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Contents

Development Induced Displacement and Arms Conflicts in Bangladesh

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Abstract. *Each year millions of people around the globe are forcefully displaced from their homes, lands and livelihoods in order to make way for large-scale development projects. It has really been a great challenge for the nations to resettle and rehabilitate them and to mitigate their adverse impacts of involuntary displacements. A number of research studies have been conducted by various scholars with regard to such issues, and among them, Michael M. Cerena in his study has excellently mapped out the adverse impacts of involuntary displacement. His study says that the displaced people face a broad range of 'impoverishment risks' and 'social exclusion'. But his study doesn't explain the whole range of risks of the involuntarily displaced people. The study on the displaced people of Kaptai Dam, Bangladesh has shown that involuntary displacement not only leads to certain impoverishment risks and social exclusion, but also, to loss of citizenship, to statelessness and arms conflicts.*

Keywords: *Kaptai Dam, Development, Displacement, Rehabilitation, Arms Conflicts, Statelessness, Bangladesh.*

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Introduction

Referring to the development strategy after the Second World War and economic growth as its indicator, all the countries both in developed and developing regions started to grow their economy. Thus, the availability of adequate infrastructure facilities is vital for the acceleration of economic development of a country. Governments across the world have given high priority to investment in sectors such as railways, roads, power, telecommunications, ports and industries, etc. Thus, dams are the outcomes of this process and symbols of development. It has multipurpose utility, such as generation of electricity, irrigation, flood control

and navigation that contribute at large to the growth of a nation. (Joyce, 1997: 1050-1055; Bandyopadhyay, 2002: 4108; World Commission on Dams, 2000: 1-15, 58-59; Deudney, 1981: 5-6; Khagram, 2004: 5-10; Milewski, 1999: 1-10, Zhang, 1999: iii-iv; Sanmuganathan, 2000: 22-57, Gritzinger, 1987: 14-15).

While many have benefited from the services dams provide, their construction has led to many significant social and human impact, particularly in terms of displacement and loss of livelihoods. Compulsory displacement that occurs for development reasons embodies a perverse and intrinsic contradiction in the context of development. It raises major ethical questions because it reflects an inequitable distribution of development's benefits and losses. Nevertheless, the involuntary displacements caused by such programmes create major impositions on some population segments. It restricts population rights by state-power intervention. This raises major issues of social justice and equity. The principles of "greater good for the larger numbers" justifies the displacements and thus some people enjoy the gains of development, while others bear its pains (Cerena, 2000: 3659; Baxi, 1989: 164-17; Hemadri, 1999: xxxii-xxxiv; Fernandes, 1999; Bartolome, 2000:9; Ramanathan, 1995; Sharma, 2003: 907-911; Dankalmair, 1999: 1; Robinson, 1999: 1-9; Bharati, 1999: 1374- 1375; World Commission on Dams, 2000: 102-104, 16-17, 110-118; Cerena, 1995: 266-267; Shylendra, 2002: 3289-3290, Mahapatra, 1991: 272-273, Jena, 1998: 822; Inter-American Development Bank, 1998: 26-27; Nayak, 2000: 79-108; World Health Organization, 1999: 4-11; Adams, 2000: 14-15; Gururaja, 2000: 13; Asian Development Bank, 2003: 1-6; Brandt, 2000: 2, 25-43, 52-58; Hemadri, 1999: xx-xxi; Bartolome, 2000: 27-32; World Bank, 1998a, b, c; Cerena, 1998: 184-185; Fernandes, 1989a, b; Mahapatra, 2000:121-134; Wet, 1999: 9-11; Jing, 1999: 16; Drydyk, 1999: 1-8).

There have been a number of studies on development-induced displacement by scholars. Among those scholars, the study of Michael M. Cerena on involuntary displacement and its socio-economic impacts is highly appreciated. His study says that displacement leads to 'Impoverishment Risks' and 'Social Exclusion' of certain social groups of people. It culminates in physical exclusion from a geographic territory and economic and social exclusion from a set of functioning social networks. Thus, affected people face a broad range of impoverishment risks that includes landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity, loss of common resources and social disarticulation that result in a loss of socio-cultural resilience. But his study doesn't explain the whole range of risks of the involuntarily displaced people (Cerena, 2000: 3659-3678). Taking these facts into consideration, the study on the displaced people of Kaptai Dam, in Bangladesh, has shown that involuntary displacement not only leads to certain impoverishment risks and social exclusions as mentioned by Cerena, but also, it leads to loss of citizenship, statelessness and arms conflicts.

Development Projects and Displacement in Pakistan

Unlike other countries in the world, national development has been largely equated with economic growth in Pakistan and therefore large scale industrialization and massive infrastructural development took place in Pakistan soon after its partition from India, and it promised to set Pakistan on the path to modernization and development. Immediately after independence, a series of developmental projects were planned in East Pakistan (presently Bangladesh)[1] (Zaman, 1996: 692-696; Fernandes, 1997: 8-9; Government of Bangladesh, 1995; Amin, 2002; Vakil, 1950: 388-398). It was in the middle of February in 1950, the Development Board of Pakistan government decided for the establishment of paper mill in Karnafully in East Pakistan. The first large scale development project that hit the Chittagong Hill Tracts (CHT) was the Pakistan National Pride 'Karnafully Paper Mill'. The paper mill started its production in 1953 and had been given 99 years to extract its raw materials (bamboo & softwood) from the forest areas. The Karnafully Rayon mill was constructed in 1966 (Gain, 2000: 30-36).

However, it caused large scale displacement in the region. The region located in the south-east of Bangladesh occupies a physical area of some 5,000 square miles (13,000 square kilometers) or ten percent of the total land area of Bangladesh, inhibited by twelve distinct tribal groups. They are the Chakmas, Marmas, Tipperas, Murungs, Tanchaungs, Kamis, Ryangs, Lusheis, Bawn, Khumi, Sak, and Pangkhua. They have their own language/dialect and all belong to the Sino-Tibetan descent group; they closely resemble the people of north-east India, Burma and Thailand, and greatly differ from the people of plains of Bangladesh. Among them, the Chakmas are the largest in numbers; they constitute about 85 percent of the total tribal population along with the Marmas and Tripuras. However, they have their rich cultural heritage irrespective of their diversified language and religion, and all commonly practice swidden or shifting agriculture, locally known as *Jhum* cultivation (Gain, 1998, 2000, 2001, 2002, Gankovsky, 1974: 220-230; Schendel, 1992: 95-97; Behera, 1996: 985-986; Khan, 2003: 9-15).

The government started the construction of the Kaptai hydroelectric project in 1957 on the Karnafully River in the CHT (Parveen, 2002: 197-200 & see Banglapedia, 2008). The dam submerged area of about 400 square miles including 54,000 acres of cultivable land. About 90 miles of government roads and 10 square miles of Reserve Forest also went beneath the water. The lake took away 18,000 families and displaced 100,000 tribal people, of which 70 percent were Chakmas. The inadequate compensation and rehabilitation forced 40,000 hill men to migrate across the border of India and remain as stateless citizens in the states of Arunachal Pradesh, Mizoram and Tripura. The rest of the displaced people remained as internal displaced people within the CHT and very

1 The present Bangladesh was part of Pakistan, known as East Pakistan. Bangladesh got separated from Pakistan in 1971 and declared herself as an independent nation.

few of them rehabilitated in Kassalong area (Sopher, 1963: 347-348; Mohsin, 1997: 102-103).

Compensation and Rehabilitation

The Government of Bangladesh set up the Revenue Compensation office at Kaptai to pay compensation for the displaced people of Kaptai Dam. The government set aside over US $51 million for both giving compensation and rehabilitating them. But only US $2.6 million was actually disbursed. The hill people allege that the public officials engaged in the compensation and rehabilitation work highly indulged in corruption and discrimination between the hill people and the Bengali resettlers and the latter were the first to get compensation. It was primarily due to the fact that the staff in charge of giving compensations were the Bengalis. After a short period of time, the programme of compensation stopped while the government declared all displaced tribal people were nomadic (Ahmed, 2002-2003: 21, Sopher, 1963: 349-362). Out of the 18,000 families displaced by the Kaptai Dam, only 4,938 families have been relocated (See Table 1). The dam submerged 54,000 acres of plough land but the Government of Bangladesh only replaced 24,801 acres of plough land to relocate the displaced. It signifies only 27.43 percent of families have been relocated by replacing them with 45.92 percent of plough land. The rest of 72.57 percent of displaced families remained as the internal displaced people (IDPs) (Sopher, 1963: 349-362, Parveen& Faisal, 2002: 201-202). There were several inadequacies in implementing the resettlement programme. The government could not keep its promise in compensating the lost arable land. Secondly, fertile land in the river valley was compensated by hilly lands, which was of no immediate use to the people, who had got accustomed to the plain land farming. Thirdly, monetary compensation was too little; for example, the displaced people received only Taka 500–700 per hectare as compensation whereas they had to pay Taka 5000 per hectare to buy similar arable plain land in other areas.

Table 1: Relocation of the Displaced People of the Kaptai Dam

Relocation Area	Land Offered		Households Moving to Area	
	Acres	% Total	Number	% Total
Kasalong	10,000	40.4	2,870	58.1
Chengri Valley	3,903	15.7	1,405	28.4
Myani Valley	1,287	5.2	99	2.0
FeniVally&Ramgarh	3,057	12.3	-	-
Circum-Rangunia	747	3.0	200	4.1
Karnafully-Sangu interfluve	374	1.5	183	3.7
Sangu&Matamuhari Valleys	5,433	21.9	181	3.7
Total	24,801	100.0	4,938	100.0

Source: Sopher, David E (1963): 'Population Dislocation in Chittagong Hills', *Geographical Review*, Vol. 53, No. 3, July, p. 355.

Impoverishment Risks and Social Exclusion

Although the Kaptai hydroelectric project produced five percent of hydropower production of the country, tribal groups got little benefit out of it. The hydroelectric plant and other industrial projects in the CHT (Karnafully Paper Mill, Karnafully Rayonand Chemical Limited and Bangladesh Timber and Plywood Industries Limited) have neither provided new avenues of job opportunities to the tribal people nor brought any development to the region. The Karnafully Paper Mill provided 6,000 employments to workers and out of those, 40 workers are tribal people. The industries and factories in the CHT do not benefit the tribal people, as the employment goes to the Bengalis. More factories and industries mean more jobs for the Bengalis and more hardship to the hill people (Barua, 2001: 80-81). Submergence of extensive *Jum* land led to acute shortage of plough land in CHT and crisis of livelihood extended to a great degree among the tribal groups.

The tribal people who once produced all their necessities in their homes and sold them in their local markets have now been replaced by industrial goods. Now the business is totally in the hands of the non-tribal people. Consequently, the tribal people have to eke out their livelihood from new occupations. Such are fishing and horticulture, in which they have little experience (Barua, 2001: 80-82). The scarcity of lands to reside forced them into the forest areas, where they fell victim to various diseases. Among those Malaria has been rampant among them. Many people died of various diseases in the initial period of their resettlement due to the lack of treatment and medicines. Health problems often arise due to the remoteness of settlements and inadequate allocation of health staff and government health programmes (Chakma, 1995: 71-74, Norwegian Refugee Council 2006: 59-62, Skinner 2008: 26). The displaced people experienced a broad range of impoverishment risks like food security, joblessness, landlessness, marginalization, health problems and at last they are socially excluded from their own homeland and it led to loss of socio-cultural resilience. Thus, the relations between tribal people and the Bengalis gradually worsened in CHT and it turned into arms conflicts and insurgency (Norwegian Refugee Council, 2006: 27-28; Sopher, 1963: 339-362; Hassan, 1991: 24-25).

Kaptai Dam and Anti-Dam Agitation

Soon after the declaration of the construction of Kaptai Dam in CHT, the Chakma Raja (King) Tridev Roy, East Pakistan Legislative Assembly Member Kamini Mohan Dewan and a few other regional leaders registered their protests against the Kaptai Dam from their respective positions. Students like the Chakma-born fighter Manabendra Larma and Binoy Kanti Khisa of Chittagong distributed booklets explaining the ill effects of dam and mobilized the people to protest against the proposed dam to construct in the Kaptai. But they were immediately arrested by the policemen and thrown in jail.

The overall political situation of East Pakistan was stifled under the iron rule of Ayub Khan. Public protest against the authorities was an impossible phenomenon during that period. The protests were isolated and the participation of common people failed to stop the construction of the dam.

In response to the state repression, an underground political party was formed by the displaced people in the year 1966, known as the CHT Welfare Association. The main aim of this association was to protect the rights of the tribal people of CHT. However, the organized protest started after the emergence of Bangladesh in 1971, when they were denied the status of ethnic minority in the constitution and it alarmed their cultural identity. The CHT Welfare Association was dissolved in 1972 with the formation of Parbottya Chattagran Jana Sanghati Samity (PCJSS) headed by Manabendra Narayan Larma (Kazi, 1980: 1510). He launched a struggle to get their rights in democratic and nonviolent ways. But later they changed their strategy of struggle from nonviolent to armed struggle when the Mujib Government proclaimed Martial Law in 1975. The democratic protests gradually evolved into rebellion (Chakma, 1995: 86-96).

Arms Conflicts and Insurgency

The well-organized guerrillas led by PCJSS attacked security forces, setting fire to security forces camps and villages of non-tribal people, killing them, kidnapping government officials and prominent citizens, sabotaged power grid lines, bridges and culverts, etc. The spread of insurgency caused large scale killing and kidnapping of people and many were injured (see Table 2). Such an act by the tribal people encouraged military persecution by the government in CHT and the conditions further worsened in the region. In such a situation, it was very difficult for the tribal people to survive in CHT under the

Table 2: Insurgency induced Casualty

Year	Killed		Injured		Kidnapped	
	Bengalis	Tribal	Bengalis	Tribal	Bengalis	Tribal
1980	87	08	75	05	57	07
1981	42	02	27	02	03	12
1982	16	07	20	-	51	18
1983	08	-	08	03	15	01
1984	108	07	45	08	18	27
1985	11	14	19	08	25	19
1986	248	33	118	16	33	04
1987	117	19	67	09	17	08
1988	128	16	65	14	131	27
1889	72	74	138	57	22	28
1990	47	20	38	12	18	22
1991	68	15	36	18	21	32
Total	**952**	**188**	**656**	**152**	**411**	**205**

Source: Shelley 1992, p.124.

constant threat of Bangladesh army and its persecution. As a result the tribal groups began to migrate crossing the Indian border as refugees. About 40,000 tribal people migrated to Mizoram in 1983 and 50,000 to Tripura in 1986 and the refugees stayed in camps (Kharat, 2003: 9-10; Bertocci, 1985: 163).

Genesis of the Protests and Armed Rebellion

The question regarding the causes of protests and armed rebellion in CHT that have been continuing till today arises. The simple answer is violation of their land rights, denial of their status of ethnic minority by the post-colonial government of Pakistan and later Bangladesh as well. The acquisition of land for Kaptai Dam by the Government of Pakistan dispossessed tribal people from their land and added fuel to the fire. The complex issue of conflicts in CHT will be better understood if we look at the history of CHT during the period of Mughal era and British rule and how it drastically changed in the post-independence era in every respect in CHT. During the post-independence era, both Pakistan and Bangladesh drastically changed the administrative structure of the CHT, denied their cultural status, and promulgated developmental projects in the name of national interest in CHT which threatened their source of livelihood and made them displaced and stateless as well.

Pakistan Period (1947-1971)

Soon after the independence of Pakistan, CHT came under the control of Ministry of Home and Kashmir Affairs and directly ruled by the central government. Although the constitution of 1956 and 1962 maintained the CHT as an "excluded area", the constitutional amendment in 1963 abrogated the CHT Regulation of 1900, which had been-introduced by the British earlier. Chakmas lost their 'autonomy' and their status of 'excluded' area, and it was a great shock for them (Bhattacharya, 2001: 329; Ahsan & Chakma, 1989: 963; Kukreja, 2003: 12-21; Behera, 1996: 988-989).

Land acquisitions and encroachment of forest land in CHT by the government has been one of the major reasons of conflict between the tribal people and the Government of Bangladesh. Under the Chittagong Hill Tracts (Land Acquisition) Regulation, in 1958, the Islamic Republic of Pakistan assumed all the powers for the acquisition of land in CHT, required for any public purpose and it violated the CHT Regulation of 1900 (Government of East Pakistan 1958). The CHT people were enjoying a variety of rights over land under the CHT Regulation of 1900 earlier declared by the British. There is a significant difference in terms of legal system between the CHT and in the rest of the country. Laws passed in the rest of the country do not automatically apply to the CHT, unless they are specially laid down in the CHT Regulation of 1900 (Roy, 1998: 56-79).

Along with the land acquisition, encouragement of commercial plantations (rubber & teak) by the government in the CHT area was another factor of discontent among

tribal people. Rubber plantations began in the CHT in 1959 on an experimental basis. In 1969 the government took over 40,000 acres of land to promote it on a commercial basis. But the plantations have become the source of conflict over land on which ethnic communities held customary rights. Such policies of Pakistan government threatened their source of livelihood, ethnic identity and culture. In this backdrop they began to put of armed resistance (Gain, 2001: 23-26; Nayak, 2005:39-40; Nayak, 2006: 61-62; Gain, 2002: 41-48). But, the Pakistan government sawit as guerilla activity spilling over the border from the hostile neighbor states of India and Burma and supressed the struggle (Zaman, 1982: 78).

Bangladesh Period (1971-onwards)

Bangladesh emerged as a new country in the world map in the year 1971. The country adopted a multi-party parliamentary form of government and a secular polity for governance. The Awami League headed by Mujibur Rehman swept the power in the parliamentary election and became the prime minister of Bangladesh (Chakravarty, 1995: 7-15). On the other hand, the Chakma leaders also participated in the elections and gained a legislative seat from Chittagong, which indicated their interest of political participation (Kharat, 2003: 6). A deputation led by Manabendra Narayan Larma called on Sheikh Mujibur Rehman on February 15, 1972, and placed before him a four-point charter of demands to protect their cultural autonomy and rights, which had earlier been violated by the Pakistan government as well as by the 1972 constitution of Bangladesh. The 1972 constitution of Bangladesh declared Bengali to be the basis of nation hood in the new state (Mohsin 1997a: 18-19). These demands were: (1) Autonomy of CHT with its own legislature; (2) Retention of the 1900 Regulation in the Bangladesh constitution; (3) Continuation of the tribal chief offices and; (4) Constitutional provisions restricting the amendment of the Regulation and imposition of a ban on the influx of the non-tribal people (Zaman, 1982: 78).

But Mujibur Rehman was in no mood to listen to those demands, and clearly expressed 'we are all Bengalis, we cannot have two systems of governments' (Hazarika, 1995: 278). He advised them "to do away with their ethnic identities" and "emphasized on Bengali nationalism and culture" (Zaman, 1982: 78). The reason of such declaration made by Mujibur Rehman was the indifference of Chakmas and the pro-Pakistani outlook of Raja Tridev Roy, Chief of Chakmas in the entire episode of Bangladesh war of independence (Islam, 1981: 1219; Kharat, 2003: 6-7). Secondly, during the Pakistan regime, the CHT served as a training centre for the Mizos who had given their support to the Pakistani forces during the liberation war. The Mujib government identified the movement of regional autonomy as a "national security problem" and was taken as secessionist movement. Thus, the government took a number of measures to suppress the autonomy movement of the tribal people. Such are population transfer programme, militarisation of CHT, Islamization of CHT and religious persecutions (Mohsin, 1997: 18-20).

Population Transfer Programme and Land Alienation in the CHT

In 1973, the non-tribal people were encouraged to settle permanently in the CHT region (sparsely-populated area) by expelling the tribal people from their home and having agricultural land forcefully and distributed among the Bengali settlers (Zaman, 1982: 78). During the period of Mujib's government (6th December 1971 – 15 August 1975), 50,000 non-tribal people had been settled in the CHT area (Kharat, 2003: 8-9). This policy was further continued by the successive governments too.

Such policy has alienated the hill people from their land and forest resources through the state-sponsored project of Bengali settlement into the hills. The tribal people in the CHT constituted 91 percent in 1951 and they suddenly reduced to 59 percent in 1981 and 51 percent in 1991 (see Table 3). It is true that economic migrants from plains land of Bangladesh were coming to CHT through individual efforts for many years, but the migration that took place during the 1980s was claimed by the government as natural migrants. The population transfer programme made during 1979-80s not only violated the individual and collective land rights but accelerated the pace of economic and political marginalization of the hill indigenous people. The loss of their livelihood sources, non-recognition of their old practiced political institutions as well as the non-tribal cultural assimilation in the CHT led to the state of frustration among the tribal people (Roy, 1997: 167-191).

Table 3: Demography of Indigenous People and Bengalis in the CHT

Census Year	1872	1901	1951	1981	1991
Indigenous People	61,957	116,000	261,538	441,776	501,144
Bengali	1,097	8,762	26,150	304,873	473.301
Total	63,054	124,762	287,688	746,649	974,445
Indigenous People (%)	98%	93%	91%	59%	51%
Bengali (%)	2%	7%	9%	41%	49%

Source: Roy 1997, p. 182.

The 'detribalization' policies followed by the government threatened the ethnic identity and their tribal rights. Thus the tribal people responded with increased armed resistance. The PCJSS headed by extremist leader Manabendra Narayan Larma soon launched its armed wing called as *Gana Mukti Fouj* (People's Liberation Army), popularly known as 'Shanti Bahini'. Therefore the increasing armed resistance of Santi Bahini alarmed the Mujib government. In 1976, the Santi Bahini first launched its first attack on Bangladeshi forces and the new insurgency had been born in Bangladesh (Hazarika, 1995: 279-280).

Development Programmes and Militarization in the CHT

In 1975, General Ziaur Rahman came to power after a series of military coups, and Martial Law was imposed in the country. The most significant step taken under Martial Law was a drastic revision of development strategy and investment policies. The new

leader rejected the Mujib's development strategy (Ahamed, 1978: 1168-1180) and he declared in 1976 that the problems in the CHT stemmed primarily due to lack of development in the CHT. Thus, he set up a development board known as the Chittagong Hill Tracts Development Board (CHTDB) to carry out large scale development projects in that region (Anderson 1976: 467-473). Under this program, various commercial plantations and afforestation were undertaken, funded by various international organizations. Among those projects, one of the most celebrated projects is 'Social Forestry'; aimed to alleviate poverty and to increase the status of livelihood of the displaced people. But it did not boost up their livelihood; rather the monoculture plantations of teak, rubber and eucalyptus, etc., further alienated the hill people from their rich bio-diversified land and forests. Thus, the crisis of livelihood among them greatly extended (Roy & Halim, 2001: 5-38).

Expansion of reserved forests in the CHT by the government has become another major concern for the hill people, where the hill people are denied of their traditional rights of collection of fuel wood, and forest products. The Ministry of Environment and Forests deemed 217,709.3 acres of land as reserved forests in 1998, which violated the CHT Regulation (Gain 2000: 19-38). Bangladesh has been getting a considerable amount of development fund that flow to the CHT in the recent period primarily in the wake of globalization. The gas exploration and various mining activities in the recent years in CHT have been putting considerable impact to the self-sufficient features of their economy, traditional production methods, survival technique, culture of tribal people, and eventually the environment (Nayak, 2005: 41-42).

On the other hand, in the name of development and maintaining law and order in the CHT, the Government of Bangladesh deployed huge military forces and the CHT simply became a military camp. Estimation shows that 30,000 troops were operating in the CHT, which was one third of all regular troops in Bangladesh. It means one security force was deployed for every fifteen tribal people (see Table 4). The main purpose of operation of military in the CHT was a counter insurgency programme to suppress the Shanti Bahini and resettle the tribal people in the cluster villages under the control of the army. As a result, the huge military presence made the tribal people live in constant fear, terrorized in every aspect of their life (Arens, 1997: 56-66).

Table 4: Security Personnel deployed in the CHT

	Division	Number of Security Personnel
Army	24th Infantry Division	80,000
BDR	6 Battalions	25,000
Ansars	4 Battalions	8,000
Navy	I Battalions	1,500

Source: The Report of the Chittagong Hill Tracts Commission, "Life is not Ours: Land and Human Rights in the Chittagong Hill Tracts, Bangladesh, May 1991, p. 41.

Human Rights Violation inthe CHT

Apart from militarization and the total control of CHT, the military also grossly violated human rights in the region. The military has divided the entire area into three zones (white, green, and red). The white zones cover an area of two miles adjacent to the Army Head Quarters. Bengali settlement areas are identified as green zones and the hill people residing in the interior area are categorised as red zones, where military carries out counter-insurgency operations. In the CHT, rape has been inflicted upon the hill women by Bengali security personnel and it has been reported that between 1991 and 1993, over 94 percent of the rape cases of hill women were by the security personnel. Over 40 percent of the victims were women under eighteen years of age. Besides that, hill people have been forcibly evicted from their homestead in the name of counter-insurgency. As many as 263 houses of the hill people were burnt down by the army in between January 1991 to June 1992.

The military also often evicts people from their land for the purpose of its own extension. In Rangamati, the military has acquired 400 acres of land, 150 acres of land in Khagrachari for military camps and 11,446.24 acres in Bandarban for building a military training centre. In the name of counter-insurgency, hill people have often been detained and tortured by the army. There were 310 cases of torture and 135 cases of arrests of the hill people by the army in between January 1991 to June 1992 (Mohsin, 1997a: 177-188).

Islamisation and Religious persecution

Besides human rights violation by the military, the state also promoted religious conversion. The young girls of the CHT are being forced to get married to the local Muslim youths after converting them to Islam. It is alleged that the army officers stationed in the CHT are encouraged to marry tribal girls in order to assimilate the ethnic minorities. The government has established an Islamic Preaching Centre at Rangamati and big mosques are being constructed in the area, financed by Saudi Arabia. *Al-Rabita*, a Saudi Arabia based Islamic missionary organization has been funding for such activities and it has been working in the CHT since 1980 to convert the hill people to Islam. The Jamaat-e-Islami, the fundamentalist Muslim party, has been active in the CHT for the promotion of Islam through various programmes. The government has built hundreds of mosques and *madarsahs* (Islamic religious educational institutions) throughout the CHT as part of its plan to islamise the tribal homeland. A number of mosques and *madarsahs*have been mushrooming in the CHT (See Table 5) (Barua, 2001: 116-118).

Table 5: Growing Mosques and Madarsahs in the CHT

Year	Mosques	Madarsahs
1979	421	4
1982	525	35
1983	529	39

Source: Barua 2001, p. 117.

Apart from islamisation, there have been accounts of religious persecutions by the military on the Buddhists and Hindu temples, churches and religious images. It was reported that 54 Buddhist temples were destroyed within a period of eight months in nine upazillas. In 1986, 22 Hindu temples were burnt down by the army. Though Islam was declared as the state religion in Bangladesh in 1988, freedom of religion is guaranteed by the constitution of Bangladesh. But, the people of the CHT have been denied their freedom of religion and such type of contradictions in the state policy has been alienating the CHT people from the Bengali regime (Mohsin, 1997a: 179-180).

Peace Process and the CHT Peace Accord

Simultaneously, side by side, the government was also making various platforms of negotiations with the Shanti Bahini to settle the conflicts in the CHT. In February 1989, the parliament enacted the Hill District Act of 1989 within the framework of three "Hill District Councils", and Special Affairs Ministry was also constituted in July 1990 to look after the affairs of the CHT. The three Hill District Councils offered the tribal people facilitation of local self-government in the CHT within the unitary constitution of Bangladesh. A beginning was made in the direction of autonomy during the last part of Ershad regime (Chowdhury, 2002: 8). In spite of strong initiatives undertaken by the government of Bangladesh, the process of repatriation during the Khaleda regime was very slow. But it took turn in 1997, when Prime Minister Sheikh Hasina came to power in 1996 (Bhattacharya, 2001: 333).

Negotiations took place between the National Committee on the CHT and the PCJSS throughout the period 1996 and a historic Accord was signed on 2 December 1997. The Accord was signed by the government and the PCJSS (Bhattacharya 2001: 333). The Awami League claimed the CHT Peace Accord as a "landmark achievement", which would not only bring peaceful national integration but indeed open the plentiful natural resources of the CHT and enhance economic growth throughout the whole region. But the Bangladesh National Party (BNP) denounced the Accord as a "black pact" and alleged that it violated both the country's sovereignty and its unitary constitution. The pro-Islamic Jamaat-e-Islam and other right wing groups claimed that the Awami League had virtually sold the CHT by signing the treaty, an area which is very important for Bangladesh's national security and economic development (Rashiduzzaman, 1998: 654-656).

The long struggle of PCJSS and its 25 years of insurgency war since 1972 for virtual autonomy for its people in the CHT came to end after the peace treaty. The armed Shanti Bahini surrendered their arms and return to their normal life. The first batch of 739 soldiers of the Shanti Bahini surrendered their arms on February 10, 1998 at the Khagrachhari stadium. Each Shanti Bahini member received a cash compensation of Tk. 50,000 (US$ 1,200) to begin a new life outside the jungle. The four main demands

of the PCJSS articulated since 1992 included (i) the constitutional recognition of the 10 ethnic communities speaking different languages (ii) removal of all Bengalis who entered the CHT after 1947 (iii) full regional autonomy to the CHT and (iv) removal of the army from the CHT. But the CHT Peace Accord slightly shifted from several of its vital demands. The PCJSS virtually sacrificed the former two demands and has been bargaining for the remaining two. The treaty remains silent about the constitutional recognition of the ethnic communities of the CHT, but however it considered the CHT as "tribal" people inhabited region (Raj, 1998: 1).

However, the accord divided the tribal people into two groups; one supporting the Accord and another opposing it. In 1998, the Jumma people activists who wanted full autonomy of the CHT launched a new political party, known as the United People's Democratic Front (UPDF). It created conflicts between the UPDF and the PCJSS. Over 500 people belonging to the two groups were killed, and more than 1,000 people injured in clashes between them. Moreover, about 1,000 people of the two groups were kidnapped. The government of Bangladesh brands the 'full autonomy' activists as terrorists and again justified the continuing presence of military in the CHT and it went under the direct rule through its local representatives, the Deputy Commissioner and the army (Norwegian Refugee Council, 2006: 31-32).

Displacement and Migration Across the Border

About 40,000 displaced people by Kaptai Dam crossed the border of India and settled in different north-eastern states of India. The Government of India made a scheme to relocate them in the North East Frontier Agency (NEFA), now known as Arunachal Pradesh. The settlement of Chakma refugees began in NEFA. Even those refugees who went to Bihar for settlement at Gaya district came back to join their brothers in NEFA in 1968. Thus the flow of refugee continued from 1965-66 to 1968 and they settled in the three districts of Tirap, Lohit and Changlang. The central government thought the NEFA was a sparsely populated tract, 4.1 persons per sq. km. against the national average of 434 persons and its climatic conditions and mountainous terrain most suitable for economic survival of Chakmas. It was the ideal territory for the rehabilitation of the Buddhist refugees in the Indian soil. As NEFA was administered by the central government, the settlement of the Chakmas came directly under the Ministry of the Home Affairs until 1972 (Chaudhury, 1997: 139-143).

For three decades after 1964, indigenous local youths in the NEFA did not raise any questions about rehabilitation of the refugees by the centre despite beginning of electoral activities in full swing since the 1980s. But surprisingly, when Arunachal Pradesh was raised to the status of full-fledged province in February 1987, the student union of Arunachal Pradesh known as Arunachal Pradesh Student Union (AAPSU) raised a political issue in the line of the Assam movement and drew the attention of the local

political parties to fight out the interest of the indigenous people of Arunachal Pradesh. On the other hand, the grant of statehood to Mizoram encouraged the AAPSU for the agitation demanding local Chakma Buddhists expulsion from the state. Initially, about 2,748 families of Chakmas consisting of 14,888 persons were settled in the NEFA purely on the temporary and the humanitarian ground by the Central government. In 1979, these figures rose to 3,919 families consisting of 21,494 persons. By 1991 the number of jumma increased around 30,064 and at present it estimates 65,000 persons. At the same time the indigenous population of just over 8,00,000 is also very small and causing great concern for the local population. In May 1994, AAPSU spearheaded the movement to project the Central government action of rehabilitation of the Chakmas during the 1960 as a serious bottleneck to the progress of the indigenous people. The body questioned the Central government propriety of such rehabilitation in NEFA and demanded their deportation from the state. Gradually the relation between the displaced Chakmas and the host communities began to deteriorate and they are staying as stateless people in India (De, 2005: 156-158, Chaudhury, 1997: 142-143; Prasad, 2007: 1375-1376; Limpert, 1998: 46-48; Ahmed, 2002-2003: 24).

Further, the large scale militarization and the religious persecution in the CHT by the Government of Bangladesh during the 1980s forced out a large number of Chakmas from the CHT and forced them to cross over to the Indian territories. Those who came to Tripura were given in six refugee camps of South Tripura sub-division. The government of India spent over eighty corers of rupees for the maintenance of Chakmas refugee camps in Tripura. There was no agitation during the period of their eleven year-stay (1986-1997) in camps. It was primarily due to the fact that the Tripura already had a local Chakma Buddhist population of 34,798 in its Southern districts (Belonia and Sabroom), where the refuges were settled. Thus, the Chakma refugees from the CHT were getting sympathy from the local Chakmas of Tripura. Thus, the Chakmas of the CHT who emigrated to Tripura did not get hostile opposition in Tripura (De, 2005: 153-154 and also see George (Ed): 151-154).

A large number of Chakmas failed to bear the expenses of journey to Tripura in the middle of the 1980s and who fled to the dense forest inside the CHT and at last they reached to Mizoram through the Jungle route on foot. Thus they became the suspected group of illegal migrants in the eyes of the Mizos. Because most of the Mizos are Christian and all the Chakmas are Buddhist. It is obvious that ethnic hatred was born in the above context and it later questioned their right to reside in the state. The growing numbers of Chakmas population in the western district of Mizoram basically became alarming after the birth of Bangladesh in 1971. Mizoram had a local Chakma Buddhist population of only ten in 1941. But it suddenly sprang up to 15,937 in 1951, soon after the partition of India. It further increased to 22,393 by the year 1971. Within the two decades of emergence of Bangladesh it was found to be 39,905 in 1981 and 50,000 in

1991. Such increase of population was not normal and was not possible without the infiltration from Bangladesh, yet, there was no major agitation against the Chakmas in Mizoram, but excitement suddenly stirred the Mizo mind in the middle of the 1990s, when Chakmas in Mizoram claimed to have population of 80,000 as recorded 50,000 in the census report of 1991 and demanded for them a union territory in the autonomous district, which led Mizosto suspect a threat to their predominance in the state. Thus, political havoc is obvious in Mizoram and they were clearly against granting any political concession to the Chakma inhabitants in Mizoram. Mizos were apprehensive of their political consequences that Chakmas might raise a demand for an autonomous state within the Mizoram like the Khasis, the Jayantias and the Garos did in Assam. Further, the permanent stay of Chakmas in Mizoram obviously would lead to the resource constraint, employment scarcity, and all kinds of social and economic tribulations (De, 2005: 154-156 and also see Sangima (Ed) 2004: 95-106).

Conclusion

The study shows how development-induced displacement leads not only impoverishment risks and social exclusion but also to arms conflicts, insurgency and statelessness. The government of Pakistan in the initial years of post-independence brought numerous developmental projects in the CHT. Among those projects, Kaptai Dam on the river Karnafully River is a huge project displaced about 100,000 people and it became the root cause of environmental degradations and livelihood crisis. Compensation of their lost assets was very meager, and in many cases no compensation at all. Very few people were rehabilitated by the Government of Pakistan and thus resentment grew among the displaced indigenous people. Even if there were protests and movements against the project Kaptai Dam to restore their customary land, the movement was suppressed by the mighty state force of Pakistan. In response to such actions of the government, the displaced people gradually began to take arms to fight against the atrocities made by the government. The conflict was further extended by the Government of Bangladesh, when it forcefully acquired the customary lands of tribal people to suppress their autonomy movement to make the country a greater Bengal society by introducing population transfer programme in the CHT with the help of military persecutions as well as religious persecutions. The civil-military regime of Bangladesh undemocratically violated the customary law of the tribal people, and it was the responsible factor of large scale displacement and conflicts in the region. The government disrespected the sustainable management of environment, practiced by the tribal people, which had been providing their livelihoods for generations. Such factors led to acute shortage of resources for livelihoods, and hence the indigenous people or tribals were forced to cross the border as stateless citizens into the Indian neighboring states.

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Cross-Cultural Conflict Resolution Revisited: A Micro Study

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Abstract. *Subsequent to military conflict between two countries, scholars advocate conflict resolution be pursued. This qualitative research measures laypersons' perceptions of conflict resolution across Western and Arab/Muslim cultures. Querying a sample of citizens from Iraq and the United States, we measure respondents' receptiveness to conflict resolution in the context of the United States and Iraq relations. We simultaneously qualify which principles and factors they determine acceptable to induce conflict resolution. Research findings demonstrate that respondents across our samples believe conflict resolution in this instance is necessary. Respondents also predominantly embrace similar principles and factors to advance a resolution process. Our theoretical approach and survey findings challenge contemporary conflict resolution comparative discourse between Arab/Muslim and Western approaches, demonstrating that there is a quantifiable degree of convergence that would enable a process to be pursued.*

Key words: *cross-cultural survey, conflict resolution.*

Introduction

The United States and Iraq have been engaged in a violent conflict relationship that has lasted for more than two decades. Since 1990, there has been an exchange of structural and physical violence during the 1991 Persian Gulf War, provoked by Saddam Hussein's annexation of Kuwait. The war was followed by international sanctioning and containment of Iraq between 1991 and 2003. Saddam Hussein's failure to comply with international weapons inspections, and George W. Bush's act of demonization, among other reasons, led to the invasion and occupation of Iraq between 2003 and 2011. Nearly simultaneously, the United States has been criticized for the maltreat-

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ment of Arab/Muslims in places like Guantánamo Bay or Abu Ghraib, and it continues to project military force and political influence in the Middle East. The combination of this violent interaction understandably gives the impression that the US, and Muslims and Arabs are mutually engaged in an existential struggle. Their aggregated manifestation has consequently produced animosity and grievances at the societal level among Arab/Muslims in general, and Iraqis in particular. While recommending that conflict resolution be pursued between Westerners and Arab/Muslims, scholars have not directly called for conflict resolution between Iraq and the United States. This article breaks the silence while challenging the accepted theoretical approach and findings of contemporary comparative conflict resolution discourse through our unique methodological approach.

Concerning the latter, we are able to counter theoretical suppositions made by Arab/Muslim and Western conflict resolution scholars in the past by transferring discourse of "Arab/Muslim" and "Western" understanding of conflict resolution from the macro level to the micro level. In our opinion, the macro approach spearheaded by scholars is inappropriate because it amalgamates diverse and complex theory and practices, and thereafter makes generalizations to about "Arab/Muslim" or "Western" opinion and approaches. Painting sentiment with such broad strokes is not always representative of political, cultural, and historical nuances that impact on societal perceptions and expectations, conflict particularities and the factors deemed acceptable for resolving or transforming a given conflict. To measure the impact of broad generalizations on theory, we directly queried a sample of respondents from Iraq and the United States to challenge basic assumptions found in contemporary Arab/Muslim and Western literature. Utilizing a convenience sample of laypersons, we are able to extricate micro level conceptualizations, and comparatively analyze how a group of cross-cultural respondents conceptualize interstate conflict resolution between Iraq and the United States and believe conflict resolution could be induced.

Background

Scholars argue that both individuals and collectives subjected to long-term violent conflict are increasingly likely to construct negative opinions of those deemed responsible for the wrongdoing, harms and humiliation endured (Bar-Tal, 2000; Rosoux, 2009). Paraphrasing Galtung's (2007, 16) assessment of deconstructive relational patterns, he argues that conflict creates frustration, frustration leads to polarization; polarization can produce existential worldviews, existential perceptions can manifest in violent behavior, and violent interaction produces trauma and aspirations for revenge. As these processes evolve, deconstructive perceptions and behavior, generally rooted in fear and distrust, proliferate (Galtung, 2007; Parent, 2012).

These deconstructive components are by products of prolonged exposure to conflict, and their perpetuation can deepen negative perceptions of the "other" (Bar-Tal, 2000; Parent, 2012; Rifkind & Picco, 2014). Over time, said elements become incorporated

into the identity of those involved, and can be transferred vertically and horizontally throughout society (Rifkind & Picco, 2014). They are equally subject to expression between the societies engaged in the conflict. In this manner, a conflict perpetuates itself, rooting in the psyche and behavior of those engaged, creating relational impasses and intractability. At its extreme, adversaries comparatively define themselves as direct opposites, de-humanizing the "other" and identifying them as an existential threat (Funk & Said, 2004; Galtung, 2007; Kelman, 2004; Parent, 2012). When this maximum level is obtained, violence becomes an acceptable and justified response (Kelman, 2004). To counteract these trends, conflict resolution is advocated to resolve or transform the quality of the relationship. For the purposes of this essay, we apply a broad understanding of conflict resolution, adhering to Ramsbotham, Woodhouse & Miall's (2011: 10) conceptualization of the process on a continuum which ranges from "'conflict settlement' at one end of the spectrum and 'conflict transformation' at the other."

This progression of conflict evolution just outlined is observable in the evolution of contemporary US-Iraq relations. The long-term deconstructive relationship endured by these two countries has produced protracted violence and animosity across referents. Distrust in the United States is high in Iraq (Opinion Research Business, 2007), while the United States equally expresses predominantly negative opinions of Iraq for the past two decades (Gallup, 2014). We therefore recommend that the US and Iraq embark on a campaign of conflict resolution to alter the years of mistrust and animosity that has formed in the public spheres. Conflict resolution is recognized as beneficial for counteracting the deconstructing negative psychological, behavior, and social effects within a society, thereby breaking the cycle of violence and preventing conflict continuation or escalation (Bar-Tal, 2000; Ramsbotham, Woodhouse & Miall, 2011; Parent, 2012; Worthington, 2006). However, our recommendation for conflict resolution to be pursued in this context presents two questions. First, are citizens in both countries supportive of such a program? We hypothesize they are, and test this using survey research. Second, how compatible is the conceptualization of conflict resolution in this case, or which principles and factors are deemed acceptable across the two cultures? The latter question is theoretically relevant because Arab/Muslim scholars criticize Western conflict resolution principles and practices are inapplicable and unacceptable to Arab/Muslims (Al-Ramahi, 2008; Irani, 1999). Our survey of laypersons' opinion of principles and tools permits us to test this scholarly assumption, while equally providing insight into which principles and factors laypersons determine applicable.

Highlighting cultural incompatibility

Similar to their Western counterparts, Arab/Muslim scholars recognize the importance of resolving conflictual relationships at all levels (Irani, 1999; Pely, 2009). The process is theorized necessary because Arab/Muslim understanding of conflict presumes that past injuries produce grievances that can "fester," sequentially engendering conflict con-

tinuation or escalation (Irani, 1999, 11). While Western scholars posit parallel theory, a reading of Arab/Muslim literature suggests that cultural divergences emerge thereafter. A cursory reading, in fact, underscores that Arab/Muslim scholars believe that cultural approaches thereafter irreconcilably diverge. According to this assumption, cultural particularities such as communal identity, collective responsibility, in addition to the influence of Islam, as well as other cultural particularities, radically change the way that conflict resolution is conceptualized and practiced in the Arab/Muslim culture (Al-Ramahi, 2008; Irani & Funk, 2000; Marsella, 2005; Safa, 2007). As a consequence of these real or hypothetical divergences, the principles and factors of resolving conflict are frequently deemed incompatible. For instance, Irani (1999) insists that cultural divergences in approaches include the level at which conflict is resolved, the importance of religion to the process, and expected outcomes.

Briefly addressing these three issues, scholars agree: that Arab/Muslim culture manages or resolves conflict primarily at the community level; Islam is inextricably linked to the process, and; not all conflicts are perceived as resolvable (Al-Ramahi, 2008; Irani, 1999). Although Arab/Muslim scholars insist that these theories are absent in Western theory, their hypotheses are based on a narrow interpretation of a vast array of Western conflict resolution literature. Most notably, the spiritual and social-psychological approaches found in Western literature are seldom referenced. Consequently, influential Western theory proposed by John Paul Lederach, among others, is marginalized or outright omitted. The theoretical importance of this marginalization cannot be overemphasized as the spiritual and social-psychological approaches have noteworthy parallels with the Arab/Muslim approach.

For instance, both the social-psychological and spiritual approaches advocate community/societal involvement in conflict resolution (Kelman, 2004; Lederach, 1995). Equally relevant, the spiritual approach is accommodative of religious influence, embracing, for example, principles such as forgiveness and healing at all levels of conflict (Lederach, 1995; Worthington, 2006). Finally, not all Western scholars believe that a conflict can be resolved (Rosoux, 2009). Hence, the impact of three of the purported cultural divergences noted by Arab/Muslim scholars' critiques of Western theory and practice is reduced. Albeit, according to their narrow interpretation of Western theory, Arab/Muslim scholars hitherto have referred to Western conflict resolution principles and techniques as excessively individualistic, inapplicable, and undesirable in the context of Arab/Muslim customs and traditions (Irani & Funk, 2000; Marsella, 2005; Safa, 2007). While this assumption might be legitimate at the community level, we do not think that it impacts on conceptualizations of conflict resolution at the interstate level. To test macro level theoretical assumptions as articulated in Arab/Muslim and Western conflict resolution literature, we directly queried a sample of laypersons at the micro level. Utilizing this methodology, it is possible to comparatively analyze findings across our cultures through our samples and to compare laypersons' opinion with scholarly theory.

Methodology

Our research of a convenience sample of US and Iraqi respondents was guided by three working hypotheses. The first hypothesis states that a majority of respondents will support conflict resolution between the United States and Iraq following decades of violent conflict between the two countries. Hypothesis two states that respondents across our sample will find acceptable most of the sixteen principles presented. Finally, Hypothesis three states that a majority of respondents will support the use of thirteen conflict resolution factors to improve US-Iraq relations. Attention now turns to explaining our survey methodology.

Our questionnaire was administered online between September 2013 and December 2013. A convenience sample of 109 adult citizens from the US and Iraq completed the survey. Concerning the demographic composition of our research samples, the US sample contains 58 participants, of whom 21 are male (36%) and 37 are female (64%). Its ethnic composition includes: 69% Caucasian (n = 40); 10% African-American (n = 6); 7% Native American (n = 4); 4% Hispanic (n = 2); and 10% claim multiracial or indicated no distinction (n = 6). Age distribution of the US sample comprises of: 8 respondents between the ages of 18-25 (14%); 13 between 26 and 35 (22%); 21 between 36 and 45 (36%); 3 between 46 and 55 (5%); 12 between 56 and 65 (21%); and one between 66 and 75 (2%).

Comparatively, our Iraqi sample contains 51 adults. Of those, 27 are refugees from Iraq currently residing in Italy. In addition, the sample includes citizens from Iraq living, studying and working in Europe (n = 18) and the United States (n = 1) solicited through social networking. Finally, 4 citizens living in Iraq participated in the research and one respondent failed to specify his location. Combined, this sample contains 36 male respondents (70.5 %) and 15 female (29.5 %). Ethnically, the sample includes: 51% Arab (n = 26); 45% Kurd (n = 23); 2% Assyrian (n = 1); and 2% claim no affiliation (n = 1). In terms of age, our Iraq sample contains: 21% between the ages of 18-25 (n = 11); 63% between 26-35 (n = 32); 14% between 36-45 (n = 7); and 2% between 46-55 (n = 1).

The religious affiliations of both samples are distributed in the following manner. The US sample of respondents is predominantly (64%) Christian (n = 37); followed by 26% who claim no affiliation (n = 15); 5% which claim an amalgamation of faiths (n = 3); 2% Jewish (n = 1); and 3% unspecified (n = 2). By comparison, respondents from Iraq associate themselves in the following manner: 39% of participants affiliate themselves with Shi'a Islam (n = 20); 19% with Sunni Islam (n = 10); 18% with Sufi Islam (n = 9); 18% claim no religious affiliation (n = 9); and 6% with Christianity (n = 3).

Finally, we requested the highest completed level of education from our respondents. On the one hand, fourteen percent of the US sample has a high school degree (n = 8); 9% have an associate's degree (n = 1); 34% have a Bachelor degree (n = 19); 33% have a Master (n = 19); 9% have a doctorate (n = 1); and 2% an M.D. (n = 1). On the other

hand, 27% of the respondents in our Iraqi sample completed middle school (n = 14); 31% have a high school diploma (n = 16); 4% a technical degree (n = 2); 20% have a Master (n = 10); 12% a Bachelor (n = 6); and 6% a doctorate (n = 3). Combined, both population samples are well educated.

Following closure of the survey, the data was transferred and analyzed using R programming language (http://www.r-project.org). Due to the sample's small size the data could only be processed and analyzed descriptively. Since the data was treated as ordinal, non-parametric tests were utilized to measure reliability (Gadermann, Guhn & Zumbo, 2012). First, Cronbachs Alpha, which is the most widely utilized test to measure internal reliability, based upon the covariance (Revelle, 2013). Next, standardized alpha, whose measurement is based upon correlations, was utilized (Mehra, 2003; Revelle, 2013). We will introduce the reliability of our data sets as we introduce our research findings.

Openness to Conflict Resolution

Founded upon the hypothesis that conflict resolution should be pursued between the United States and Iraq subsequent to the 2003 war and occupation, our survey first queried respondents about the necessity of conflict resolution in this context. Hypothesis 1 states that subsequent to decades of deconstructive and violent relations between the United States and Iraq, exemplified by the 2003 Iraq War, a majority of respondents from our convenience sample will agree that conflict resolution is necessary to improve contemporary US-Iraq relations. Our hypothesis is confirmed with a reliability of 0.76 with both tests. When questioned if respondents believe that the Iraq and US governments should reconcile their relationship, 79% of US (n = 46) and 63% of those from the Iraq sample (n = 32) agree this is necessary. Hence, a clear majority of respondents from both our convenience samples advocates conflict resolution in this context. This finding confirms Hypothesis one.

Subsequent to qualifying general openness to the program, we transitioned our attention to allowing respondents to rate principles and factors associated with this objective. In this manner, we can qualify similarities and divergences across our samples.

Perceptions of Principles

Next, we measure laypersons' perceptions of principles that Arab/Muslim or Western scholars emphasize in the literature. We hypothesize that respondents will embrace these same principles across cultures. Hypothesis 2, therefore, states that a majority of respondents from our samples will embrace similar principles when conceptualizing conflict resolution. Reliability of the question set regarding 16 conflict resolution principles is 0.85 with both Cronbach's raw and standardized Alpha.

To begin our analysis, we recall that scholars assert that Arab/Muslim societies prefer the principle of religion as a component of conflict resolution while the West minimizes

it (Gulam, 2003; Irani, 1999). As expected, when conceptualizing conflict resolution in general, a majority of US (57%) respondents (n = 33) rejects the influence of religion. Comparatively, the Iraq sample is polarized with 51% of respondents (n = 26) stating that religious values should not guide conflict resolution. Similarly, when rating religious values as a principle of conflict resolution, a minority of US respondents (43%) supports its influence (n = 25). In fact, 38% of our US sample (n = 22) opposes the principle of religion in conflict resolution and 19% are undecided (n = 11). By comparison, 65% of respondents from Iraq believe that religion should be a fundamental principle of conflict resolution (n = 33), with 23% opposed (n = 12) and 12% undecided (n = 6). These findings demonstrate that our Iraq sample is more inclined to support the principle of religion in conflict resolution, while the US sample rejects it as Irani (1999) surmises.

The second principle qualified is forgiveness. This principle was tested due to the dissension it produces in Western literature, and in order to introduce laypersons' opinion into the discourse. Recalling the critiques proffered by Western scholars, forgiveness is suggested to be a religiously laden concept (Bar-On, 2005) that invokes a sense of idealism (Rosoux, 2009) and/or a "forgive and forget" attitude (Bloomfield, 2006, 23-25; Rothfield, 2008, 559). However, our US sample does not appear to be adverse to forgiveness at the interstate level, contrary to the theory offered by Bloomfield (2006) and others (Lerche, 2000; Rothfield, 2008). Instead, a majority of respondents from the US (72%, n = 42) agrees that showing forgiveness is essential to resolving a conflict. Their endorsement suggests that some Western scholars, such as Bloomfield (2006), may be misrepresenting laypersons' openness to forgiveness and, consequently, may be devaluing the relative utility of this principle. We concluded that our US sample advocates forgiveness as a principle and practice of conflict resolution, similar to Western scholars including John Paul Lederach (1995) and others (Avruch, 2010; Parent, 2012; Wohl & Branscombe, 2009; Worthington, 2006).

By comparison, 80% of the Iraq sample (n = 41) supports forgiveness. The prioritization of this principle among our Iraqi sample confirms Arab/Muslim scholars' theory that forgiveness is an essential component of conflict resolution in the Arab/Muslim context (Abu-Nimer, 2000; Ashki, 2006; Soliman, 2009). Affirming our collective findings on forgiveness denoted hitherto, when forgiveness is rated as a principle of conflict resolution, eighty-one percent of US participants (n = 47) advocate its use. Comparatively, an overwhelming majority (98%) of respondents from Iraq (n = 50) embraces the principle. Combined, our findings indicate that a clear majority of our US and Iraqi samples embraces forgiveness as a component of conflict resolution.

The next principle analyzed was honor. Arab/Muslim societies place a significant amount of weight on individual and family honor as it impacts individual and collective identity and social status (Gellman & Vuinovich, 2008; Irani, 1999; Pely, 2009). According to our survey findings, honor is an esteemed principle in terms of conflict resolution

across cultures. Combined, 84% of participants from the US (n = 49) and 88% from Iraq (n = 45) favor the principle. Interestingly, nearly thirty-eight percent of US respondents (n = 22) give honor the highest ranking on the Likert scale versus twenty-three percent of those from Iraq (n = 12). Overall both samples largely support its application.

Dignity (Gellman & Vuinovich, 2008; Pely, 2009) and respect (Irani, 1999) are also venerated principles in Arab/Muslim conflict resolution literature, and were likewise included in the survey. Our findings indicate that 90% of participants from Iraq (n = 46) and 86% of US respondents (n = 50) agree that dignity is a valuable principle, with response distribution of the Iraq sample (39%, n = 20) weighing more favorably than the US (29%, n = 17) in absolute terms. Concerning the principle of respect, majorities from both sample populations agree that respect is crucial to conflict resolution. An overwhelming 98% of the US (n = 57), compared to 100% of the Iraq sample (n = 51), positively rate the principle, with more than fifty percent from each sample group qualifying respect as absolutely imperative. Thus, both samples overwhelmingly support respect and dignity as principles of conflict resolution.

Thereafter, we explored the principles of satisfaction of interests and needs of stakeholders as advocated by Western scholars (Adelman, 2005; Briggs, 2003; Ramsbotham, Woodhouse & Miall, 2011; Reimann, 2004). It should be recalled that Arab/Muslim scholars express diverse views toward these principles, as they must be considered in relation to Islamic teachings and norms. On the one hand, a clear majority of respondents from our US (78%, n = 45) and Iraq samples (86%, n = 44) asserts that satisfaction of the "interests" of those involved in a conflict is indispensable for resolution. On the other hand, 92% of respondents from Iraq (n = 49) prioritize satisfaction of stakeholders' "needs" versus 84% of US participants (n = 47). Hence, clear majorities across both sample populations support the satisfaction of stakeholders' interests and needs when resolving a conflict, with our Iraq sample expressing more support than our US sample.

Then, Arab/Muslim (Abu-Nimer, 2000; Ashki, 2006; Bekdash, 2009) and Western (Anderlini, Conway & Kays, 2004; Kriesberg, 2004; Rouhana, 2004) scholars prioritize the principle of justice. Unsurprisingly, a clear majority from both samples favors the principle of justice in conflict resolution. There are, however, notable discrepancies across cultures. Foremost, 88% of the U.S. respondents (n = 51) favor the pursuit of justice compared to a plurality (96%) of those from our Iraqi sample (n = 49). There is also a notable distribution difference, with forty-five percent of those from Iraq (n = 23) making justice an absolute priority versus twenty-seven percent among respondents from the United States (n = 16). Amalgamated, our data illustrates that our Iraqi sample is more inclined to embrace justice than our US sample, although a majority from both samples support the principle.

Subsequently, perceptions of truth as a principle were qualified. Truth, or the establishment of an objective, detailed account of what has occurred in the past, is hypothesized

as essential to conflict resolution according to both Arab/Muslim (Abu-Nimer, 2000; Ashki, 2006; Bekdash, 2009; Said & Funk, 2001) and Western scholars (Adelman, 2005; Bar-Tal & Bennink, 2004; Kelman, 2004; Rosoux, 2009). Our research confirms this hypothesis. A plurality of respondents from Iraq (96%, n = 49) prioritizes the principle of truth when resolving conflict. By comparison, a clear majority of US respondents (88%, n = 51) equally favors the inclusion of the principle. Both samples, therefore, embrace truth as a principle, while our Iraq sample expresses an increased degree of support.

Similarly, we measured respondent perceptions of accountability when resolving conflict. We found overwhelming majorities across cultures advocate this principle, with 95% of participants from the US (n = 55) and 96% from Iraq (n = 49) favoring accountability. However, our Iraq sample ranks this principle higher than their US counterparts, with forty-three percent of respondents from Iraq (n = 22) ranking accountability as an absolute priority versus thirty-two percent of respondents from the US sample (n = 19). Nevertheless, a clear plurality of respondents from both samples embraces accountability in conflict resolution.

The next principle explored was the protection of individual rights, which Abu-Nimer (2000) suggests is essential to Arab/Muslim conceptualizations and practices of conflict resolution. Our data illustrates that absolute majorities from both countries positively rate the protection of individual rights. Ninety-five percent of participants from the US (n = 55) and 100% from Iraq (n = 51) claim that the protection of stakeholders' individual rights should be prioritized when resolving conflict. Hence, this principle is likewise shared across cultures.

The most noteworthy difference in perceptions of principles qualified between our US and Iraq samples revolve around the importance of compensation extended to those who have suffered during a conflict. Although compensation or restitution is a recognized principle and factor of conflict resolution in both Arab/Muslim (Abu-Nimer, 2000; Bekdash, 2009) and the Western theory and practice (Bar-Tal & Bennink, 2004; Kriesberg, 2004; Rosoux, 2009), there is a noteworthy discrepancy between how our respondents rate this practice. While a plurality (94%) of participants from Iraq (n = 48) support the payment of reparations, only 67% of US respondents (n = 39) express the same opinion. US respondents are not only less supportive of the factor, 22% reject the principle (n = 13) compared to two participants from our Iraqi sample (4%). Thus, although a majority from both samples approves the principle of restitution, our Iraq sample is more inclined to embrace the principle compared to our US sample.

Thereafter, empowerment was explored. Empowerment is a principle embraced by Arab/Muslim (Abu-Nimer, 2000) and Western (Lederach, 1995; Reimann, 2004) scholars, and support for it was measured using multiple scenarios. First, respondents were asked whether the opinion of those involved in a conflict should be consulted when constructing conflict resolution between two countries. A plurality of participants from

Iraq (98%, n = 50) agrees that getting the opinion of those involved is crucial when resolving conflict. Comparatively, 86% of US respondents (n = 50) share this sentiment. Next, respondents were queried about the importance of listening to the other. Once again, a plurality from both samples agrees on the importance of listening, with 97% of US (n = 56) and 96% of our Iraq sample (n = 49) expressing support.

Linked to the above, respondents were then asked if practices acceptable to affected stakeholders should be incorporated into conflict resolution. Consultation to identify factors utilized in conflict resolution is advocated by Western scholars such as Stover, Megally and Mufti (2005). Our data show a majority of US participants (93%, n = 54) agrees conflict resolution practices should be acceptable to affected stakeholders. By comparison, 86% of respondents from Iraq (n = 44) believe practices should be mutually acceptable. Therefore, we found that our samples think citizens should be consulted on conflict resolution, they felt that listening to the other was important and that practices utilized to resolve a conflict should be mutually acceptable.

Finally, we explored the principle of mutual benefit. Although Arab/Muslim culture is suggested to minimize the importance of mutual benefit *vis-à-vis* their prioritization of collective interests during the resolution of a conflict (Irani, 1999; Irani & Funk, 2000; Said & Funk, 2001), this research measured respondent openness to mutual benefit. Our data illustrate that 88% of US (n = 51) and 82% of respondents from Iraq (n = 42) perceive mutual benefit as an essential principle of conflict resolution at this level. Thus, both our samples advocate mutually beneficial resolutions.

Table 1. Respondent Support for Principles in General

Principle	U.S. sample		Iraqi sample	
honor	84%	✓	88%	✓
dignity	86%	✓	90%	✓
respect	98%	✓	100%	✓
satisfaction of interests	78%	✓	86%	✓
satisfaction of the needs	84%	✓	92%	✓
protection of individual rights	95%	✓	100%	✓
appropriate compensation	67%	✓	94%	✓
consultation (getting opinions)	86%	✓	98%	✓
listening to the “other”	97%	✓	96%	✓
mutual benefit	88%	✓	82%	✓
acceptable practices	93%	✓	86%	✓
justice	88%	✓	96%	✓
truth	88%	✓	96%	✓
accountability	95%	✓	96%	✓
forgiveness	81%	✓	98%	✓
religion	43%	×	65%	✓

Table 1 provides the percentage of respondents from our survey who supported conflict resolution principles in general. Check marks indicate that a majority of respondents in the sample supported the principle in question.

Combined, our survey of principles demonstrates that most respondents in the US and Iraq samples esteem similar principles. Only the principle of religion is rejected by a majority of US respondents. See Table 1 for a summary of our research findings according to the percentage of support each population expressed for conflict resolution principles. These findings confirm Hypothesis 2, demonstrating that a majority of US and Iraqi respondents embraces (similar) conflict resolution principles.

Perceptions of Thirteen Factors in Context

Hypothesis 3 projects a majority of research participants from our US and Iraqi samples will agree on conflict resolution factors to transform the quality of US-Iraq relations. Reliability of the question set is 0.90 with Cronbach's Alpha raw and standardized alpha. This is a high rate of reliability.

When asked if US politicians should take Iraqi public opinion into consideration when drafting US-Iraq policy, 83% of US (n = 48) and 76% of respondents from Iraq (n = 39) agree such consultation should take place. More specifically, 35% of our Iraqi sample (n = 18) express that politicians should "definitely" take opinions into consideration when drafting US policy, compared to 52% of US respondents (n = 30) holding the same opinion. This finding reiterates one of the lessons learned from US government analysis of occupied Iraq, namely that the host population should be engaged to determine their needs and desires (Bowen, 2013).

Next, focus was placed on structural factors of conflict resolution in context. We found that pluralities support continued economic cooperation between the United States and Iraq. 86% of our Iraq (n = 44) and 81% of our US sample (n = 47) advocate the tool. This finding was expected as majorities in Iraq had previously stated that the US should provide financial resources to reconstruct Iraq in the aftermath of the 2003 war (ABC News, 2008; Iraq Centre for Research and Strategic Studies, 2006). Similarly, increased political cooperation is advocated by a clear majority of citizens from Iraq (84%, n = 43) and the US (88%, n = 51). Combined, clear majorities from our samples embrace economic and political cooperation between the United States and Iraq as means of altering their relationship.

In addition, respondents widely support security cooperation. Seventy-two percent of US respondents (n = 42) support security cooperation, which is slightly less than our Iraq sample (84%, n = 43). While a clear majority of US respondents advocate security cooperation with Iraq, this means is less appealing to US respondents by comparison. Support among the Iraq sample was expected as ABC News (2008, 5) found that 76% of respondents from Iraq thought that the United States should train and equip the Iraqi Security Forces. Moreover, a majority of Iraqi respondents had expressed interest in United States assisting Iraq with national security against neighboring countries such as Turkey and Iran (ABC News, 2008).

Thereafter, the survey measured respondents' openness to retributive justice mechanisms. Seventy-eight percent of respondents from Iraq (n = 40) support an international tribunal to investigate wrongdoing committed during the 2003 War in Iraq. Of those, 37% of participants from Iraq (n = 19) "definitely" support an international tribunal compared to 41% (n = 21) who claim they would "probably" support such an inquiry. A total of 20% of the Iraq sample is undecided about the relative utility of an international tribunal. By comparison, sixty-nine percent of all US respondents (n = 40) support an international tribunal in this instance. Thirty-eight percent (n = 22) of our US sample proclaims they would "definitely" support such a tribunal, and thirty-one percent (n = 18) claim they would "probably" be supportive. Nevertheless, twenty-four percent of US respondents (n = 14) reject this means in context compared to only two percent of those from Iraq (n = 1). Amalgamated, a clear majority from our samples supports an international tribunal as a means of transforming US-Iraq relations; although our US sample is less likely to support it and nearly one-quarter reject international tribunals in context.

Similarly, respondents were queried about government inquiries into the 2003 War. These were incorporated to determine the potential value of these types of inquires by comparison to other forms of determining the truth (such as trials or truth commissions). On the one hand, a US government inquiry into the 2003 US-Iraq War is supported by 62% of US respondents (n = 36) compared to 49% from our Iraq sample (n = 25). Among these, forty percent of US respondents (n = 23) "definitely" support a US government inquiry compared to eighteen percent of those from Iraq (n = 9). These figures indicate that a majority of US respondents supports a US government inquiry while the Iraq sample is generally polarized on the issue. Concerning the latter, twenty-five percent of our Iraq sample (n = 13) are undecided on the utility of inquiries. While the survey could not qualify the source of reluctance and indecision, we hypothesize that our Iraq sample distrusts the US government to objectively conduct an inquiry.

Reversely, respondents were asked if they would support a Government of Iraq inquiry into the 2003 war. In this instance, our US participants (66%, n = 38) express slightly less support for an Iraq inquiry into the war versus 78% of participants from Iraq (n = 40). Together, our data indicate that clear majorities from both populations support the use of an Iraqi inquiry, but our Iraq population expresses more support. It can also be surmised that our Iraq sample has more faith in a GOI inquiry than one conducted by the United States government.

Subsequently, attention turned to qualifying support for restorative justice mechanisms in context. The data shows there are notable discrepancies across our population samples. Firstly, a plurality (96%, n = 49) of participants from Iraq supports a truth commission compared to 69% of US respondents (n = 40). The nearly unanimous support expressed by the Iraqi sample dwarfs that expressed by the US sample. An analogous

discrepancy is found in the appropriateness of a US apology for its actions in Iraq. Ninety percent of those in our Iraq sample (n = 46) favor the use of an apology compared to only fifty percent of US respondents (n = 29). In this case, a clear majority of respondents from Iraq supports an apology while the US sample is polarized on the mechanism in context. Finally, nearly twice as many respondents from Iraq (96%, n = 49) favor the payment of reparations by the US, compared to 53% of their US counterparts (n = 31). It should be recalled that US participants gave these three means marginally positive rating in general terms. Hence, clear majorities from our Iraqi sample support these three means in context, while US respondents clearly embrace a truth commission, but support is polarized on reparations and apology.

The next mechanism examined was third party intervention. Two questions were asked concerning mediation. Firstly, when queried if respondents would support conflict resolution if a third party proposed it, 69% from the US (n = 40), and 57% from Iraq (n = 29), assert that they would. Among those, twenty-four percent of US participants (n = 14) say they would "definitely" support conflict resolution if a third party proposed it versus eighteen percent of those from Iraq (n = 9). However, fourteen percent of US (n = 8) and sixteen percent of respondents from Iraq (n = 8) state that they would not support conflict resolution if proposed by a third party. Nonetheless, a majority of respondents from both countries would support conflict resolution if proposed by a third party. Secondly, respondents were asked to rate third party intervention in the context of contemporary US-Iraq relations. A slight majority from our Iraq (69%, n = 35) and the US samples (69%, n = 40) rate third party involvement positively. Hence, both sample populations similarly embrace this mechanism in context.

Table 2. Respondent Support for Factors in Context

Factors in context	U.S. sample		Iraqi sample	
a U.S. inquiry	62%	✓	49%	×
consultation with Iraqis	83%	✓	76%	✓
cultural exchanges	81%	✓	96%	✓
international tribunal	67%	✓	92%	✓
a U.S. apology	50%	×	90%	✓
security cooperation	72%	✓	84%	✓
an Iraq inquiry	66%	✓	78%	✓
truth commission	69%	✓	96%	✓
economic cooperation	81%	✓	86%	✓
third party intervention	69%	✓	69%	✓
positive media coverage	81%	✓	84%	✓
political cooperation	88%	✓	84%	✓
reparations	53%	✓	96%	✓

Table 2 provides the percentage of respondents from our survey who supported conflict resolution factors in the context of contemporary US-Iraq relations. Check marks indicate that a majority of respondents in a given sample supported the factor in question.

Finally, tools for advancing cultural awareness were incorporated into the survey to measure respondent rating of their utility for altering US-Iraq relations. On the one hand, clear majorities advocate positive media coverage. Eighty-four percent of the Iraqi sample (n = 43), and eighty-one percent of US participants (n = 47), perceive positive media coverage as beneficial for transforming US-Iraq relations. Thirty-three percent of US respondents (n = 19) give this the highest priority versus 19% of those from Iraq (n = 10). On the other hand, clear majorities express openness to cultural exchanges. An overwhelming 96% of participants from Iraq (n = 49) approve cultural exchanges compared to 81% of those from the US (n = 47). Both positive media coverage and cultural exchanges are, therefore, supported by our US and Iraq samples.

Combining our findings demonstrate that both samples approve a plurality of the conflict resolution tools introduced in this section in the context of contemporary US-Iraq relations. See Table 2 for a summary of the percentage of respondents who supported these conflict resolution practices to improve contemporary US-Iraq relations. Our Iraqi sample only rejected a US government inquiry, while our US samples rejected a US apology and narrowly approved the US payment of reparations. In 9 of 13 instances, the sample from Iraq views these conflict resolution mechanisms more favorably in context than their US counterparts. Accordingly, Hypothesis 3 is confirmed as a majority of our research participants agrees on conflict resolution to transform the quality of US-Iraq relations.

Conclusion

Subsequent to decades of conflict between the United States and Iraq, we wanted to determine if citizens of both countries were open to bilateral conflict resolution and how they conceptualized said process. Our research was guided by three working hypotheses: that stated respondents would be open to conflict resolution between the United States and Iraq; that principles would largely converge; and that mechanisms for pursuing such a process would largely converge.

Supporting hypotheses one, our survey of laypersons finds that a clear majority of respondents from our Iraq and US samples believe that conflict resolution should be pursued between Iraq and the United States. Upon confirmation of Hypothesis one, we qualified which principles and practices respondents deemed relevant for resolving conflict at the interstate level. Our data indicate that clear majorities from both samples embrace 15 of the 16 conflict resolution principles analyzed. Two conclusions can be deduced from this data. On the one hand, despite the frequent assertion that Western and Arab/Muslim conceptualizations of conflict resolution diverge, we find that there is notable convergence of principles embraced across our US and Iraqi samples when interstate resolution is considered. Cross-culturally embraced principles include justice, truth and honor, which are widely accepted among our respondents.

On the other hand, our US sample rejects the inclusion of the principle of religion. This finding supports Arab/Muslim theory that Westerners reject religion as a principle of conflict resolution. However, forgiveness and truth, principles frequently associated with religion, were widely embraced by our US sample. We conclude that direct reference to religious dogma is rejected by our US sample, while related principles are deemed acceptable. Our recommendation would be that emphasis be placed on associated principles as opposed to

Lastly, we queried respondent receptiveness to thirteen conflict resolution tools for resolving contemporary US-Iraq relations. Of those introduced, each sample rejects one. The US respondents do not support an apology, and respondents from Iraq do not endorse a US government inquiry into the 2003 war. Our US sample was also nearly polarized on the issue of payment of reparations. However, at least 65% of US respondents support each of the remaining twelve, compared to at least 75% of respondents from Iraq who supports the remaining twelve. Therefore, a majority of our US and Iraq samples embrace twelve of thirteen mechanisms presented in the context of US-Iraq relations, confirming hypothesis three.

Combined, our survey of laypersons from Iraq and the United States proves there are marked commonalities across cultures regarding preferred principles and factors for resolving interstate conflict. Our data contradict the hypothesis that conflict resolution theory and practices across Arab/Muslim and Western cultures are incompatible. Despite our qualification of a high degree of commonality between Arab/Muslim and Western theory and practice among our sample, which exceeds that generally acknowledged in scholarly comparisons of cross-cultural conflict resolution techniques made hitherto, we do not suggest that Western standards and practices should be prioritized or imposed. On the contrary, our position is that there is reason to believe that there is a higher degree of parallel than the literature acknowledges. Upon this finding, we believe commonality exists and could easily be built and expanded upon to create mutually acceptable, symmetrical approaches of resolving conflict at the interstate level across these cultures. We equally believe that more collaborative research should be conducted to further qualify comparisons and divergences of conceptualizations of conflict resolution among Arab/Muslim and Western scholars and laypersons, especially in the case of the U.S.-Iraq relations.

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The Expectations of the Romanian Mediators. The Preliminary Results of a Survey Analysis

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Abstract. *The article presents the preliminary results of the first professional survey done in Romania, developed by the Romanian Institute for Evaluation and Strategy (IRES), regarding the perceptions and expectations of the Romanian mediators. It provides also an analysis of the electoral behavior of the Romanian mediators in comparison with the results of the electoral process for the Romanian Mediation Council.*

Keywords*: mediation, Romanian Mediation Council, survey, Romanian Institute for Evaluation and Strategy (IRES).*

Introduction

Developing the mediation in Romania as a primary tool in conflict settlement proved to be a long and unsuccessful endeavor. After a good start it seems that the initial enthusiasm lost its force and magnitude. All the hopes of the Romanian mediators are projected to the newly elected Mediation Council.

In this article we study some of the causes that brought to the current situation of the Romanian mediation and the perceptions and expectations of the Romanian mediators. Our first approach is an historical one and then we support our conclusions on the first professional survey ever done, to our knowledge, developed by the Romanian Institute for Evaluation and Strategy (IRES). A separate section is dedicated to an analy-

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sis of the mediators' electoral behavior and the results of the electoral process for the Romanian Mediation Council.

Mediation in Romania

The History

Prior to the mediation law no. 192/2006, several attempts of introducing the mediation in Romania have been made, starting with 2000 when a draft law regarding mediation was registered at the Romanian Chamber of Deputies, but the Legislative Council has given a negative opinion (Chereji & Tanul, 2005). After this failed attempt, the next four following years another four drafts of a possible mediation law where initiated, with the same result. Only in 2005, an improved version became a project endorsed by the Minister of Justice herself, Mrs. Monica Louisa Macovei, and finally was adopted an year later as the first Romanian mediation law, the Law no. 192/2006.

Parallel with the legislative attempts of institutionalizing mediation in Romania, a few NGOs developed projects that stimulated the use of ADR methods, especially mediation. Their work spread on a wide area, from conferences to trainings for lawyers and judges. Even an MA program in conflict mediation was developed at the A.I. Cuza University in Iași (Ibid., 2005). The history of NGOs' involvement in promoting mediation begins in 1996 when the Foundation for Democratic Changes developed a project in partnership with the Canadian International Institute for Applied Negotiation, including several representatives of the legal professions and the Ministry of Justice. In the following period, another project financed by the Open Society Foundation – Soros recommended for the first time the design of a mediation law. Later on, between 1999 and 2000 the Ministry of Justice with help from the American Bar Association and the Open Society Foundation developed a small pilot program for promoting and use of mediation in Bucharest (Lungu, 2010).

The mediation initiatives gained substantial support after the 2003 approval of the Reform Strategy for the Judicial System in Romania (Topor & Dragomir, 2012). The first real breakthrough was the Pilot Mediation Center in Craiova, developed in 2003 at the initiative of the International Judicial Academy and initially funded by the US State Department ("International Judicial Academy," n.d.). It had the support of the US Embassy in Romania and the Romanian Ministry of Justice, through the Craiova First Instance Court and the Craiova Tribunal. Its main purpose was the training of 400 to lawyers from all the Romanian counties as professional mediators (Centrul de Mediere Craiova, 2015), under the supervision of American trainers. At that time it does considered to be the best method for introducing institutionalized mediation to the Romanian society. The program evolved in the next years into a network of 43 mediation centers all over Romania, under the umbrella of the Association Craiova Mediation Center. Beside

trainings, and important numbers of mediation have been held with some promising results (Ibid, 2015).

The first Mediation Council was appointed by the minister of justice in 2006, based on the law number 192/2006. A number of documents and regulations regarding mediation and mediation trainings were put in place as part of the official launch of mediation as an independent profession in Romania ("Consiliul de Mediere (Ghid de Mediere)," 2013). After this important milestone for the Romanian mediation, the number of practitioners grew constantly in the following years. In 2012 they reached 3,171 mediators, doubled in 2013 with 7,380 members and touched a high point in 2014 with 8,522. The beginning of 2015 was the first time in the Romanian mediation history when the number of mediators decreased (to 6,805) (Ursan, 2015). According to internal documents provided by the Mediation Council, the mediators are organized in 120 professional associations, but only 16 of them have more than 100 members, the biggest accounting about 2000 mediators. There are also 23 certified training programs for mediators ("Consiliul de Mediere," 2015a).

The Law

Law no. 192/2006 on mediation and organization of the mediation profession regulates the mediation activity all over Romania. However, there are some European recommendations relating to mediation, that establish some directions and principles for the member states that can be found also into the Romanian law. For example, there are Recommendation no. 98 (1) on mediation in family matters, especially divorces, Recommendation no. 99 (19) concerning mediation in criminal mattersand aiming to improve the victim-offender relation in criminal proceedings, Recommendation no. 2001 (9) on the alternatives to disputes between administrative authorities and private parties and Recommendation no. 2002 (10) with regarding the subject of mediation in civil matters (Bunea, 2014; Goga, 2014).Maybe the most important document is the Directive no. 2008/52/EC of the European Parliament regarding mediation in civil and commercial matters, which allowed European States to transpose some provisions of the Directive into their internal procedures or into pre-existing legislation (Goga, 2014).

According to Romanian law mediation can be extrajudicial or out of the court meaning that before the referral of the case to a court of law the parties can try to settle their dispute with the aid of a mediator. In this case the judge can, if the parties consider it necessary, acknowledge the settled agreement or the parties can present the agreement to a public notary in order to make it enforceable (Topor & Dragomir, 2012). The judicial mediation can intervene in every point of the judicial process and can bring the case to an end if the parties are willing to find their own solution to their dispute. Both as an extrajudicial or a judicial procedure, mediation is applicable to a large array of conflicts starting with disputes of civil, family or commercial nature to workplace,

consumer rights and intellectual property disputes. New Romania the mediation can also be used in criminal matters, but only for the crimes for which the withdrawal of the complaint or the party reconciliation precludes criminal liability (Bunea, 2014).

Mediation Council is an autonomous institution, self-funded, who runs the destinies of the Romanian mediation. Apart the first Mediation Council, the mediators have elected all the next four teams of nine members. The Romanian Mediation Council is the only who has the right to authorize practitioners of mediation, to regulate the trainings for mediators, to approved training programs, and to administer the Panel of Mediators (Gavrila, 2012).

There are some basic requirements for a person to become mediator. She or he has to have a high education degree, a work seniority of at least three years, to enjoy a good reputation and no criminal record and to graduate an 80 hours mediators training program (*Legea nr. 192 din 16 mai 2006 privind medierea și organizarea profesiei de mediator*, 2006). No law degree or legal expertise is required to became a Romanian certified mediator (Gavrila, 2012).

The mediation in Romania is governed by four principles: neutrality, impartiality, confidentiality and self-determination. As a result, the mediator has no power over the settlement of the disputing parties and therefore is not acknowledgeable for the final agreement. His role is mainly to facilitate communication, help the parties to identify their best needs and interests and guide the parties through the difficult moments of their conflict.

The mediator is free to use whatever methods and techniques he considers necessary during a mediation, as far as the procedure respects the mediation principles. The law imposes a standard procedure only before mediation, regarding the steps needed for inviting all the parties. There are also a few mandatory documents, like the binding contract between the mediator and the parties and the final report that indicate the way the mediation ended. In some specific cases, especially in the judicial mediation, an agreement is requested as a written document to be presented to a judge as proof the conflict settlement (*Legea nr. 192 din 16 mai 2006 privind medierea și organizarea profesiei de mediator*, 2006).

Reforming mediation

In the last nine years, there have been made several minor adjustments of the Law 192/2006. The most important was the Governmental Ordinance no. 12/2010, which put in accordance the Romanian legislation on mediation with the Directive 2008/52/CE of the European Parliament(Lungu, 2010). However, the Law no. 115/2012 introduced a major modification into the mediation process. Starting with July 2013, before going to court the claimant had to attend an information session about mediation advantages and procedure (Gavrila & Chereji, 2015). Another legislative document, the Governmental

Emergency Ordinance number 19/2012 set a sanction, starting with August 2013, in the claimant failed to prove that he attended the mandatory information session.

Even if the information session should have been, by law,a free service provided by mediators, a series of abuses have been reported (Ibid, 2015). There was also some confusion, even between mediators, regarding what was mandatory, the mediation per se or just the information session. For the clients the confusion was even bigger because the law allowed other professions to perform the information session, like the judges, the lawyers and other practitioners of law.

All lasted about a year because the Decision no. 266/2014 of the Romanian Constitutional Court declared the mandatory information session not constitutional. It was considered that could hinder the free access to justice. One of the immediate effects was the radical drop of the number of mediations and the lack of interest for mediation trainings.

The practice

Unfortunately, there are no official data about the number of mediations in Romania. There are, however, some studies that estimate a number of 5,696 mediations in 2014, but they are counting only the judicial mediations. Comparing with 2013 the number of mediations almost doubled (from 2,769 mediations) when the number of mediators increased only by 13,4% from 2013 to 2014 (from 7,380 to 8,522) (Ursan, 2015). Also, the numbers presented above reflect only the successful mediations, the one ended with a written agreement, and it does not take into consideration the attempts and/or the failed mediations.

Methodology

The Romanian Institute for Evaluation and Strategy (IRES[1]) conducted two surveys related to mediation starting with 2014. One of the studies was carried out in May 2014 and it focused on the population's perceptions on mediation[2]. The second one was conducted among mediators[3], between 19th and 20th of February 2015 and its main purpose was to reflect the mediators' expectations regarding the newly elected Mediation Council (abbreviated MC below).

The sample chosen for the first study is representative for the Romanian population aged 18+; the survey was conducted on 1243 respondents, from both rural and urban

1 Institutul Român pentru Evaluare şi Strategie (IRES) is an independent think tank doing social research since 2009.

2 The survey results are available at http://www.ires.com.ro/articol/260/perceptiile-romanilor-despre-mediere (Romanian language only).

3 The survey results are available at http://www.ires.com.ro/articol/294/medierea-in-romania (Romanian language only).

areas and the margin of error is ± 2,8%, for a confidence level of 95%. The target population of the second study was comprised of all mediators who had the right to vote for the 2015 Mediation Council elections[4]. The method for choosing the 926 respondents was simple random sampling and the margin of error is ± 3%, for a confidence level of 95%. The interviewing method used in both studies was CATI (Computer Assisted Telephone Interviewing).

The study results for the second survey will be presented below and some of the information will also reflect the general population's perspectives on mediation (first survey).

The questionnaire for the second survey had 50 items, and questions were grouped in 3 main categories: **perceptions on mediation and the Mediation Council (1)**, **electoral opinions and behaviour (2)**, and, finally, **facts and figures about respondents' mediation related activities(3)**.

The gender structure of the respondents (42% male, 58% female) mainly reflects Romania's overall gender structure, which means that there are no specific inclinations of either gender towards the profession. The survey conducted on the general population shows that more than one third of the respondents would not be interested in the gender of their mediator; however, one quarter of the interviewees would prefer their mediator to be a man and one third of the respondents would prefer their mediator to be a woman.

The youngest interviewed mediator was 24 years old, part of the smallest age group of mediators answering the survey (24-35 years old, 17%), while the oldest respondent was 78 years old, the 51+ age group representing 27% of the sample. More than half of the interviewees were 36-50 years old (55%).

25% of the mediators who answered the survey declare that their main profession is jurist, 14% declare they are economists (or expert accountants), another 14% – lawyers, 10% – engineers, 4% – teachers / professors, and 3% declare that their main profession is mediation. Other professions frequently mentioned were: manager, public servant (2% each), Ministry of Internal Affairs' employee, pensioner, journalist / PR / communication specialist, medical professions, other juridical professions (mentioned by 1% of the respondents each). 2% of those who were interviewed did not want to answer this question.

While 33% of the study participants do not want to declare their income, 9% gain up to 1000 lei per month (~225 Eur), 20% of the respondents have an income ranging

4 The full list of mediators was published on the Council of Mediation website, on the 2nd of February 2015, at http://www.cmediere.ro/page/1154/lista-finala-a-mediatorilor-cu-drept-de-vot-actualizata-la-data-de-02-02-2015

between 1001 and 2000 lei per month (~225-450 Eur), 14% earn between 2001 and 3000 lei per month (~450-675 Eur), 16% have incomes between 3,001 and 5,000 lei (~675-1125 Eur), while incomes higher than 5001 lei per month are gained by 8% of the respondents. The average respondents' monthly income (irrespective of its source) is 3713 lei (~715 Eur).

The results

Perceptions on mediation and the Mediation Council

More than half of those interviewed (57%) consider that mediation in Romania is going in the wrong direction, while only 33% believe the direction is right and 10% do not know or do not answer the question.

When asked about their trust in the MC, irrespective of its membership, 47% of the respondents declare they have much or very much trust in this institution, while 51% express little or very little trust. However, mediators authorized between 2008 and 2011 trust the MC to a lesser extent: 34% have much or very much trust in the MC, while 63% have little or very little trust in it. However, the respondents' satisfaction related to the Mediation Council ending its commission in March 2015 is more polarized: looking at the entire sample, only 32% interviewees declare that they are satisfied with the MC's activity, while 40% are dissatisfied and a quarter of the participants are neither satisfied, nor dissatisfied. Additionally, looking at those who declare that mediation is their main profession, differences are higher: only 28% declare their satisfaction, while 51% express dissatisfaction and only 20% are neither satisfied, nor dissatisfied. Furthermore, 21% of those who were authorized between 2008 and 2011 declare they are satisfied with the MC's activity, and 52% declare they are not satisfied, while those neither satisfied, nor dissatisfied represent a quarter of the interviewees authorized during the first years of mediation in Romania.

The main reasons survey participants offer for being satisfied with the late MC's activities (the 32% who express satisfaction) are that its members have been promoting mediation (14%), that they have been communicating with mediators (13%), they have been offering help when one needed help (9%), that they have implemented legislative changes (9%), its representatives have been involved (8%), they have fulfilled their duties (6%), etc.

The 40% of the interviewees who expressed their dissatisfaction with the late MC's activity mention reasons such as: the members' lack of interest, involvement and fulfillment of duties (26%), poor promotion of mediation (18%), failure in representing the mediators' interests (11%), the fact that the information session about mediation's benefits is no longer mandatory (9%), the lack of a legislative framework for mediation (6%), the fact that mediation does not function in Romania (6%), etc.

While mediators are both satisfied and dissatisfied about how mediation has been promoted, 57% of the respondents from the general population have heard about mediation and 42% have not heard about it. However, three quarters of those who know about mediation trust both mediation and mediators.

73% of mediators interviewed believe mediation should be mandatory in Romania, while only one quarter do not consider mediation should be mandatory and 2% of the respondents do not know.

Electoral opinions and behavior

One quarter of the survey participants are not interested in the 2015 elections for the MC, 74% declare they are interested in these elections, while 1% of the interviewees did not know that elections are being held (the answer "I did not know about the elections" was not offered to respondents; consequently, those who declared not knowing anything about elections, did it spontaneously and, therefore, the percentage of mediators who were not aware elections will be held in a few weeks could be higher).

The same percentage of respondents mentioning they are interested in the elections declares they will also vote (either by correspondence – 62%, or at the MC's headquarters – 12%), 12% of those interviewed declare they will not vote, while 14% are undecided. The percentage of mediators authorized between 2008 and 2011 who answer they will definitely vote is higher – 78%, while the percentage of respondents whose main profession is mediation and declare they will vote increases further to 89%.

In order to reduce costs for correspondence voting, the MC emailed mediators several times and posted a request on their website, asking that they inform the Council about their preferred option for voting (either by correspondence or direct voting, in the MC headquarters, in Bucharest). Although the deadline for mediators to send this information to the MC was 20th February, the Secretariat informed that by the 14th February, there were less than 1000 (~15%) mediators who sent an email expressing their voting option. Consequently, the Council decided that all those who did not communicate their voting option, will be considered voters by correspondence and will be sent the ballot via courier. When asked whether they have sent an email to the MC declaring their option for voting (correspondence or at the MC headquarters), only 29% of the interviewees declared they have already done this, while 47% mentioned they did not send this sort of email, but they intend to do it. 4% of the respondents did not know that they were supposed to inform the MC about their chosen method of voting.[5] The

5 Although the survey was conducted on the 19th and 20th of February 2015 (i.e. the day before the deadline for sending the email and the day with the deadline), percentages of respondents declaring they intend to send this informative email are similar for both days. Consequently, it could be interpreted that interviewees did not pay very close attention to the deadline.

percentage of respondents whose main profession is mediation and declare they have already sent this email is higher – 47%.

Mediators interested in being members of the MC were able to submit their candidates' files between the 4th and 14th February. During this time, as more candidates enrolled, their list was daily updated on the MC's website, until the 18th February (when there were 74 candidates enumerated). On the 27th February, the final table showing eligible candidates was uploaded on the MC's website (69 candidates listed). Voting mediators were supposed to choose a minimum of 1 and maximum of 9 people for being members of the next MC, from the list of 69 candidates. Survey participants had to answer a question related to how many candidates they heard about (as a result of their activities) and a quarter of the respondents said they knew none of the candidates, while only 7% declared they knew 10 or more than 10 candidates. More than a half, though, (57%) mentioned knowing between 1 and 5 candidates. Consequently, eight out of ten respondents knew the activities of up to five candidates. The situation is slightly different for mediators authorized between 2008 and 2011, who declared knowing more than 6 candidates to a greater extent (25%) when compared to the entire sample (18%).

Eight in ten respondents consider the elections are useful, 88% believe that the elections respect the mediators' right to vote, 78% think that they respect the mediators' right to be elected, 54% consider that the elections' organization is transparent and 54% think that the elections are well organized.

Respondents were asked to mention the main five qualities they would like a member in the newly elected MC to have. The most frequently listed characteristics are: being a good / competent mediator, openness (availability / good communicator / negotiator), implication / dedication, honesty, integrity / lack of financial interests, transparency, correctness, practical experience as a mediator, determination / resolution, good manager, promoter of mediation.

Additionally, although the MC's President is not directly elected by mediators (the President is voted by the members of the Council), respondents also listed three main characteristics they would like the President to have and these correspond to the traits also mentioned above, for the MC's members; however, one additional feature was proposed: being a leader; also, a few of the qualities referred to above ranked higher related to the mediators' expectations from the President: honesty, being a good manager and determination.

The main activities of the new MC, in the participants' opinions, should be: revising the legislation regarding mediation, promoting mediation, implementing mandatory mediation / information session about mediation, communication with mediators, struggling for the mediation to function, reorganizing the profession, collaboration with other institutions (such as the Supreme Council of Magistracy, courts, the Ministry of Justice).

When asked about how much a MC's member allowance should be, 8% of the respondents declared that members of the MC should have no allowance and 53% did now know or did not answer the question. The average monthly amount mentioned by interviewees was 2,239 lei (~500 Eur); however, if calculating the average including the "0 (zero)" responses, the average is 1846 lei / month (~415 Eur).

Facts and figures about respondents' mediation related activities

As detailed above, only 3% of those who were interviewed declare that their main profession is mediation. This question about respondents' profession did not contain further details or descriptors; however, the call center operators were asked to prompt for answers related to the interviewees' current occupation, the job taking up the most of their time, rather than the respondents' formal qualification (given by the title offered together with graduation degrees). Additionally, one other question refined the answers: participants in the study were asked whether mediation is their main activity (the one earning the largest part of their income) and the answer was "yes" for 13% of the cases. Differences between percentages of mediators answering these two questions could be explained by fewer interviewees actually doing only mediation-related activities in their working time (the 3%) and more respondents (the 13%) gaining a larger part of their income from mediation when compared to their main profession.

As expected, most of the respondents (76%) received their authorization to practice mediation between 2012 and 2014. During 2010 and 2011, 17% of those who were interviewed obtained their authorization, while only 7% of the interviewees were authorized as mediators between 2008 and 2009. The intervals described above reflect the different stages and types of motivation Romanians had in order to become mediators: while those who were authorized between 2008 and 2009, and even up to 2011 represent first-line mediators, the larger group of mediators, those authorized after 2012 could be depicted as the "opportunists".

When asked how many cases of mediation (documented with a contract and a closing written document) they had during 2013, 16% of the respondents declared "0 (zero)", 22% mentioned having between 1 and 5 cases, 20% – between 6 and 60 cases, 3% declared having had over 61 cases and 38% that the question does not apply to them[6]. The **average** number of mediation cases in **2013** is **11.84**. Responses offered for same question asked about **2014** reflects the change in legislation: the **average** number of mediation cases being higher: **12.42**, the percentage of mediators with 0 (zero) cases of mediation decreasing with 4 percent and the percentage of mediators with a number

6 Because it was not specifically mentioned in the answering options, this percentage reflects mostly mediators not being authorized in 2013, but some of those with no cases mediated could have also considered the question does not apply to them.

between 1 and 5 cases increasing to 31%; similarly, the percentage reflecting more than 6 cases (up to 60) increases to 33%. Additionally, the number of mediators to whom the question does not apply decreases to 20%.

As expected, the average number of mediation cases for those declaring mediation as their main profession is significantly higher: **26.25** in **2013** and **24** in **2014**. Interestingly, though, while for the entire sample the number of mediation raises for 2014 when compared to 2013, the situation seems to be reversed for those whose main profession is mediation. However, while the most frequent interval is between 1 and 5 cases per year (both 2013 and 2014) for the entire sample and for those whose main profession is mediation, a significant increase for a number of cases between 10 and 30 (from 15% in 2013 to 28% in 2014) can be observed. Additionally, while the question does not apply for 32% of the respondents whose main profession is mediation (2013), the situation is completely different for 2014, as the same question does not apply for 9% of the interviewees.

To sum up, taking into account the significant increase in number of authorized mediators during 2013[7] (the number increased by 2.3 times) and the similar average number of cases of mediation declared by mediators participating in the survey for 2013 and 2014, one can determine that **the number of mediated cases (documented with a contract and a closing written document) has actually more than doubled between 2013 and 2014**.

The most common types of cases mediated in Romania during 2014, according to the survey participants' declarations are family disputes (44%) and commercial disputes (15%). Other types of disputes mentioned are: work related conflicts (5%), vicinity related conflicts (5%), inheritance conflicts (5%), etc. Parties have found their mediators, in the respondents' opinions', most frequently as a result of other parties' recommendations (30%), lawyers' recommendation (25%), by consulting the Mediators' Panel (17%), by consulting the mediator's website (5%), etc.

In order to better understand the mediators' business perspective, respondents were asked about implementing several management elements in their practices. The findings are that 57% of the interviewees have defined objectives for their practice, 45% of them have developed an action plan, 41% have thought about a marketing strategy and the same percent have a general offer describing their services and pricing, 40% drew up a development strategy and the same proportion have chosen a specific field for their services; additionally, only 39% of those interviewed have a social media account

7 There were 3,171 active mediators at the end of 2012 and 7,380 active mediators at the end of 2013, as indicated by Iuliu Ursan, at http://www.tabloumediatori.ro/files/Prezentare_Starea_medierii_-_instante.pdf (Romanian only).

(Facebook) and 32% have a website or blog. Comparatively, percentages for the same aspects in respondents' whose main profession is mediation are significantly higher: 83% have defined their practice's objectives, 67% have a development strategy, 65% have an action plan, 63% – a marketing strategy, 62% – a description of services and prices, 59% have a social media account (Facebook).

When asked about their income from mediation in 2014, one quarter of the interviewees do not answer the question and 29% declare they did not have an income by practicing mediation (0 – zero – lei). 23% of the survey participants declare having had incomes up to 1500 lei (~335 Eur) from mediation during 2014, 22% mention amounts between 1,501 and 5,000 lei (~335-1,125 Eur), while the average income from mediation in 2014 ranges from 2,018 lei (~455 Eur) (cases with amounts equal to 0 included) to 3,304 lei (~745 Eur) (only those declaring they earned an income from mediation).

Of course, mediators need to take into account, among other aspects, the parties' expectations and availability to pay certain amounts when deciding the prices for their services. While almost half the interviewees from the general population do not know how much they would be willing to pay for a mediation session and 16% state they would not be willing to pay at all, only 6% of those participating in the study would be willing to pay more than 701 lei per session (~155 Eur), 7% would be willing to pay amounts from 401 to 700 lei (~90-155 Eur), and a quarter of respondents would be willing to pay up to 400 lei (~90 Eur).

Considering the monthly general income respondents have (irrespective of its source) and the income they had from practicing mediation, one can conclude that the latter is approximately 13 times lower than the first. That is, the survey respondents earn an average of 3,713 lei (~715 Eur) **monthly** by practicing their main profession and an average of 3,304 lei (~745 Eur) **yearly** by practicing mediation. In other words, analyzing the respondents' statements, one earns yearly from mediation a little more than one earns monthly by practicing one's main profession.

Discussion

Although a questionnaire based survey such as the one for which the results have been described above is not aimed at gaining a deep comprehension of the respondents' views, but rather at simply highlighting facts based on the interviewees' opinions, we tried looking beyond data, in an effort to better understand the Romanian mediators' interests and motivations. We will highlight below a few of the findings.

The elections for the Mediation Council and the expectations of the mediators

On 20 March 2015, the newly elected MC has been validated. From the total of 6714 mediators with the right to vote, 4,612, representing 68.69%, expressed their options for at least one of the 69 candidates for the MC (Comisia de Validare a Voturilor, 2015;

Consiliul de Mediere, 2015c). This figure is highly close the percentage shown by the IRES survey (74%). It is also true that 1628 ballots have been invalidated due to failure to respect the voting procedure (representing 35.29% from total number of ballots) (Comisia de Validare a Voturilor, 2015). Therefore,at the end only 44.44% of the mediators, from the 6,714, managed to cast a valid vote.

47% of the mediators that responded to the survey declare that they have much or very much trust in the MC. It seems that this number predicted an intention to vote because four of the nine members of the newly elected MC have been reelected (44.44%).

Some of the most common expectations interviewees had from the newly elected members of the Mediation Council were that they are good mediators and good managers. These statements also say more, in our opinion, about the mediators' expectations: they would like to learn by example from the representatives of their profession (good mediator) and they would like mediation in Romania to be organized and planned in such a manner that results can be predictable (good manager). Additionally, the interviewees' declare they would like members of the new MC to be more communicative with the mediators and to be transparent, which leads us to derive that they would like the MC to listen to their opinions and to consult them during the decision-making processes. When stating that they would like the MC to be transparent, respondents actually say, as we understand it, that they would like mediators to be informed about actions, resources and activities of the MC.

What is quite odd is that even if 73% from the responders shown interest in mandatory mediation only four of the new members of the MC supported some kind of mandatory mediation while the others have been more reserved on the matter (Consiliul de Mediere, 2015d). Several actions that respondents would like the newly elected MC to undertake shed more light on the interviewees' motivations. Their statements are that mediation should be mandatory, mediation should be better promoted and the MC should cooperate with other institutions. We identify here the interest respondents have for **more practice, more mediation cases**.

Another difference between the mediators' expectation and the promises made by the newly members of MC during the elections is represented by the need for reorganizing the profession. While almost all of the members highly supported the creation of some sort of a hierarchical structure, starting from local or regional level taking thus the focus from the professional associations as the main form of organizing the mediators, only 3% of the mediators consider that this should be the first action of the new MC. Following the same logic, 91% of the mediators do not consider that reorganizing the profession should be on the top three most important things to be done by the MC in the near future.

If we consider also the percentages regarding how well known where the candidates by the electors we might find possible explanation for the differences mentioned above.

All the new members of the MC are also trainers in mediation, most of them are presidents and/or representatives of the top 10 professional associations of mediators. It is fair to argues that for the mediators that casted their votes was more important if they personally met the candidate then his promises or electoral program.

Past, present and future of Romanian mediation

The numbers are showing that most mediators have between one and five mediations per year. Furthermore on the subject, as we have seen above, the average income mediators earn in a year is almost the same as the average income the same people earn in a month working in a different position. It is not difficult to predict, in this case, that mediators would actually like to earn more by doing mediation, so that they increase their incomes while practicing a profession they consciously and rationally chose in adulthood.

In the same time, the average number of mediation was more or less constant in the last two years (11.84 in 2013 and 12.42 in 2014). There was a small increase but only in the lessthan thirty mediations per year range. Both the figures from 2013 and 2014 were influenced by the mandatory information session. The wave of newly certified mediators in the same years (from 3,171 in 2012 to 7,380 in 2013 and to 8,522 in 2014) tells the same story. The data provided by the MC shows that almost half of the mediators that became certified in 2013 and 2014 have done their training before the mandatory information session and have just waited an opportunity for an easy practice (Consiliul de Mediere, 2015b).

Additionally, 40% of the mediators do not have objectives for short, medium or long term, more than 50% do not have an action plan or a strategy for developing a successful career (Sandu, 2013). More dramatically, more than 55% do not have a basic plan for promoting their services.

Putting together all these data we can conclude that most of the mediators have done mediations only by chance, helped by a favorable legislation. They became mediators driven by the promise of making some easy money. The real professionals who understand that mediation in Romania is a business and they should act accordingly are few and constant in number.

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ADR in Sport Disputes: Should Mediation be Used over Arbitration?

Ciprian SANDU

Abstract. *In our days, sport is a big business, with huge sums of money involved. With various types of emotions and the huge budgets involved, conflict is a daily reality of sports organizations. The present article started from the idea that arbitration – the most commonly used procedure in dealing with sports disputes – doesnot represent a viable solution any more, and that mediation could succeed where arbitration has failed. The article will present the reasons behind this statement by describing the procedure and the high number of national and international institutions with arbitrational responsibilities. Based on 40 interviews with athletes and staff, and from my own professional and academic experience as mediator, the article presents the main benefits of mediation that can be used in sports disputes.*

Keywords: *conflict, sports dispute, mediation, negotiation, arbitration, Court of Arbitration for Sport.*

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Since the autumn of 2014, I started to work in the administrative branch of a football club from my town. This opportunity, together with the one of being a professional mediator, gave me the idea to write this article in order to develop an old idea of mine that mediation should start to play a bigger part on the alternative dispute resolution scene of sports disputes. My first experience with mediation in a sports organization was in 2004 in Val d'Isere, a professional ski club where I activated for a year. At that point, the club had some financial difficulties and the managers invited all the athletes and adjacent personnel to a mediation meeting in order to negotiate the lowering of the contractual monthly fees. The club selected a mediator from Lyon, and each meeting took

no longer than one hour. From that point on, being a sports person myself, I saw and read that an increasing number of sports organizations include mediation and arbitration clauses as primary ways for dealing with conflicts that arise in the field of games, as well as from commercial and business matters.

In our days, sport is a big business, with huge sums of money involved. The sports industry is estimated to account for between 3 and 6 per cent of total world trade (McAuliffe & Rigozzi, 2013). Thus, it comes as no surprise that it is also a major source of legal disputes. "The unique investment of competitive egos, emotions, expectations, and money in international sports almost guarantees a dividend of highly charged disputes… and the structure for resolving them is complex" (Nafziger, 2009). With this type of emotions and the huge budgets involved, conflict is an inherent, and some would say natural, part of this phenomenon, like any other business or employment relation. Modern sports organizations are dynamic, made up of people with increasingly diverse backgrounds, opinions, values and expectations about work, but often the tension to manage these emotions and the responsibility to manage billions of dollars budgets can lead to disputes,which in turn can lead to conflicts.

In this context, disputes are inevitable. Neil Goodrum, a member of the Sports Resolutions Mediation Panel, has a very simple, linear approach in this regard. He says that when something is inevitable,the manager of the organization must have an idea, a model and an agenda to deal with it. When a dispute occurs, there is a risk that it will escalate. If such a risk can be reasonably anticipated, then a plan can be put in place to minimize it. Traditionally, the plan and the following action is that the dispute, if not quickly resolved between the parties, will be referred to a third, outside, party who must decide and impose a solution on the disputants. Generally, the process is costly, often time consuming and almost always stressful for those involved. The outcome does not necessarily guarantee to the parties the result they wanted and imagined. In the context of sports disputes, the reference to the third deciding party can be through the civil national courts. Alternatively, it can be done through an internal arbitration process, where the parties agree to submit the dispute to an internal decision maker such as the LPF Disciplinary Commission. Although the internal processes usually have the advantage of being confidential and less expensive than court proceedings, the disadvantages of a complex procedure, subject to the decision of a third party, still apply (Goodrum, 2013).

Unfortunately, this alternative plan is becoming more and more institutionalized at a national and international level due to the large amount of sports institutions developed in order to solve sports disputes through arbitration. For example, in Romania we have the case of Mihai Costea. Mihai Costea is a football player from Romania who didn't play for almost two years for his club due to a transfer clause between his old and new club. He hired a lawyer and hoped that the national commission from the Romanian Football Federation (FRF) would admit his right to work. Inside the commission, things moved

very slowly, and he went even further to CAS, at Lausanne, where several meetings occurred without any decision. Another example is yet another football player,Vasile Maftei. For almost 13 months now, he should have received a sum of money from his old club, but his case was passed on from one commission to another inside LPF and FRF. For almost two months he has advanced his case to the Court of Arbitration for Sport (CAS).

Arbitration is a process in which a third-party issues a binding judgment based on the arguments presented by the parties involved in a dispute. Casual examples of such disputes are objecting to the selection of national team members, a disciplinary measure of a sports federation or when an athlete appeals an anti-doping rule violation. Even if this kind of dispute goes to court, there is a high possibility that it will be regarded as not being a legal dispute and be dismissed without prejudice. Even if an athlete can sue the federation, it will take a large amount of time; it is sometimes likely that the competition or the athlete's career will have ended before the decision (for example Adrian Mutu's dispute with FC Chelsea ended 10 years after it started).

My theory is that this kind of conflicts moves so slow because sports arbitration, although an ADR procedure, became so formal and institutionalized that it is now almost similar to traditional litigation. An alternative plan for dealing with disputes could be to appeal to a third party who would facilitate the communication between the parties to find a solution, rather than deciding it for the parties. This method is usually cheaper, quicker, and less stressful than the alternative, and also respects the confidentiality of any information shared. Sport is a fast-paced world, and it is in the interest of all stakeholders, clubs, and athletes,that disputes are resolved quickly and cost-efficiently (Hesse, 2014). In order to do that, I think that mediation should start to play a bigger part when dealing with sports disputes, due to its principles and techniques.

Today, in sports, the common ways to resolve sports disputes are very complex. One way is by submitting the dispute to a national court. The other way is to choose from a complex structure of national and international bodies that can provide arbitration services and decisions. Some relevant institutions include national sports organizations or governing bodies, like The Romanian Federation of Football (FRF), The Professional League of Football (LPF), international sports federations (IFs), like FIFA and UEFA, The International Olympic Committees (IOC), the International Council of Arbitration for Sport (ICAS), and, finally, the Court of Arbitration for Sport (CAS), which is the most frequently used procedure (Nafziger, 2002).Unfortunately, these institutions do not have procedures, and decide, according to the same rules, so both of these procedures, national courts and international football bodies, can be at least time-consuming and cost intensive. A short description of these bodies and their responsibilities would help us better understandt his problem:

National governing bodies have the primary responsibility to avoid and resolve disputes and to apply sanctions. Disagreements are resolved by internal administrative review

within the commissions of those bodies or independent arbitration. Things don't look so bad, right? The answer would be NO, but these national bodies are a general subject to the rules of their respective IFs.

International federations may review the decisions of the national bodies concerning a large area of conflicts from the competition to the status of an athlete. The rules of the Olympic Charter rule supreme but sometimes are somehow unclear when IOC decisions pass the ones of IFs (Nafziger, 2002). Disagreements between IFs and national bodies that transcend national laws are resolved by, again, arbitration.

The International Olympic Committee, on its own initiative or on that of an athlete, can review a broad range of decisions made by the National Olympic Committees (NOC) or IFs. Under the Olympic Charter, IOCs recognize the "exclusive powers" of NOCs to represent their countries or select athletes to represent them in competitions, but at the same time it grants power to the IFs to establish criteria of eligibility and to establish and enforce rules to govern the practice of their respective sports (Nafziger, 2002). Nevertheless, the IOC retains authority as a final arbiter of disputes within the Olympic Movement.

The International Court of Arbitration for Sport is the umbrella under which many IFs require mandatory arbitration in contracts between athletes and national bodies. Athletes must sign these contracts in order to be eligible to participate in the competitions organized and governed by the IFs. Mandatory arbitration is conducted under the auspices of ICAS's principal sanction-review body, the CAS.

The CAS becomes a central mechanism for resolving sports disputes, especially those related to international competitions. At the beginning of the 1980s, the regular increase in the number of international sports-related disputes, and the absence of any independent authority specializing in sports-related problems, led the top sports organizations to reflect on the question of sports dispute resolution. In 1981, soon after his election as IOC President, Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year at the IOC Session held in Rome, Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of what would quickly become the CAS (Court of Arbitration for Sport, 2015).

In principle, two types of dispute may be submitted to the CAS: those of a commercial and those of disciplinary nature. The first category involves disputes regarding the execution of contracts, the sale of television rights, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts). Disputes relating to civil issues also come under this category (an accident of an athlete during a sports competition). These so-called commercial disputes are handled by the CAS acting as a court of sole instance(Court of Arbitration for Sport, 2015).

The second group of disputes submitted to the CAS is represented by the disciplinary cases,most of them doping-related. In addition to these, the CAS is called upon to rule on other various disciplinary cases like violence on the field of play or abuse of a referee. Such disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance (Court of Arbitration for Sport, 2015). The CAS also has the power over IFs, being empowered to review IFs decisions in the following areas: IFs constitutions, its powers over an athlete or property and general contract law. The CAS arbitrates disputes brought by individual athletes, IFs and national bodies.

Thankfully, most recently, more and more sports organizations started to use mediation as a way to resolve their disputes with a low cost of time and money. In separate matters, the Western Athletic Conference and the Big 12 Conference utilized mediation to resolve issues pertaining to the departure of member schools, a mediated resolution being achieved within a month. Dealing with such disputes in court would have required a significant amount of time and resources. What's more, mediation provided the conferences and member schools the opportunity to resolve their problems with the respect of confidentiality and to continue and improve the working and competition relationship.

Another example regarding the use of mediation in sports disputes is represented by a group of top female soccer players who participated in a mediation process with the Canadian Soccer Association (CSA) in a bid to resolve a dispute over the proposed use of artificial turf at the Women's World Cup.

In addition to the contractual grievance arbitration, the CBA between the Major League Clubs and the Major League Baseball (MLB) Players Association provides fora hybrid form of arbitration for salary disputes. The past Agreement (effective 2007-2011) provided the parties with the ability to seek the assistance to select an arbitrator to resolve salary disputes in the event that both sides cannot agree to an arbitrator (by January 1st of any year during the agreement). While these arbitrations are a form of labor arbitration, the arbitrator is not permitted to fashion remedies or write opinions; they are closer to a mediator.

The agreement between the National Football League (NFL) Players Association and the National Football League provides for arbitration and mediation clauses for labor disputes between a team and a player. Issues can include salaries and whether an injury that precluded a player from performing was sustained as a result of the play or unprofessional conduct on the field.

Mediation is a relatively new concept in Europe and even newer in Romania, as an alternative to the traditional means of adjudication. Litigating procedures, arbitration included, result in winners and losers. In some cases, all parties leave the procedure

disappointed with the decision of the judge/arbitrator. When this happens, sports managers and their organizations are confronted with a lot of problems. Some of them are the stress and lack of concentration occurred during the court formal proceedings. Physical absence also represents a big cost as the individuals are more concerned to take care of the conflict than they are to do their jobs. Management is diverted to deal with the conflict instead of focusing on managing the business and also, and this is very important in the sport industry, the employer's external reputation could be compromised, being perceived at least as a low-moral individual, if not as a problem-individual for the team and the organization.

Certain unique characteristics of mediation provide remedies for many of the problems occurred between players and management in today's market (Bell, 2012). Mediation offers a speedy and cost effective way to resolve any type of sports dispute. Its confidential nature would promote open communication between the parties, which would preserve, if not enhance, their working relationships.

International superior bodies are also aware about the increase demand for speedy, less costly and more important, win-win benefits for the parties, so even CAS, the largest institution providing professional ADR services for sports disputes, recognizes the benefits of mediation in sports disputes. Mediation is defined in art. 1 of the CAS MEDIATION RULES starting from 1999 as: "a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports – related dispute". CAS mediation has all accepted characteristics of mediation. It may be provided for the resolution of all kinds of sports disputes, except for "disputes related to disciplinary matters as well as doping issues". The assistance of a mediator can help those involved to define the problem and discuss it in order to reach to reach a "win-win" solution, preferably.

In principle, mediation is provided, according to this article, for the resolution of disputes submitted to the CAS ordinary arbitration procedure. Disputes related to disciplinary matters (doping, match-fixing, or corruption) are not eligible for mediation. However, in certain cases where the circumstances require this, and the parties agree, disputes related to other disciplinary matters can be submitted to the CAS (doping suspensions, suspensions after red cards, suspension of the stadiums due to violent fans). Unless the parties select a mediator, the CAS President will choose one for the parties from the list of the 59 CAS mediators. The mediator, the parties and their representatives (lawyers or agents) must all sign, according to Article 10, a confidentiality agreement. No information provided during the mediation procedure will be disclosed, unless required by law.

In order to get a better picture of the use and usefulness of mediation in sports, I participated in several meetings during which I conducted interviews with 40 athletes

and administrative staff from two football clubs from Cluj-Napoca. In order to understand both sides of the problem, I chose to discuss with 30 players from the first and second team (15 each) and 5 administrative staff from each club, namely 4 couches and 1 Technical Director. These 40 interviews are just a small part of a bigger personal project, to conduct interviews with athletes and administrative staff within all professional sports clubs in this city – handball, athletics, basketball, rugby, and volleyball teams. I am going to extend this research in order to have a full picture of the way sports disputes are resolved in Romania and, most importantly, to see if mediation could play an important role in doing so. Being still an on-going project, a draw-back is that I am going to present just a few answers and conclusions drawn from the 40 interviews already done with the football clubs, so the final conclusions of the study could differ from the one presented here. Also, and this is the most important aspect, from both my academic and professional experience, straight from the beginning I've entered into a deadlock because none of the 40 persons knew anything about mediation in general, not to mention mediation in sports disputes. I've assumed this draw-back and postponed the interviews for a later date. During this time, I received permission from both clubs to present and even to teach the athletes and staff something about mediation. Things moved quickly because one of the football clubs is the one where I work, and my job is just that, to teach and use mediation techniques. Finally, I had the opportunity to conduct the interviews and below there are some conclusions I want to share, relevant for the present article.

Interestingly, 82.5% of the respondents (33 out of 40) were in favor of the use of mediation for contractual disputes between the club and themselves. For an outsider, the percentage is very high but for the athletes, staff and fans this could be a normal one, taking into account the present financial situation. Both clubs requested to enter into insolvency, the athletes must receive several unpaid monthly fees, and both the clubs and the athletes have pending arbitration decisions from the national football bodies to the CAS. When I asked why, all 33 pro-mediation respondents said the timing was the major argument because prolonged uncertainty and stress could affect their performances on the field. Another interesting fact, just three staff members out of ten were in favor of mediation, being in the same financial situation as the athletes. Moreover, the coaching staff has a major contractual problem in Romania, 27 coaches from 18 teams being changed in 21 competition stages since August 2014 until February 2015. All of them had at least one signed year of the contract.

Another important conclusion of the research is in terms of confidentiality in relationship with mass-media as playing a bigger role than neutrality or impartiality. A number of 29 respondents from 40 (72.5%) acknowledge the benefits of confidentiality regarding both the dispute and the outcome. Again, the percentage is not high because, according to the respondents, the increasing role of mass-media in sports activities and decisions could affect their reputation and performance. The rest of 11 respondents

are not against this principle but recognize the advantages of a transparent and open relationship with the media.

Probably the most important aspect of this research, and a strong argument for my thesis regarding the role of mediation in sports disputes, is the fact that all 40 respondents were involved in arbitration procedures at least once in their careers, so they experienced what this type of procedure implies. Most of the respondents were happy with the outcome of arbitration (30 of them), mostly because they gained something like less days of suspension after a red card, or their clubs paid them some pending fees. The majority of the administrative staff (eight out of ten) was not comfortable with the outcome because in most of the cases the organization lost something like money or suspension of the field. Even if most of the respondents were happy with the outcome, they were not happy with the solution imposed by the arbitrator. A number of 26 out of those 30 happy respondents (87%) said that they had another solution in mind during the procedure and that in most of the cases the gain was less than what they had thought of. The fact that mediation respects and grants the free will of the participants to attend and to discuss about their own needs and solutions can resolve the frustration coming from the fact that at the end of arbitration, even if you gain something, it could to be less than what you desired. For the individuals who tend to see the glass half empty, this could lead to stress, frustration, and even anger.

Another step back of arbitration for the respondents was the timing and the procedural delays like one body not having the final decision on a dispute, and the solution being likely to be appealed to another body. From their responses, I found out the shortest arbitration procedure lasted just 30 minutes (two athletes were recorded having a violent and provocative attitude toward the referee; both of them received a red card and two days suspensions. The arbitrator kept this decisions imposed by the national bodies due to the video recordings) and the longest procedure lasted for 15 months (a contractual clause contested at the national and international bodies). In most of the cases the procedure lasted between two and four months. From their responses I found out that 38 of 40 consider their arbitration experiences time-consuming and would use mediation due to this problem. 23 of them continued their responses with examples occurred during the procedure, like stress or lack of concentration on the field that led to the lack of performance.

With the help of these responses, and based on my academic and professional experience in the mediation field, but also as a former athlete and employee in a sports organization, I can now present some of the most important benefits of mediation in order to sustain my idea that mediation should start to play an increased role in sport disputes.

According to Simon Gardiner, one main advantage of using mediation to settle sports disputes is that the process preserves personal and business relationships. "*The sports world is a small one – everyone seems to know somebody – and relationships, and indeed,*

reputations, are therefore more important and worth preserving". Mediation allows "*legal disputes to be resolved within the family of sport*".

Sports disputes undoubtedly have a negative effect on fans and team morale. Mediation is praised for its potential to promote the spirit of understanding and fair play. Taking a confrontational posturing of positions, which is a staple of litigation, can terminate existing relationships and impair interaction on future projects. Since the entertainment industry thrives on a unique collaborative effort, mediation provides a template for continuity in partnerships (Slotnick, 2014).From my experience, most of the parties desire to continue their business relationship. Although working relationships are important to all businesses, the performance of a player can lead to unique problems. For example, there are cases when the managers want to sell or buy a specific player. In most of the cases, the negotiations are like a cat and mouse play, with both parties wanting to gain as much as possible. Sometimes, the performance of the player involved is questioned in order to lower his agent individual demands. When this happens, the manager does not want the player to know this in order to maintain his confidence on the pitch. In conclusion, mediation can prevent the player hearing such negative commentary directly in order to continue his job on the field.

Another major benefit is the fact that the parties have direct participation and control over the outcome,in contrast to the risks and uncertainties of litigation or arbitration According to Chereji and Pop, mediation is a voluntary process, based on self-determination. Mediators do not impose a solution and do not pass judgment - mediators will offer skilled assistance and support for the people involved voluntarily taking responsibility for finding a practical way forward (Chereji & Pop, 2014). All conflicts involve downsides, the mai none being the risk of losing (the case, money, reputation, or opportunities). Mediation permits the parties to engage in a careful discourse with the ultimate aim to find a solution that satisfies both parties. The most important factor is that the parties themselves find this solution, rather than the mediator, who only facilitates the parties' communication and helps them explore their issues, needs, and options. The mediator does not have the competence to make a decision (Hesse, 2014). Instead, his role is to guide the parties through the mediation process, facilitating communication in a way that is optimal for the parties' needs and that tries to bring the discussion towards a rational solution. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but the resolution of the dispute rests with the disputants themselves (Hesse, 2014).

At the heart of mediation is the principle that negotiations can only be effectively facilitated in an atmosphere of privacy and confidentiality. This expectation of privacy not only distinguishes mediation from most adjudicative processes, but also lays the foundation for more candid interactions between the parties and the mediator. As French advocate Pierre Raoul Duval explains, "Confidentiality allows the parties frankly to

discuss the facts, their position, the issues and settlement options. It also facilitates the exchange of information ... It encourages the parties to participate actively in the mediation process." Most of the agreements to mediate sports disputes protect what is said and done during the mediation sessions. Such agreements, permit the parties to discuss and negotiate with the understanding that what is said or done will not show up in the next day's papers (Nelson & Stipanowich, 2004).

Mediation can provide special benefits in the case of disputes between persons of different cultures. In the last ten years, most of the teams started to bring athletes from different countries and continents in order to help them reach their goals. Cultural, social, and political differences often represent factors that influence our communication and perception. Mediators who understand these differences may help the parties avoid jams in their interaction and re-frame and re-phrase any misunderstanding.

Reduced costs in terms of resources and time are among the most important benefits of mediation. Mediation usually produces positive results in a relatively short time. Depending on the complexity of the dispute and the number of parties, the process may conclude in a matter of days, weeks or, at most, a few months. Given the consensual nature of mediation, the parties always have the choice of continuing with the process, pending a resolution, or calling a halt (Nelson & Stipanowich, 2004).

Most importantly, there can be a mistaken perception that mediation is a soft option and that real business people do not need to mediate. The perception of some parties to a dispute is: "we know how to negotiate and we don't need someone to help us do that", frequently coupled with "if we can't do a deal on these terms we will see you in court!" (Goodrum, 2013). Both of these approaches miss an opportunity. Using a professional facilitator, the discussion is not an admission of being a poor negotiator, but rather recognition that changing the dynamic of the discussion in this way enhances the prospects of getting a satisfactory deal where bilateral negotiation is not getting over an impasse.

A conflict has many faces, various dimensions and many different ways to be resolved. People involved in a dispute will initially look at what they believe is their right to have or to obtain. After they establish this, the parties will think of the method they are going to use to get it. As we in the conflict studies field all know, all the methods to resolve a conflict are presented in the Continuum Model of Conflict Resolution. If we take a look at the methods ranging from avoidance to violent coercion, and letting aside the avoidance, it will seem right to choose a third party, such as a judge, who can impose a solution, but it is rarely as simple as that (Goodrum, 2013). Even if a conflict was brought in front of the judge, there is an opportunity to negotiate the settlement. That can be through direct talks (negotiation), or through a meeting in front of a third party (arbitration or mediation) and this is a method that frequently produces a resolution. The choice of one or another is conditioned not by the superiority of one method over

another, but by the particular structure of the dispute which makes a method suitable and adequate for an efficient resolution (Chereji, 2013).

The history of sports disputes resolved by litigation or arbitration, their negative effect on the entire staff, athletes, and fans demonstrates the need for the sports organizations to adopt a speedy and cost-effective alternative resolution technique, such as mediation. In my opinion, mediation is not the perfect remedy for sports disputes, but it could be a good alternative to the many national and international commissions with arbitration responsibilities, because it provides a safe, informal, and proper scene for open communication, which is currently missing in many sports relations. Mediation gives both parties the opportunity to express freely, in a confidential way, which can be used to strengthen both their working and private relationship. The neutral environment provided by mediation has proven to be very helpful and efficient in resolving disputes because of the trust it inspires. In short, the unique qualities of mediation prove that this method could be the right answer for resolving various disputes in sports. In the same time, being a professional mediator, I am aware of the limitations. As a mediator and a sports fan, I want some cases to be arbitrated at CAS or even in national courts. It is in the best interest of the competition for some athletes or teams to be punished and sanctioned for corruption or doping, and these cases must be public in order to stop this bad evolution of the sports industry. On the other hand, the use of this technique would be financially and emotionally rewarding for the business part of the industry, like the athletes' contracts or partnership between sports organizations and different sponsors. Parties involved in sports disputes often look for a quick, confidential, and cost effective resolution. Unfortunately, arbitration, even as a major pillar of ADR, became more and more institutionalized at various national and international levels. It became so formalized that now, at least in sports disputes, it is of more and more resemblance with the traditional litigation. Mediation is capable of meeting these needs and interests, having the potential to reduce the cost of time and resources to the benefit of all stakeholders involved, including athletes, clubs and federations.

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The transposition of the Directive on alternative dispute resolution for consumer disputes (Directive 2013/11/EU) in Romania – new challenges for mediators and businesses

Ciprian TANUL

Abstract. *The National Authority for Consumer Protection of Romania has recently completed the public consultation on the draft law on alternative dispute resolution between consumers and professionals. The law is intended to transpose the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR) into the national legal system. The Romanian authorities seem to prefer a centralized approach, completely excluding from the process the private ADR entities that already exist, such as mediators and organizations that provide mediation services. The financial and administrative burden of the procedure is generally attributed to businesses. The total cost of transposition is still unknown and a number of uncertainties arising from the wording of the Directive are perpetuated. The purpose of this article is to present some important aspects of the future law, with an emphasis on the main challenges that mediators and businesses will face in the near future if the law is to be adopted as such by the Romanian Parliament.*

Keywords: *the transposition of the Directive 2013/11/EU in Romania, public consultation, trader – professional, goods – products, further education – post-secondary non-tertiary education, gold-plating, nationalization of ADR procedures.*

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Introduction

On 19 of May 2010,the European Union strategy called "*A Digital Agenda for Europe*" (EC 2010) was released with the objective of drawing a road map for the use of the full potential of the new communication technologies, particularly the Internet, in order to obtain sustainable economic and social benefits by **creating a digital single market**. The Agenda is one of the seven flagship initiatives of the Europe 2020 Strategy (EC

2010a) and it aims to define the role of information and communication technology (ICT) in achieving Europe's objectives for the year 2020 (EC 2010, p. 4).These objectives relate to increasing the percentage of employed population, increasing investment in research and development,reducing carbon dioxide emissions, increasing the percentage of renewable energies and energy efficiency (all of these with 20%), reducing school drop-out rate and increasing the percentage of higher education diplomas, as well as reducing the number of people at risk of poverty (EC 2010a, p. 5).Finally, the strategy should enable the European Union to grow:

- smart, by developing an economy based on knowledge and innovation;
- sustainable, based on a more resource efficient, greener and more competitive economy; and
- inclusive, fostering a high-employment economy delivering social and territorial cohesion (EC 2010a, p. 5).

Among the obstacles identified in the way of creating a digital single market, there is a **low degree of confidence in the online environment**. Citizens continue to be concerned about the security of payments, the protection of personal data, and the lack of certainty that their rights are respected. In order to improve this situation, the European Commission has taken a series of actions, including **the launch of an EU-wide strategy to improve the Alternative Dispute Resolution systems (ADR), the creation of an EU-wide online redress tool for electronic commerce and improve the access to justice online**, as well as the creation of an EU **online trustmark** for retail websites (EC 2010, p. 15).

The public consultation procedure aimed to identify the difficulties related to the use of ADR and the means of improving the use of ADR in the EU took place between 18 of January 2011 and 15 of March 2011. The consultation document submitted to public attention indicated that, although at the EU level there are over 750 such alternative mechanisms, most of them being free for consumers or having a moderate cost (less than 50 euros), and cases are solved in a short period of time (an average of 90 days), only 3% of the European consumers who have not received a satisfactory answer from the trader resorted to such an alternative system. The percentage of traders who have used ADR means was only slightly higher, of 9% respectively (EC 2011, paragraphs 15 and 16). Identified deficiencies relate, *inter alia*, to the **lack of information for consumers and businesses on ADR means**, to gaps in ADR coverage and to issues related to financing, with an impact on their independence. The reactions received by the European Commission (EC 2011a) within the public consultation process highlighted, however, considerable support for ADR means as an efficient alternative to court proceedings, the importance of developing ADR programs for consumers and support for the improvement of online dispute resolution programs for electronic transactions. Consequently, on 29 of November 2011, the European Commission presented a legislative package

consisting of a *Proposal for a Directive on alternative dispute resolution for consumer disputes (Directive on consumer ADR)* (EC 2011b) and a *Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR)* (EC 2011c). The two proposals were adopted on 21 of May 2013 and became the *Directive 2013/11/EU* (EU 2013) and the *Regulation (EU) No. 524/2013* (EU 2013), respectively.

The Directive 2013/11/EU must be implemented by the member states by 9 of July 2015. Its purpose is "to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures" (EU 2013, Article 1). These ADR procedures are regarded as necessary for consolidating consumers' confidence in cross-border and online commerce. Their development should "build on existing ADR procedures in the member states and respect their legal tradition" [EU 2013, recital (15)].

We have already analysed the main provisions of the Directive in the article "ADR and ODR in Romania – future challenges" (Tanul 2014), therefore we will not discuss them again here. We will treat only the significant aspects in terms of transposition in Romania, as the draft law proposed by the National Authority for Consumer Protection (ANPC) has been recently published on this institution's website. In brief, the project in question provides that:

1. **Any central public authority** responsible for consumer protection **can be an ADR entity**;
2. **ADR procedures may be carried out only by central public authorities**;
3. **A professional is obliged to resort to the use of an ADR procedure** when there is a dispute with a consumer;
4. **An ADR entity proposes a solution which will become binding for the parties** (to be read "for the professional"– because only the professional is exposed to a fine for non-compliance) if it is accepted by the consumer;
5. A body responsible for conducting ADR procedures is established within the ANPC, in direct coordination of the President of ANPC, which may have the role of residual entity;
6. Organization, financing and execution of ADR procedures will be established by means of government decision.

In the first part of the article we will critically examine the conduct of the public consultation procedure. Next, we will analyse a number of terminological differences between the Directive and the draft law, which could produce unintended legal effects, focusing on the pairs of terms "**trader**"**–"professional", "goods"–"products", "further education"–"post-secondary non-tertiary education"**. The last part of the article will be dedicated to an analysis of the *sui-generis* ADR system designed by ANPC, insisting on its effects on the development of mediation in Romania. We will also present some

solutions adopted by other EU Member States, such as Belgium – which has already completed the transposition of the Directive by adopting the Law of 4 of April 2014 on inserting Book XVI "Extra-judicial settlement of consumer disputes" into the Economic Law Code, Luxembourg –where the Bill is currently subject to parliamentary debate, and the United Kingdom– a country where the public consultation has ended and the government has published its regulatory intentions.

Comments on the public consultation procedure

In Romania, the participation of citizens in the process of adopting normative acts is regulated by Law no. 52/2003 concerning transparency in public administration, republished[1]. According to this law, the public consultation procedure is based on the publication of a notice by the central or local authorities, on the internet or in the media, on the future act. This notice shall include, *inter alia*, a background note, a statement of reasons, a paper on the need for regulatory action, an impact study and/or a feasibility study, as appropriate, the full text of the draft instrument and the deadline, place and manner in which those interested may submit written proposals. If the draft legislation is relevant to the business environment, the notice shall be sent by the initiator to the business associations and to other legally constituted associations, on specific areas of activity. The deadline for the receipt of proposals is 10 calendar days. If a legally constituted association or another public authority requests a public debate, such a debate may be organized and the public may have access to its minutes, to the written recommendations, to the improved versions of the draft legislation in various stages of its development, to the advising reports and to the final adopted version of the normative act. In any case, **the public authority is obliged to maintain the above mentioned documents on its website**, in a special section. Also, the requirements of Law no. 52/2003 are minimal, the authority being able to take other measures in order to improve transparency of the decision-making process.

Currently, **neither the notice published by ANPC, nor any of the documents referred to above may be consulted on its website**[2], except the hyperlink to the draft law, which is still valid[3]. Information on the public consultation procedure is available on third-party sites, such as "Legestart"[4] or the site of The National Association of Romanian

1 Monitorul Oficial al României, Part I, No. 679 of 5 November 2013.

2 http://www.anpc.gov.ro/index.php?option=com_content&view=category&layout=blog&id=34&Itemid=41.

3 http://www.anpc.gov.ro/anpcftp/legislatie/140827/proiect_lege_solutionare_alternativa_litigii_140827.pdf.

4 http://legestart.ro/solutionarea-alternativa-litigiilor-dintre-consumatori-si-profesionisti-ce-reguli-propune-anpc-ul/.

Bars (NARB)[5]. According to "Legestart", the period for submission of comments and proposals was 4-15 September 2014. That period is not mentioned in the ANPC's document and there is no indication of an address where the proposals could be sent. On ANPC's web site there is no official information at this time on the results of the public consultation, whether a public debate was organized or not,whether recommendations were submitted by organizations and what the results of the public consultation are. There are no such observations published on the websites of other bodies concerned, such as NARB or The Mediation Council[6].

This situation, together with the reading of the statement of reasons, leads to the conclusion that the public consultation was purely formal and the transparency of the decision-making process – in this case – practically does not exist. The only legal requirement fulfilled by ANPC is the publication on its website of the statement of reasons and draft regulations for an unknown period of time. Moreover, in section 6 of the statement of reasons, entitled "*Consultations carried out for developing draft legislation*", under paragraphs "*1. Information on the consultation process with non-governmental organizations, research institutes and other bodies concerned*" and "*2. Justification of the choice of organizations consulted and of the way the work of these organizations is related to the subject of draft legislation*" it is provided that "**The draft law does not address this issue**", therefore **the public authority did not deem it necessary to consult any other organization concerned**.

Another curious aspect is the absence of any information on the social, economic and financial implications of the bill, even though, as we will see, they exist and affect both public and private sector. Thus, all paragraphs in section 4 of the statement of reasons, entitled "*The financial impact on the consolidated general budget, both on short term, for the current year and on long-term (5 years)*", whether they relate to budgetary income or expenses, to the financial impact on the state budget or on the local budgets, are accompanied by the phrase "**not applicable**". The situation is similar for Section 3 –"*The socio-economic impact of draft legislation*". The sections on the macroeconomic impact, the impact on the competition environment and the social impact are followed by the sentence "**The draft law does not address the topic**", while under the heading "*The impact on the business environment*" it is mentioned that "harmonisation at European level of the requirements relating to alternative dispute resolution systems increases consumer confidence in the internal market and encourages cross-border trade. Besides, professionals will be able to settle in quickly and at low costs any dispute with a consumer, without an administrative penalty being applied to them" (ANPC 2014, p. 5).

5 http://unbr.ro/ro/proiect-de-act-normativ-cu-incidenta-asupra-profesiei-de-avocat-solutionarea-alternativa-a-litigiilor-dintre-consumatori-si-profesionisti/.

6 http://www.cmediere.ro/.

An impact document or another policy document to accompany the legislative proposal was not published. ANPC borders itself to a presentation of the current situation of ADR for consumers in Romania, in Section 2,entitled "*The reason for issuing the normative act*", emphasising the tradition and efficiency of the current mechanism for resolving consumers complaints by administrative means, along with a summary of the Directive 2013/11/EU and of the draft law.

A completely different example is the British public consultation. *Department for Business, Innovation & Skills* (BIS) has performed this procedure from 11 of March until 3 of June 2014, in a 1st phase making public two documents: a document of the "Green Paper" type, which presents in detail the main issues of transposition and the questions asked by the government to the interested parties (BIS 2014) and an impact assessment study (BIS 2014). In addition to their publication on the internet, the documents were sent directly to a wide range of organizations – 156 in total. Also, versions of those documents in other languages than English, in Braille or on audio cassette were available upon request (BIS 2014, p. 13). Later, on 18 November 2014,a summary of the 85 responses received, together with the government's position on each issue subject to public debate was published (BIS 2014b). To remain in the area of the socio-economic impact resulted from the application of the Directive, it would be of interest, for example, the cost-benefit analysis for all three target groups: businesses, government, and consumers. Thus, **on the costs that would be incurred by businesses**, the UK authorities anticipated that:

- providing information to consumers about ADR/ODR would cost, in a first stage, between £ 25.3 million and £ 38 million [one initial expense which includes the cost of familiarisation with the new system estimated at £ 17 million, taking into account one hour of training for one employee, costs for updating the websites of £ 6.6 million, while an IT programmer would do the operation in one hour, and costs of changing terms and conditions between £ 85 for a microbusiness and £ 2,578 for a large company (BIS 2014, p. 46)], the expenditures decreasing after that at £ 500,000 to £ 700,000 per year (BIS 2014, p. 6);
- establishing a competent authority to monitor the compliance with the Directive would cost businesses approximately £ 100,000 per year;
- fees paid by businesses to the ADR residual body, as an effect of the increased number of complaints, would amount to £ 900,000 – £ 9.6 million per year;
- administrative business expenditure generated by additional complaints would amount to £ 400,000 – £ 2 million per year.

The British government, in turn, should spend approximately £ 6 million with:

- the establishment and funding of a residual ADR entity (£ 5 million);
- the establishment of an ODR contact point (£ 100,000 per year);

- the establishment of a competent authority to monitor compliance with the Directive (a one-time cost of £ 200,000); and
- the operation of the Helpdesk (£ 100,000 per annum while the set-up costs are not yet estimated).

Consumers would themselves pay additional costs ranging between £ 100,000 and £ 300,000 due to the increase of complaints' number.

In terms of **benefits**, they were approximated as follows: due to the decrease of the number of disputes litigated, businesses would save between £ 300,000 – £ 1.6 million; any savings that would be made by the government and consumers have not yet been established. For consumers, it was approximated that the compensation they might receive from businesses would amount to £ 400,000 – £ 2 million per year.

What kind of ADR procedure?

In general, the draft proposed by ANPC copies the text of the Directive, therefore copying the terminological ambiguities, too. Thus, it is not sufficiently clear what kind of ADR procedures will apply, who will fall under the law, what kind of goods and services will be affected by this law and to what extent the laws already in force have to be modified, starting with The Mediation Law.

In our opinion, the most important omission (taken as such from the Directive) affects the very definition of the ADR procedure provided at Article 3(1)(g):"*procedure as referred to in Article 2, which complies with the requirements set out in this law and is carried out by an alternative dispute resolution entity*". It does not result, either from this definition, or from the wording of Article 2 or other articles of the project, what kind of procedure is involved: **conciliation, mediation, arbitration, med-arb, neutral fact-finding, ombudsman**, etc. However, from the combination of several articles, it results that in case the consumers choose to make use of the ADR procedure, this procedure becomes **mandatory for professionals** [Article 13(1)], **which may not withdraw** [according to Article 7(1)(j) and Article 9(2)(a) only consumers may withdraw from the procedure]. The proposed ADR procedure is an adversarial one, parties being able to express their views, to present evidence, to take notice of the arguments and evidence submitted by the opposing party and to comment on them, and to be represented or assisted by lawyers, legal advisors, independent advisors or third parties, although the representation or assistance is not mandatory. In case it accepts to settle the complaint [grounds for refusal are set out in Article 5(5)], the ADR entity –that can only be an administrative body –"**proposes a solution**" [Article 2(1)] **which becomes binding for the parties as soon as the consumer accepts it**[Article 5(9)]. **The outcome of the procedure shall be motivated and notified to the parties** [art. 9(1)]. If the professionals do not wish to participate in the proceedings or if they do not implement the solution agreed upon by consumers, they risk fines up to 6,000 RON [Article 20(3)].

From this description it follows that we are dealing with a *sui generis* procedure for resolving a dispute through the intervention of a third party, with the following characteristics:

a. **The third party is a civil servant and it is imposed to the parties by law. Neither the consumer, nor the professional can choose him/her. Private ADR entities, like mediators or arbitrators, are not allowed to perform such a procedure.** The establishment of administrative structures and the appointment of persons who will actually perform the procedure, their mandate etc. will be regulated later by means of secondary legislation.
b. **The third party has the option to refuse, under certain conditions, the conduct of the procedure.** The means for challenging the refusal, which will probably be subject of secondary legislation,are not yet established.
c. **The value of the dispute is irrelevant for the procedure.** The draft law does not provide minimum or maximum limits for acceptance or rejection of dealing with the case by means of this procedure.
d. **The procedure is free for the consumer.** The fees that will be charged to the professional are not specified and they shall be established later.
e. **The procedure is adversarial,** with the possibility of representation and/or assistance by a lawyer/another person.
f. **The procedure is mandatory for the professional.** There is no possibility of giving up the procedure, except by the consumer.
g. If the third party agrees to handle the case, **it is obliged to propose a solution.** If the solution is accepted by the consumer, it becomes **mandatory for the professional**, under the sanction of a fine.
h. **Only a consumer may initiate an ADR procedure** against a professional.
i. Finally, the settlement of consumer disputes through ADR, whether online or offline, will be available **only through the public ADR entities**, with the exclusion of mediators, arbitrators or other forms of private ADR. **These will no longer have access to the European Commission's ODR platform, established by Regulation (EU) no. 524/2013. Consequently, the online dispute resolution for consumers in Romania will be a state monopoly in the next period**.

"Trader" or "professional"?

According to Article 2(1) of the Directive 2013/11, "[t]his Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts ***between a trader*** *established in the Union and a consumer resident in the Union* through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution". According to Article 4(1)(b) of the same Directive, "'**trader**' means any natural person, or any legal person

irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession". The ANPC, probably intending to adapt the terminology to the provisions of the new Civil Code, has replaced the term "**trader**" with "**professional**", ignoring the difference between genus and species (for a more extensive discussion on this distinction, see Popa and Frangeti, 2011).

Therefore, in the draft law, the two articles mentioned above read as follows:

Article 2(1) –"This law shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a ***professional*** established in the European Union and a consumer resident in the European Union through the intervention of an ADR entity which proposes a solution."

Article 3(1)(b) –"'***professional***' –any natural or legal person, public or private, acting within the framework of his commercial, industrial or production, artisanal or liberal activity, or any person acting in his name or on his behalf, for the same purpose."

The question is whether the **liberal professions** (lawyer, notary, auditor, tax consultant, expert accountant, chartered accountant, securities investment consultant, architect and others, such as mediator or sworn translator) that would enter within the scope of the law – as they fall within the definition of 'professional' [the Romanian word is „profesionist"] – would be in the same situation if the term "trader" [the Romanian word is „comerciant"] was kept(incidentally, the same terminological difference exists between the different language versions of the Directive. Thus, in the English version the term used was 'trader', in Spanish "*comerciante*", in French "*professionnel*" and in Italian "*professionista*"). Analysing the definition of the Directive, namely "person [...] acting [...] for purposes relating to his trade, business, craft or profession", we may say the situation would be the same, but we anticipate that during the legislative procedure the discussions concerning whether or not to exempt some professions, invoking, *inter alia*, this terminological difference, will continue. We will not dwell here either on the impact of the law on the profession of lawyer, or on the reconciliation of professional secrecy with solving disputes between clients and lawyers in an administrative way.

"Goods" or "products"?

Another substitution of genus with species, in the reverse sense, was operated in relation with the sales contract. At Article 4(1)(c) of the Directive, it is defined as "*any contract under which the trader* ***transfers or undertakes to transfer the ownership of goods*** [RO – "bunuri"] *to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*". Conversely, the similar provision in the draft law, namely Article 3(1)(c), uses the term "***products***"

[RO – "produse"]– this time narrowing the scope of the law. According to that article, "sales contract" means "any contract under which the professional transfers or undertakes to transfer ***the ownership of products*** to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both products and services". There placement has no justification at least for two reasons: a) it is not motivated, as the inversion discussed above, by the terminology of the new Civil Code, which provides, *inter alia*, in Article 3(3) that "it constitutes an exploitation of an undertaking the systematic exploitation, by one or more persons, of an organized activity consisting in the production, the administration or the alienation of **goods** or in the provision of services, whether for profit or not" and b) all language versions consulted use the equivalent word (EN – „goods", FR – „biens", IT – „beni", ES – „bienes"). To make the situation even more difficult, in the current Romanian legislation on consumer protection, **"products" means only movable property**. Thus, the Law no. 449 of 12 November 2003 on the sale of products and their associated guarantees provide in Article 2(b) that „product means the movable tangible property whose final destination is individual or collective consumption or use", while Government emergency ordinance (OUG) no. 34 of 4 June 2014 on consumer rights in contracts concluded with professionals, under Article 2 para 3 states that **product means any „movable tangible property**, with the exception of goods sold by way of execution or valued as a result of the application of legal provisions; water, gas, electricity and thermal energy are considered "products" when they are put up for sale in limited volume or in fixed quantity". It can be easily observed that **real estate** cannot be included in these definitions and, therefore, contracts for the sale of real estate do not fall within the scope of the law, although they fit the requirements of the Directive.

"Further education" or "Post-secondary non-tertiary education"?

Finally, the third terminological difference concerns services in the area of education not covered by the new regulations. Thus, according to Article 2(2)(i) of the Directive, it **shall not apply** to"public providers of **further** or higher **education**" [in Romanian version: "entităților publice de învățământ superior sau **complementar**"], while according to Article 2(3)(g) of the draft law, it shall not apply to „public entities of **post-secondary non-tertiary** or higher **education**" [in Romanian version: "entităților publice de învățământ postliceal sau superior"]. A first observation would be that the concept of "**educational entity**" does not exist in the Romanian educational system. The National Education Law no. 1/2011, revised, uses only the terms "**educational units and institutions**". Next, the Romanian equivalent used in the Directive for "further education", i.e. "învățământ complementar" (the term was used to describe apprentice education) is not a part of the national education system anymore (see Article 23 of Law no. 1/2011), this notion having been completely eliminated. Therefore,the problem of

clarifying the will of the European legislator arises. What kind of education services are exempt from the provisions of the Directive? Services provided by former apprenticeship schools, as stated by the Romanian version of the Directive, those provided by post-secondary non-tertiary public schools, as the draft law provides, other services, such as those offered by technical and vocational education schools or even continuing education courses offered by universities? Other language versions of the Directive are sufficiently different to maintain the confusion. Thus, the Spanish version, which is the most similar to the Romanian one, uses the phrase "a los prestadores públicos de **enseñanza complementaria** o superior". On the contrary, the French version is more like the draft law, since it provides that the Directive does not apply to "prestataires publics de **l'enseignement postsecondaire** ou de l'enseignement supérieur", but there are differences between the Romanian "învățământ postliceal"and the French "enseignement postsecondaire". Unlike post-secondary non-tertiary education in Romania, which is part of the technical and vocational education, the post-secondary education in France can be also theoretical, seeking, for example, to prepare students for higher education by offering them additional courses designed to help them pass the exam for obtaining the diploma giving access to higher education[7]. To make things even more complicated, the Italian version uses the expression "agli organismi pubblici di istruzione superiore o di **formazione continua**", and the English version uses the expression "public providers of **further** or higher education". We believe it is superfluous to insist on the difference between the concept of "post-secondary non-tertiary education"and "further education"). The problem seems to be, by far, a translation-related one and it will be difficult to solve it, given the diversity of the educational systems in Europe.

Can we speak about a case of excessive-regulation?

By excessive regulation or "over-regulation" (in English the established term is "gold-plating") we mean the phenomenon by which the states impose obligations that go beyond what is necessary to transpose an EU directive into the national legal systems, but without infringing the provisions of that Directive. The excess of regulation results in an increase of bureaucracy, of administrative costs for businesses and therefore in a decrease in their competitiveness. The European Commission states that Member States should avoid such situations and confirms that it is ready to assist them in this regard (EC 2011d, p. 7).

Beyond the terminological ambiguities outlined above, the big problem of the ANPC's draft law consists precisely in the very way it intends to transpose the Directive 2013/11. We will not resume here the obligations under the Directive, as we have

7 http://www.insee.fr/fr/methodes/default.asp?page=nomenclatures/naf2008/n5_85.41z.htm.

already done that (Tanul 2014). However, we will point out that Member States must ensure, *inter alia*:

a. **that consumers have access to quality ADR procedures** in order to solve any contractual dispute originated in a sale of goods or in a supply of services between a trader and a consumer;
b. **that ADR entities meet certain standards**, including independence, transparency, expertise, efficiency and fairness, and the ADR procedures are conducted under certain conditions;
c. **that traders inform the consumers** about the availability of ADR entities or programs and if they do or do not intend to use them;
d. **that an authority competent to monitor the functioning of ADR entities exists**.

On the one hand, we must recognize that the draft law prepared by ANPC is not contrary to the text of the Directive 2013/11, all the proposed solutions being"covered"by its provisions. On the other hand, nevertheless, we must emphasize that the project establishes a *so-called ADR* system (which is neither conciliation,nor mediation or arbitration), bureaucratic, centralized and cumbersome, mainly for traders, but which will eventually produce negative effects on consumers, too, first by transfer of additional costs in the price of products and services and, subsequently, by the quality of ADR procedures offered. It is hard to believe that a small number – by the nature of things –of civil servants will be able to resolve, at the standard level imposed by the Directive, the consumers' complaints **in all fields – from the sale of toys, books and DVDs to the sale of cars and solar panels or from the provision of international transport services to legal assistance services, to name just a few**. Inevitably, given the budgetary constraints that will prevent employment of qualified staff, consumers will actually **have NO access to the ADR services** required by the Directive and its violation will occur *de facto*, as it happens with many other public services in Romania.

The mechanism proposed by ANPC moves away significantly both from the spirit of the Directive and from the way in which it was already implemented in other countries (Belgium) or from the way in which the authorities of other countries intend to implement it (UK, Ireland or Luxembourg). The main arguments are:

- **none of the above mentioned countries has nationalized ADR procedures for consumer protection,** as Romania is preparing to do. By "nationalization of ADR procedures" we mean their exclusive entrusting to the central public authorities and the removal of any private entity (whether they are individuals – mediators, or legal entities – companies or NGOs that deal with alternative disputes in different areas). Thus, in the explanatory memorandum to the draft law, it is explicitly provided that "the draft states that ***any central public authority*** responsible for consumer protection ***shall be an alternative dispute resolution entity***. In this sense, the project ***establishes that alternative dispute resolution procedures may be performed***

only by central public authorities" [emphasis added]. Next, article 3(1)(h) provides that "in the sense of the present law [...]alternative dispute resolution entity (ADR entity) [means] ***any structure within a central public authority*** responsible for consumer protection, offering the resolution of dispute through an ADR procedure [...]" [emphasis added]. For comparison, the Belgian Law provides: "Article 2: In Book I, Title 2 of the Code of economic law, a Chapter 11 is introduced, as follows:"Chapter 11: Definitions specific to Book XVI. Article I. 19. The following definitions apply to the Book XVI: 3° alternative dispute resolution for consuming [means]: any intervention of an entity created by authorities ***or of an independent entity of a private nature*** which proposes or imposes a solution or brings together the parties in order to resolve a consumer dispute; 4° qualified entity [means]: **any private entity** or an entity set-up by a public authority which provides consumer alternative dispute resolution [...]" [emphasis added]. Similarly, the Luxembourgish draft law, currently under parliamentary debate (Luxembourg 2014) defines the extrajudicial settlement of consumer disputes as "any intervention of an entity which proposes a solution or brings the parties together in order to facilitate the identification of an amicable settlement in case of a consumer dispute", and "qualified entity" as "any entity, regardless of how it is called or cited, which is established in a sustainable way and proposes the settlement of a consumer dispute by an out-of-court means of consumer disputes resolution" [...] [Luxembourg 2014, Article L. 311-1, 6) and 7)]. Furthermore, the authors of the bill show further, in the relevant section dedicated to the explanation of each article, that "the legal form is free: the entity may be constituted **by a natural person**, a legal person or an association of natural or legal persons. The entity may be **a private entity** or an authority or other public body" [emphasis added] (Luxembourg 2014, p. 25). As for the implementation in the UK, the situation is even more clear: the British government does not plan to set-up a new residual ADR entity, not even for interventions in the sectors currently not covered by the existing offer (over 70 ADR programs, both public and private, some voluntary, others mandatory), but it will entrust that role to an institution designated by means of a call for tenders (BIS 2014b, pt. 30).

- none **of the above mentioned countries established a new form of ADR** (neither conciliation, nor mediation or arbitration) **compulsory for only one party** (i.e. for the professional), as the Romanian authority intends to do. Thus, Article 13 of the ANPC's draft law provides that "the professionals established in Romania **are obliged to use ADR procedures** in order to solve disputes with consumers when the latter choose to make use of such procedures". It is important to point out that the **Directive 2013/11 does not impose this obligation**, but only states that it is without prejudice to national rules that already provide it. In this respect, recital (49) of the Directive is clear: "This Directive ***should not require the participation of traders in ADR procedures to be mandatory*** or the outcome of such procedures to be binding on traders,

when a consumer has lodged a complaint against them. […] Therefore, this Directive should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders […]"[emphasis added]. The reason why other countries have avoided establishing a general obligation to make use of ADR is precisely related to insuring a balance between the need for consumer protection and the need to reduce administrative costs of business. For example, the British government stated that "Use of the residual scheme will not be compulsory – it will be available should businesses choose to use it. **We believe a blanket obligation on businesses to use ADR is not appropriate at this time**. The fees that businesses are charged to use ADR would impose a high annual cost to business. We do not believe that there is currently sufficient evidence that the benefits of making ADR mandatory justify this cost" [emphasis added] (BIS 2014b, p. 15, pt. 32), estimating that these additional costs could amount to £ 18 million – £ 38, 5 million.

- **the mediation as an ADR means and the mediators as ADR entities are completely eliminated** from the ANPC's draft law. According to The Mediation Council, there are almost 7,000 mediators registered in Romania (RCM 2014), as well as 123 professional associations in the field of mediation (RCM 2014), 11 organizations providing mediation services (RCM 2014b) and 122 authorized trainers (RCM 2014c). In addition, Article 2(2) of the Law no. 192/2006 on mediation and organization of the profession of mediator, revised, provides that "**[t]he provisions of this Law shall also be applicable to conflicts in the field of consumers' protection**, in case the consumer invokes the existence of injury as a result of having purchased defective products or services, of failure to comply with the contract clauses or with the securities provided, of existence of certain abusive clauses included in the contracts concluded between the consumers and the economic operators or of infringement of other rights provided by the national law or the European Union law in the field of consumers' protection"[emphasis added]. Therefore, both the legal framework and human resources necessary to provide traders and consumers with **a private alternative** to the public ADR services are already in place in Romania. Moreover, the Directive itself states in recital (15) that "**[s]uch development should build on existing ADR procedures** in the Member States and respect their legal traditions. Both **existing** and newly established properly functioning **dispute resolution entities** that comply with the quality requirements set out in this Directive **should be considered as 'ADR entities' within the meaning of this Directive**". This does not happen according to the proposed regulations, the existing procedures and ADR entities being completely ignored in favor of newly created state-owned entities. In addition, **the ANPC's project is also contradictory** since, on one hand, in Article 4(2) it provides that "this law is without prejudice to Law no. 192/2006 on mediation and organization of the profession of mediator [...]", but on the other hand, in article

4(1) it provides that "save as otherwise set out in this Law, if any provision of this law conflicts with a provision laid down in another piece of legislation transposing a legal act of the European Union and relating to out-of-court redress procedures initiated by a consumer against a professional, the provision of this Law shall prevail". In other words, Article 2(2) of Law no. 192/2006 remains without object, without thereby being brought "any prejudice"to that law, which is obviously false. Moreover, in Section 5 of the explanatory memorandum entitled "*Effects of draft law on legislation in force*" it is written in black and white that "the emergence of this law entails the modification of the following acts: [...] Law no. 192/2006 on mediation organization of the profession of mediator".

As for the other countries in question, both Belgium and Luxembourg intend to set up a residual ADR service based on mediation. In Belgium, it will be called „Service de médiation pour le consommateur" (The Mediation Service for Consumers) and in Luxembourg „Le Médiateur de la consommation" (The Consumer Mediator). None of the two countries intends to eliminate existing forms of organization of mediation in favour of a public service;

- **setting up an unfavourable regime for traders that goes beyond what is necessary to achieve the objectives of the Directive**. Thus, traders will be "subordinated" by the government to an ADR entity, without being able to influence this assignation in any way. The draft law does not give them the possibility to choose another ADR program. The "neutral and impartial" third party will be imposed on the parties, as it is the case of adjudication and it will be a representative of the public authority. The difference is that he/she will not be a judge, but a civil servant. He/she will not impose a solution, but will propose one, after analysing the file, the evidences and after hearing the parties or their representatives. We do not know whether and to what extent that civil servant will endeavour to determine the parties to identify a solution themselves, or, given the limited time, the lack of financial motivation and the large number of cases, he/she will rather tend to come with a prefabricated solution of a "one size fits all" type. If a consumer files a complaint, the trader will be obliged to make use of the ADR procedure if the administrative ADR entity considers it is competent to address it. The procedure is free of charge only for the consumers, but not for traders, who will be forced to pay some taxes. Since no fee is stipulated for submitting a complaint and no minimum amount is required for such a claim to be considered, the likelihood of abuse increases. Nothing is specified about incurring the costs in case of unfounded complaints. Only consumers can withdraw from the procedure, the traders are not allowed to. Only consumers have the possibility to accept or reject the proposal made by the ADR entity, not the traders. On the contrary, the latter are obliged to implement it if it is supported by the consumers, under the penalty of a fine.

Conclusion

In our previous paper, dedicated to the transposition of Directive 2013/11 in Romania, we have anticipated that the authorities' first option will be a centralized approach, a "one ADR scheme covering all consumer disputes in all areas" type, showing that ANPC is already prepared in the sense, but the perspective that ANPC will be the only ADR entity that settles consumer disputes will not be welcomed by mediators. We have shown that the effectiveness of such approach, given the lack of qualified personnel, is debatable. In addition, we have anticipated that endless talks between professionals (especially between mediators and lawyers) on better regulation of the sector, but also the permanent disputes between different interest groups will mark the future legislation (Tanul 2014, p. 68).

Some of the above are included in the current legislative proposal, namely the preference for the centralized approach of settling consumer disputes by ADR under the auspices of ANPC, which is obvious. Whether this centralized approach will produce the results pursued by the Directive, namely increasing consumers' confidence in ADR, boosting their confidence in e-commerce and, consequently, the growth of cross-border sales, we will see in time. In our opinion, these results will fail to appear. What we believe will happen if the law is approved as such by the Romanian Parliament, is the introduction of a new way to collect various taxes from businesses under the guise of "we are asked to do so by the European Union", without quality public services in the field of consumer dispute resolution being provided in return.

We did not anticipate last year the absence of any serious public debate on the legislative proposal, especially given the passion the Romanian mediators understood to criticise the 2006 Law on mediation with, regardless of any changes, and to place the blame for non-performance (usually synthesized in the phrase "mediation does not work") on the legal framework. We expected a vigorous institutional response from the directly interested mediators' organizations and we expected that such a project, which brutally brings the consumer disputes out of their sphere of activity, would be the subject of intense debates. To our surprise, it passed almost unnoticed, especially during the election campaign for the establishment of the new Mediation Council.

We hope that at least some of the issues raised in this article will be the subject of changes in the parliamentary procedure, particularly those relating to the clarification of the terminology used and to the introduction of the free choice of established ADR means by the interested parties. The development of new bureaucratic mechanisms, as an opportunity to collect additional taxes, is not healthy, either for businesses or consumers, or,ultimately, for the state.

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