European Union. A Structural Comparative Analysis of Mediation in Northern and Southern Europe

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Abstract. *The role of mediation as an alternative conflict resolution technique remains a disputed subject within Europe and the European Union. Indeed, both national laws and European regulations and directives have been introduced with the aim of enforcing or encouraging the application of what is perceived as a more effective means of managing conflicts, but the results continue to be inconsistent. Certain states, such as Norway, Denmark and Belgium have registered positive results related to the praxis of mediation while others, such as Italy, Spain and France, have been relatively unsuccessful. Generally, the considerable gap in mediation related performance between the "North" and the "South" of Europe is considered as rooted in deep cultural differences; while this is not by any means false, it is insufficient to fully explain the phenomenon. The aim of this article is to approach the subject matter from a purely technical angle, isolating the cultural factor without forgetting its relevance. What we have left is a structural analysis which emphasizes the importance of the legal and institutional policy concerned with court-annexed mediation. In this context, a fundamental difference is identified between the pragmatic and the legalistic approach.*

Keywords. *mediation, Alternative Dispute Resolution, pragmatic approach, bureaucratic/legalistic approach, institutional structure, legal foundation, professional autonomy, state employee mentality.*

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Because of the general incoherence encountered at the European level when it comes to the way the different member states have approached the issues of judicial mediation and ADR techniques, Directive 2008/52/EC of the European Parliament and of the Council was issued in an attempt to harmonize European legislation regarding the place and relevance of these apparently novel conflict resolution methods. Due to the fact that the directive provides only general guidelines and principles as to the

rapport of mediation to the courts, the status of the mediator and the way mediation should be conducted, we see that the member states have adopted very different strategies as to how mediation should be applied to the particular legal environment of each state. Statistical data gathered regarding the efficiency of judicial mediation in European countries has shown that the tendency is for this method of dispute resolution to be more effective in Northern countries than in Southern countries. Of course, the North/South differentiation is an approximate one, meant to distinguish between two schools of thought; a more exact division would be that established by Giuseppe de Palo between *pragmatic*, equivalent to the Northern countries, and *legalistic*, equivalent to the Southern countries, systems of mediation. There are several main factors that differentiate one system from the other: (1) the institutional approach to mediation, (2) the status of the mediator and (3) cultural inclinations.

Institutional Approach to Mediation

The Bureaucratic/Legalistic Approach

The different institutional approaches to mediation adopted by different states produced quite an unexpected result. It has been noticed that in those states which have implemented fiscal and procedural incentives for the use of mediation, the tendency is for the public to view this conflict resolution method as ineffective. This is the case in many Southern European states including Spain, Italy, and Romania, each employing different types of financial and legal incentives in order to steer individuals away from an over-encumbered adjudication system. In these countries, mediation is generally presented as the cheaper, faster alternative to the court trial; little emphasis is placed on the actual quality of the service. The bureaucratic/legalistic approach also implies the idea of mediation as a universal "cure", tailored for the improvement of the adjudication process. It is seen as an attempt at correcting the faults of the court system rather than as an autonomous concept or a process in its own right. The idea of a "quick fix" somewhat forcedly implemented through regulations is a common topic in the approach of most Southern European states. Despite this, we see considerable variations on this basic topic. In the following pages, we will analyze some of the main traits of the legalistic approach to mediation, including the politicization of the process, the over-bureaucratization and the focus on material incentives.

Italy- The politicization of mediation

Despite Italy being one of the first European Union members to implement the 2008/52/EC Directive, through the Legislative Decree 28/2010, the process of mediation has never truly been accepted by most professionals in the field or by the general population. Its implementers have conceived mediation as a remedy for the considerable tension exerted on the Italian Court system, due to the large number of cases, but the effects

of the Italian mediation law seem to have created more problems than it has resolved. During the last decade, the Italian judicial system encountered serious procedural problems due to the high number of cases submitted each year and due to the time spent on resolving these issues. There are several characteristics, such as over-bureaucratization, the excessive number of local courts and the large public expenditure needed to sustain the system, that have produced a deep inefficiency of the Italian judicial system. It has been assessed that the expenditure of the Italian judicial system, of approximately 3,051,375,987 euro, is considerably higher than the European average, when calculated on a per capita basis. The Italian Government spends around 50.3 euros per inhabitant, while the EU27 average is 41.7 euros per inhabitant (Dubois, Schurrer, Velicogna, 2013). Maybe the most striking feature of the Italian legal system is the prominence and solidarity of the Italian lawyers. There are around 211,962 lawyers working within the judicial system, which means that there are approximately 349 lawyers per 100,000 inhabitants whereas the European average is of 160 per 100,000 inhabitants (Dubois, Schurrer, Velicogna, 2013).

Table 1:

Courts budget	Budget in €	Budget in €/ Population	% of general government expenditure[145]
TOTAL annual approved budget allocated to the functioning of all courts	3,051,375,987	50.3	0.39%
Annual public budget allocated to (gross) salaries	2,274,336,102	37.5	0.29%
Annual public budget allocated to computerisation (equipment, investments, maintenance)	58,083,534	1.0	0.01%
Annual public budget allocated to justice expenses (expertise, interpretation, etc), without legal aid.	317,399,440	5.2	0.04%
Annual public budget allocated to court buildings (maintenance, operating costs)	269,968,019	4.5	0.03%
Annual public budget allocated to investments in new (court) buildings	NA	NA	NA
Annual public budget allocated to training and education	755,313	0.0	0.00%
Other	130,833,579	2.2	0.02%

	Professional judges sitting in courts full time	Professional judges sitting in courts full time, professional judges sitting in courts on occasional basis, non-professional judges, and Rechtspfleger for countries which have such category	Lawyers	EU lawyers	Notaries	Enforcement agents
Number	6,654	9,775	211,962	NA	4,750	3,365
Number / population *100,000	11.0	16.1	349.6	NA	7.8	5.6
Number / State + Local annual expenditure in Billions	8.5	12.5	270.2	NA	6.1	4.3

Despite the quite rapid implementation of a mediation law in Italy, the concrete effects expected from such a measure did not become visible, or did, but to a very small degree. It seems that the practice of mediation in Italy encounters resistance not only at the level of the beneficiaries, but also at the level of the law specialists. In 2011, it was in fact the members of the professional law practitioners, especially the Italian lawyers, who organized an industrial action against the state coupled with a nation-wide strike in an attempt to impede the implementation of mandatory mediation. The strike organized by the Organismo Unitario dell'Avvocatura Italiana was not against mediation itself, as a means of conflict resolution facilitated by a neutral and impartial individual, but rather against the fact that it had been deemed mandatory by the Italian Government. Their reasoning was that it not only affected their private professional interests, but it also impeded Italian citizens to search for justice within the court system if they so desired. The issue of mandatory versus voluntary mediation soon became an important factor in the political struggle between the Berlusconi Government, which at the time was dealing with serious legal complications, and the Italian judicial system (Bowcott, 2011). This conflict was partially resolved by a decision by the Italian Constitutional Court that the Legislative Decree nr. 28 dated 4 March 2010 that deemed the "Compulsory Mediation" procedure unconstitutional. We should note that the ruling of the court did not tackle the substance of the issue, but simply stated that the Government did not have the legal authority to emit such a law. The authority of the Government in this issue originated from Act 69 through which Italian Parliament mandated the Government to implement the necessary reforms in order to integrate national law within the emerging framework of European mediation law, but the question of mandatory versus voluntary mediation was not included in the parliamentary mandate.

In Italy, the issue of mandatory mediation was taken further than in most countries, as some possible penalties were included if the process was refused by its beneficiaries. Despite the hostility expressed by many Italian lawyers towards the mandatory implementation of mediation, according to the law, it was their duty to inform the parties regarding the option of mediating their conflict and the financial advantages such an option would provide. There, the mediator had to propose a solution that could be refused by one or both parties. If one party refused mediation and the subsequent court ruling was similar to the solution proposed by the mediator, the party that refused the mediator's solution could be forced to bear all court cost and fees, including those of the other party. This strategy caused not only passive resistance from the population, which simply does not trust this new method of conflict resolution, partially because it was forced upon them, but also active resistance from the part of the legal professionals. We must note that, as of yet, the essence of the issue has not been discussed. For now, mandatory mediation has been rejected by the judicial system based on procedural arguments and not on the practical benefits or faults of such an approach.

Spain – Mediation as a free public service

The legal system in Spain suffers from similar deficiencies as its Italian counterpart. The growing number of cases coupled with an over-bureaucratized judicial structure led to the steady decrease of the clearance rate of cases. In Spain, the overall budget of the justice system is 4,632,278,011 euros including the budget for the court system, legal aid, public prosecution services, probation services, Council of the judiciary and functioning of the Ministry of Justice. Despite the already high expenses of the Spanish legal system, the tendency is for the number of cases submitted to increase by an average of 13.6% per year, from 2,024,371 in 2006 to 2,607,873 in 2008, and to 3,374,149 in 2010 (Dubois, Schurrer, Velicogna, 2013). As in the case of the Italian system, the cost of the Spanish judicial bureaucracy exceeds the EU27 average, with 62.1 euro being spent per inhabitant. Another characteristic that is shared by the Spanish and the Italian systems is the large number of lawyer compared to the country's population. As shown in table 3, there are 272.3 lawyers for every 100,000 inhabitants.

Table 3:

	Budget in €	Budget in €/ Population	% of general government expenditure[249]
TOTAL annual approved budget allocated to the functioning of all courts	4,202,016,219	91.4	0.88%
Annual public budget allocated to (gross) salaries	1,329,868,250	28.9	0.28%
Annual public budget allocated to computerisation (equipment, investments, maintenance)	158,163,660	3.4	0.03%
Annual public budget allocated to justice expenses (expertise, interpretation, etc), without legal aid.	NA	NA	NA
Annual public budget allocated to court buildings (maintenance, operating costs)	NA	NA	NA
Annual public budget allocated to investments in new (court) buildings	NA	NA	NA
Annual public budget allocated to training and education	NA	NA	NA
Other	NA	NA	NA

Table 4:

	Judges / 100,000 inhabitants	Judge-like agents/ 100,000 inhabitants	Judges and administrative personnel/ 100,000 inhabitants	Lawyers / 100,000 inhabitants
Spain	10.2	39.5	not available	272.3
EU 27 Average (AM)	18.9	45.6	103.7	160.7
EU 27 Median	17.9	29.8	92.3	104.6
EU 27 STDEV (S)	10.8	36.9	49.5	109.5

Again, mediation became a panacea for those who wished to improve the efficiency of the Court system. The practice of mediation is established in Spain by the Royal Decree-Law 5/2012, which prescribes that the process must be very simple and brief, extending over a minimal number of sessions. This format is designed to guarantee a trouble-free, affordable and brief conflict resolution process that will attract a large portion of those who are confronted with such issues. In practice, however, mediation brought only minimal improvements to the Spanish judicial system. The strategy of the Spanish authorities was not to impose the use of mediation as a dispute resolution method parallel to the Court system, but rather to make it increasingly attractive from a financial point of view. The premise was that if mediation became the most viable economic option, then it would also become the most utilized option. The essence of the Spanish approach was to underline the economic advantages mediation brings by offering additional material incentives. Court-annexed mediation became free of charge in several fields of activity, including the employment field, the services of the Autonomous Communities and SIMA. Also, mediation services in the family field by the bodies working with the courts are generally free of charge. In Catalonia, the cost of the mediation process is regulated in the case of people who do not receive legal aid. Very often, mediation is offered for free when applied to the criminal field.

Still, the limited success of mediation in Spain is proof that material incentives do not necessarily translate into popularity or efficiency. On the contrary, it seems that material or legal incentives alone tend to produce the opposite reactions than planned, leaving the impression that mediation is a "second rate" or "cheap" method of conflict resolution.

France- The bureaucratic interpretation of mediation

In the case of France, we see mediation being adopted not as an alternative to the process of litigation, but rather as an assimilated instrument of court justice, subject to the extensive influence of the judge. The mediator himself, when professing in the context of a court-annexed mediation, has the status of a civil servant under the direction of the Court and not that of a professional hired by the parties. The judicial system in France has been deeply affected by their well-known centralistic approach to the administration of public affairs. Historically, Paris has held complete control over French courts, limiting judges' power to *bouches de la loi*, mere "mouthpieces of the law," and reserving the power to change the law to the legislature alone. The political center, in this way, prevented the periphery from possessing the capacity to make legal changes by keeping the courts out of the people's reach. Unlike common law, in the American judicial system, where judges have the capacity to modify law through the medium of judicial opinion, the decisions of French judges cannot affect national law in that manner. There is also a difference in the way the courts are perceived by the people. In France, unlike North America, the people do not consider the courts to be the guardians of their rights, but rather a simple extension of the government, whose function

is merely to enforce the laws promulgated by the legislature, and not re-consider their constitutionality. This translated into a certain degree of rigidity of the French judicial system as the judges see their function as arbiters of the law and not conflict managers. They prefer to simply determine who is correct according to the text of the law rather than facilitate the finding of solutions adaptable to particular problems. The gradual expansion of the centralist state culminates in an étatist culture where the people have become accustomed to having change handed down to them from Paris, the political and legal center of France. In conclusion, without a sustained effort from the part of Paris, the use of mediation in France would most likely remain scarce and undervalued.

The field of mediation is regulated by Decree No. 96-652 of 22 July, 1996 and codified in articles 131-1 to 131-15 of the French Civil Procedure Code. One of the main institutional characteristics of mediation in France is the degree to which the process of court-annexed mediation has been assimilated to the judicial system, both procedurally and professionally. The relation between the court and the mediator is one of subordination, especially due to the capacity of the judge to indirectly interfere with the process. The mediation referral is subject, of course, to the prior consent of the parties; however, if a court action has already started, "the court dealing with the dispute may, with the consent of the parties, appoint a third person to ascertain the parties' positions and to present their points of view so as to enable them to find a solution to their dispute" (Article 131-1 of the Civil Procedure Code). In accordance with the law, French judges could instruct parties to mediate their dispute once the judge had been assigned the case for litigation, but could only do so by first securing the consent of both parties. An individual may enter mediation either prior to entering the judicial system or, once the case has been presented to a court, only if the judge directs the case to a mediator or an association of mediators. In other words, the judge reserves the right to initiate or not the process of mediation. It is important to note that mediation in France does not function as an alternative to litigation, and does not remove the case from the authority of the judge (Article 131-2 of the Civil Procedure Code). Rather than considering it an alternative to the judicial system, the French legal professionals view it as an appendix to the court, an instrument that is at the disposal of the judge. Furthermore, the judge also retains the power to put an end to the mediation in three circumstances: upon request of the parties, upon the request of the mediator or *sua sponte* (of his own initiative). He may also set a time limit for the mediation and to grant extensions when the situation calls for it, though the law does provide an initial time frame of three months. In regard to the normative regulations put in place in connection to the exercise of parental control or what interim measures should be introduced in relation to divorce, the court has the possibility to direct the parties to attend a briefing meeting on mediation. The meeting will be free of charge, and cannot lead to any type of sanction being imposed as in the case of the Italian judicial system (Articles 255 and 373-2-10 of the Civil Code). Studies regarding the practice of media-

tion in France suggest that, despite the success of arbitration in this country, mediation had very little impact on the approach to conflict resolution in France. Finally, once the parties have reached an agreement through mediation, it is subject to approval by the judge, and then only then deemed enforceable. It is worth mentioning that the law not only offers little incentive for the use of mediation, but the parties do not have the freedom to pursue such a course, within the court system, without the initiative of the judge, considerably limiting the number of mediation cases.

The problems of French mediation arise, as we shall see, particularly from a lack of both a private and a public concerted effort to resolve conflict using this means. In France there is no central or government authority responsible for regulating the profession of mediator, nor are there currently any plans to create such a body. There are, on the other hand, some non-governmental organizations that operate in the area of family law, such as:

- The APMF (Association Pour la Médiation Familiale – Association for Family Mediation) in 2007 claimed 792 members, of which 681 were individuals, mostly mediators and 111 legal entities;
- The FENAMEF (Fédération Nationale des Associations de Médiation Familiales – National Federation of Family Mediation Associations**)** in 2007 claimed a membership of 260 mediation associations or services.

Theoretically, the text of the law gives mediators an extensive operational freedom. Under French law, parties may refer a matter to mediation in any area of law, with only one very important restriction in place, namely that mediation does not undermine the rules of public policy regulating social and economic conduct. For example, it will not be possible to conclude a mediation settlement in order to circumvent mandatory rules on marriage or divorce. Under certain circumstances, mediation may be used even in criminal cases, but only prior to prosecution with the accord of the parties and at the initiative of the public prosecutor (Article 41 of the Code of Criminal Procedure). All settlements must be in complete accord with the text of the law. If the law provides certain penalties or obligations, they cannot be avoided through any ADR method. As in many parts of Europe, mediation is most often used in family law cases, by appealing to the family court and through the participation of a family mediator, and in small claims, namely cases presented before the small claims court or the District Court where the value is less than 10,000 euros, with the participation of a conciliator. One of the main reasons for which mediation is more or less limited to family and small claims cases is that labor and commercial conflicts are generally resolved using conciliation and, respectively, arbitration, both of which have a longer tradition in France. Conciliation in work related cases was first implemented following the French Revolution, in an attempt to increase the efficiency of the court system and to promote social peace, while French commercial arbitration is believed to be one of the most effective arbitration

programs in the world (Altman, 2012). Due to the success and well established reputation of conciliation and arbitration, mediation is generally applied to other fields.

The Pragmatic Approach to Mediation

Those states that have adopted a pragmatic institutional approach to the act of mediation generally tend to focus their national legislation and structural efforts towards increasing the quality of service rather than the number of those exposed to this particular means of conflict resolution. Furthermore, mediation is not presented as a judicial "panacea"; it is viewed and portrayed as a viable alternative facilitated by highly trained professionals that tend to be autonomous from the court system. The general principles behind the pragmatic approach to mediation seem to *be autonomy*, *quality* and *flexibility.*

Norway- A Cultural Incentive towards Mediation

One of the main characteristics of mediation in Norway is that it is considered a traditional form of settlement negotiation and a standard agreement for extra-judicial mediation and the promotion of an autonomous judicial mediation process pursuant to the Norwegian Dispute Act, which entered into force on 1 January 2008. Due to the fact that alternative dispute resolution mechanisms have a long tradition in Norway, mediation being one of the most successful methods, great importance has been given to these techniques, not only in the new Dispute Act, but also in the process guidelines laid down in Norwegian family law. One of the fundamental traits of the Norwegian approach to alternative dispute resolutions is the fact that they are seen as autonomous and organic processes which are not dependent on the court system; on the contrary, court-annexed mediation is perceived as the natural extension of a long ADR tradition. In Northern culture, mediation is not seen as the "cure", but rather as a prophylactic measure integrated in a long-term effort towards a more peaceful society. Its purpose is not to alleviate the pressure off of an over-bureaucratic court system, but to identify and resolve conflicts that are still in their initial phases.

The implementation of Restorative Justice in Norway is relevant for the way the authorities and the public have approached mediation. The following extract refers to the application of mediation to the resolving of incipient intra-community conflicts and the re-integration of juvenile delinquents. "The Norwegian mediation services in Northern Norway, i.e. Finnmark, Troms and Northen Nordland, may serve as an example. They have wished to take an active part in the development of enhanced cooperation and understanding between people living in the Barents region. This was seen in a long-term perspective through the establishment of a permanent cooperation within the framework of Restorative Justice. In particular there was an emphasis on vulnerable juveniles and the possibility of youth peer group development as a means for peaceful and well functioning communities in the north. Likewise the emphasis was on a par-

ticular approach to the rehabilitation of imprisoned juveniles in order to contribute to the development of local peace and security. This is now at a starting point in the Norwegian Ministry of Justice cooperating with relevant authorities in the region of Murmansk" (Hydle, 2011). Against this background, the mediation training for judges appears somewhat modest, especially when taking into account that the different types of mediation regulations provide mediators with a broad discretion for tailoring their duties and processes to the individual circumstances of the case.

It must be noted that the judge is a central figure for Norwegian mediation, though he does not dominate the process, as the French judge does. In fact, the Norwegian judge is given the capacity to refuse a certain case if his actions as a mediator are affecting his position as judge. According to the text of the Dispute Act, „the preparatory judge in the case, one of the other judges of the court or a person from the court's panel of judicial mediators may act as the judicial mediator. The court may with the consent of the parties appoint a judicial mediator who is not on the panel of judicial mediators. The court may also with the consent of the parties appoint an assistant to the judicial mediator" (Dispute Act, chapter 8, section 8-4). In other words, while the judge is a very important figure in the process of mediation, possessing a certain authority but also being given the freedom to extract himself from the court proceedings, there are also mediation specialists available to the general public. Nevertheless, a great number of empirical studies regard the different judicial mediation procedures as being a 'faster, cheaper and friendlier' means of conflict resolution than ordinary court proceedings. Yet, the emphasis is not necessarily placed on these aspects of the process, but rather on the fact that they give the parties the freedom to find a solution that will improve their relation.

Denmark- Mediation as a well established practice

Denmark, unlike many of its European neighbors, offers an example of tradition in the practice of mediation. While for most European states, many ADR techniques are seen as novelties tailored for issues that are quite modern, in Denmark, mediation is in fact a longstanding and popular procedure. King Christian V's *Danish Law of 1683* was the first instance in which mediation became a valid legal option in all civil cases, of course, with the consent of the parties. In 1795, the social relevance of mediation was already recognized by the Danish authorities, as it was mandated for all civil cases with the aim of encouraging citizens to be less quarrelsome. In spite of the legal nature of the regulation, mediation had to occur in a format and environment designed especially for mediation and not in any way attached to the courts. A clear distinction between the process of mediation and the process of adjudication was established, giving the mediators considerable autonomy. Furthermore, the mediators were not to be legal professionals. On the contrary, emphasis was placed on their respectability in the commu-

nity and their common sense. In contrast to states such as France, Italy, and Spain, the number of Danish civil cases have decreased in the last 25 years from 224,000 in 1988 to approximately 100,000 in 1996.

Table 5:

Courts budget	Budget in €	Budget in €/ Population	% of general government expenditure[60]
TOTAL annual approved budget allocated to the functioning of all courts	216,795,693	39.0	0.16%
Annual public budget allocated to (gross) salaries	148,501,965	26.7	0.11%
Annual public budget allocated to computerisation (equipment, investments, maintenance)	17,053,306	3.1	0.01%
Annual public budget allocated to justice expenses (expertise, interpretation, etc), without legal aid.	NAP	NAP	NAP
Annual public budget allocated to court buildings (maintenance, operating costs)	33,408,917	6.0	0.02%
Annual public budget allocated to investments in new (court) buildings	NA	NA	NA
Annual public budget allocated to training and education	2,012,585	0.4	0.001%
Other	15,818,920	2.8	0.01%

Table 6:

	Judges / 100,000 inhabitants	Judge-like agents/ 100,000 inhabitants	Judges and administrative personnel/ 100,000 inhabitants	Lawyers / 100,000 inhabitants	Lawyers / judges
Denmark	9.0	excluded	not available	104.6	11.6
EU 27 Average (AM)	18.9	45.6	103.7	160.7	16.2
EU 27 Median	17.9	29.8	92.3	104.6	7.0
EU 27 STDEV (S)	10.8	36.9	49.5	109.5	21.7

The state of the Danish judicial system is, in most ways, superior to the Southern European systems; it tends to be more efficient, less expensive and more flexible. The costs amount to 39 euros per inhabitant, which falls slightly under the 41.7 euro EU average. Also, the number of lawyers is much smaller than in the states we have studied in section A of this paper, with 104.6 lawyers per every 100,000 inhabitants. As for the length of the litigious civil and commercial cases, in 2010 it was of 186.2 days, which corresponds to 0.65 times the EU27 average disposition time. In many ways, the Danish system is the opposite of its Italian, Spanish and French counterparts. While in the latter, extensive bureaucratic structures and rigid procedures were put into place, the Danish lawmakers preferred minimalism and simplicity. Since the process of mediation has evolved in parallel with that of adjudication, today, those who practice mediation may rely on an already existing capital of trust, while in most European countries it is particularly the lack of trust which hinders any noteworthy progress.

Belgium – Promoting Mediation through Accessibility

Table 7:

	Budget in €	Budget in €/ Population	% of general government expenditure[27]
TOTAL annual approved budget allocated to the functioning of all courts	934,837,000	86.2	0.50%
Annual public budget allocated to (gross) salaries	621,115,000	57.3	0.33%
Annual public budget allocated to computerisation (equipment, investments, maintenance)	37,623,000	3.5	0.02%
Annual public budget allocated to justice expenses (expertise, interpretation, etc), without legal aid	107,464,000	9.9	0.06%
Annual public budget allocated to court buildings (maintenance, operating costs)	68,767,000	6.3	0.04%
Annual public budget allocated to investments in new (court) buildings	6,341,000	0.6	0.00%
Annual public budget allocated to training and education	5,220,000	0.5	0.00%
Other	88,307,000	8.1	0.05%

Table 8:

	Professional judges sitting in courts full time	Professional judges sitting in courts full time, professional judges sitting in courts on occasional basis, non-professional judges, and Rechtspfleger for countries which have such category	Lawyers
Number	1,607	4,261	16,517
Number / population *100,000	14.8	39.3	152.4
Number / State + Local annual expenditure in Billions	8.6	22.8	88.3

Mediation in Belgium is regulated by Articles 1724-1737 of the Code of Civil Procedures. These provisions, despite dating from 2005, have not been amended after the adoption of Directive 2008/52/EC by the European Commission, since they were considered to be in line with the emerging European policy. In Belgium, the profession of mediator is managed and regulated by the Federal Commission, an organization whose leadership is composed of the representatives of professions relevant to the field of mediation, namely two lawyers, two notaries, and two mediators. The Commission is politically independent from the Belgian state, though the Public Federal Justice Service (Service Public Fédéral de la Justice) does offer logistical support. Structurally, there are three sub-commissions specialized on either family affairs, civil affairs, or commercial and social affairs. While the Commission itself does not practice mediation, it does regulate the profession and keep an updated roster of certified mediators. The main function

of this institution is to guarantee, through the process of mediator accreditation, the quality and continuous development of mediation.

Mediation, as an official method of resolving legal conflicts, is admissible in:

- Civil law (including family disputes);
- Commercial law;
- Employment law.

Victim-offender and restorative mediation also exists, but these areas do not fall within the jurisdiction of the Federal Mediation Commission. As in the case of France, the most common area of mediation is civil law, and more specifically family matters.

According to European Directive 2008/52/EC, it must be possible to request that a written agreement resulting from mediation be enforced. The Member States indicate which courts or other authorities are competent to receive such requests. Belgium has not yet provided this information.

The Belgian law regarding mediation states that there are three types of mediation of which only two are regulated by the state: judicial mediation, voluntary mediation and private mediation (médiation libre). In the case of judicial mediation, a mediator accredited by the Federal Commission is assigned by the judge, either at the request of the parties or of his own will, but with approval of the parties. Voluntary mediation may take place both within and outside of the court system. When it is within a judicial context, the parties may select, at their own initiative, a mediator for their case. As a general rule, the judge accepts mediators who have been accredited by the Federal Commission, but, at the explicit and well documented request of the parties, a non-accredited mediator may be appointed, if it is determined that he is capable of facilitating the agreement of the parties. In the case of a joint application by the parties, the procedural time limits for the filing of pleadings etc. are suspended during the period of the mediation. In the case of private mediation, there is no form of state intervention because it is considered to be the natural application of mediation concerning private disputes in day-to-day social interactions.

Here we see one of the fundamental differences between the Belgian and the French judicial systems. At any time during the proceedings, a Belgian court, upon the joint application of all the parties or upon the judge's own initiative, but with the agreement of all the parties, may order the parties to attempt mediation. In the case of French court-annexed mediation, it is exclusively the judge's privilege to asses the situation and decide if mediation is necessary or not. In the case of Belgium, the parties are granted the freedom to find a resolution that is adapted to their particular situation, both from within and outside the court system. In the French system, the parties are bound to the authority and opinion of their judge. In the event that the mediation is successful, the

parties and the mediator sign a mediation agreement, which, assuming the mediator is certified, has the same effects as in the case of voluntary mediation.

However, in conformity with Articles 1733 and 1736 of the Judicial Code, it is possible to have the mediation agreement approved by a judge, which makes such an agreement authentic and enforceable. In terms of form, the agreement then becomes a ruling, but only accredited mediators may use this opportunity.

There is an alternative to approval. It is possible to have the mediation agreement made into a notarial instrument by a notary. In this way, the agreement is also made authentic and enforceable without recourse to a judge. This option is only possible with the agreement of all of the parties.

The Professional Status of the Mediator

While there is a multitude of differences in the way mediation is perceived as an alternative dispute resolution from on state to the next, we may still identify certain fundamental characteristics that make a particular set of systems effective as opposed to others. Our premise is that the mediators of those states who adhere to a pragmatic approach to mediation tend to become increasingly professionalized while those that practice under bureaucratic and legalistic systems tend to become auxiliaries of the courts. This difference occurs in the training received by the mediators, but also in the way they are perceived by society. Making a comparison between Italy and Romania, on the one hand and Denmark, the Netherlands and Norway on the other, underlines the difference in the approach to mediation as a profession. There are two broad approaches to the profession of mediator.

The Mediator as an Independent Professional

Dutch mediators, on the other hand, not only have to complete a 20 day training course, but also have to constantly maintain their skills up to date in order to keep their certification. Organizations like the Dutch Mediation Institute and the Danish Institute of Arbitration closely and permanently supervise the quality of the work of the accredited mediators. In Denmark, mediations are often filmed or recorded in order to keep track of a particular mediator's performance. The very high quality standards set by the Northern states and the national mediator communities operating in those countries have led to the professionalization of mediators in those countries.

In conclusion, while in many Southern countries, the emergence of mediation has been viewed as a threat to the established "legal bureaucracy", legal systems with a pragmatic approach have very easily integrated it as a valid method of conflict resolution. The way mediation and the mediator are implicitly portrayed is another fundamental difference between the two schools of thought. In states like Spain, Italy and Romania,

the tendency is to view the mediator as the provider of a service that is cheaper, while in the Netherlands, Denmark and Belgium, where the fees given to the mediators tend to be higher than in Southern countries, mediation is perceived as a useful and effective ADR method. In the Northern states that have had a pragmatic approach on mediation, we see that state regulations are generally less intrusive and oriented towards quality control rather than imposing mediation upon its citizens. There are also less state-directed financial incentives to use mediation, which, somewhat paradoxically, leads to the increase of those willing to use mediation, since it is not portrayed as a "cheap and granted" service. Besides this aspect, in countries like the Netherlands and Denmark, the implementation of laws regarding mediation was preceded by long-term experimental programs meant to gradually educate both the public and the professionals working in the field, like the very successful "Project Mediation alongside the Courts". This suggested a gradual and organic approach to the implementation and development of the profession, which contrasts with the southern states' experience. "On the other hand, the Dutch model, based upon the idea that before introducing permanent legislation of mediation, experimental projects to evaluate its possible impact on that society are fundamental, is associated with far more effective results in creating a real and widespread practice of mediation" (De Palo, Carmeli, 2005).

The conditions under which an individual may become an accredited mediator ("médiator agréé") according to Article 1726 of the Belgian Judicial Code are as follows: they have to be qualified on a certain type of conflict, to demonstrate the training and experience needed for the practice of mediation, to present guarantees of independence and impartiality, must not possess a criminal record and must not have incurred an administrative punishment that is incompatible with the function of mediator. The Federal Mediation Commission has regulated the mediator training, but the training itself is provided by the private sector. The training program, which is applied to all individuals who wish to become mediators in Belgium, comprises a core of 60 hours, divided into at least 25 hours of theoretical training and at least 25 hours of practical training.

The core component of the program covers the general principles of mediation, including ethical issues, the study of the various Alternative Dispute Resolution Methods, applicable law, the sociological and psychological aspects of the process of mediation, and so on. The practical exercises cover the subjects in the program and, through role-play, develop negotiation and communication skills.

In addition to this common core, there are programs specific to each type of mediation (at least 30 hours, divided at will between theoretical and practical training time). There are specific programs for family, civil and commercial, and community mediation. In order for an individual to act as a court-annexed mediator, he must be well prepared in the particular field in which he plans to work. This is why the Belgian authorities have implemented specialization programs as a way of completing ones mediator training.

Mediation is not free of charge. The mediator's fees are agreed between the private mediator and the parties. The law does not regulate them. Traditionally, each party pays half of the fees. It is possible for a party to obtain aid to pay a mediator's fees provided that party's income is modest and that the mediator is accredited.

The Mediator as a Provider of Inexpensive Services

The differences between the pragmatic and the bureaucratic approach to mediation are not limited to institutional structure. The status of the mediator also differs greatly. If within the bureaucratic approach, the mediator becomes either a civil servant or the cheaper "equivalent" of the lawyer, the pragmatic approach entitles the mediator with full professional independence and focuses on the quality of his work rather than the services he might potentially bring to the court.

In Romania, the law provides limited requirements when one chooses to become a mediator. His training must consist of an 80-hour course conducted under the supervision of a private provider approved by the Mediation Council with the additional requirement that he has at least three years work experience before receiving his certification. The great majority of Romanian mediators do not have any legal experience. In Italy, the situation is similar. For an individual to be able to legally profess as a mediator, he must go through a training course of only 36 hours with a 12 hours refresh course every two years (Bruni, 2013). In both countries, mediators tend to have two professions, the second profession being quite often unassociated with any legal field. In Greece, for example, there is no national training program whatsoever. Italy and Romania provide procedural incentives under the form of mandatory mediation briefings for issues that concern a number of fields of the law, of which civil and family matters are the most prominent. Before entering the adjudication process, the subjects have to attend a meeting with a mediator in which the process is explained to them. If they refuse mediation, they may proceed to the classical adjudication process.

One of the main characteristics of the French court-annexed mediator is the degree of his subordination to the court that has designated him to a particular case. Article 131-9 of the Civil Code, for instance, states that „the person conducting the mediation must keep the judge informed regarding the difficulties he encounters during the accomplishment of his mission." The confidential nature of mediation in France is, in other words, somewhat curtailed, though it applies only in the case of „difficulties". The training is provided by centers approved by the Regional Health and Social Services Offices (DRASS). In these centers, the students undergo 560 hours of training spread out over three years, with at least 70 hours of practice. At the end of the training, candidates take the test examinations confirming their training. According to the Center for Mediation and Arbitration, approximately 50% of French mediators are lawyers, magistrates and other functionaries, 38% are business owners and 12% have a liberal

profession (Centre de Médiation et d'Arbitrage, 2013). As for judicial mediation, the mediator may be remunerated from the legal aid fund. In all cases, remuneration is fixed by the taxing judge after the work is complete and on submission of a memorandum or costs statement (Section 119 of Decree no. 91-1266 of December 19, 1991). This is typical of court-annexed mediators in France who are perceived, as stated before, more as civil servants than private practitioners. It is the judge that fixes the amount of the deposit and the remuneration, according to Articles 131-6 and 131-3 of the Civil Code of Procedure, rather than letting the parties and the mediator decide, as is the case in Belgium, for instance. In the absence of any cost scale defined precisely by the legislation, the unitary cost for the provision of family mediation services varies from region to region. As part of the national protocol, signed by the Ministry of Justice, the Ministry of Employment, Social Affairs, the Family and the Solidarity Fund, the National Family Allowance Fund and the Central Agricultural Mutual Benefit Fund, services which benefit from the provision of a 'family mediation' service have undertaken to follow a national scale, which varies depending on the income of the parties. Subject to the judge's assessment, the financial share to be borne by the parties per mediation session ranges from EUR 5 to EUR 131.21. The French mediator's status, similar to that of a public clerk, has not necessarily affected the quality of his work, but due to the influence of the judge, it has reduced the public access to his services. His training, while considerable in the field of family affairs, does not extend to the other fields of law, such as commercial and labor laws. This is because of the existence of other competing ADR traditions in France, such as commercial arbitration and conciliation through the Conseil des prud'hommes.

In the Italian model there is a predominance of legislative initiatives adopted by the government- yet the limited effects of the legislative support are obvious. The public perception of mediators also differs greatly between Southern/legalistic mediation systems and the Northern/pragmatic ones. While states like Italy and Spain focus on financial incentives to convince their citizens to utilize mediation as a method of conflict resolution, Northern states generally focus more on quality of service. The attitude of legal professionals towards mediation also differs. Lawyers in Italy for instance tend to avoid advising their clients to pursue mediation while in countries like the Netherlands, Denmark and Finland there is a greater tendency for legal professionals to suggest mediation to those that have employed them. Moreover, since the state offers no or very little financial incentives when it comes to the payment of mediation services, the general population tends to view them as quality services that should be appreciated and not something that they have to be talked into.

In conclusion, the legalistic/Southern strategy of using procedural incentives, like the implementation of mandatory mediation and of different state-supported financial aids has backfired. Instead of encouraging the use of mediation, it has only created a ten-

dency to view it as a low-quality service and to be taken for granted. Also, the expectation that simple statutory reform would be enough to promote this method of conflict resolution was contradicted by the more complicated social and cultural realities. Those states that have adopted a pragmatic/Northern approach have intruded less into the field and generally have focused that intrusion on quality control and not promotion or institutional coercion. Also, the use of experimental programs that have preceded the implementation of law, has prepared both the public and the professional world for the upcoming legal reform and have given the lawmakers further data with which to work when designing judicial reform.

Cultural Inclinations

There are also complex cultural factors that contribute to the condition of mediation within the European judicial systems. The strong sense of community present in Scandinavian societies coupled with a tradition of out-of-court dispute resolution has produced a propensity to access mediation more often than in Southern states. King Christian V's famous decree dating from 1683 is often used to illustrate the long history of Scandinavian mediation despite the fact that community elders have been applying ADR techniques long before this. The royal decree supported community leaders who were mediating between other members. This trans-generational tradition, which exists in one form or another in all Scandinavian states, while relevant, does not completely explain the phenomenon. Certain social characteristics embedded within Nordic societies have been identified as conducive to the use of peaceful and non-"legalistic" methods of conflict resolution. There are several sociological studies connected to group conflict and conflict management that have shown that northern communities tend to be low-conflict communities based both on their sociocultural and on their institutional approach to conflict. Even in urban, organizational settings, studies have shown that Scandinavians tend to avoid conflicts rather than help them escalate. Most employees interviewed in the context of these studies recall one or two intense arguments in a 20-25 year period. When people find themselves in hostile situations, they usually either refrain themselves from expressing their anger in an overly emotional or aggressive manner or simply walk out of the room, the last option being particularly common in Sweden. They do this because engaging in verbal conflicts is perceived as simply not an "acceptable form of discussion". When one does choose or is forced into an openly hostile situation, he usually does so reluctantly and without conviction. One manager, recalling an argument he had heard several years ago, stated that "it was also civilised. ... They shouted and argued quietly", which is illustrative of the paradoxical approach Scandinavians tend to have on conflict (Schramm-Nielsen, 2002). In other words, when conflicts do occur, they tend to be less intense, an idiosyncrasy which facilitates the act of finding convenient solutions. Harry Eckstein, a respected American political scientist and sociologist, has

studied the origin of this state of affairs and has concluded that much of it is due to the education received by Scandinavian children. Education in Northern states, both at home and in schools, tends to be less structured with a greater prevalence given to kindness and solidarity rather than discipline. Of course, the educational explanation does not offer a comprehensive explanation of the issue, but it does provide us with an essential part of the equation.

On the other hand, while nations like Italy, Spain and Portugal are also traditionalistic and possess strong community bonds, they did not benefit from a well organized local hierarchy that has consistently exercised a conflict managing function. In Latin countries, different conflict related traditions prevailed. The duel, the vendetta and the guerrilla ("little war" in Spanish, initially referring to peasant uprisings) were often utilized to end disputes in a very permanent manner. While the Catholic Church did try to act as an agent of conflict managing, its effectiveness varied. The fractured nature of Latin societies arising from deep seated regional divisions has undoubtedly contributed to this state of affairs. Also, child education in countries like Spain and Italy tends to be more rigid and focused on the projection of parental authority rather than the embedding of character qualities. Physical disciplining has had a rather long tradition in Latin countries and is still informally tolerated today, despite the fact that it is no longer considered a legal method of education. A general tendency towards a relatively greater political and social instability in Southern cultures can be identified, but for such a statement to become sociological certainty, it requires the support of additional research.

All in all, we may say that the main difference between the Northern and Southern approach to mediation resides in both their structural and cultural substance. Northern states tend to have a more pragmatic approach based on voluntarism and quality control with a gradual implementation of legislature that is preceded by practical experimentation. Southern states, on the other hand, have adopted a legalistic approach, trying to artificially increase the appeal of mediation through state emitted regulations the result being that this method of conflict resolution is seen as unprofessional, cheap and, ultimately, ineffective. A number of other organizational factors contribute to the ineffectiveness of mediation in Southern states, including the resistance expressed by an overly-bureaucratic judicial system. The cultural component also seems to favor the use of ADR in Nordic societies compared to Latin societies. Besides the strong community bond and social solidarity existing between the members of Nordic communities, there is also the educational factor. Kindness and care for one's fellow men seem to be the main qualities promoted by Scandinavian parents, while Southern parents tend to put more emphasis on discipline and hierarchy. It is the combination of all of these factors that determines the use of mediation and its success rate.

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