation. Any limitation of this right, however small it is, must be duly justified, analysing to what extent the disadvantages due to it not somehow outweigh the possible benefits. […]"

24. Accordingly, the court considers that the preliminary mandatory procedure of information on the advantages of mediation appears to be a disincentive to obtaining citizen's rights in the courts of law. […].

25. In the context retained above, the court finds that the obligation imposed on the parties, natural or legal persons, to participate in the briefing on the advantages of mediation, otherwise inadmissible the application for summons is an unconstitutional measure, the contrary to Article 21 of the Constitution."

The image of an apocalypse is close to how the market for mediation services looked in Romania since January 2015. The only attempts we now see are internal and isolated. There is almost no demand for mediation services, while some of the public perceptions projected by the Constitutional Court's Decision 266/2014 were that mediation was mandatory and that it was found by the Constitutional Court to fail the constitutionality check, and therefore, mediation is not constitutional.

Although Romania has had an eighty-hour standard for basic mediation training since 2007, the whole experience reopened the discussion about the quality of mediators and mediation services. Are eighty hours enough for ensuring the needed quality? Should there be mentoring and coaching stages included – or some form of apprenticeship?

One of the outcomes was for most mediators to stop practising. A simple check of the national panel of mediators on the Mediation Council's website reveals that 1325 mediators are licence for practice nationally out of 10607 accredited mediators (Romanian Mediation Council, 2022). The biggest challenge for us now is to draw lessons from this experiment and map out options for next steps that are based on the best international standards, can be adapted to our local circumstances and, very important, will address the needs of local ADR actors and therefore will be accepted as such by them.

Options for next steps

The main goal of a sustainable effort to map options and choose the next steps is to design the possible optional courses of action that could be taken. Given the theoretical tenets of public policy design, it is clear that we are considering the "analytical approach" to public policy design, in contrast with the "political approach" (Dye, 2016). Whether this later approach refers to building and mobilising the political support needed to adopt and implement a certain public policy, the former concerns the rational process of identifying feasible options and choosing the one that offers the most benefits for the predicted costs, and the one that comes closest to the overall goals formulated at the beginning of the process. This paper provides a glimpse into the "analytical approach" that we have taken; the "political approach" falls far beyond the scope of this paper, but it is our major concern for the near future because these two approaches are the two sides of a single coin – and there is no coin in our known universe that can exist having only one side. The specialised literature all points to the fact that, even if we can talk of two different approaches to public policy design for academic and research reasons, in reality, there is practically no way to separate one from each other. No policymaker will choose a measure that clearly has no support, no matter how reasonable it seems at the moment; nor will a policymaker take the first measure presented to him or her without at least considering a range of other options before making a decision.

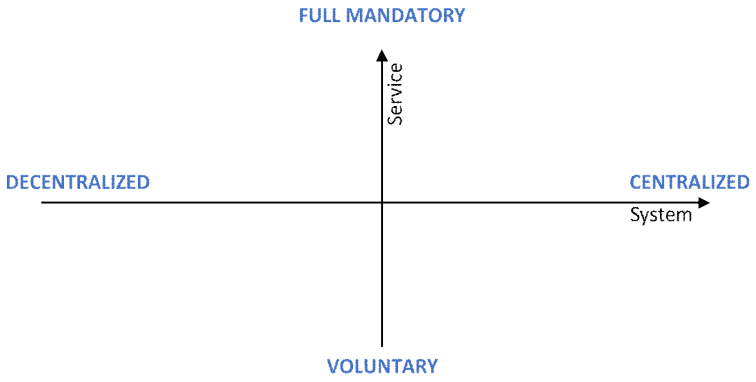

Figure 1 - Main variables defining a national mediation system
Source: Author's own compilation

In light of these conceptual considerations and the main objectives already formulated, we need to identify the possible options for the present situation. Since we want to take a systematic approach for this purpose, we are aware of the fact that we have to identify the main variables that define a national mediation system, those parameters that can be found at the heart of any mediation system in any country, regardless of theculture, its legal system, economical, political and social ecosystem. We therefore propose a two variables that we believe to define a mediation system: (1) the variable of system organisation, which ranges from fully decentralised (mediators belong to one or more professional organisations with different characteristics and pursue several goals, with no central decision-making body at the national level - the network structure, as an example, the mediation framework in the United Kingdom) to

fully centralised (all mediators are basically part of a single, nationwide organisation, with all decision-making authority resting with the central bodies of that organisation - a pyramidal structure; as an example, consider the Maltese national mediation system) and (2) the valiable related to the provision of mediation services, which ranges from being voluntary (mediation based only on the parties' consent to engage, without any coercion formulated by law, courts or other authorities - as was the case in Romania and several other EU countries) to completely mandatory (where attending the full mediation process is required by law and enforced by the judiciary with sanctions for non-compliance, for most cases with few exceptions and no options to redraw - this is an extreme situation that can't be found in any country, but may be intellectually of theoretically conceivable).

If we use these pair of variables as a system of two perpendicular axes, we end up with the graphic described in Figure 1.

This analysis included here was conducted by the Propact Center for Mediation and Arbitration (about this organisation at http://www.solutii-dispute.ro/) that implemented, between June 2018 and October 2019, the project "Mediation - effective public policy in the civic dialogue" (more information in Romanian is available at http://www.mediereapoliticapublica.ro/). The project was financed under the Romanian Operational Program Administrative Capacity 2014-2020, Priority Axis 1 - Public administration and efficient judicial system, Component 1 - "Increasing the capacity of NGOs and social partners to formulate alternative public policies". The overall goal of this project was to formulate, probably for the first time, a sustainable public policy regarding mediation in Romania. The author of this article was a member of the project research team.

Accordingly, we can conclude that, wherever in the world they are located, mediation systems fall in one of the four categories defined by these two axes: 1. de-centralised and voluntary; 2. de-centralised and mandatory; 3. centralised and mandatory and 4. centralised and voluntary. Of course, the variations inside these categories can be significant as there are also possible transgressions – systems that partially belong to two or even more categories. Obviously, all other aspects regarding mediation systems – i.e. regulation, funding, promotion and stimulation, enforcement – are determined by these two main variables – institutional organisation and process functionality – and by their combinations.

Following the building of the matrix and identifying the four distinct categories, we proceeded to put meat on the bones of this structural skeleton by devising all the components of each ideal-type system corresponding to those categories. Basically, we imagined how these ideal-type systems would look like from the point of view of the two main variables – organisation and functionality – and then we projected what kind of regulation modifications were to be done to give it legal form; what would the funding look like and estimated the costs of implementation; and what impact all of these would have on the marketing, stimulation and enforcement of mediation utilisation. At the end of each exercise, we did a simple SWOT analysis to see how the benefits of each ideal-type system would be compared to the estimated costs and how they align with our overall goals. At this point, it should be noted that we have imagined ideal models at the extreme points of each individual axis. Yet, for each variant we developed its components using elements and experience from the national mediation system that exists in Romania.

Regardless, we consider that our approach can be used by anyone all over Europe and the world, as the structural elements remain the same across cultures and legal systems; what changes are the components – institutions, organisations, courts and structure of the justice system etc. – and the way they are correlated one to each other depending on national specifics.

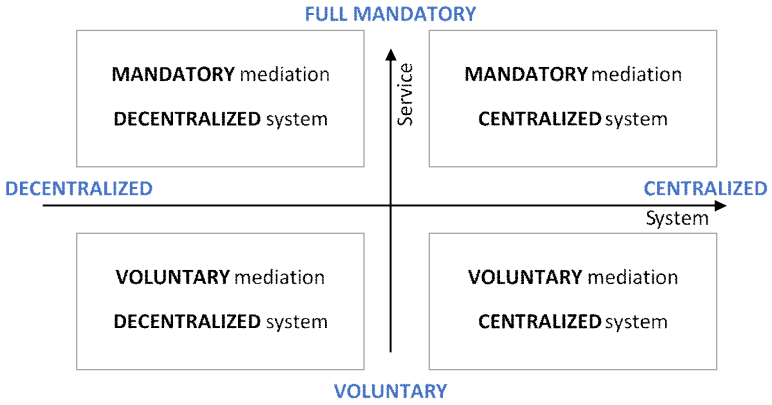

Figure 2 - The four main categories of mediation public policies
Source: Author's own compilation

Having defined and structured the four options, we proceeded to identifying a fifth option, an option that we named "middle ground" and that combines the parts that work best from each of the four models according to the consolidated results of the SWOT exercise we conducted.

Besides the general objectives for developing a fifth model or system there were two additional conditions. They relate to the political perspective to making public policies that was mentioned previously. The first objective refered to a minimal change in legislation, since the Romanian Ministry of Justice and judiciary mediation stakeholders are already suffering from a "traumatic weariness syndrome" when it comes to "improving the legal framework for mediation". Secondly, the intention was to improve the existing system as opposed to redisigning it from zero, an endeavour with virtually no chance of gaining the appropriate support from policy makers and other mediation stakeholders.

We decided to choose a moderated option located between the other four options. This is because a course of action that does not require additional actions or "do nothing "was not appreciated as feasible as per the reasons explained above

In designing the "moderated" option, we undertook another SWOT analysis of the evolution of the Romanian mediation system from its earlier phases to the present day. The main goal was to identify what parameters or elements in the existing system were not functioning as they should have. The focus was on identifying the triggers for this „less than ideal" functioning and using the developed model to improve certain areas accordingly. This resulted in a comprehensive piece containing concrete recommendations for mediation public policies that can improve the current system in Romania and promote mediation among prefered means to resolve disputes.

Conclusions

Unfortunately for mediation and mediators, there has been no systematic approach to public mediation policy-making anywhere in the world that has been seriously considered. Without going too far into the past and too deep into the argument, we cannot name any country where the introduction of mediation into national justice systems has resulted from a full-fledged public policy as defined by the professional literature. Aside from the unnecessary academic hair-splitting that deals with details and keeping only the big picture in mind, we could not identify any public mediation policy that has been fully articulated and consistently implemented.

The introduction of mediation was primarily about deciding that an alternative to the courts was necessary, deciding that mediation could be a solution, and drafting legislation to include mediation among the accepted dispute resolution methods. Very little attention has been paid to how this particular legislation has been integrated into the larger body of national laws and, in particular, court procedures. Similarly, the implementation of the said policies was imperfect in most countries.

The implementation of mediation public policies has almost universally been piecemeal, one measure today, another tomorrow, and so on; it has been the victim of rotation of government and transfers of political power that came with new ideas, hard turns and starting over with every cycle. Above all, the mediation public policies were the victim of resistance from entrenched interests that have not been sufficiently informed or involved in decision making or public policy design. As a result, mediation systems today look like a cabin in the woods built over time from different materials and furnished with old furniture left over after various renovations of the main house - a hodgepodge of mismatched pieces, hardly the big encouraging picture that a mediation system needs to be successful.

The major benefit of our approach was that it first stipulated what the main goals were; secondly, it identified the two major variables that define any mediation system, wherever it may be; thirdly, that it structured the four idealtypes of mediation systems and described them in detail, regarding organisation, functionality, legislation, marketing, stimulation and enforcement; fourth, that it analysed all of these four types in terms of strengths, weaknesses, opportunities and threats, allowing the policy designers to use the scales of centralisation-de-centralisation and mandatory-voluntary to fine-tune their option; fifth, that is designed a method of upgrading/improving the current mediation system using the results of the ideal-type systems SWOT analysis to replace the dis-functional parts and add or delete parts that missing or, respectively, un-necessary. The end result is a public policy paper that can map the road that has to be taken by policymakers and stakeholders to bring the system up to expectations and offer mediation as a mainstream method of dispute resolution.

The goal of any Act of Parliament establishing the legal framework for mediation should be its better understanding, respect and acceptance by the mediation stakeholders. The mandatory components of the legal framework for mediation carry high risks that need to be carefully assessed in advance. Although case numbers may increase, the practice is artificially perpetuated, and if parties are motivated by nothing else to use mediation services, they will forget about mediation altogether if the mandatory components are removed.

The ongoing discussion about what needs to be done to advance mediation activities towards a higher level of understanding, acceptance, respect and use should include a strategic approach concerning collaboration, culture, stakeholders' interests

and principles of mediation. Numbers are always useful but should not be relied upon solely, especially when sound, reliable statistics in mediation are still a thing of the future. More, mediation should be promoted with the needs of the people in mind, not as an argument for decreasing courts backlogs or taking a burden from the ever-thinner government budget.

Parties to a dispute have the right to resort to mediation if they so desire. This right must be granted to them through a pre-action protocol or a required procedural step that educates them about mediation, so they understand how and why it works and what value it can have for them - it is inexcusable to allow litigants to go to court without granting them this right. This would also relieve pressure on judicial budgets, increase the court system's efficiency in cases that do not lend themselves to mediation and result in faster and more satisfying justice for everyone.

Applying Buckminster's Law to the world's legal systems leads to a new legal paradigm with the potential to add value, work well, improve efficiency, save costs, reduce risk, and that makes sense.

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