RIGA GRADUATE SCHOOL OF LAW

Does the right to access to justice oblige the States to include a working court mandatory mediation system?

Bachelor's thesis

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ABSTRACT

Over the last two decades mediation has become more popular. With the ongoing trend in Europe of making mediation mandatory there have been discussions about if the process of making mediation compulsory goes against the right to access to justice. And in order to ensure access to justice are states obliged to include mandatory mediation in their court systems. The aim of this work is to answer these questions and see how compulsory mediation has affected the access to justice.

Results showed that the main aim of the Mediation Directive was not met and there is a need to introduce mandatory mediation to resolve it. Making the process compulsory does not go against the right, on the contrary it promotes it as proved by the results of the state analysis.

Key words: mandatory mediation, access to justice, article 6 of the ECHR, mediation.

SUMMARY

As mediation, which is one of the alternative dispute resolution methods, has become more and more popular over the last two decades, there has been a developing trend on making mediation mandatory. With more and more states wanting to make the process mandatory there have been concerns about how that affects mandatory mediation and if the state has the obligation to ensure this process.

The author in this work looked at mediation and its principle, focusing on the voluntary principle that seemingly contradicted the move on making the mediation compulsory. As the word itself suggests that it is the parties' free will to choose to mediate, however after developing the analysis the author concludes that making mediation compulsory does not go against the right to access to justice. In contrary it promotes it, and it goes hand in hand as it offers the people the chance to ensure their rights.

In the first chapter the author found that both terms "mandatory" and "compulsory" can be used, as there is no significant difference found. In addition, there are several models of mandatory mediation - categorical, quasi-mandatory, contractual, and discretional mandatory mediation. The European Union has not stated which of these models the stats have to use, thus it is up to the states to choose. The author found that there is a common trend for mandatory mediation to be applicable specifically in civil disputes.

In the following chapter the analysis of three states was conducted – Bulgaria, Lithuania and Italy. Bulgaria is still in the process of making mediation mandatory and this will be in force as of 1 of July 2024. Bulgaria will use mainly categorical mediation, this will not include family law cases. In these cases, the judge will be the one who decides if there is a need to try mediation. The author could not analyze the success and effect of the compulsory mediation as it is not yet in force.

Mediation became mandatory in Lithuania on the first of January 2020. Despite the fact that Lithuania is a leader for resolving civil and commercial disputes, the state still implemented mandatory mediation. Reasons for it was the developing trend in the Europa and the benefits that the process provides. The process has been effective as there have been more mediation cases settled peacefully with 57.61% of the overall cases. An issue found is that there are no regulations describing how children's best interests are protected or heard during required mediation.

Italy has had mandatory mediation as of 2013. The author found that Italy feels no need to create new incentives and promote this process even more - states that has not yet implemented this process are now having more incentives. Data from 2012-2018 suggests that there have not been significant changes in how fast the court can resolve disputes – it taking 400 days. However, Italy is the leader in the Europe for having the most mediators per 100 000 inhabitants.

The European Parliament stated that the aim of the Mediation directive was not met and thus there is a need for change to happen. The author agrees to this and believes that the right to justice does oblige the states to include mandatory mediation in their court system. There is a need for a future change of legislation in order for this kind of mediation to become more effective.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Ministry of Justice	Ministry of Justice of the Republic of Lithuania
SGLA	State Guaranteed Legal Aid Service
Supreme Court	The Supreme Court of Latvia
The Commission	European Commission
The EP	European Parliament
The EU	European Union

INTRODUCTION

Mediation is believed to be around for as long as the ancient Mesopotamia, the middle east. However, as an alternative dispute resolution has been developed and used at a different way nowadays. And the process itself can be described as a process where parties who are having a dispute meet with a mediation who is neutral and impartial, and they try to find the mutual agreement. Many states have used mediation and implemented it in their legislation, furthermore, making it mandatory as of recent decades.

There have been concerns expressed by the European Parliament that the main objectives of the mediation Directive have not been met. This leads the author to question if there is a bigger policy by the European Parliament. Over the last two decades there has been a trend in Europe of making mediation mandatory. One of the main principles of mediation is voluntariness and with the recent trend of making mediation mandatory there have been questions of how that affects the right to access to justice. The purpose of this work is to look at mandatory mediation and the right to access to justice to see if the creation of mandatory mediation promotes or the opposite – acts as an obstacle for the right to access to justice.

Hypothesis of the work - mandatory mediation is not breaching the right to access to justice, it provides a more effectively functioning judiciary.

Objective of this research is to see what mandatory mediation is, how does the methods of it differ as well as to look at the states that have or are in the process of making the mediation process compulsory. The author has chosen three states to be further analyzed, that being Bulgaria, Lithuania and Italy. Right to access to justice will also be analyzed with the look on how does making mandatory obligatory affect this right and what is the stance on this issue from the perspective of scholars, judges, mediators and the author. In the end of the research the author will look at the political aspect of this change and how that has affected the recent trend developing in the European Union of making this process compulsory.

Additionally, the author will consider whether the permission is legally binding. Every European Union member state has some type of required mediation in one way or another. The writer will research that. Because this is a consideration that needs to be taken into account if each member state has embraced this process in their own manner. The state is required to establish a functioning judiciary by the European Convention on Human Rights. It is not stated that mediation must be arranged by the government.

The author will contend in this work that convention obliges the state to do so. Article 47 of the European Union's Charter of Fundamental Rights is not violated, according to the preliminary judgment of the Court of Justice of Luxembourg in the case involving Italy. In light of the fact that parties are being diverted away from the judicial system and toward the extrajudicial system, the author will be interpreting the right to justice in this context. Since the court mandated mediation, the work will center on how the mediation improved the situation.

The author will use doctrinal research method to attain an analysis of legal materials and answer the given research question. The author will study the law – more specifically the article 6 of ECHR and the mandatory mediation legislation in the three previously mentioned states, with the possibility to mention others to better explain ana argument. In addition, there will be relative case law analysis, of the ECtHR and the CJEU. Also research of the academic literature will be conducted. Interpretation methods that will be used in this research are the grammatical (linguistic) – the author will look at the wording given in the text and how tat

changes the meaning of the term. Also using the systematic by looking at how the norm of the law is in relation to another norm, here being how mandatory mediation effects the right to access to justice. And last but not least using teleological method, by looking at the meaning and purpose of the mandatory mediation.

There are limits set by the author in this research. First being that a deeper analysis of other states will not be conducted, only the three previously mentioned states will be delved into. However, the author keeps the right to mention other states to further develop the thought and argumentation of the research, one example of that being Australia. The second limitation is that the mandatory mediation methods will be analyses not looking at the European Union data and the usage of it. The method will be only explained form a theoretical point of view, as there is a lack of data provided to conduct that type of research. Last but not last limitation is the political analysis, the author will only conduct a deeper analysis of one of the states, that being Italy, with other small mentions being used as well.

There is a possibility to continue the research, with one of the examples expressed by the author being the effect of mandatory mediation in Bulgaria. This can however be done only after at least three years, as mediation will become compulsory only in 2024. The author could also research a state which has had mediation for a long time but is not a country from Europe to see what the difference in the legislation and approach to the topic in general is and why that is the case. To better understand the need for it and how that can affect the access to justice. One example that the author could propose is Australia.

Structure of the thesis – The author has divided the research into three main chapters, all of the chapters consisting of various subchapters. The first chapter being the principle of the right to justice and mandatory mediation. This chapter will start by explaining what aces to justice and mediation is, moving on to the definition and interpretation of this process and models of mandatory mediation. Following by the difference in the terms that can be used when discussing mandatory mediation. And ending it with what are the concerns and problems arising when looking at the mandatory mediation in relation to access to justice. The second chapter will focus on the regulation of mandatory mediation in three states – Bulgaria, Lithuania and Italy. And will analyze the effectiveness of the process and will look at the data on how it has affected access to justice. Last but not least, the third chapter will focus on the need for the European Union to make mediation mandatory. In its subchapter discussing the political argument behind this move, as well as the ongoing trend and a deeper political analysis of Italy.

1. PRINCIPLE OF RIGHT TO JUSTICE AND MANDATORY MEDIATION

There has been a discussion of how the mandatory mediation has and will affect the right to justice. As mediation itself is seen as a voluntary process and making it mandatory has been disputed to lead to coercion. The right to access to justice is a fundamental right and with the introduction of mandatory mediation one must wonder if it is an obstacle for the right to access to justice or does it do the opposite – promote it.

In this chapter the author will look at the principle of the right to access to justice and what is mandatory mediation. How are these terms defined and does the meaning change if different terms are used, in the mandatory mediation case, if the word "compulsory" is used. Also keeping in mind the translation aspect as well looking at the models of mandatory mediation which will differ from state to state. In addition the author will look at the previously mentioned concerns surrounding the principle of the right to access to justice.

1.1. Access to justice – definition and interpretation

The access to justice is a basic principle of the rule of law and it is there for people to exercise their rights and have their voice heard.[1] Other sources state that this principle can be defined as the ability of people to obtain as well as seek remedy with the help of an informal or a formal institution of justice.[2] The author can thus conclude that this is a fundamental right which provides the possibility for people to protect other rights.

If one looks at the meaning of each of the words in the term it can be seen that both words – "access" and "justice" are hard to defined if not being given context. The author looks at both of the words, starting with "access", it can be described as the "freedom or ability to obtain or make use of something".[3] And the term "justice" is explained as the "the maintenance or administration of what is just (..) by the impartial adjustment of conflicting claims".[4] The author can then conclude that the combination of both of the words suggests that this principle provides the ability to obtain help or remedy that is just.

It is important to look at the European convention on Human Rights (furthermore, ECHR) to see how this principle is defined there. Article 6 of the ECHR describes the right to a fair trial and as the title stipulates is there to protect people's right to a fair trial.[5] Meaning that this principle gives people the right to a fair and public hearing.

However, one must now look at what is meant by the fair and public hearing. One of the conditions for this is that the hearing is held within a reasonable time. There is no clear definition of what is considered to be "reasonable time".[6] Despite that the author believes that

[1] United Nations. Access to Justice. Available on: https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/. Accessed January 10, 2023.
[2] United States Institution of Peace. Necessary Condition: Access to Justice. Available on: https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice. Accessed January 10. 2023.
[3] Merriam-Webster. Access. Available on: https://www.merriam-webster.com/dictionary/access. Accessed January 10, 2022.
[4] Merriam-Webster. Justice. Available on: https://www.merriam-webster.com/dictionary/justice. Accessed January 10, 2022.
[5] Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed November 9, 2022.
[6] Law Insider. Reasonable Time. Available on: https://www.lawinsider.com/dictionary/reasonable-time. Accessed January 12, 2023.

this term is used when the action does not need to be done quickly. Meaning that if something is asked to be done in a reasonable time it will depend on different circumstances. And that time has to be a fair amount to what needs to be done. Other conditions include the fact that this hearing will be heard by an impartial decision-maker as well as will give all the necessary information and will be a public decision.[7]

The author can thus conclude that the principle of the right to access to justice which is enshrined in article 6 of the ECHR provides every person with the possibility to seek legal help in cases of unlawful acts. If this right cannot be enforced, then the right is not effective. This is what the author wants to research with the work, to see if the introduction of mandatory mediation will go against the right to access to justice making it ineffective.

1.2.Mediation and its principles

Before analyzing mandatory mediation and its necessity one must look at the general principles that are set in place for mediation and mediators. There is no set list of the principles, however, there is a general acknowledgment of them. Starting with the first principle that will be analyzed and looked at the most by the author- the voluntary principle. This principle states that the process of mediation has to be voluntary at all times and not only participants but also the mediator is free to not continue with the process.[8] What is crucial about this principle is that in order to maintain this principle the mediator has to be aware that the participants are participating on their own will. If there are suspicions that the participant is not there voluntarily then the mediator has to raise the issue and look at either suspending the process or stopping it completely.[9] There are cases where there is a need for more time or there are different obstacles appearing which need to be addressed beforehand, in these cases the suspension is appropriate. In other cases where there are clear signs of coercion or for instance abuse then mediator can stop the process completely.

The author would like to highlight that there is no set checklist of when suspension should happen instead of stopping the process completely, the mediator is the one who decides this aspect. This is why the voluntary principal is so crucial, both parties have to want to participate in the process, as it won't produce result if both parties are not interested in finding the best solution for them possible. In addition, the voluntary principle is crucial to mandatory mediation and the relation to the principle of the right to access to justice as one must wonder if making the process compulsory goes against the main principle of the whole process. This will be further address both in the following subchapters as well as in the analysis of the states with developing mandatory mediation as well as states with mandatory mediation already set in place in chapter two.

Next principle to be discussed is the impartiality principle. What that means is that the mediator must be impartial at all times of the mediation process. This can be affected by a conflict of interests.[10] What needs to be looked at is what being impartial entails. The dictionary

[7] Equality and Human Rights Commission. Article 6: Right to a fair trial. Available on: https://www.equalityhumanrights.com/en/human-rights-act/article-6-right-fair-trial. Accessed January 6, 2023.
[8] Family Mediators Association. Four Principles of Mediation. Available on: https://thefma.co.uk/about-family-mediation/four-principles-of-mediation/. Accessed January 22, 2023.
[9] Family Mediation NI. The Principles of Mediation. Available on: https://www.familymediationni.org.uk/about/the-principles-of-mediation/. Accessed January 12, 2023.
[10] Family Mediation Council. General Principles for mediators and mediation. Available on:https://www.familymediationcouncil.org.uk/us/code-practice/general-principles/. Accessed March 9, 2023.

provides that it means not favoring one side or the other in an argument.[11] The author further completes the thought by stating that the mediator must not have any personal interest in this process and must not in their professional practice mediate conflicts where there are family members, friends, or any kind of personal matters involved. This ensures that the mediator is objective and fair in helping parties reach an agreement and the parties can fully trust both in this process and the mediator.

A similar principle to the previous one is the neutrality principle. This principle entails that the mediator has to stay neutral when it comes to the outcome of the process. The mediator cannot force its own opinion on the parties or in any way steer them in a direction of its liking. It is stated that what the mediator can do is to inform of what the court can approve or otherwise dismiss if the parties have asked for this advice.[12] This approval can be connected to many factors, the author can name some starting with the question of whether this is a real solution or an impossible thought that the court will not approve. Other factors can be legal implications or any other suggestions, however, the mediator must be clear with the parties stating that the information given is not advice.

Another important principle to the process is the confidentiality principle which implies that the mediator shall not disclose information regarding the parties or information that is obtained during the process.[13] This cannot be done without the consent of the parties involved, when the law imposes it or when there is a courts order. Confidentiality also implies to the legal advisors that the parties have, meaning that without the explicit consent of parties involved the mediator cannot disclose any information about the process to the advisors. Factors that impact the possibility to disclose information are if there is a possibility that a child is in danger or significant harm to the child. Then the mediator must act in order to protect the child, this can be done by getting in touch with the social services of the specific state.[14] Thus the author stresses that confidentiality is an important principle however it cannot go against the best interests of the child or whenever there are people being abused.

Last but not least is self-determination and responsibility. This principle entails that the parties themselves determine the outcome of the process, the mediator does not make a decision on who is wrong and right in a situation.[15] Mediator's job is to be there to assist and help to come to a conclusion that would be beneficiary for both parties. Thus, the responsibility lies within the parties. It is crucial to note that there is a difference between equality and cooperation – when it comes to negotiations then the parties are concluding that on their own, however mediation is between the parties with the help of a third party, in this case it is the mediator.[16]

The author can conclude that there is not a set list of principles of mediation, however there are general principles that are taken into account when conducting the process. Including but not limited to voluntary, confidentiality, impartiality, neutrality, and self-determination.

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[11] Cambridge Dictionary. Impartiality. Available on: https://dictionary.cambridge.org/dictionary/english/impartiality. Accessed March 7, 2023.

[12] Family Mediation Council. General Principles for mediators and mediation. Available on:https://www.familymediationcouncil.org.uk/us/code-practice/general-principles/. Accessed March 9, 2023.

[13] Family Mediation NI. The Principles of Mediation, *supra note* 9.

[14] Lizbeth M. Morris. "Mandatory Custody Mediation: A Threat to Confidentiality." *Santa Clara Law Review*. Volume 26, No. 3. Article 9. Available on: https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1883&context=lawreview. Accessed January 9, 2023.

[15] Bob Wright. "Self-Determination in Mediation" *Oakland County Legal News* (May 3, 2022). Available on: https://mediate.com/self-determination-in-mediation/. Accessed January 7, 2023.

[16] *Ibid.*

These principles ensure that the parties involved in the dispute can come to the best conclusion for themselves with the help of a specialist. As previously stated, principle of voluntarily in the main focus of the work and it needs to be looked at further to see if this is not being breached when implementing mandatory mediating. It can be mentioned already that the wording itself goes against the principle – voluntary is something done out of their own will, however if something is mandatory then it has be obliged. The author in the further analysis will look at this aspect to find the result to this question addressed.

1.3.Mandatory mediation – definition and interpretation

Mediation is a process where parties involved in a dispute try to reach an agreement and settle the dispute at hand on a voluntary basis, this is done with the help of a mediator.[17] As previously stated the author would like to highlight the voluntary part, this part is crucial as the main idea of mediation is that parties themselves come to an agreement that is best for themselves. There has been a discussion on whether the fact that it will be mandatory goes against the whole point of mediation and the right to access to justice.

There is no clear definition in legislation when it comes to the term "mandatory mediation". When one takes a look at the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (furthermore, the Mediation Directive) it can be seen that the definition of mandatory or compulsory mediation is not stated.[18] There are mentions of the process itself, however the way it has to conducted or what specific model should be used is not addressed.

A point that needs to be discussed is the different variations and categories of mediation. As there is no clear definition of what mandatory mediation is, there are variations of it. Different types of these serve better for different processes and situations.[19] Different states understand this concept of "mandatory mediation" as something different. For example, some states have made mandatory mediation for all civil cases and others have decided on mandatory mediation only for some civil lawsuits. These examples will be further addressed in the second chapter. However, there is a question arising - is there a difference between the terms "mandatory" and "compulsory" and if using one not the other influence the meaning of the phrase. This will be analyzed in the following subchapter.

1.3.1. Difference between the term "mandatory" and "compulsory"

The author has taken a closer look at the Mediation directive and the wording chosen. In this document there is the term "compulsory" used rather than the word "mandatory". The notion to the term compulsory has been mentioned twice. First when stating that the directive is without prejudice to the national legislation making mediation compulsory.[20] And the second being mentioned in article 5 of the document which discussed the resource to mediation. This

[17] JAMS. Mediation Defined: What is Mediation? Available on: https://www.jamsadr.com/mediation-defined/. Accessed February 6, 2023.
[18] Mediation Directive 2008/52/EC, 21 May 2008. Available on: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf. Accessed November 10, 2022.
[19] Texas A&M University School of Law. Mandatory Mediation and Its Variations (2011). Available on: https://core.ac.uk/download/pdf/217219562.pdf. Accessed January 6, 2023.
[20] Mediation Directive 2008/52/EC, *supra note* 18.

also stating the prejudice of making mediation compulsory.[21] Both of these mentions have been similar in wording and have mentioned the "access to justice". The essence of this statement is that the national legislation cannot prevent parties that are involved in the mediation process to exercise their right to access to the judicial system in place.[22] This shows that the possible influence of mandatory mediation to the principle of the right to access to justice has been kept in mind when developing the directive.

One has to look at the difference between the two terms to see if there is a significant difference when using one or the other. First is the term compulsory. It can be seen that when looking up this term the word mandatory comes into picture as a synonym for the word. The definition for this term according to the Marriam-webster dictionary is "required or compelled by law".[23] Next is the term mandatory. Which by the same dictionary is "containing or constituting a command: being obligatory".[24] This leads the author to the conclusion that both of these terms suggest the same thing, that something has to be done or followed. In this case, that mediation has to be obeyed, that the process has to be done.

Another factor that can influence the wording is the translation. If looking at the Latvian use of the term "mandatory mediation" it can be seen that it is translated to "obligāta mediācija". And this term is used in various documents when discussion mediation and if it has to be mandatory. One of the examples being the LV Portāls (LV Portal) on mediation being a voluntary process.[25] When translating the term "compulsory mediation" the translation is the same. However, the author would like to emphasize that this is not the same instance in every case. As the terms are synonyms, when translating into different languages the terms can suggest different things. This has to be kept in mind when talking about mandatory mediation.

The author states that in this research the word mandatory will be mainly used instead of the word compulsory, the author keeping the opportunity from time to time address the process also with the help of synonyms. As both terms are synonyms and the arguments provided by the author state that using one over the other will not create a difference. This is where the access to justice comes into play, as it is mentioned in the directive itself. As the author stated beforehand it is mentioned in the Mediation Directive itself that making mediation mandatory should not "prevent parties from exercising their right of access to the judicial system."[26]Another definition provides that mandatory or compulsory mediation states that:

> [P]arties are obliged to attend a first session, but it remains voluntary in that they are always free to leave at any stage once the first session has begun.[27]

Furthermore, emphasizing the connection between making mediation compulsory and the right to access to justice. Definition also highlights the heavily discussed aspect of what really is "mandatory" and how many sessions parties need to attend before having the option of not choosing mediation. The author can conclude that based on what is stated in the Mediation Directive the amount of session that are mandatory for the parties involved is one,

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[21] *Ibid.*
[22] *Ibid.*
[23] Marriam-Webester. Compulsory. Available on: https://www.merriam-webster.com/dictionary/compulsory. Accessed January 10, 2023.
[24] Merriam-Webster. Mandatory. Available on: https://www.merriam-webster.com/dictionary/mandatory#legalDictionary. Accessed January 10, 2023.
[25] LV Portāls. Mediācijas process is brīvprātīgs (Mediation process is voluntary). Available on: https://lvportals.lv/e-konsultacijas/7336-mediacijas-process-ir-brivpratigs-2015. Accessed January 6, 2023.
[26] Mediation Directive 2008/52/EC, *supra note* 18.
[27] Law Insider. Mandatory mediation - Definition. Available on: https://www.lawinsider.com/dictionary/mandatory-mediation. Accessed January 12, 2022.

allowing for them to not continue the process after that first session. This leads the author to the next thought - if only the first session is mandatory then who has to pay for this session, is it the government or the parties themselves. This will be further discussed in the following chapters when looking at the state examples and the political aspects of making mediation compulsory.

1.3.2. Mandatory Mediation models

As the author previously mentioned there is no universal definition of mandatory mediation and the understanding of what that process is varies from state to state. This will be further analyzed in the research with three state examples – Bulgaria, Lithuania and Italy. However there can be common points seen in all of the different concepts. One of the most important one is the voluntary principle. The discussion of whether making mediation compulsory breaches the right to access to justice is not without reason. However mandatory mediation in the different states have one thing in common, that they make people participate in the process without making people reach a certain outcome. There are different models of mandatory mediation – categorical, quasi-mandatory, contractual, and discretional mandatory mediation.[28] Before delving into the state examples one must look at how model differ.

First to be looked at is categorical mandatory mediation, this is the type of mediation that coerce parties to take part in mediation that is conducted out of court.[29] The reason for this is to try this process before going to settle the dispute in court. The agreement can be of any nature. One example of this is the Australian court systems, more specifically South Australia. Here there is the civil procedure that makes parties do mediation willingly or not.[30]

Here is where the discussion takes place as some scholars argue that this is done in order to promote mediation and its benefits, as well as take off the workload of the court system. The other opinion stating that this goes against the free will of the parties and their right to access to justice.[31] This is where the exceptions to mandatory mediation come into play. Taking the same example of Austria and its legislation, more specifically previously mentioned Australian Family Act, which states that there are exceptions to the compulsory mediation and this exception is seen in cases where there are grounds to believe that the child is at risk or there is domestic violence.[32] This is not a one of a kind practice as already stated by the author when discussing the principles of mediation, as mediators are taught to looked at the process and alert the respective authorities in cases where there are signs of domestic violence or as previously mentioned the child is in danger.

Discretional mediation is often also mentioned as referral mediation. Scholars have stated that the decision to coerce parties to mediation should be up to the judges themselves.[33] The argument for this is that the judges are more equipped to decide if the parties in the dispute

[28] Texas A&M University School of Law. "Mandatory Mediation and Its Variations", *supra note* 19.
[29] *Ibid.*
[30] Federal Court of Australia. Mediation. Available on: https://www.fedcourt.gov.au/services/ADR/mediation. Accessed January 18, 2023.
[31] Texas A&M University School of Law. "Mandatory Mediation and Its Variations", *supra note* 19.
[32] Australia. Family Law Act, 1975. Available on: https://www.legislation.gov.au/Details/C2019C00101. Accessed February 8, 2023.
[33] Frank E A Sander, "Another View of Mandatory Mediation" Dispute Resolution Magazine no. 13 (2007).

are suited for this process and can in the end reach the best outcome for both of them.[34] The author can see the reasoning for this as voluntary principle is very crucial for the process to succeed and if the parties are against the process from the start or have unresolved issues that cannot be that easily overcome then it is more vise and sustainable if the process is not done. As the author believes, mediation is not for everybody and does not work in every situation.

The third mediation model that will be analyzed is the quasi-mandatory mediation. This type of mediation provides that the mediation is optional, however, it is still perceived compulsory as the costs of legal action are awarded to the party that prevented the process or was not being cooperative while in the process.[35] An example of this can also be seen in the Australian legislation with the wording of "reasonable effort" mentioned as the awarding of costs will be analyzed on the reasonable effort that the party puts in the process.[36] The author believes that there can be an issue with this condition as it is vague and not clearly defined on what is considered to be reasonable effort. One way that this can be looked at is that the parties have entered in the process in good faith and are willingly participating in the process.

Last but not least is the contractual mandatory mediation and this can be explained as the process where the parties have agreed beforehand that they will try to settle the dispute with the help of mediation beforehand.[37] In the case where the parties have agreed upon this the dispute will reach court only when the parties involved cannot reach an agreement and can provide evidence that they have tried to settle it with the help of mediation. This model of mediation is relevant to the commercial cases, not to the family cases.

One can look at the data that shows that in the European Union majority of the states are using at least one of the models presented beforehand. Mostly present in the family disputes, however it is a common trend for mandatory mediation to be applicable specifically in civil disputes.[38] One example of a state adopting several models of mediation is Lithuania which will be analyzed in the following chapter.

1.4. Access to justice and mandatory mediation – concerns and problems arising

One of the main benefits of mediation is the low costs of the process in comparison of dispute settlement in court. However, when talking about the access to justice then there have been critiques regarding these costs as making mediation mandatory means that the state imposes mediation costs on the parties involved. The author would like to highlight that many states that impose mandatory mediation have system in place that offers the first session of mediation that is mandatory free of charge and this will be looked upon more by the author. Nevertheless, there are views that these costs that compulsory mediation bring are decreasing the capacity to access to justice. This can be argued when mediation has been tried and failed, meaning that the parties now have extra fees upon on the litigation fees.

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[34] Court of Appeal for Ontario. Some Reflections On Judicial Mediation: Reality Or Fantasy? Available on: https://www.ontariocourts.ca/coa/about-the-court/archives/reflections_judicial_mediation/. Accessed February 2, 2023.

[35] Australian bar Review. Mandatory and quasi-mandatory mediation. Available on: https://search.informit.org/doi/abs/10.3316/agispt.20190917017027. Accessed February 12, 2023.

[36] *Ibid.*

[37] Texas A&M University School of Law. "Mandatory Mediation and Its Variations", *supra note* 19.

[38] European Justice. Mediation in EU countries. Available on: https://e-justice.europa.eu/64/EN/mediation_in_eu_countries. Accessed February 8, 2023.

From the analysis conducted in the previous subchapters the author believes that there are two understandings of access to justice previously discussed. First is that access to justice entails the ability to make a legal determination of one's obligations as well as rights. This right has to be safeguarded by legislation that does not increase the burdens of the parties involved. The second is that access to justice is understood as the possibility of the mediation process for the parties involved then the legislation has to think of ways how that can be funded in order for mediation to be available to the parties involved in the set dispute. In the author's point of view access to justice means both of these understandings. Meaning that when imposing mandatory mediation there must be legal policies in place that keep in mind the costs of the procedure and maintain the process fair and efficient.

There is an opinion that there is a need for balancing the legal policies of mandatory mediation, as there are two sides to this regulation.[39] First, making this process compulsory will produce the risk of burdening the parties and in the end, reduce the access to courts that they have. However, the second side is that this regulation in the end helps to overcome the obstacles of mediation use and will increase the access to justice available by providing an alternative way of settling disputes.[40] The author believes that the main point of concern is that the legislation at hand should be aimed at not causing harm, then the mandatory aspect of it should not be an issue. As previously stated, the costs should not diminish the access to justice as well as not allowing lawyers to participate in mediation sessions should also not be done in order to not do harm to the process itself. The states in order to safeguard this should aim to educate and train professionals to be able to provide a mediation process.

[39] Lawyer Monthly. "What Are the Pros and Cons of Compulsory Mediation?" Available on: https://www.lawyer-monthly.com/2022/08/what-are-the-pros-and-cons-of-compulsory-mediation/. Accessed November 29, 2022.
[40] Stella Vettori. "Mandatory mediation: An obstacle to access to justice?" African Human Rights Law Journal vol. 15 n.2 Pretoria 2015. http://dx.doi.org/10.17159/1996-2096/2015/v15n2a6

2. REGULATION OF MANDATORY MEDIATION AND THE RELATION TO THE RIGHT TO JUSTICE

The previous chapter provided the understanding of what is mandatory mediation and its relations to the principle of the right to access to justice. In this chapter the author aims to look at the state examples, first being a state which is in the process of making mediation compulsory, which will be Bulgaria. The second being a state which has mandatory mediation in place but has done it recently, that will be Lithuania. And last but not least for the state which has had mandatory mediation for a longer period of time the author has chosen Italy. In the analysis the author will look at how the states have come to the decision to make mediation compulsory as well as look at how mandatory mediation is conducted, this involving the model of it, also taking a look at the data before and after making mediation mandatory. Has that changed anything and in the end how is making the process compulsory affected access to justice.

2.1. Upcoming regulation on mandatory mediation in Bulgaria

Mediation in Bulgari was regulated in the year 2004 when the Bulgarian Mediation Act (furthermore, Mediation Act) came into force .[41] This act has been amended several times as of this moment. One can say that mediation is still in its starting point in this state as when it comes to mandatory regulation for mediation, Bulgaria does not have one as of now. The author believes that a major role of the promotion and popularity of this practice is heavily based on the efforts form the judges and mediators.

As of now Bulgaria is last to adopt mandatory mediation, this is still in process as it will happen as of 1 July 2024. This is not an unforeseen event as almost every country in Europe has some sort of mandatory mediation.[42] One can see the quick development as in the last two decades mediation came from not being used or known to the mandatory regulation of it. The author can state that the reasons for this change is the case law by the European Court of Human Rights (furthermore, ECtHR) which gave a push to compulsory mediation and the second being the need for a quick solution regarding the overflow of cases for national courts. One of these fundamental ECHR cases discussing mandatory mediation will be looked at when discussing Italy.

One can look at the regulation as of now to see at what stage mediation is in this state. The Mediation Act has regulated that the mediation agreements are not enforceable by themselves, however since the reform that took place in 2011 the parties involved in the dispute can ask the court in question to accept a settlement despite there not being a pending case in court.[43]The question in hand for this research is the right to access to justice and the mandatory mediation. When looking at Bulgaria it can be stated that it is an example of the state that has not traditionally used mediation as a way of solve disputes. One can see that it has become increasingly more popular. It is also due to the fact that the right to access to justice, which is

[41] Bulgaria. Mediation Act. Available on: https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/bulgaria-mediation-act-2004.pdf. Accessed January 18, 2023.
[42] Financier Worldwide. SPECIAL REPORT: INTERNATIONAL DISPUTE RESOLUTION. “Mandatory mediation in the EU”. Available on: https://www.financierworldwide.com/mandatory-mediation-in-the-eu. Accessed February 13, 2023.
[43] Oxford Academic. Mediation in Bulgaria: Legal Regime, EU Harmonization and Practical Experience. Available on: https://academic.oup.com/book/34838/chapter-abstract/297781971?redirectedFrom=fulltext. Accessed March 12, 2023.

the previously mentioned article 6 has been seemingly breached with the overflow of the cases in the courts and people not having the chance to receive justice. Mediation is becoming one of the ways this can be solved. The author will delve into the political side of the movement in the following chapters.

Mediation act and the Civil Procedure Code of Bulgaria was amended in February 2023 and will be affected starting from the first of July 2024. And the change in question is the hybrid model of compulsory mediation.[44] Bulgaria will use mainly categorical mediation in various of cases, however it is important to note that this will not include family law cases.[45] Here author comes to the question of what will be done in family law cases. In these cases the judge will be the one who decides if the family has to be referred to a session that informs about what mediation is and the benefits of it. After the explanation the parties have the chance to go to the mediation center in the court that provides a court assigned mediator. This mediator has to pass a training done by the Supreme Judicial Council and has to have a legal education in order for them to be able to be in charge of the mediation.[46]

As the amendments are not yet in place the author cannot analyze the success of the process and if there are benefits of making mediation mandatory. What can be looked at is the fact that the state is pushing towards this change and sees the need of this amendments to be implemented. Thus, highlighting the struggles that the sate has. One of them being the overload of cases that the court has, this leading to the cases claiming that Bulgari has breached their rights to access to justice stated in article 6 of ECHR.[47] The author believes that this is a wise step and Bulgari can greatly benefit from the process. An important factor to consider when looking at the mediation in Bulgaria is the centers in the court that offer mediation. At this moment there are four centers in four different cities that will be able to provide mediation after the judge has referred parties to it. But this can affect the success of the new amendments. However, it will be visible only after a period of time after the amendments come into force.

2.2.Lithuania and its regulation on mandatory mediation

Taking into consideration that mediation is not a new trend in Lithuania, it has never been widely used. The reasons for this can be stated as cultural differences with other European countries also having the same issue. Meaning that the wider application of mediation can be achieved by additional legal measures.[48] The author believes that there was, and it can be considered that there still is a lack of information provided to the people about this alternative dispute resolution method. People do not know about this way of settling disputes and are afraid of using it, thus opting for the traditional way of solving disputes - going to the court.

The author believes that one of the reasons why Lithuania did not make mediation compulsory earlier is the benefits that mediation provides and their relevance to the people of

[44] Bulgaria. Mediation Act. Available on: https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/bulgaria-mediation-act-2004.pdf. Accessed January 18, 2023.
[45] Bulgarian Official Gazette, issue 11, 2023. Available on: https://dv.parliament.bg/DVWeb/fileUploadShowing.jsp?&idFileAtt=550352&allowCache=true&openDirectly=false. Accessed March 8, 2023.
[46] *Ibid*.
[47] BTA. "See You in Court" Gives Way to "See You with Our Mediator". Available on: https://www.bta.bg/en/news/bulgaria/430960--see-you-in-court-gives-way-to-see-you-with-our-mediator-. Accessed February 8, 2023.
[48] Tvaronavičienė, Agne. Mandatory mediation in family disputes in Lithuania: model and first-year application experience. DOI: 10.34616/143582. Accessed January 26, 2023.

Lithuania. To explain, the mentioned benefits are that the process is cheaper and less expensive.[49] However, when it comes to the legal processes provided by the Lithuanian courts one can see that they are relatively inexpensive and quite short. The statistic that proves this point is the European Union Justice Scoreboard, the author has chosen to look at the 2020 Scoreboard. This specific year was chosen as that is the year which the regulation of mandatory mediation came in force. The statistic shows that Lithuania is able to resolve civil and commercial disputes in less than 100 days.[50] That makes Lithuania the leader in the speed of which disputes in these areas are being resolved.

Leading the author to question what was the reasoning for making mediation compulsory? One can state that this is because of the advancing international practice already mentioned beforehand. Which showed positive outcomes of this practice and made the state think of the benefits this legislation could provide. The institution responsible for the implementation of the legislation that provided the new model of mediation was the Ministry of Justice of the Republic of Lithuania (furthermore, the Ministry of Justice).

Another aspect that showed that mandatory mediation was necessary was the use of mediation in this state. When it comes to the cases of mediation proceedings in civil cases one has to look at the data of the National Courts Administration. In 2017 case count was 540, while in 2018 it was 483. The next year showed an increase with 533 cases with 2020 providing only 516 cases.[51] One can state that this is a significantly low interest in this alternative dispute resolution and can be seen as a signal of the need to create further legal framework, promote mediation and its benefits as well as provide assistance for the parties in the dispute.

The regulation of mandatory mediation started with a draft of the Law of Mediation in 2017. What this law included was the mandatory mediation specifically in family disputes. However, the implementation of the provision came only on the first of January 2020.[52] Before the implementation it was important that preparation was done to establish a good practice of mandatory mediation. Both the providers of mediation as well as the public was educated on mediation and several project such as "Development of the Conciliatory Mediation System" were launched by the authorities of Lithuania.[53]

Another input provided by the state of Lithuania is the requirements set for mediation services. This can be found in the Law of Mediation, more specifically Articles 4, 5 and 6.[54] These articles explain that the mediators who are on the list of Lithuanian mediators are the ones who are allowed to provide mediation services.

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[49] Lawyer Monthly. "What Are the Pros and Cons of Compulsory Mediation?" *supra note* 39.
[50] European Commission. EU Justice Scoreboard 2020. Available on: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. Accessed January 20, 2023.
[51] Judicial Mediation Commission of Lithuania. Annual report of the Judicial Mediation Commission (2020). Available on: https://www.teismai. lt/data/public/uploads/2021/03/tmk-ataskaita_2020.pdf. Accessed January 15, 2023.)
[52] Ministry of Justice of the Republic of Lithuania. Mediation. Available on: https://tm.lrv.lt/en/fields-of-activity/mediation. Accessed January 9. 2023.
[53] Tvaronavičienė, Agne. "Mandatory mediation in family disputes in Lithuania: model and first-year application experience" *supra note* 48.
[54] Lithuania. Republic of Lithuania Law on Consiciatort Mediation in Civil Disputes. 15 July 2008. Available on: https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/lithuania-mediation-law-2008.pdf. Accessed January 9, 2023.

2.2.1. The effectiveness of the mandatory mediation in Lithuania in relation to access to justice – analysis of the year 2020

A service that reports on the legal aid in Lithuania is the State Guaranteed Legal Aid Service (furthermore, the SGLA). The author has chosen to look at the year 2020 which is the first year of compulsory mediation in Lithuania to see the results of implementing mandatory mediation. Starting with the previously mentioned mediators, the SGLA appointed mediators to 2751 cases which from the overall case count of 6789 is 40.52%.[55] Meaning that the state provides mediators for overall almost half of all mediation cases, providing the opportunity for people to access to justice and mediation itself.

From the overall request count of 6789 there were 203 ones that were a joint request of both of the dispute parties.[56]The author can explain this by the model of mediation in Lithuania, meaning that the initiation of mediation is only obligatory for the party who has decided to go to the court. There is a choice by law to not take part in the mediation process.[57] This shows the extent that the regulation has. One can argue that based on the data provided the model that is currently in place is also the most effective one, which the author agrees on.

Next to be analyzed are the cases that have reached a peaceful settlement. When it comes to the year of the mandatory mediation we implemented, the overall case count which reached a peaceful settlement was 1045, that being 57.61 percent of the overall case count.[58] In the author's point of view this shows the benefits that the mediation has to offer and the data proves that this process can in fact reduce the number of disputes that go to court while still providing people the right to access to justice.

The author would like to highlight a point that could make the analysis of that year's mediation cases more difficult. That being the Covid-19 pandemic which complicated the possibility to go to court as well as use mediation as a possibility.[59] Direct in-person mediation was limited, and the mediators had to use alternative ways of providing the service, for example using online meetings. This proves the point that the author tried to highlight, the results shown can vary because of the overwhelming issue that the pandemic provided.

As stated beforehand by the author mediation was initially used in Lithuania a few decades ago, and it is now undergoing rapid development. However, based on the analysis conducted the author believes that the creation of mandated mediation in family disputes is one of the most crucial stages. The first year of Lithuania having mandatory mediation reveals that many disagreements subject to the mandatory mediation rule do not make it to the mediator because, if one of the disputing parties is required to start the proceedings, the other side can

[55] State Guaranteed Legal Aid Service. "The Annual report of the State Guaranteed Legal Aid Service" (2020). Available: https://vgtpt.lrv.lt/uploads/vgtpt/documents/files/VEIKLOS%20ATASKAITA%202020%20(2021%2002%2025)%20FINAL.pdf Accessed January 7, 2023

[56] *Ibid.*

[57] Ministry of Justice of the Republic of Lithuania. Mediation, *supra note* 52.

[58] State Guaranteed Legal Aid Service. "The Annual report of the State Guaranteed Legal Aid Service" *supra note* 55.

[59] Rimantas Simaitis. "A New Wave of Mediation in Lithuania - What Does it Mean for Lawyers." Cobalt (2020). Available on: https://www.cobalt.legal/en/news-cases/a-new-wave-of-mediation-in-lithuania-what-does-it-mean-for-lawyers. Accessed February 4, 2023.

reject the offer to mediate without facing any repercussions. Because of this, more than half of family disputes are still resolved through the courts rather than through mediation.[60]

The author believes that the disputes to which the provision requiring compelled mediation applies are not clearly defined and this is a significant issue. There are no regulations describing how children's best interests are protected or heard during required mediation. This aspect has to be regulated in order to ensure the right to access to justice as well as the best interests of the child. Due to mandated mediation, Lithuania occasionally loses the fight for jurisdiction in family issues involving other countries.[61] Which is a significant obstacle that needs to be addressed.

2.3. Mediation in Italy – changes before and after mandatory mediation and its relation to the right to access to justice

Italy has used various of alternative dispute resolution methods for a long period of time, however meditation itself has developed only in the past three decades. This was because of the legislation that was developed in order to solve disputes in a more beneficial way. Italy has also implemented the previously mentioned Mediation Directive that specifically talks about the commercial as well as civil disputes.[62] An important aspect to mention is that one of the first states in Europe to establish obligatory mediation was Italy. The legislation requiring mediation was established in 2010, however it was reinstated in 2013.[63]

When it comes to Italy it is known that there have been a lot of proceedings against this state due to the lengthy proceedings. The main argument being that there is a failure to access to justice, meaning a breach of article 6. This is known to be one of the reasons for Italy to make mediation mandatory as the state was paying damages for the delay in judiciary.[64] The mediation Directive is a stepping point for compulsory mediation. The institution that provides the accreditation for both private and public mediation is the Ministry of Justice. And the last two decades have set the standard for civil and commercial mediation and that is that the process of mediation has to be provided by professional mediators. These mediators are the ones who are registered by the Ministry of Justice.[65]

As of now there are four types of commercial and civil mediation that is established by the state. First being the voluntary type, the title already indicates that this is freely chosen by the parties. Next is judicial or court-ordered mediation, this type of mediation is established when the judge orders parties involved in the conflict to attempt mediation. With this step the judge provides the parties 15 days for them to choose a mediator of their liking. This can be done at any stage of the pleading, that including the Court of Appeal. [66]

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[60] State Guaranteed Legal Aid Service. "The Annual report of the State Guaranteed Legal Aid Service" supra note 55.
[61] Tvaronavičienė, Agne. Mandatory mediation in family disputes in Lithuania: model and first-year application experience. DOI: 10.34616/143582. Accessed January 26, 2023.
[62] Consent. Mediation in Italy. Available on: https://www.mediation-help.com/en/about-mediation/italy/. Accessed March 27, 2023.
[63] Mediatbankry. A History Of Mediation In Italy: Both Ancient (Including Bankruptcy) And Recent. Available on: https://mediatbankry.com/2021/09/14/a-history-of-mediation-in-italy-both-ancient-including-bankruptcy-and-recent/. Accessed February 11, 2023.
[64] *Ibid.*
[65] Lexology. Mediation in Italy. Available on: https://www.lexology.com/library/detail.aspx?g=d0faf894-e442-46f9-9fee-dfb1f78ddd4a. Accessed March 11, 2023.
[66] Consent. Mediation in Italy *supra note* 62.

Another mediation type is "ex contractu" and this is when the fact that parties will attempt on solving their dispute through mediation first is written in the contract and parties of the contract have agreed to it beforehand.[67] Last but least is the mandatory type which is analyzed more deeply in this research. This type states that mediation attempt is imposed by legislation and is seen as one of the preconditions in order to proceed with a case in court.[68]

Next the author will delve into the issue of the right to access to justice and what happens in the cases when a person does not want to do mediation. The judge has the right to consider that a party has triggered a negative interference if the party fails to appear at the mediation process. Other consequences are that the party will be obligated to pay an amount of money in sanctions to the state. This will be equal to the amount that the party is paying in order to appear in the courts proceedings. This is regulated by the Code of Civil procedure of Italy, more specifically the Article 116 (2). [69]

The author would like to highlight an crucial aspect in the regulation of mandatory mediation in Italy. The judges of a case at any time can order the parties to try mediation as a way to solve a dispute. This also applies to the court of appeal. The criteria that the court looks at is the behavior of parties involved, nature of the case itself as well as the state and other considerations.[70] What is important to note is that the legislation in Italy provides that the mediations both in civil and commercial matters have to end in a written report. This report must consists of an agreement that both parties have concluded.[71]

An interesting point is the judge's involvement in mediation as the law of Italy, more specifically the Civil Procedure Code allows the judges to promote a conciliation before the case is seen by the court. It can be argued that the judges in Italy have not used this provision that often and do not have significant confidence in this resolution.[72] One of the reasons that the author can name is the training that they have received, with most of the judges not receiving significant training on the matter as well as the cultural background. This will be further discussed by the author in the following chapter.

2.3.1. Judiciary in Italy –analysis of the influence of mandatory mediation

The author will look at data and scoreboards that show the mediation in Italy and how that has changed over the years. First the author will analyze the European Union Justice Scoreboard of 2020. This year is chosen to be able to compare with the examples of Lithuania and Bulgaria. One can take a look at the "Promotion of incentives for using ADR methods" in the year of 2019. It is intriguing to see that Italy is 22nd from the European Union states for putting effort in promoting the alternative dispute resolution methods which also involves mediation.[73] From the analysis conducted before the author can state that the reason for this could be that mediation

[67] Merriam-Webster. Ex contractu. Available on: https://www.merriam-webster.com/legal/ex%20contractu. Accessed March 20, 2023.
[68] Lexology. Mediation in Italy *supra note* 65.
[69] Italy. The Italian Code of Civil Procedure. Available on: http://www.arbitrations.ru/userfiles/file/Law/Arbitration%20acts/Italian%20Code%20of%20Civil%20Procedure.pdf,. Accessed March 10, 2023.
[70] Italy. Legislative Decree No. 28 of 4 March 2010. Available on: https://www.scirp.org/journal/paperinformation.aspx?paperid=25385. Accessed March 5, 2023.
[71] *Ibid.*
[72] Consent. Mediation in Italy *supra note* 62.
[73] European Union. The 2020 EU Justice Scoreboard, p. 36 Available on: https://commission.europa.eu/system/files/2020-08/justice_scoreboard_2020_en.pdf. Accessed February 2, 2023.

has been involved into the Italian legal system for a long time, one of the longest in Italy. Leaving for the author to conclude that Italy feels no need to create new incentives and promote the process even more.

If compared to Lithuania and Bulgaria, Lithuania is the third in this list, showing that as of year 2019 which was one year before making mediation compulsory Lithuania has made many initiatives and has promoted this method heavily. When talking to Bulgaria it is placed eight in the ranking and that can be explained the same way as for Lithuania, because as the author explained previously mandatory mediation will be included in legislation as of July 2024. This data showing the recent trend developing of making mediation mandatory and that states that has not yet implemented this process are now having more incentives.

Next data that the author will analyze from the same scoreboard is the figure 5 "Estimated time needed to resolve civil, commercial, administrative and other cases, 2012-2018". This figure shows the development from the year 2012 to 2018 and is a great way to show the changes mediation has brought.[74] Italy has been in the end of the list of how fast the courts are able to resolve disputes and provide justice. At the year 2012 when mandatory mediation had been implemented for two years, also one year before the reform the score was one of the worst from all of the European Union states. But as of the year 2018 the rating has decreased. However the situation is still not great with the average of 400 days needed to resolve disputes.[75]

Another interesting data shows more information regarding the mandatory mediation, more precisely the "Existence and use of alternative dispute resolution in Italy". The number of mediators per 100 000 inhabits for Italy in 2014 when compulsory mediation has been just in the starting points was 31,7. While in the year 2020 it is 40,2, that is more than half more than the average in the EU that is 14,4.[76] This proves the development of mandatory mediation that Italy has, showing how different the situation is for the rest of the states. When comparing to Lithuania it can be stated that 237.773 mediation proceedings were started, that is significantly more than what Lithuania had.[77] Taking into account the differences that Lithuania has, one of them being the size of the state. The author concludes the same aspect that was concluded for Lithuania, that the Covid 19 pandemic has impacted the results of that year and the use of mediation.

[74] Ibid p. 2.
[75] *Ibid.*
[76] Council of Europe. "Judiciary at glance in Italy", p. 19. Available on: https://rm.coe.int/italy-country-fiche/1680a77898. Accessed March 20, 2023.
[77] *Ibid.*

3. NEED FOR THE POLICY OF THE EUROPEAN UNION TO MAKE MEDIATION MANDATORY

The debate on whether or not to make mediation mandatory is up to each of the states in the European Union, with no obligatory approach chosen. However, the author asks the question of the need for the policy of mandatory mediation to be made. What would be the arguments for this approach taken as well as the position of the various institutions in the European Union and the example of Italy and its political argumentation regarding the choice of making mandatory mediation so early before any other European Union country will be analyzed in this chapter.

3.1. Political arguments behind the move for mandatory mediation

What governs mediation is the Mediation Directive and the main aspect of it is that it lays the ground rules for how the process should be done. However, one can argue that the wording of it gives a lot of room for states to decide whether or not to make it mandatory.[78] In this subchapter the author will deal with the question of what the main political arguments of are making the mediation mandatory. One has to note the different mentalities among the member states that are part of the European Union (furthermore, the EU). Despite this fact the main reason why the Mediation Directive was to make better the access to justice and all in all make stronger alternative dispute resolution (furthermore, ADR).[79] The author sees this as a push for the strengthening of ADR and not as much a way of decreasing pressure from the courts.

The author wants to delve into the issue of mandatory mediation as many argue that there cannot be such a thing in general.[80] The argument for this is that mediation in its core is voluntary and one of the main principles of this practice is that parties are agreeing to get into this process by their own will.[81] Here comes the question of whether making this process mandatory goes against the principles of mediation and what it stands for as well as the right to access to justice. This is where one can see the clash of two aspects, the first one being the collective identity and what is best for the community and the values that the individual has. This has become a never-ending issue for the EU.[82] As one may argue that making mediation mandatory will benefit the public greatly as the courts will not be so overwhelmed with cases. However, what happens with the principle of voluntary and that the person can choose whether to go into the process of mediation.

Question of what can determine more vague terms as for example “dignity” or in this case what is voluntary. Many have argued that the law only states varying from country to country that people in the mediation process have to try this process for example for one or two times and then they can decide if that is what they want.[83] However, the fact that this is made

[78] Mediation Directive 2008/52/EC, 21 May 2008. Available on: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf. Accessed February 10, 2023.
[79] Financier Worldwide. “SPECIAL REPORT: INTERNATIONAL DISPUTE RESOLUTION. Mandatory mediation in the EU” supra note 42.
[80] Medium. Wellness is Optional. Available on: https://medium.com/@jeremymcc/wellness-is-optional-8fefd8421ec1. Access February 17, 2023.
[81] Family Mediation Council. General Principles for mediators and mediation. Available on: https://www.familymediationcouncil.org.uk/us/code-practice/general-principles/. Access February 17, 2023.
[82] *Ibid.*
[83] Family Mediators Association. Four Principles of Mediation, *supra note* 8.

as an obligatory step is an interesting aspect to discuss. Despite the fact that this is an interesting topic to discuss, the author will not delve deeper into this topic, keeping in mind the chance to further analyze this aspect later on.

3.1.1. European Parliament position on mandatory mediation and questions issued by the member states.

The European Parliament (furthermore, EP) has expressed its stance on the Mediation Directive. The author would like to highlight an aspect that was mentioned in this resolution of 12 September 2017, which is that there is an absence of meditation culture in many member states of EU.[84] This point will be analyzed more in the next subchapter which will discuss Italy as an example. However, it is important to note that the EP has called upon member states to increase their efforts in this area and more importantly mediation in disputes which are commercial and civil.[85] In addition, it was mentioned in the resolution that the European Commission (furthermore, Commission) needs to analyze if there is a need for a European standard for the mediation services. And added that Commission needs to further promote the benefits that mediation has, which includes but is not limited to be affordable and effective.[86]

There are many questions surrounding the issue of what happens if a state makes mediation obligatory. Who will pay for those session and how much will that amount be. As a part of the course studies in mediation the author visited the Supreme Court of Latvia (furthermore, Supreme Court) and talked with one of the judges who has been one of the advocates for mediation - Zane Pētersone. In this talk the judge expressed their opinion that mediation should not be mandatory, one of the main arguments being exactly the questions of costs of the process. In addition, the principle that mediation should be voluntary. However, the judge mentioned that it is the judges job to encourage people to use this opportunity as it is a cost friendly and effective way of settling disputes. Over the years the judge has seen a difference in mediation used because of this encouragement. This shows the attitude that the Latvian judges have on this stance and that with the activism of judges there can be push for a cause.

Another crucial EP resolution is the resolution of 13 September 2011 which expressed that mediation was indeed more likely to give result that is beneficial and agreeable for the parties involved in the process.[87] EP went on to stress that states and their national authorities have to develop promotional programs that would give knowledge on mediation as ADR.[88] One

[84] European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)). Available on: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0321_EN.html?redirect. Accessed February 17, 2023.

[85] European Parliament. Implementation in action - Mediation Directive 2008/52/EC. Available on: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf. Accessed February 18, 2023.

[86] *Ibid.*

[87] European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)). Available on: https://www.europarl.europa.eu/doceo/document/TA-7-2011-0361_EN.html?redirect. Accessed February 18, 2032.

[88] European Parliament. Implementation in action - Mediation Directive 2008/52/EC. Available on: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf. Accessed February 18, 2023.

has to note that there have been several debates on the topic of mediation and there have been made several studies on this topic.[89]The author again would live to refer to the visit to the Supreme Court and the talk with the judge which helps shine some light on this issue as well. As one of the main things that the judge stated was the push for mediation that the judges are putting on people who are coming to courts to settle their issues. There are now even rooms for mediation in the court and mediators at hand for people to go and give the process a try.

Here one can see that the EU is indeed the union of values, and the EU tries to reach some common understanding of them. And the author argues that there is a bigger policy made by the EU and its organs, this can be understood from the resolutions issues by the EP. It is the author's opinion that the main goal of the directive is not achieved, and the EP is trying to establish this bigger policy which may not be written. In order to achieve it states should make mediation mandatory, but in practice this can be a difficult process.

There have been questions from the European Parliament addressed to the Commission concerning the Mediation Directive and the transposition of it.[90] There have been many aspects covered in these questions, however the author would like to look at one. That question is about the mediation costs. The main part of this worry is whether or not the commission has intended to introduce in the future a fair criteria for mediation costs. This includes the question of people who part of a disadvantaged group are.[91] This is the exact point that the Supreme Court judge mentioned and the author would like to highlight this as one of the points why states are not making mediation mandatory.

3.1.2. Ongoing trend in Europe and the influence of court decisions

One can state that there has been a trend for making mediation mandatory in Europe. Over the last decade many states have been incorporating compulsory mediation, with examples like Belgium and Italy being one of them. In the recent years states like Greece, Romanie and Turkey have been joining the other states and introducing mandatory mediation in their legislation.[92] However, why is there this trend emerging?

This can be linked to the decision of the CJEU Menini and another v Banco Popolare Società Cooperative which was concluded in 2017. This case looked at whether imposing compulsory mediation is precluded by the ADR framework.[93] One has to take into consideration that the parties are not stopped from exercising the right to access to the judicial system that they possess. The decision stated that the national legislation does not preclude it.[94] Here one

[89] European Parliament. Mediation in civil and commercial matters. Available on: https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1239153&t=e&l=en. Accessed February 18, 2023.
[90] European Parliament. Parliamentary question – Limiting mediation costs. Question for written answer E-002702-17 to the Commission. Available on: https://www.europarl.europa.eu/doceo/document/E-8-2017-002702_EN.html. Accessed February 19, 2023.
[91] European Parliament. Parliamentary question – Mediation Directive. Question for written answer E-002698-17 to the Commission. Available on: https://www.europarl.europa.eu/doceo/document/E-8-2017-002698_EN.html. Accessed February 19, 2032.
[92] Kluwer Mediation Blog. To compel or not to compel: Is mandatory mediation becoming "popular"? Available on: https://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/. Accessed February 19, 2023.
[93] Judgment of the Court (First Chamber) of 14 June 2017. *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa*., C-75/16, EU:C:2017:457, para 13.
[94] Judgment of the Court (First Chamber) of 14 June 2017. Livio Menini, Maria Antonia Rampanelli v Banco Popolare — Società Cooperativa. Case C-75/16. Available on:

can look at the role of the courts and the impact that they have on the states and their decisions. After the judgment of the CJEU there was a trend to make mediation mandatory. Hower, can one say that this is judicial activism? The author would state that it is not, however it is a step that the EU has made in order to realize the bigger policy that it has.

3.2. Political vision meeting the legal – why mandatory mediation was written

The Mediation Directive that the European Union has established had provided a seemingly free approach to the issue of mandatory mediation.[95] In other words this means that the states are free to choose whether or not to establish such a practice. There is a so called "split" in two groups, with one being the ones who have chosen to have a restrained approach, and the other where the process is fully voluntary, example of the voluntary process being France, Germany and Poland among many others. However, there is a group of states that have decided upon a certain degree of mandatory mediation, with Italy being one of the examples together with Belgium where there are certain proceedings that are compulsory.[96]

However, the author in this part of the research will not look at the legal aspect of the need for mandatory mediation but at the political vision. There is a need to look at why mandatory mediation legislation was made and how politics have impacted that. The author has chosen to look at a state which has mandatory mediation for civil and commercial mediation, which is Italy. What needs to be looked at is the timing of the mandatory mediation. What was necessary for the countries is to receive the push from the legal side that would confirm the need for that kind of regulation. The previously mentioned judgment was the indication that it is indeed the reason for the upcoming trend. The country at the forefront was Italy with Greece following after that.

There is a distinction between the previously mentioned discussion in Parliament and the mediation directive. One needs to see how that has evolved. First with the mediation Directive which was only for the cross-border activities. There was also the Council of Europe which was adopting recommendations, with the first one being in 1999, which is 10 years before the directive. Council is where the policies take place thus when discussing the political aspect of mediation and making it mandatory one needs to look here. However, countries are not obliged to follow them, this is why there was the need for the directive which followed a decade later.

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https://curia.europa.eu/juris/document/document.jsf?text=&docid=193669&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=4226105. Accessed February 18, 2023.

[95] Mediation Directive 2008/52/EC, 21 May 2008. Available on: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf. Accessed February 10, 2023.

[96] Financier Worldwide. SPECIAL REPORT: INTERNATIONAL DISPUTE RESOLUTION. Mandatory mediation in the EU *supra note* 42.

3.2.1. Political view on a state that has mandatory mediation - Italy

The country that the author has chosen to analyze is Italy. It has proved to be an intriguing example as the state faced a lot of backlash for the mandatory mediation law that began in 2010 and was reintroduced in 2013.[97] Despite the fact that the statistics have shown the effectiveness of the mandatory mediation law. Italy was one of the first European countries to introduce mandatory mediation. The need for it arose as there was a Legislative Decree issue that stated the legislation for mandatory that was not mandatory but voluntary.[98] This, however, was not utilized. When asked what the reason is for not using mediation, lawyers stated that it is only a suggestion and they were not obliged to use it.[99] Judges from all instances were not abord with this change and even the Constitutional Court in its judgment on December 12, 2012, stated that the mandatory mediation was not constitutional.[100] The argumentation was that the government in this instance was acting beyond its powers in creating delegated legislation. The clear unwillingness to use mediation was visible as judges did not support this as they called "new way".[101] However, as time went on, they realized the benefits of this process.

The question of the role of the court can be looked at in this case. It can be stated that the courts are making narratives. The judges in this case are protecting democracy and the values that it has, as there is the essence of community. It can be found in the preamble of the constitution.[102] The author concludes that the essence here in question is the beliefs and the things that the Italian community trusts. It can be stated that there is a lack of tradition of mediation in this state. In fact, none of the alternative dispute resolution methods have been widely accepted or used in Italy.[103] This can be explained by the decision of the court which is acting on the community believes. Despite the fact that there is a need for the load of the cases that the court has to be cut, the backlash of the lawyers and people who are not using mediation is a testing factor in the courts decision.

In addition, here one can look at the arguments raised by Ran Hirschl. It was mentioned that judicial activism is stimulated by non-legal factors, also by the local circumstances.[104] The author agrees with this statement as one can see with the impact that the Covid-19 pandemic had on Italy. The state had made a decision to reduce the length of civil trials by 40%. And this was done by the Minister of Justice which made a proposal about mediation.[105] As mentioned

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[97] Mediatbankry. "A History Of Mediation In Italy: Both Ancient" (Including Bankruptcy) And Recent *supra note* 63.

[98] Italy. Legislative Decree no 5/2003. Available on: https://content.next.westlaw.com/practical-law/document/I7fe7f538a56111ebbea4f0dc9fb69570/Legislative-Decree-no-5-2003?viewType=FullText&originationContext=document&transitionType=DocumentItem&ppcid=646fade3d03248648d4815cf07d166af&contextData=(sc.DocLink)&firstPage=true. Accessed February 11, 2023.

[99] International bar Association. The Italian model of mediation: an update. Available on: https://www.ibanet.org/the-italian-model-of-mediation-an-update. Accessed February 13, 2022.

[100] Herbert Smith Freehills. Italy's Constitutional Court rules mandatory mediation unconstitutional. Available on: https://hsfnotes.com/adr/2012/11/05/italys-constitutional-court-rules-mandatory-mediation-unconstitutional/. Accessed February 15, 2023.

[101] Mediate. Compulsory Civil Mediation in Italy 2011/ 2021. Available on: https://mediate.com/compulsory-civil-mediation-in-italy-2011-2021/. Accessed February 15, 2023.

[102] Italy. Italian Constitution (January 9, 1948). Available on: https://perma.cc/H4KQ-SX6K. Accessed January 9, 2023.

[103] Gustizia Civile. The Italian Way of Mediation. Available on: https://giustiziacivile.com/giustizia-civile-riv-trim/italian-way-mediation. Accessed February 13, 2023.

[104] Hirschl, Ran. Towards Juristocracy. The Origins and Consequences of the New Constitutionalism. (London: Harvard University Press, 2004), pp. 100-148.

[105] Mediate. Compulsory Civil Mediation in Italy 2011/ 2021. Available on: https://mediate.com/compulsory-civil-mediation-in-italy-2011-2021/. Accessed February 15, 2023.

beforehand the judges have come around to the idea of mediation and started referring more of the cases to meditation, as there was a need for a solution in the face of the unforeseen circumstances and the lack of tools to fight the overload that the courts had.

The question of public administration has come up often when discussing the issue of mandatory mediation. Officials that are appointed to represent the public administration are for most of the time not attending mediation proceedings. It has been speculated that it is because of the fear of accounting liability.[106] The author can conclude that there is a need for a future change of legislation in order for this kind of mediation to become more effective.

[106] London School of Mediation. Mediation in Italy, how does it differ? Available on: https://www.londonschoolofmediation.com/story/2019/02/06/mediation-in-italy-how-does-it-differ-/107/. Accessed February 15, 2023.

CONCLUSION

Hypothesis of the work – mandatory mediation is not breaching the right to access to justice, it provides a more effectively functioning judiciary. The author does not reject the hypothesis expressed in the start of the work and believes that making mediation compulsory is not going against the right to access to justice. The right to access to justice does indeed oblige the states to include mandatory mediation system.

There are aspects of mandatory mediation process that the author believes has to be left to the states to decide – that being the models of the process. As well as if the family disputes have to be settled using mediation. This part needs to be left to judges to determine taking into account the specific situation and the best interests of the child.

Mandatory mediation could be viewed as a barrier to accessing justice. Although there is a difference between being forced to enter a mediation process and being forced to settle, being forced to enter a mediation process might result in being forced to settle. However, the author believes that making mediation mandatory is not an obstacle for people to exercise the right to access to justice, in the contrary it promotes it. The quick delivery of justice without monetarily burdening the parties is mandatory mediation's ultimate purpose. The European Union's official position should be to read things in more than one way. And the author has observed that everything in relation to the mediation directive is gradually changing.

There are four mandatory mediation methods stated, each state choosing the different type of method to implement. Data of the European Union shows that majority of the European Union states have at least one type of method applied in their legislation, with some states having more than one, Lithuania and Italy being example of this. There is no set approach in the European Union that would state the preferred methods, the author believes that this is the right approach, allowing the states to choose the method that suits their system the best.

There is no one set definition of mandatory mediation. When looking at the Mediation Directive it also does not provide a definition for what is mandatory mediation. Wording used for this process is "mandatory" or "compulsory" mediation, there are factors that can influence the one chosen. What can influence the wording is translation with one of the examples analyzed being the Latvian version of the two words which proved to not differ, thus allowing to choose either one of them when discussing the matter. However this can differ based on the language. This was not analyzed further by the author. The author can conclude that there is no significant difference between using the term "compulsory" or "mandatory", thus both words can be used.

Bulgaria has a Mediation Act which regulates the process in the state. This act has several amendments with the last one of them being the mandatory mediation aspect added as of 1st of July 2024. Traditionally Bulgaria has not used mediation as a way to solve disputes, however it has been recently becoming more popular. One of the reasons that the author has found is the recent trend in Europe to use this process more as well as make mediation mandatory.

When the relation to the access to justice is looked at when talking about Bulgaria one can find that there have been several breaches of the right set in article 6, mediation becoming one of the ways that this right can be granted. The model chosen by the state is set to be the categorical model, not including family law cases. In these instances, the judge will be the one who chooses if mediation should be tried or not. The author did not conduct analysis of the

impact of mandatory mediation relating to the access to justice as the legislation has not come in force. There is an opportunity by the author to explore this topic further in the future research when there is data on this subject.

When it comes to Lithuania the state as well as Bulgaria has not been widely using mediation but it has made mediation mandatory as of January 2020. The author has concluded that one of the main reasons for the state to make mediation compulsory relatively later then other European states is the justice system and people's perception of both mediation and the courts. Explaining that Lithuanian courts provide a relatively short and inexpensive process. If one keeps in mind the main benefits of the process which is the process being faster and cheaper than regular litigation. Then one can see that this explains why mediation was not used that often – people did not see the need for it. The European Union Justice Scoreboard proves this with the 2020 Scoreboard showing that Lithuania was one of the leaders in the speed in which the courts resolve civil and commercial disputes.

As Lithuania has had mandatory mediation for three years already the author can conclude the effectiveness of making this process compulsory. One of the main factors that affected the precision of the data is the covid pandemic which influenced the possibility to use mediation. The author chose the year 2020 to analyze, factors for this being that this was the year the mediation became mandatory as well as this year was the least affected by the pandemic, keeping in mind that the data from the years 2022 and 2023 has not been summarized. This year showed that there were 6780 mediation cases, from which 40.52% were state appointed mediators. In author point of view this is one of the main reasons why the mandatory mediation process is seen as successful both in scholar viewpoint as well as the authors. From all of the mediation cases in 2020, 57.61% were peacefully settled, showing that the process is beneficiary.

Looking at how frequently and how many violations of article 6 of the ECHR have occurred the author claims that there is a problem of effective judiciary and the people's right to access to justice. Analysis of Italy with the focus on its journey to mandatory mediation and the time after its implementation proves the previously mentioned points that mandatory mediation is not breaching people right to access justice, in contrary it is a right that goes hand in hand with mediation and can be a tool to make the situation at hand better and ensure that people get the chance to protect their rights.

From all of the states that the author has analyzed further Italy is the one who has had mandatory mediation the longest. Mediation itself has developed in the state for the last three decades. Mandatory mediation was introduced in 2010 with it being reinforced in 2013, providing that Italy was one of the first states to introduce compulsory mediation. The author has concluded that mandatory mediation over the years has slightly improved the situation of the breaches in relation to article 6. However, it has not shifted the weight of the court workload as much as one would want. Based on the data conducted by the European Union Justice Scoreboard the author can state that starting from the year of 2012 when mandatory mediation was set in place for a year up until the year 2018 the time for dispute resolution has not changed that drastically with 400 days needed for the dispute resolution in Italy.

According to the European Parliament the mediation directive's objectives have not been met. The author agrees with this point and has observed that there is a more extensive policy that is based on parliamentary resolutions. Despite the fact that it may not be in writing, the author argues that the member states ought to make it so. The mediation process should be required if the mediation directive's objectives are to be met.

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