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European Union Corruption and Its Impact on the Implementation of Mediation in the EU. A Comparative North-South Approach

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Abstract. *Denmark, Finland, Iceland, Norway and Sweden are generally regarded as the Scandinavian states or the Northern European states. The Nordic countries share a common history and tradition. The Danish, Swedish and Norwegian languages are very similar, the inhabitants of the country being able to understand each other very easily. The Nordic people were warriors until the conversion to Christianity, when the Viking culture started dying off quickly. After the loss of this warrior culture, the Northern people focused on agriculture-based activities. Today, these states are a model for the rest of the world in almost all aspects of social culture. It is well known that the justice system and the mediation procedures in the Northern states are more efficient than in the Southern European states. The court rooms in the south are overwhelmed with cases, leaving the population dissatisfied with the current justice system. In this article I will focus on how corruption disrupts the justice system. I will analyze the effects of corruption, the causes and how the low level of corruption in the Scandinavian countries leads to their highly efficient judicial system.*

Key words: *Europe, justice system, mediation, corruption, social cohesion, Euromedia, Nordic states, Scandinavian states, legal system, Transparency International, bureaucracy, bribery, nepotism, abuse of power, ethics, morality, public officials, judges, lawyers, mediators, common law, civil law, Scandinavian law.*

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What is Corruption?

Corruption means the abuse of power and trust for personal gain. The corrupt is acting on interest without thought for future consequences or the harm he might be doing to the community. Some would say that corruption is very humane; it is a sort of misguided survival instinct if you will.

The corrupt person is using all means available to reach the top of the food chain.

Indeed, corruption was present in human society since the formation of cities, government and the appearance of public workers. Taking bribes was as common an activity in Ancient Greece as it is today. Plato himself was against this practice and, in Ancient Rome, measures were also taken with the intent to limit corruption. The Roman measures to prevent corruption at a judicial level were taken in the shape of laws: Lex Servilia Glauci and Lex Cincia, which forbade lawyers to receive gifts after pleading a case (A Dictionary of Greek and Roman Antiquities, 1875). Corruption was a subject of much heated debate and trials to reduce it, throughout history. Today, corruption is present in various degrees in all European states. The states have different ways of dealing with corruption. We will see that corruption is understood differently from state to state.

Corruption can include material goods, intangible goods, unjust favors and any other kind of unlawful benefit. We are referring to corrupt public officials, but also to persons working in the private sector (notaries, mediators, lawyers), who do not act in a professional manner, working in the best interest of the public. In order for an act to be corrupt, the following elements need to be present: intent and personal or political gain. So, according to these criteria, the act must be done consciously and, as such, it must be identified as either simple abuse done because of incompetence, lack of experience or a simple error from that person. Adapting the definition of corruption to the legal system, we can say that judicial corruption is any act that has negative influence over the people working in the legal system, which affects the impartiality of judicial proceedings in order to obtain an unlawful benefit by them or other parties. When corruption is present in the legal system the result is an improper delivery of justice and legal rights to the citizens of a state. The judicial system includes: lawyers, court rooms, notaries, judges, magistrates, prosecutors, law enforcement officers, mediators, court clerks etc. When these people act in their own self-interest instead of abiding the rules they swore upon, the rights of the citizens are in danger. The most important aspects of democracy are liberty and justice for all. The fundamental principles of democracy are crossed; there is danger that the rules might be only for those who can't afford to pay for their rights or who aren't well connected. There is an imbalance in society that over time could escalate, the bridge between the poor and the rich becoming wider. In my opinion, there are two ways in which the justice system is negatively influenced. The first is by using pressure points; this means someone with power to influence the system uses that power to manipulate it in their own interest. The best example is political pressure, where politicians use their influence to affect the objectivity and independence of the legal system and of judges. The independence of the justice system can be affected if the politicians meddle with the appointment of judges, their pay or the way cases are assigned to certain judges. The second way to negatively influence the justice system is by the traditional bribe given to workers in the legal sector.

Corruption in Europe

In 2011, in their annual report, Transparency International discovered from European Union surveys that almost three-quarters of its citizens believe corruption exists in EU institutions. Two thirds think it's a major problem in their country. These findings are a sharp wake-up call to those who think corruption occurs mostly outside Europe (Transparency International, 2011). Moving on to 2012 and looking at the corruption perception index from that year, we can see that the Northern European states are the least corrupt states in the world. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 - 100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean.

A country's rank indicates its position relative to the other countries and territories included in the index. Denmark and Finland received an almost perfect score of 90, granting them first place for clean countries. Sweden scored 88 points and Norway 85. This countries are the ones we perceived to have a good judicial system. Moving further south to countries that we perceived to have a weaker judicial system we can see that they are also perceived to be more corrupt. Spain scored 65 points, ranking the 30th place for corruption cleanness. Italy scored 42 points and Romania 44 (Transparency International, 2012). I will not list the score for all countries but below you can see a table for consultation.

RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90
1	Finland	90
1	New Zealand	90
4	Sweden	88
5	Singapore	87
6	Switzerland	86
7	Australia	85
7	Norway	85
9	Canada	84
9	Netherlands	84
11	Iceland	82
12	Luxembourg	80
13	Germany	79
14	Hong Kong	77
15	Barbados	76
16	Belgium	75
17	Japan	74
17	United Kingdom	74
19	United States	73
20	Chile	72
20	Uruguay	72
22	Bahamas	71
22	France	71
22	Saint Lucia	71
25	Austria	69
25	Ireland	69
27	Qatar	68
27	United Arab Emirates	68
29	Cyprus	66
30	Botswana	65
30	Spain	65
32	Estonia	64
33	Bhutan	63
33	Portugal	63
33	Puerto Rico	63
36	Saint Vincent and the Grenadines	62
37	Slovenia	61
37	Taiwan	61
39	Cape Verde	60
39	Israel	60
41	Dominica	58
41	Poland	58
43	Malta	57
43	Mauritius	57
45	Korea (South)	56
46	Brunei	55
46	Hungary	55
48	Costa Rica	54
48	Lithuania	54
50	Rwanda	53
51	Georgia	52
51	Seychelles	52
53	Bahrain	51
54	Czech Republic	49
54	Latvia	49
54	Malaysia	49
54	Turkey	49
58	Cuba	48
58	Jordan	48
58	Namibia	48
61	Oman	47
62	Croatia	46
62	Slovakia	46
64	Ghana	45
64	Lesotho	45
66	Kuwait	44
66	Romania	44
66	Saudi Arabia	44
69	Brazil	43
69	FYR Macedonia	43
69	South Africa	43
72	Bosnia and Herzegovina	42
72	Italy	42
72	Sao Tome and Principe	42
75	Bulgaria	41
75	Liberia	41
75	Montenegro	41
75	Tunisia	41
79	Sri Lanka	40
80	China	39
80	Serbia	39
80	Trinidad and Tobago	39
83	Burkina Faso	38
83	El Salvador	38
83	Jamaica	38
83	Panama	38
83	Peru	38
88	Malawi	37
88	Morocco	37
88	Suriname	37
88	Swaziland	37

A 2009 poll by the Euromedia research group showed that only sixteen percent of Italians fully trust the current justice system in Italy and they were highly displeased with the court system (Fischer, Bruce, 2011). Italy is not alone when it comes to corruption and inadequacies in their justice system. This is a problem present in many states as the above graph shows. When individuals within the various systems of law are corrupt, injustices often occur.

An inadequacy of the judicial system is the most obvious consequence of corruption, but the most severe result is at a macro level, affecting the whole population in different fields. It creates a cultural background that is very hard to shake. A high level of corruption builds a high level of mistrust among the population for the state institutions, but also a high level of mistrust among people in general. The worst thing that happens is that over time people think that it's all right to cheat and lie because everybody does it. Constant news of corruption builds a mindset that it is fine to cheat your neighbor, because that is how to get ahead in life. If you don't do it, then you mark yourself as a fool that is fair game for any con man. We will study further in this article the various impacts of corruption and we will try to find some causes why there are such high discrepancies between European states.

How Widespread is Bribery and Corruption?

The 2013 report of Transparency International offers an image of how inclined people are to offer a bribe. The report featured 114,000 respondents in 107 countries, but in this article we will concentrate only on the responses from the countries in Europe. Transparency International gives insight on how willing people are to stop corruption. A survey was conducted to find out how many people had to pay a bribe in 2012. As expected, countries that are less corrupt hold the smallest percentage of people that have done this. Less that 5% of respondents from Denmark, Finland, Norway, Portugal, and Spain reported that they had to pay a bribe. Around 5 - 9.9% of the respondents from Bulgaria, Estonia, Italy, Slovenia, UK, stated that they paid a bribe, while in Hungary 10-14.9 %, in Romania 15-19.9%. The highest percent of people that declared they paid a bribe was in Greece, Lithuania, Moldova and Bosnia, around 20-29.9%. According to the studies conducted, people most often pay bribes when they interact with the police, while the second most bribed institution worldwide is the court house. The judiciary system is normally viewed as very corrupt (Transparency International, 2013). The 2013 report also analyzes how people viewed how clean and efficient the judicial system in their country was. The Northern European countries (Finland, Denmark, Germany etc.) that are less corrupt and are thought of as having a good judicial system have a very high standing on the chart, compared to Southern states. The table with all the statistics for every country is available for browsing in the Global Corruption Barometer.

Understanding the Legal System in Europe

Civil law, one of the most widespread systems of law today, is based on Roman Corpus Juris Civilus. Most European countries have a civil law system; an exception is England, which has a common law system. In essence, civil law is dedicated to the strict codification of regulations and then the enforcement of those regulations. It is the task of the judges to examine, de-codify and correctly apply the law. Civil law is a complete assortment of laws that citizens must know to follow. The judge is the one that determines the penalty based on the written documents (The Dictionary by Farlex, Legal Dictionary). Common law, by contrast, was established before the written practices, and it continued to be applied even after the documentation of rules and procedures. This type of law derives from community customs and traditions and has evolved over the centuries. One of the main differences between civil law and common law is that the latter relies on precedent. A judge practicing common law relies on a predecessor's decision and on former reports and decisions, rather than on set-in-stone documents and written procedures. In a common law court, lawyers present their arguments in front of a neutral party, judge and jury, who then evaluate the arguments and the evidence, and issue a decision.

Ulf Bernitz, in his article on "What is Scandinavian Law" cites Åke Malmström, a law professor at Uppsala University and Scandinavian pioneer in the field of comparative law with his work on law study. In his research, he comes to the conclusion that the judicial system in European states can be divided into the following legal families: that based on the French civil code (in France, Italy and Spain), German civil law (in Germany, Austria, Switzerland, Yugoslavia, Greece and Portugal) and Scandinavian law (in Denmark, Norway, Sweden, Finland and Iceland). The argument that Scandinavian law is an independent family is based on two things. The first is that there isn't a clear, undistinguished division between civil law and common law.

As I have stated above, civil law has its origins in the Roman Empire, while common law has its origins in England. Throughout the history of the Scandinavian countries (Finland, Iceland, Denmark, Sweden, Norway), Roman law was never accepted, but because of the spread of globalization and the continuous exchanges between the states, some elements of the Roman law have slipped in these countries. Basically the law in the Scandinavian countries is currently a mix between common law and the Roman-Germanic legal family. "There are no general civil codes of French, German, Austrian or Italian model in the Scandinavian countries and no plans to enact such codes exist. On the other hand, statutory law constitutes the basis in most fields of law" (Bernitz, 2010). There is a tradition of unification of law, the drafting of uniform laws has been used and the process continues under the guidance of the Nordic Council (established in 1952). There are no general civil codes in the Nordic countries. The states have a variety of acts or statutes on several aspects of private law. Some of the acts cover basic

parts of the law, but they do not cover all aspects, remaining intentionally incomplete. What aspects are uncovered are solved by applying analogy principles expressed in the statutes or by supplementing case law. A special Contract Act is in force in all of the Scandinavian countries. This act covers some aspects of contract law. Other aspects of legal cooperation between the countries include intellectual property, maritime law, sales and torts.

Effects of Corruption

The effects of corruption are numerous and have a lot of ramifications, but because this article only focuses on corruption in correlation with the justice system, I will only tackle those effects.

A Chaotic Society

Corruption in the legal system is one of the most damaging types, for the only reason that it makes it very hard to fight all other forms of corruption. The corrupt remain beyond the law, not suffering any consequences for their action. In turn, this also encourages others that might have been fearful of the law to engage in activities that promote their self-interest. The justice system is very broad. It implicates a whole lot of people: the police force, investigators, lawyers, notaries, magistrates, judges etc. All of them if influenced negatively can obstruct the course of justice. An investigation for a corrupt official could be without a proper result if the investigators, judges, lawyers and any one working on the case are compelled to overlook evidence. The above mentioned official could walk away free, encouraging others to behave in the same way. Hence, we can draw the conclusion that a clean legal system is the building block for any kind of initiative to fight corruption. In order to tackle corruption and reduce it, it is particularly important to concentrate on the legal system. If we manage to reduce it, we can be sure of the smooth procedure of investigations into other cases and punishments for those who are guilty. All states in the European Union are democratic and, as such, the citizens in these states expect equal treatment and their rights to be defended. A society isn't democratic in the true sense of the word if small elites can break the cohesive rules that form the said society. Opinion polls show that corruption in the judicial system ranks high. People view the personnel working there as very corrupt and not working in their best interest. If we are to have a successful legal system that people can trust, measures must be taken to reduce the corruption index and have a cleaner system. This will improve the effectiveness of the system on a macro and micro level. Court procedures will be faster, reducing the overcrowding of courts and people will also start trusting alternate resolution methods (ADR methods). ADR methods are much appreciated in countries such as Finland, Denmark, Sweden and still untrusted in countries such as Italy, Romania, Croatia, and Greece, who have a corrupt judicial system. In my opinion, one of the reasons for this is that the population has grown so accustomed to corrup-

tion, especially in the legal system, that they need sound proof of a resolution. And they feel that the only way they can concretely find a permanent solution to their problems is within the traditional court rooms. There, even if it's a long process and they have limited control of the result, they can be sure of a solution. It is much harder to work on a solution that pleases everyone, a win-win solution, especially if everyone thinks that the other person is trying to cheat them. This is what corruption does; it creates a mind-set that everyone is against you. How can we have a proper judicial system and how can we use ADR methods if there is no trust? This feeling of dissociation and lack of empathy must be eliminated.

Nepotism

Nepotism can be defined as favoritism to a relative of the person in power. This is done in disregard of merit, experience, capacity, skills, or other factors that are a must for a regular person. The word comes from the Italian word, *nepotismo*, which means nephew. The dictionary defines this word as favoritism or a patronage of a family member, (Dictionary Online, 2013). Nepotism is a symptom of corruption, government and the justice institutions being the most affected by this phenomenon. European states have numerous reports of illegal hiring practices amounting to nepotism. In 2011, for example, Bulgaria was rocked when "hundreds of judges demanded the dissolution of the top judicial body over its controversial appointment of a court chief." The controversial court chief was Vladimira Yaneva; she was a close family friend of the interior minister and it was feared that she might negatively influence court rulings (Eubusiness, 2011).

While at first glance we might say that it isn't so wrong to help friends and family, the truth is that it is a disastrous practice that brings negative consequences in all aspects. The factors that are at play when we are discussing nepotism are lack of objectivity, lack of skill, poor performance, thus reducing opportunities for the majority. I will first start talking about the lack of objectivity. This works in two ways; the first is if the person is appointed in order to control the decision making process. For example, a politician might meddle in the appointment of a judge, in this way allowing him/her to decide in certain rulings he/she might be interested in. If the system is highly corrupt, a judge might be afraid to do his duty. A very important person might walk away free, just because of powerful friends, or because of their relation to the judge. This leads to many investigations being opened, but very few convictions. On the other hand, small wrongdoers are the ones condemned, to give an impression of security. This is a factor that fosters the continuity of corruption and also increases the criminal rates in a country. It is one of the factors that contribute to the creation of criminal organizations and crime families. Due to the many ramifications and connections of such an organization, by being assured of the sympathy of the legal system, the heads walk free. They are encouraged to continue their activity, knowing that they are above the law. If a state

would like to reduce its criminal activity, they would have to start by increasing the objectiveness of the legal system. The old saying that justice is blind still applies but in the sense that it is blind to the mistakes of those that it favors.

The second way in which lack of objectivity works is if the relationship of those working in the justice system leads to a conflict of interest. I will use again the example of the judge, because it is the most obvious and easy to understand. If one of the lawyers pleading the case has close ties with the judge presiding, then this will be a conflict of interest, because it might affect the objectivity of the judge. Of course, this conflict of interest is illegal and a case should not be decided like this, but sadly it happens. As I have said before, objectivity is not the only problem derived from nepotism, but incompetence also. The practice of appointing family members and friends in offices, with disregard for skills leads to many problems in the management of things. If we talk strictly about the legal system, these problems are investigation issues, blockage of cases, negligence, paralysis of cases, omissions. It is for these reasons that often innocent people are condemned and that it takes so much time to resolve a case. There are numerous cases of this happening: in Romania for example, there are numerous reports of people spending decades in prison because of incompetence. Failure to appoint personnel based on merit leads to workers that are more pliable and more easily influenced. They are more pliable due to a variety of reasons – fear of losing their job and being replaced being one of them.

Lack of Public Trust

Corruption determines the loss of respect and trust for the authority of the institutions. It causes negative effects on the legitimacy of the system. Corruption is perceived by the citizens of a state as negative, which leads to accusations and calumnies. Even an honest legal worker can be afraid that his image could be easily destroyed by calumnies and unfounded accusations. Corruption is disadvantageous for citizens with little material resources and without high powered relations. Their complaints, pleads and cases are often left behind to give priority to those with money or those who have friends in high places. The government and those working in the judicial system, especially judges, are highly mistrusted in lots of governments. There is something in the human nature that rejects authority and those who would cage them, imposing rules. Citizens associate people working in the legal sector with the government, associating them with being part of the problem rather than part of the solution.

Loss of Resources

Corruption in the system leads to higher rates of unreached objectives. It's harder to reach the objectives you have planned for the future if you have unqualified personnel, leading also to a loss of resources. The cost of administration is higher. More resources, both material and human, are required to maintain the system. Improper personnel,

hired just because of nepotism, are a bad managerial practice. More people will be required to complete a task that could be done by just one person. If the personnel are highly skilled, they are able to work faster and are able to fulfill a higher variety of tasks. The bureaucracy in the system can in this way be reduced and resources could be saved. Instead of paying three or four salaries for unskilled personnel it is more efficient to pay one salary to one very skilled and efficient person. The loss is not only material but there is also a loss of time, resources and energy that is wasted with trying to outsmart the system and trying to cheat and make leverages.

Disregard for Morality

This is as much an effect of corruption as a cause. Corruption feeds corruption. When the mass majority sees that those who make the laws and have to apply them disobey them, then they are tempted to do so as well. The vast majority wonders (and we can't blame them) why they should conform to some rules they didn't have any part in creating when those that are in power don't. The majority will see loop holes in the law and will try to find new ways to avoid punishment. They will spend their energy in avoiding the law and doing everything they can to satisfy their interests. Very aggravated individuals, as a last measure, will choose to take matters in their own hands and seek justice on their own. This happens when a law system is considered corrupt and biased. If things are to improve, the average citizen must be confident that those who are part of the decision making process have to abide by the law and if not, suffer the consequences.

Possible Causes of Corruption

Low Salaries for Workers of the Judicial System

One possible cause of corruption is low salaries and poor working conditions. The salaries and working conditions vary across European states, each one setting it independently of the EU. If the salary is low, the work space overcrowded and there is a lack of equipment then there is a problem. A justice system where individuals are overworked and ill paid is a recipe for disaster. If the remuneration, or the pension, is very low, people are encouraged to seek unlawful means of finance for their retirement fund. The countries that are considered developing, typically those that have been under the communist regime, have a tendency to underpay their public workers. This practice encourages negligence and corruption.

Developing Countries are more prone to Corruption

There is a set of factors that make developing countries more prone to corruption. A developing country is in the process of forming its system and organizing its laws, it is an ever changing entity. Because of this, it is easier to break the rules and go unnoticed. The strategies against corruption are typically just forming and the mentality of the

people is under construction. In Europe, developing countries are typically those that have been under communist rule. Under the communism, people were afraid to speak against the government and take actions against it for fear of retribution. Some of this mentality still remains in the generation that grew up under the communist era. I believe that is one of the reasons people are complacent and are more willing to overlook the flaws of the government and the judicial system. Furthermore, a mentality has been created among people, namely that the public workers, far from being there to help implement the rights of citizens, are untrustworthy and work only for themselves. Public administration in developing countries is often very bureaucratic and very inefficient. The complex regulation that is not very clear and still in the process of formation, makes the fight against corruption that much harder. The biggest challenge is that after years of this, the population grows complacent, corruption being seen as something of a norm, with the people not being able to do anything about it. If we look again at the corruption perception index from 2012, we can see that the former countries with a communist regime are now among the most corrupt in Europe. These Eastern European countries, as they are called, have had a rough time because of the change of regime. This has led to economic, political and organizational problems. Even if the recent economic crisis has put a damper on their economical progression, the countries are still evolving. New policies are being implemented to fight corruption. In the future, with the right managerial practices and a rise in economy and initiatives from the civil society, better practices can be foreseen that can reduce corruption. Of course I consider that this will be done in a long time span, possibly a period of ten, twenty years, depending on the implication and interests of the civilians and politicians.

Tolerance for Corruption

Corruption breeds corruption. Studies have shown that in societies that have been dealing with corruption for a very long time, people start to see it as a norm. Societies start to think that there is nothing wrong with corruption and that it is a part of daily life. Citizens start to have a mindset that there is nothing that they can do about it. Even worse, some consider corruption beneficial, because it allows them to access special privileges, speed up procedures. The payment of a bribe is seen as an acceptable part of society and a normal part of doing business. Sometimes people don't even consider their behavior immoral. As Pepys exemplifies "attorneys who consider themselves law-abiding do not hesitate to pay a bribe to a court clerk to expedite a case file. Since the attorney is not interfering in the substance of the case, he does not believe any corrupt activity has been conducted. Such an attorney overlooks the fact that his behavior can have the effect of distorting the average citizen's access to the court's procedural process", (Pepys, 2003). The effects of such practices are laws being passed and politicians getting in office even if they are not deserving of it. The problem resides also in the fact that there is a shift in mentality. It is no longer an ethical-moral prohibition to be

corrupt. Everybody is doing it, so why not do it? This is the question that passes to the vast majority of persons living for years in a corrupt society.

A High Level of Bureaucracy

Excessive bureaucracy or red tape, as it is sometimes referred to, describes excessive regulation or a very rigid conformity to formal rules that are considered redundant and hinder the process of decision making and taking action (Transparency International, 2012). Red tape can express itself through excessive or overly rigid administrative procedures, excessive paper work, requirements for unnecessary licenses, multiple people or committees and a myriad of specific rules that slow down the active process. The multitude of scholars on corruption generally agree that a highly bureaucratic system is a danger for fostering corruption and decreasing direct action. People willing to skip these procedures in one way or another often try to turn to bribery, thus encouraging corruption. Those involved in the bureaucratic system are usually public officials/ workers that upon the prospect of receiving bribe have a low interest in reducing the bureaucracy in a system. Rather than doing this, they increase the level of bureaucracy, encouraging people to appeal to bribes so they can skip the endless steps. This increase also makes it harder to verify that the whole process is clean, because it leads to more people being involved and more steps that need to be taken and controlled.

Fear of Consequences

Corruption and the judicial system are closely related: what affects one affects the other and vice versa. The probability of getting caught and punished for abuse of power, accepting a bribe or engaging into unethical practices influences the risks people are willing to take. Therefore, the greater the effectiveness of the legal system, the smaller the chances of corruption.

Social Capital

Social capital is a concept that reunites elements such as trust, human connections, cooperation, solidarity, interpersonal relations, contacts, all of which contribute to the well-being of society. "Social capital is embedded in primary social institutions which provide people with basic values, such as high levels of social trust, cohesion and participation" (Del Monte, Papagni, 2007). The studies conducted by Almond-Verba in 1963 and Inglehart in 1990 demonstrated that elements of social capital (trust, public participation) increase the quality of democracy. In their article, Alfredo Del Monte and Erasmo Papagni argue that if we follow the transaction cost theory we can say that in a high trust culture transaction costs are reduced because less contracts are required and disputes may be settled more easily. Some disputes could be prevented from arising in the first place, thus reducing the need to appeal to public and private dispute resolution methods (courts, ADR methods).

Social capital promotes democracy by allowing people to form active connections thru the community. In a country with high social capital, people are more willing to get involved in different organizations, do volunteer work and get together to support a cause they believe in. This permits the achievement of goals that could not be gained otherwise, or would be gained at a higher cost. One such goal could be the public pressure put on a corrupt public official to resign if corruption evidence is presented against him. In countries with low social capital, citizens are more dispersed, acting separately rather than as a whole. By promoting trust, exchange of relations, participation, the people in a community are more likely to get together for signing petitions, manifesting for their beliefs and generally putting pressure on the government.

Therefore, social capital is a supporter for democracy and a resource for the individuals in the community, allowing them to put in practice their goals and move with a purpose. The element of trust is considered a moral resource and unlike other resources, the more you use trust, the more it increases. Hence, it increases the civic spirit of the community and promotes a clearer, more transparent exchange between individuals. The authors that have studied social capital have all come to the conclusion that "if a society has established patterns of trust, cooperation and social interaction, this will generally result in a more vigorous economy, more democratic and effective government and fewer social problems" (Del Monte, Papagni, 2007).

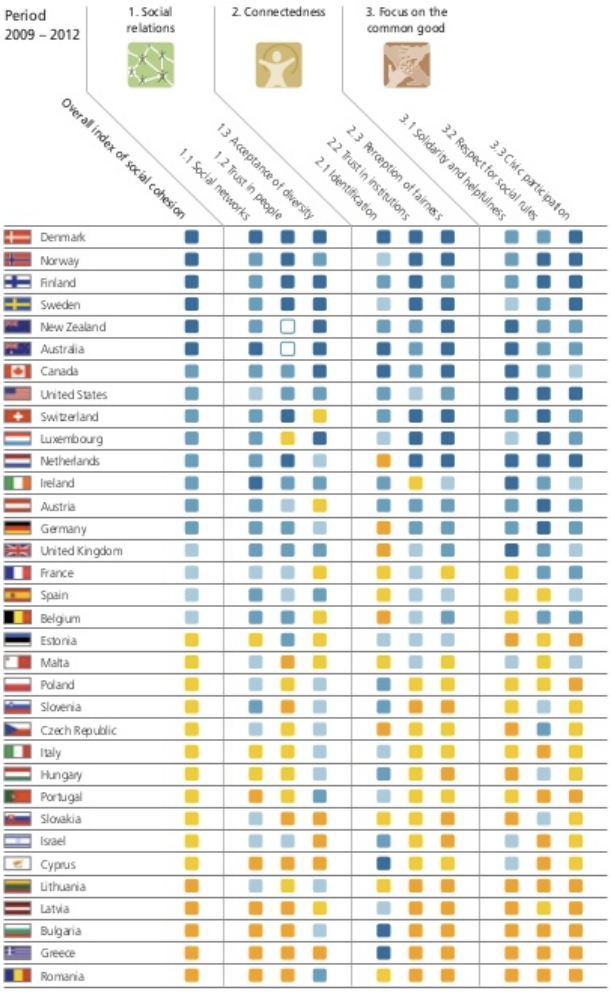
Social Cohesion

A recent study by German Bertelsmann Foundation and Jacobs University in Bremen, which looked at 34 countries in the EU and the OECD, was aimed at analyzing social cohesion. They intended to measure relationships and connectedness between members and communities and their focus on the common good. Dimensions include people's social network, trust in others, confidence in social and political institutions, willingness to help others and participation in public activities. The study revealed that Denmark, Norway, Sweden and Finland had the best social cohesion. At the bottom were Romania, Greece and Bulgaria (Bertlesmann Stiftung, 2013). The graph below shows the results for all countries analyzed. Rather than using numbers to describe the results, the countries are divided into color groups. The top tier countries are identified with the dark blue dot, the second tier ones are blue, and the next are light blue, yellow and orange.

Social cohesion is directly related to corruption. A highly corrupt state affects the social cohesion of its inhabitants. In turn, this affects the judicial system of that respective state. If social cohesion in a country is high, then there is a smaller probability of conflicts, and when they arise, they are more easily solved. Individuals have a greater desire to respect social rules and work for a constructive community. They have faith that the other is also trying to do the same and is not trying to backstab them, because of the high level of trust. It is easier to build a dialogue, and find a solution, if the parties in the

conflict start with the assumption that the other party is honest. This permits better communication: if one is always with their guard up and wastes energy on thinking of how the other party might backstab them, it limits their creativity in finding a solution. We can say that the graph below is an image of social capital. Trust, social relations, connections, community spirit, are all elements of social capital, therefore the graph allows us to see witch countries have the highest social capital.

Figure 3 An international comparison of social cohesion (2009 – 2012)



The figure shows mean values for the nine dimensions for the EU and Western OECD countries. The five colors designate the top tier (dark blue = ■), second tier (blue = ■), middle tier (light blue = ■), fourth tier (yellow = ■) and bottom tier (orange = ■). White dots (□) designate dimension values that were estimated based on other time periods.

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Mediation

Governments are looking to mediation as a solution to improve the judicial system. Mediation is viewed as an alternative to court rooms. In order to have a successful result, trust is required: mediation is based on trust. A lot of countries with high corruption and low social cohesion are having problems in implementing mediation, getting people to trust the procedure and having favorable results. In order for these countries to successfully implement mediation at the level it is in Scandinavian countries, the social cohesion of the community must be increased by reducing corruption.

The Effect of Corruption on the Parties that Go to Mediation

Mediation is built on trust and cooperation between the parties. When the parties go to mediation, it is expected of them to communicate with each other in order to find a win-win solution. But when parties are constantly obsessing over having to be vigilant, lest they be cheated, and also constantly thinking of loop holes in order to stir the situation in their favor, it is no wonder that the system has problems. A successful mediation depends on the parties; the contract is not enforced by law unless they go to court or to a public notary, so after the mediation session, it's up to the parties to respect the agreement. When the parties learn that the result of the mediation is not enforceable, they are weary to try mediation, preferring court. There, they know that the judge's decision is final and the other party has to obey it. The culture of mistrust affects the number of people that go for mediation and fills the courts to exhaustion.

The Effect of Corruption on the Mediator

If the general population is corrupt and has a cultural mindset prone to corruption, there are higher chances for the mediator to have the same predispositions. Of course, I am not saying that all mediators are corrupt. I'm merely stating that the statistics on corruption are a mirror of the predisposition of the population to become corrupt. Public clerks (judges, politicians, doctors etc.) are after all part of the general population and thus reflect the traits of the people.

A mediator with a corrupt mindset would not enter into mediation for helping the disputing parties solve their problems. He would enter mediation to earn as much money as possible, with no regard to the parties. The mediation process would be as quick as possible and the results would not be long lasting because the conflict would arise again. Such mediators are a danger to the system by distorting the image of the process. This would mean that less people would apply for mediation and prefer a court trial, with all its drawbacks. The process of mediation is relatively new in a lot of European countries (the mediation legislation is constantly changing and improving). Because of this, it is especially important to ensure that the mediators that are practicing are doing the whole process justice, in order to build a favorable image.

Conclusion

The content of the article shows how corruption can affect the legal system and how closely tied together the two are. We have seen there are a lot of social mechanisms that affect a state and its level of cleanliness. In order to tackle corruption, the first thing that must be addressed is trust and public participation, by increasing social capital. There is a high level of corruption, especially in the former communist countries. These are characterized by a lack of trust and a general sense of apathy among the population. There is a clear need for reforms that combat corruption at all levels. By contrast, countries like Finland, Denmark, Sweden have a low level of corruption and there is a strong sense of trust both among the people living there and for the institutions that serve them. The European Union has several instruments and legislations in place for the purpose of combating corruption, but implementation is still faulty. Starting from 2013, the EU has set up the European Anti-Corruption Report with the purpose of monitoring and assessing the efforts of member states in their fight against corruption. Furthermore, plans are being made to create new instruments in order to tackle corruption in the police and the judicial system. These are all done with the hope to reduce corruption on a global scale in the EU.

References

1. A Dictionary of Greek and Roman Antiquities (1875), (http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Repetundae.html), retrieved on the 8th of July 2013.
2. Bernitz, U. (2010), *What is Scandinavian Law? Concept, Characteristics, Future*, Institute for Scandinavian Law, Stockholm.
3. Bertelsmann, S. (2013), *Social Cohesion Radar Measuring Common Ground: An International Comparison of Social Cohesion,* (http://www.bertelsmannstiftung.de/cps/rde/xbcr/SID5FFAD0107345BBC8/bst_engl/xcms_bst_dms_38334_38335_2.pdf), retrieved on the 2nd of July 2013.
4. Del Monte, A., Papagni, E. (2007), *The Determinants of Corruption in Italy: Regional Panel Data Analysis*, (http://www.economiaindustriale.unina.it/papers/Corr2004.pdf), retrieved at the 5th of July 2013.
5. Dictionary Online (2013), (http://dictionary.reference.com/browse/nepotism), retrieved at the 13th of July 2013.
6. Eubusiness website (2011), *Nepotism' scandal in Bulgaria's judiciary escalates*, (http://www.eubusiness.com/news-eu/bulgaria-justice.anw), retrieved at the 10th of July 2013.
7. Fischer, B. (2011), *Injustice in Perugia: a Book Detailing the Wrongful Conviction of Amanda Knox and Raffaele Sollecito,* (http://books.google.ro/books?id=kN-xx5sQe7oC&printsec=frontcover#v=onepage&q&f=false), retrieved at the 5th of July 2013.
8. Pepys, M. N. (2003), *Corruption and the Justice Sector,* Management Systems International.

9. The Free Dictionary by Farlex (2013), (http://legal-dictionary.thefreedictionary.com/Civil+Law), retrieved at the 11th of July 2013.
10. Transparency International (2011), Annual Report (http://issuu.com/transparencyinternational/docs/annual_report_2011_en), retrieved at the 6th of July 2013.
11. Transparency International (2012), *Best Practices in Reducing Bureaucracy and Corruption*, (http://www.transparency.org/files/content/corruptionqas/Best_practices_in_reducing_bureaucracy_and_corruption.pdf), retrieved at the 6th of July 2013.
12. Transparency International (2012), *Corruption Percentage Index* (http://cpi.transparency.org/cpi2012/results/), retrieved at the 7th of July 2013.
13. Transparency International, (2013), *Global Corruption Barometer* (http://www.transparency.org/research/gcb/overview), retrieved at the 7th of July 2013.

European Union Gemeinschaft-Gesellschaft Tipology and the Implementation of Mediation in Northern and Southern Europe

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Abstract. *This article will try to explain why the mediation process works better in the Nordic countries than in the Southern part of Europe. The more specific question is why people in the Southern part of Europe, where the justice system does not work properly, do not turn to mediation as an alternative to the former. The issue will be analyzed from the perspective of the countries' values, of their culture, of the Gemeinschaft-Gesellschaft typology and the tradition that the countries have in using mediation.*

Keywords: *mediation, value, constraint, community, society, Gemeinschaft, Gesellschaft, tradition, culture, individualism, collectivism, power distance.*

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The question that this article will try to answer is a very interesting one. Usually, when a system does not work properly, people tend to search for an alternative that works. If this is true, then why, in states where the justice system is known to be flawed and even corrupt, mediation, a process that basically leaves the solution in the hands of the involved parties, does not work either? To answer this question, we will first take a look at values in general and how they influence the individual, even to the point of constraint. Then, we will look at two very interesting concepts, Gemeinschaft (community) and Gesellschaft (society) and see how mediation works in these types of countries. Also, we will take a look at the culture of the Northern and Southern states of Europe, us-

ing Geert Hofstede's model of analysis. Last but not least, we will see how mediation can be influenced by the tradition that it has in certain countries. The second part of the article is a short data analysis on several Northern and Southern states of Europe, with emphasis on values, citizen participation in civil life, religious characteristics and confidence in various systems, based on data from The European Value Survey.

Values as Constraints

Values are generally the main aspects that describe a society and that establish the rules, the „do's and don'ts", the idea of good and bad, of what is „normal" and accepted by the members of a certain group, country or society.

Values are culturally defined standards held by human individuals or groups about what is desirable, proper, beautiful, good or bad, that serve as broad guidelines for social life (Social Science Dictionary, 2013). Another definition gives us a more complex view on values: important and lasting beliefs or ideals, shared by the members of a culture about what is good or bad and desirable or undesirable.

Values have a major influence on a person's behavior and attitude and serve as broad guidelines in all situations. Some common business values are, for instance, fairness, innovation and community involvement (Business Dictionary, 2013). As we can see, values are of great importance in every area of human life and of society. Whether they are general societal values, or more specific ones, such as values in business, they play an important role in the way things work.

Also, the values of an organization, for instance, are the ones that give birth to its organizational culture and are also the most difficult – if not impossible, to change. Although not very obvious, in contrast to other aspects of culture such as buildings, uniforms and so on, values are the ones that every new member of an organization has to embrace in order to be accepted.

When speaking about values, Anthony Giddens offered, in his *Introductory Sociology (1981)* a very simple and yet important explanation on how society affects individual behavior. The idea is that what we are as individuals is decided by the particular society in which we live and also by the particular social groups to which we belong. This is so because the world around us channels our actions, constraining us to act in a particular way. As a result, regularities and patterns can be observed in the behavior of individuals. Very plainly put, for instance, if we wanted to leave a room, we could do so by the limited number of means available to us, meaning through the door or the windows; if they are locked, we could not leave. We have a limited choice of actions, settled by the constraints of our physical environment – in other words, norms.

Sociologists describe norms as informal understandings that govern society's behaviors, (Axelrod, 1984) while psychologists have adopted a more general definition, recognizing

that smaller group units, like a team or an office, may also endorse norms separately or in addition to cultural or societal expectations (Young, 2008). The psychological definition emphasizes the behavioral component of social norms, stating that norms have two dimensions: the extent to which behavior is exhibited and the extent to which the group approves of that behavior (Young 2008).

Norms running counter the behaviors of the predominant society or culture may be transmitted and maintained within small subgroups of society. For example, Crandall (1988) noted that certain groups (e.g., cheerleading squads, dance troupes, sports teams, and sororities) have a rate of bulimia, a publicly recognized life-threatening disease, which is much higher than society as a whole. Social norms have a way of maintaining order and organizing groups (Haung and Wu, 1994).

Even if most of the norms that we follow in our social lives are not legally enforced, they are rules nevertheless. For instance, if I had the money to buy a hundred Ferraris, I might not wish to do so because I might believe it to be wrong to buy an Italian car. In this case, it is not the law or any physical constraints that will stop me from doing something, but my own beliefs. So, my beliefs are a very powerful constraint on my own behavior and, bearing in mind that what we believe to be right and wrong is, to a large extent, learnt behavior, that we do not inherit such beliefs, it is obvious that the source of these beliefs has to be seen as a major constraint on, and determinant of, our behavior. Of course, this source is society and the particular social groups within it. Let us take a very simple example. In many societies, including ours, it is considered to be normal for a man to marry one woman. In other societies, normal for a man is to marry more than one woman. Both these rules are considered to be right by those following them; the conclusion can be that these rules are not „right" and „wrong" per se, but are simply different rules of extremely different societies (Giddens, 1981).

Normality (also known as normalcy) is the state of being normal. Behavior can be normal for an individual (intrapersonal normality) when it is consistent with the most common behavior for that person. Normal is also used to describe when someone's behavior conforms to the most common behavior in society (known as conforming to the norm). The definition of normality may vary according to person, time, place and situation – it changes along with changing societal standards and norms. Normal behavior is often only recognized in contrast to abnormality. In its simplest form, normality is seen as good while abnormality is seen as bad (Bartlett, 2011).

The French sociologist Emile Durkheim indicated, in his *Rules of the Sociological Method,* that it was necessary for the sociological method to offer parameters to distinguish normality from pathology or abnormality. He suggested that behaviors or "social facts" which are present in the majority of cases are normal, and exceptions to that behavior indicate pathology (Durkheim, 1982). Durkheim's model of normality further explained that the most frequent or general behaviors, and thus the most normal behaviors, will

persist through transition periods in society. Crime, for instance, exists under every society through every time period, and so, should be considered normal (Jones, 1986). There is a two-fold version of normality; behaviors considered normal on a societal level may still be considered pathological on an individual level. On the individual level, people who violate social norms, such as criminals, will invite a punishment from others in the society. In other words, normality is geographically and temporally defined.

Geert Hofstede, in *Culture's Consequences* (2001), explained the issue of values in a more detailed manner. He states that values are in a dichotomy, each has a plus and a minus pole. We have, for example, good versus evil, clean versus dirty, decent versus indecent, moral versus immoral and so on. Also, because our values are programmed early in our lives, they are non-rational (although we perceive them as being totally rational). Our values are mutually related and form value systems, but these systems are not necessarily in a state of harmony. Most people hold several conflicting values at the same time. The term value is used in all social sciences with different, although not completely unrelated, meanings. Christian, Judaic and Muslim biblical mythology puts the choice between good and evil at the beginning of human history (with Adam and Eve), thus indicating that we cannot escape from choices based on value judgments.

I chose to analyze the issue of values in this article because, as I said before, values have a major influence on a person's behavior and attitude. Additionally, values serve as guidelines in all situations of a person's life, whether we talk about personal relations or situations at the work place. Also, I believe there is a strong relationship between values and mediation. First of all, values affect the way in which people react to certain situations, such as conflicts, disputes or other conflict situations. Furthermore, values influence the way in which people solve their problems and find solutions to different situations. Last but not least, I consider that values influence the way in which people see the mediation process in general, considering that mediation is a voluntary process in which the parties basically get to an agreement by themselves, with only the assistance of a third neutral party. The recourse to and the success of mediation process is highly influenced by the attitude that the parties involved in the process have towards the process.

Community or Society

There are numerous definitions of these concepts, as there are a host of theories trying to explain how communities function, how are they structured, what are their roles etc.

Linked to the discussion about the importance and influence of values in a society are the two concepts, namely that of Gemeinschaft and Gesellschaft. Gemeinschaft und Gesellschaft (generally translated as "community" and "society") are categories which were employed by the German sociologist Ferdinand Tönnies in order to categorize social ties (now called social networks) into two dichotomous sociological types. The

dichotomy was proposed by Tönnies as a purely conceptual tool, built up logically, not as an ideal type. According to the dichotomy, social ties can be categorized, on one hand, either as belonging to personal social interactions, roles, values, and beliefs based on such interactions (Gemeinschaft, German, commonly translated as "community"), or as belonging to indirect interactions, impersonal roles, formal values, and beliefs based on such interactions (Gesellschaft, German, commonly translated as "society") (Tonnies, 1887).

Individuals in Gemeinschaft (often translated as community) are guided by common mores or beliefs about the appropriate behavior and responsibility of members of the association, towards each other and towards the association at large; their ties are characterized by a moderate division of labor, strong personal relationships, strong families, and relatively simple social institutions. In such societies there is seldom a need to enforce indirect social control, due to a direct sense of loyalty an individual feels for Gemeinschaft. Tönnies saw the family as the most appropriate expression of Gemeinschaft; however, he expected that Gemeinschaft could be based on shared place and shared belief as well as kinship and he included globally dispersed religious communities as possible examples of Gemeinschaft. Gemeinschaft community implies ascribed status. You are given a status by birth. For example, an individual born to a farmer will come to occupy the parent's role until death. In the rural, peasant societies that typify the Gemeinschaft, personal relationships are defined and regulated on the basis of traditional social rules. People have simple and direct face-to-face relations with each other that are determined by Wesenwille (natural will)—i.e., natural and spontaneously arising emotions and expressions of sentiment (Britannica Encyclopedia, 2013).

In contrast, Gesellschaft (often translated as society, civil society or association) describes associations in which, for the individual, the larger association never takes precedence over the individual's self-interest and these associations lack the same level of shared mores. Gesellschaft is maintained through individuals acting in their own self-interest. A modern business is a good example of Gesellschaft: the workers, managers, and owners may have very little in terms of shared orientations or beliefs, they may not care deeply for the product they are making, but it is in all their self-interest to come to work to make money and, thus, the business continues. Gesellschaft society implies achieved status. You reach your status by education and work, for example, through the attainment of goals, or attendance at University.

Unlike Gemeinschaften, Gesellschaften emphasize secondary relationships rather than familial or community ties, and there is generally less individual loyalty to society. Social cohesion in Gesellschaften typically derives from a more elaborate division of labor. Such societies are considered more susceptible to class conflict, as well as to racial and ethnic conflicts.

The Gesellschaft is the creation of Kürwille (rational will) and is typified by modern, cosmopolitan societies with their government bureaucracies and large industrial organizations. In the Gesellschaft, rational self-interest and calculating conduct act to weaken the traditional bonds of family, kinship and religion that permeate the Gemeinschaft's structure. In the Gesellschaft, human relations are more impersonal and indirect, being rationally constructed in the interest of efficiency or other economic and political considerations (Britannica Encyclopedia, 2013).

From the point of view of Tönnies's theory, Nordic countries are rather a Gemeinschaft type of society: the role of communities is high, the society as a whole is trusted and social cohesion has very high levels. Proof: their welfare system and their social work and social protection policies.

At this point, there is a very important observation to be made. The purpose of this article is not to categorize Nordic countries as Gemeinschaft and Southern countries as Gesellschaft. Let's imagine these two ideal types on a continuum. If at the left extremity there are the Gemeinschaft type societies, the Nordic countries are situated somewhere in the center-left of the continuum. The same applies for Gesellschaft-type societies and Southern countries. In other words, Gemeinschaft and Gesellschaft are used here as conceptual tools. Another way to put it is that Nordic societies have more characteristics of Gemeinschaft than Southern societies. I am not saying that Southern countries have no characteristics of Gemeinschaft, just that the Nordic ones are more close to this type of society. This hypothesis is sustained also by Geert Hofstede's work on cultures, if we look at the five dimensions he analyzed and the results of his study (to be expanded further on).

Gemeinschaft and Gesellschaft are also linked to the discussion about values. It is fair to say that both concepts have, at their core, sets of well-defined values. For instance, Gemeinschaft is based on values such as family, social responsibility, equality, loyalty and so on. On the other hand, Gesellschaft is characterized by values such as individualism, rationality and efficiency. Of course, these values influence the way in which these communities and societies work. Basically, the difference between them, the typology was made taking into account the different values, beliefs and characteristics that were identified. Furthermore, it is time to link the two concepts, Gemeinschaft and Gesellschaft, to mediation. It is, of course, a matter of values. As we have seen before, values affect the way in which people react to conflict and mediation. Also, values are at the core of the concepts of Gemeinschaft and Gesellschaft. Taking this into account, it is evident that mediation works differently in Gemeinschaft and Gesellschaft. As we will see in the analysis, the values, beliefs and people's way of life in Gemeinschaft-type countries apparently affect the way in which mediation and other processes (such as civil service, the justice system, the health system) are perceived and work.

Is Mediation Influenced by Culture?

It is common knowledge that various countries have various cultural traits that can be used to describe what the literature calls "the national culture". Out of all the theories that cover this topic, we selected Geert Hofstede's model (Hofstede, 2005). But before presenting the model, it is useful to see the author's opinion on values. He argues that values are held by individuals as well as by collectivities; culture presupposes a collectivity. A value is a broad tendency to prefer certain states of affairs over others. This definition is a simplified version of an anthropological definition by Kluckhohn (1951/1967): „A value is a conception, explicit or implicit, distinctive of an individual or characteristic of a group, of the desirable which influences the selection from available modes, means and ends of actions" (Hofstede, 2001).

Also, at this point it is very important to define mediation. Mediation is a dispute resolution process in which the parties involved in a conflict situation try to get to a mutually satisfying solution, assisted by a neutral and impartial third party. The whole process is based on trust and negotiation in good-will. These are the two most important "ingredients" that make a mediation process work and that contribute to its success. As we can see only from the definition above, the characteristics of mediation make it more suitable to Gemeinschaft-type societies. As we have seen above, these societies are determined by natural will, natural arising emotions and expression of feeling. Also, these societies put greater emphasis on community, on the well-being of the people that are part of this society. It is only normal that they prefer a mediation process before anything else, because they have the tendency to solve their problems in a satisfying manner for all parties involved. Furthermore, because of their characteristics, they will negotiate in good-will and trust each-other to find the best solution that is suitable for all parties. They will not follow only their own interest. This last aspect is a characteristic of Gesellschaft-type societies where efficiency, rational will, self-interest and calculated conduct are the leading aspects.

Returning to the model, the Dutch author considers that every national culture is structured along 5 dimensions (it should be noted here that this model is also used in analyzing the organizational culture but it was primarily designed to analyze the "host culture" – that is the culture of a society as a whole). The five dimensions proposed by Hofstede are: degree of risk avoidance, masculinity vs. femininity, long term vs. short term orientation, individualism vs. collectivism and distance to power.

The model is presented below, but for the purpose of this article, we will only analyze two of these dimensions in relation to mediation: individualism versus collectivism and power distance.

The five dimensions are described below.

Risk avoidance. This dimension refers to the way in which we perceive time, the value we place on the past, the present and the future. In accordance to that, we have two types of attitudes: *fatalistic* – the uncertainty of the future is part of life and we cannot influence it, it is a datum and has to be accepted as such; and *pragmatic* – the future can be influenced by our actions in the present, we can guard against its inherent uncertainty. According to our attitude toward uncertainty we have two types of societies. Those who are tolerant toward the risks brought by uncertainty and, as a consequence, accept the existence of things outside our control and those who are intolerant toward uncertainty and, as such, wish to maximize the level of control they exert over every domain of their own existence.

Masculinity vs. femininity. This dimension refers to different sets of values that structure the behavior of the social actors. Masculine societies tend to value hierarchical relations, material gains (money above all) and an indifferent attitude toward the other social actors. On the other hand, feminine societies focus on values like cooperation, environmental preservation, quality of life etc.

Long term vs. short term orientation. This dimension refers to the emphasis placed upon long term/short term goals. The short term orientation indicates a tendency toward consumption, "respect for tradition, preservation of "face" and fulfilling social obligations" (Hofstede and Hofstede, 2005). The long term orientation focuses on "perseverance, sustained efforts toward slow results, (…) concern with personal adaptability, willingness to subordinate oneself to a purpose (…)." (Hofstede, 2005).

Individualism vs. collectivism. This characteristic refers to the value that is attached to individual behavior. In a predominantly individualistic society connection between social actors are few and shallow, there is great freedom of choice in what concerns each individual's goals and the way they go about attaining them. Self-interest is the norm and rule. On the other hand, in a predominantly collectivistic society individuals cooperate and their decisions and actions often are oriented by the greater good or community values. What counts is the common interest, the good of the group/community. Social/group values carry a lot of weight and the social structure is very important for the individual. Morals, ethics and common decency are key concepts in describing the socially accepted behavior. The relationship between the individual and the collectivity is intimately linked with societal norms, in the sense of value systems of major groups of population. It therefore affects both people's mental programming and the structure and functioning of many institutions aside from the family. The central element in our mental programming involved in this case is the self-concept. A good example of individualist or collectivist self-concept is religious or ideological conversion. In Western societies, converting oneself is a highly individualist act; it is unlikely that the family of the converted will follow. On the other hand, history gives us a great

deal of examples of group conversions, as the history of great religions has been one of collective conversions (Hofstede, 2001).

This dimension of Hofstede's model can also be linked to the mediation process and the way it works in different types of countries. For instance, in a collectivistic society, in which people cooperate and take their decision together, mediation might have a greater rate of success. The fact that people consider the collective well-being as very important makes them more prone to being interested in a process that helps them to resolve their own problems, in a manner that satisfies each party. Moreover, the trust that members of such a community place in community/society offered services (such as mediation) is considerable; therefore the number of people who make use of these services is larger than in other social systems.

Power distance. This dimension refers to power distribution and usage. At societal level, "power distance" is about inequality (social, economic etc.) and the way it is addressed. Looking at this issue from a different perspective, we can say that it is about the distribution of resources. In societies that have great power distance, the way in which resources are distributed throughout the social system compounds inequality and social distance. In societies that have low power distance, the distribution of resources reduces inequality and social distance.

This theoretical model has been used for many research projects over the years and, in the following, we will present just one of them. According to Mary Jo Hatchet (Hatchet, 2006), countries can be grouped in regions, according to their national cultures. Table 1 presents only a part of this research, the part that is relevant for our topic.

Table 1. Culture of various regions, according to Hofstede's model (Hatch, 2006, p. 315)

Region/country	Individualism- Collectivism	Power Distance
Nordic	Collectivism	Low
Latin Europe	Medium/high individualism	High

Although Nordic countries might appear as the most individualized societies in the world, where family has been transformed into a social institution and in which people put a strong emphasis on individual self-realization and are more willing to accept the market economy both as consumers and producers (World Future Society, 2011), the data of the study shown above contradicts this first impression. Nordic countries are actually characterized by collectivism, as we will see from the data analysis part of the article.

As seen above, there are quite a few differences between Nordic and Latin countries. Summarizing, Nordic societies have a culture characterized by collectivism and low power distance. That means that social values are important, the accent is placed on cooperation and society as a whole is trusted by its members. More than that, Nordic

countries are Gemeinschaft, social systems where community is the fundamental fiber of the social structure and where the interface between individuals and communities is very active.

The research shows that Nordic countries are characterized by collectivism and low power distance and the Southern countries by individualism and high power distance. This only re-instates the idea that the Nordic countries are Gemeinschaft and the Southern ones are Gesellschaft. As we have seen before, Gemeinschaft-type countries are characterized by values such as family, social responsibility, equality, loyalty. These values are inherent to collectivistic societies. Also, the fact that Gemeinschaft citizens are highly involved in politics and decision-making processes (as we will see in the analysis part of the article) is a sign that they have low power distance. On the other hand, the main characteristic of Gesellschaft-type countries is individualism, characteristic that we also found in Hofstede's model. Also, Gesellschaft-type countries are more institutionalized, which is a sign of high power distance. In conclusion, there is a strong relation between the characteristics given by Hofstede's model and Tönnies's concepts of Gemeinschaft and Gesellschaft.

Tradition in Mediation

Concerning this topic, we are interested in how mediation is part of the social history of a particular country. Within the Nordic region, instances of mediation are present in all the sagas and stories of that region (Logan, 1990). The resort to a third party in order to resolve internal disputes was common practice for community-based social systems. Saying that what happened in the Viking era has a direct bearing on modern, present day societies is a little bit of a stretch but it proves that mediation-like processes were part of that region's history and might have influenced, however slightly, people's attitudes toward the social tools available for solving their own problems.

Two relevant examples of how tradition has influenced the use of mediation in Nordic versus Latin countries are Denmark and Italy.

In Denmark, King Christian V's Danish Law of 1683 was the first Danish law to make mediation optional in all civil cases. In 1795 mediation 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. Furthermore, the mediators were not to be legal professionals. On the contrary, emphasis was placed on men's respectability in the community and their common sense. There was no salary for mediators as the role was considered both a public duty and a duty of honor. However, those who were particularly successful as mediators were granted 'majestic rewards' by the King (Vindeloev, 2003). Here we can see yet again why we stated that the Nordic States are Gemeinschaft. The fact that being a mediator was a free endeavor and, most

importantly, was considered a duty of honor, shows us the emphasis that these societies put on the welfare of the community as a whole, and not on the individual.

On the other hand, Italy has a more recent history of mediation. The legal framework for mediation procedures in Italy consists of Law no. 69 /2009, which, through art. 60, recognized mediation in civil and commercial disputes and delegated power to the Italian government to issue a Legislative Decree on mediation to implement the provisions of Directive 2008/52/EC. Also, the Legislative Decree no. 28/2010 was enacted as a result of the delegation from Law 69/2009, Art. 60 and, while implementing Directive 2008/52/EC, incentivized mediation by creating financial incentives and enacting procedures for not only voluntary and judicial referral mediation, but also mandatory mediation in many civil and commercial cases. Basically, only after the European Union recommendation, Italy had a law on mediation and, although the judicial system does not work properly, people are not used to mediation and do not trust this process also because of the fact that they have no tradition of using it (Euro Net Mediation, 2013).

This is another explanation of why mediation works in the Nordic states, which have a long tradition in using various forms of mediation, and does not work properly in the Latin countries, for which mediation is a new process.

The following part of the article represents a short analysis of some aspects related to the issue in discussion. The data is taken from the European Values Survey from 2008. Some of the variables present in the database were recoded as following: the variable „North" represents the Nordic states and consist of Denmark, Finland, Norway, and Sweden; the variable „South" represents the Southern or Latin states and consists of Spain, Portugal, Malta, and Greece. We used compared means as our statistical tools, comparing the overall means for the two regions mentioned above. The European Values Survey has a persistent focus on a broad range of values. Questions with respect to family, work, religious, political, and societal values are highly present and helped with the purpose of this article.

Table 2. Political participation, North and South (European Values Survey, 2008)

QUESTION	MEAN	
	NORTH	SOUTH
How important are politics in your life?	2.64	2.87
How interested are you in politics?	2.45	2.79
How much confidence do you have in political parties?	2.83	3.05

The table above represents the view towards politics of the respondents to the survey, split in two categories: North and South. The answer scale is from 1 to 5, 1 representing „a great deal" and 5 "none/not at all". As we can see from the table, the means calculated for each of the categories of countries are constantly different. For the Nordic citizens politics are more important than for their Southern counterparts. As expected, they are also more interested in politics than their Southern neighbors.

This is yet another proof that the Nordic countries are Gemeinschaft-type societies because the citizens from these countries are more involved in the aspects concerning their community, their country, politics being actually the first step in the decision making processes in a society. Also, this can be linked to the hypothesis that, as we said before, the Nordic states have a lower power-distance than the Southern ones. The fact that they are interested in politics and consider politics important, and also that they are able and allowed to participate in politics is proof enough that these states are characterized by low power distance.

Concerning the last question, confidence in political parties, again the Nordic respondents have greater confidence in their countries' political parties. This might be explained by the fact that their participation in the political life is greater and so they can influence the political decisions more easily because of the lower power-distance. This aspect also influences the process of mediation in these countries. It is fair to say that in a country where people are extremely involved in the well-being of their community, in the sense that they are interested and want to have an influence on the decisions taken, their confidence in the whole system will be higher. Evidently, their confidence in the mediation process, which is also a traditional dispute resolution method in the area, will be higher and this is a possible explanation of why the process works better in the Nordic states. Moreover, Nordic citizens trust that the social (political) system works and that what it offers to them (in terms of institutions, processes and structures) is efficient. Mediation is somewhat offered by the state, so the trust that is conferred to the state extends to the mediation process.

The fact that Nordic citizens are interested in politics is linked to mediation. Interest in politics usually means an interest in how things work in a certain country or society. Thus, if Nordic citizens are interested for things to work properly in their countries, they will enter mediation with the purpose of solving the problem. This is an explanation why mediation works in these countries. The interest of finding a mutually satisfying solution to a problem makes them to enter mediation with trust in the process and in each-other and to negotiate in good-will.

Table 3. Religious aspects, North and South (European Values Survey, 2008)

QUESTION	MEAN	
	NORTH	SOUTH
How much confidence do you have in church?	2.46	2.26
Does church answer to moral problems?	1.66	1.50
Do you have a duty towards society to have children?	3.89	2.85

Another relevant aspect to be analyzed in relation to the mediation process in North and South is religion. When asked how much confidence they have in church, the results indicate that the Northerners have less confidence in church than the citizens from the Southern part of Europe.

To be noted here that we are talking about two different churches, the Catholic Church and the Reformed Church. At their core, these two churches are very different in their approach towards their followers. In the Reformed Church, the participation of the followers is higher than in the Catholic Church (for example, anyone can be a priest in the Reformed Church). It can be said that the Reformed Church is a community-based religion because of the high participation of the followers in any aspect of the religious life. The Catholic Church has always been more institutionalized and closed-up. Also, the core philosophy of this church is that the right answers lie in God and the priest and the parishioners should follow what the priest, the representative of God on Earth, says. It is only normal that the citizens from these catholic countries have maybe the wrong attitude toward mediation, a process that basically means that you have to solve your own problems, with only the assistance of a third neutral party, that usually cannot give advice or solutions concerning the issue in dispute.

A strange thing here is that, although participation in the Reformed Church is higher than in the Catholic Church, still the Catholics have higher confidence in the church. A possible explanation for this is the next aspect analyzed – if the church answers to moral problems. The Southern respondents have a stronger belief that the church answers to moral problems than the Nordic ones. If we put these two aspects together, we can say that maybe Nordic citizens do not need their church to solve their problems and that the church has other important roles in the Nordic societies, such as moral support, advice and so on. Also concerning participation in church, we can easily say that the Reformed Church is characterized by low power distance because it allows high participation of its followers and, in contrast, the Catholic Church is characterized by high power distance (for example, only men can be priests, the decisions are made by the Pope and so on).

The second issue analyzed for the purpose of this article is the duty towards society to have children. The Southern respondents feel that they have a greater duty towards society to have children. The relevant word here is „duty". As we said before, the Nordic societies are Gemeinschaft, which means that people are more involved in their community; they have strong personal and family relationships. Also, people in Gemeinschaft are regulated by common beliefs and have a very clear view of what their responsibility in the community is. The difference is, we believe, evident by now. The Nordic citizens might believe that they have a responsibility to have children, but not a duty. The sense of responsibility comes from an interior belief of what one is supposed to do in a society. A duty is something that is given to you by a superior, by a priest, by a pre-established set of rules, by religion. I think this is a very important difference between these two types of countries and it can also be linked to mediation. In Gemeinschaft, people know they have the responsibility to get along or, if not, to try and solve their own problems in a way that is best for all parties, specifically because of their emphasis on community.

In Southern societies (Gesellschaft), the solving of the problems usually comes from a third, superior party, which also decides for the actors involved. A relevant example for this is how the Pope of the Catholic Church decided at one point in history almost everything, from the crowning of catholic kings to the punishment of thieves.

In other words, participation in the life of one's community (for a Gemeinschaft-type society), including the religious communities, is voluntary, an expression of that person's will, it is not imposed or coerced. Meanwhile, in Gesellschaft-type societies, participation is perceived as a compulsory process. The individuals know that they are expected to be a part of the religious community and to obey its commands. The pressure of the social and religious norms is much greater than in community-based social systems, such as the Northern countries analyzed here.

As we have seen before, the Nordic states are characterized by low-power distance. This also affects the way in which the mediation process works in these countries. Low-power distance is an indicator of the fact that in these societies, citizens are more involved in the public life and are closer to the decision-making factors in their communities. So, they are used to be involved in the decision-making processes concerning problems that are of interest to them. Only natural, they will enter a mediation process and try to negotiate at their best, because they are used to making their own decisions. Also, a society characterized by low-power distance is less bureaucratic, the processes, procedures and actions are enforced differently and are even more informal. This means a difference in implementing mediation on the two types of societies.

Table 4: Confidence in the civil service, justice system and government (European Values Survey, 2008)

QUESTION	MEAN	
	NORTH	SOUTH
How much confidence do you have in civil service?	2.42	2.66
How much confidence do you have in the justice system?	2.00	2.61
How much confidence do you have in the government?	2.57	2.87

Also linked to mediation and why it works better in the Nordic states rather than in the Southern states is the confidence that citizens of these countries have in several systems, such as the justice system. Respondents from the Northern countries have greater confidence in the justice system. Again, this is in favor of the idea that the Nordic states are Gemeinschaft, where people are more involved in the problems of their community and so, the confidence in these types of systems is greater.

The confidence in the civil service is of real importance to the issue of mediation. The Nordic citizens have greater confidence in the civil service than the Southern citizens. Although mediation is mainly a private endeavor (it is not provided by the state), still, in some countries, it is seen as an annex to the justice system and mediators are perceived as civil servants (in some cases they actually are). The idea here is, of course,

that if people in a country have confidence in the civil service as a whole, they will also have confidence in a part of it (i.e. mediation) and this can be another explanation of why mediation works better in the Nordic states.

Last in this set of questions is confidence in the government. This goes hand in hand with confidence in politics, the justice system and civil service. Basically, it encompasses the three and enforces the already analyzed data. If we look at the data, the Northern respondents have greater confidence in their governments, a fact that resonates with them being collectivistic cultures. In this type of social system, common goals are important, the well-being of the community is paramount and great emphasis is placed upon cooperation and collaboration. As a consequence, governments are the perceived expression of the community's will – therefore, are trusted.

Table 5: Friends, job decisions (European Values Survey, 2008)

QUESTION	MEAN	
	NORTH	SOUTH
How free are you to make decisions at your job?	7.38	6.51
How important are friends and acquaintances in your life?	1.51	1.70

The first question in the Table 5 refers to the freedom of the work-place related decision-making process. The answer scale is from 1 to 10, 1 representing „not at all" and 10 „a great deal". As we can see from data, the Northern employees consider that they have greater freedom to decide at their workplace. This aspect is very important in relation to Hofstede's model because it proves, once again, that Nordic countries are characterized by low power distance. The fact that the employees are allowed to make decisions at work is reflected, on a larger scale, on the whole country and means that, in a large proportion, people want and can participate in the decision making processes (see Table 2 – the involvement in politics). More than that, they can influence decisions. We consider that, in some way, if people from a country think and know that they can make their own calls, they also tend to solve their own problems. With the risk of repeating ourselves, mediation works better in the Nordic states also because of the culture of these states. They do not need someone to give them solutions; they want someone to help them find their own solutions.

Also linked to culture and values is the importance of friends and acquaintances. Here, the answers were on a scale from 1 to 5, 1 representing „very important" and 5 „not at all". Although respondents from the Southern states believe that family is more important, Northerners place greater emphasis on friends and acquaintances. For instance, for an Italian family (extended family) it is one of the most important things in life. Meanwhile, for a Northerner friends are just important. In other words, for a Southern person, family comes first and community second, while for the Northerners there is no such difference or, at least, the two are considered to be of equal value. This conclu-

sion supports the hypothesis that Nordic societies are characterized by collectivism, where individuals cooperate and their decisions and actions often are oriented by the greater good or community values. In the Southern countries this cooperation is limited to family.

Conclusions

For starters, we must say that the purpose of this article is not to say that one of the types of social systems is better than others and also, the conclusion of this article does not disagree with Tönnies's theory. It simply aims at understanding why mediation works better in Gemeinschaft-type countries, without stating that one of the types is better than the other.

The conclusion, as the article, has several parts. First of all, it is important to note the link between Gemeinschaft, Gesellschaft and how mediation works. The question was why mediation works better in Gemeinschaft-type countries. There are several explanations. In these types of countries, participation in politics and confidence in systems such as the civil system, the justice system or the government is very high. This means that people are not just interested, but participate in the decision making processes in their community. In the same way, mediation being another service provided by the community, they are confident regarding this process, they trust mediation. Also, we have compared the two categories of states, Northern and Southern countries, and we have seen that the first category has implemented mediation since the 17th century. This is very important because people usually tend to trust a process that is already a tradition in their country.

As we have seen before, mediation is a dispute resolution process in which the parties involved in a conflict situation try to get to a mutually satisfying solution, assisted by a neutral and impartial third party. The whole process is based on trust and negotiation in good-will. These are the two most important „ingredients" that make a mediation process work and that contribute to its success. As we can see only from the definition above, the characteristics of mediation make it more suitable to Gemeinschaft-type societies. As we have seen before, these societies are determined by natural will, naturally arising emotions and expression of feeling. Also, these societies put greater emphasis on community, on the well-being of the people that are part of this society. It is only normal that they enter a mediation process in the first place, because they have the tendency to solve their problems in a satisfying manner for all parties involved. Furthermore, because of their characteristics, they will negotiate in good-will and trust each-other to find the best solution that is suitable for all parties. They will not follow only their own interest. This last aspect is a characteristic of Gesellschaft-type societies where efficiency, rational will, self-interest and calculated conduct are the leading aspects. In Gesellschaft-type societies, the parties will follow their own interest

during mediation and negotiate towards maximizing their outcome. This is the link that we tried to create between the two ideal types of societies and how mediation works and is implemented.

Furthermore, we have considered relevant for this subject the religious aspects of the two types of countries. As we have seen, the Southerners tend to have greater trust in the church and also, to feel that the church answers to moral problems. Also, the Catholic Church is more institutionalized. On the other hand, the Northerners have a more flexible church, with higher participation of the followers. It is only natural that the citizens from these Catholic countries have maybe the wrong attitude toward mediation, a process that basically means that you have to solve your own problems, with only the assistance of a third neutral party, that usually cannot give advice or solutions concerning the issue in dispute.

These conclusions only tried to bring into attention the most important aspects that have been analyzed in this article. Each and every aspect of the analysis is important in painting a picture concerning mediation in the Northern and Southern countries of Europe and why the process works in some areas and not in others.

References

1. Axelrod, R. (1984), *The Evolution of Cooperation*, New York: Basic Books.
2. Bartlett, S. J. (2011), *Normality Does Not Equal Mental Health: The Need to Look Elsewhere for Standards of Good Psychological Health*, New York: Praeger.
3. Business dictionary (2013), (http://www.businessdictionary.com/definition/values.html), retrieved at 21st of August 2013.
4. Durkheim, É. (1982), *Rules of Sociological Method*, New York: Free Press.
5. Encyclopedia Britannica (2013), *Gemeinschaft and Gesellschaft* (http://www.britannica.com/EBchecked/topic/228066/Gemeinschaft-and-Gesellschaft) retrieved at 21st of August 2013.
6. European Values Study (2013), (http://www.europeanvaluesstudy.eu/) retrieved at 25th of August.
7. Giddens, A. (1981), *Introductory Sociology*, Macmillan Press, Great Britain.
8. Giddens, A. (2010), *Sociologie,* 5th edition, Ed. ALL.
9. Hatch, M.J. (2006), *Organization Theory*, Oxford University Press.
10. Haung, P., Wu, H.M. (1994), *More Order without More Law: A Theory of Social Norms and Organizational Cultures*.
11. Hofstede, G. (2001), *Culture's Consequences*, 2nd ed., Sage Publications, California.
12. Hofstede, G. and Hofstede, G. J. (2005), *Cultures and Organizations, Software of the Mind*, McGraw Hill.
13. Jones, R.A. (1986), *Emile Durkheim: An Introduction to Four Major Works*, Beverly Hills, CA: Sage Publications, Inc.

14. Logan, F. D. (1990), *Vikingii*, Ed. Bălcescu.
15. Marxmeier, N. (2011), *The Nordic way – shared values for a new reality?*, World Future Society, (http://www.wfs.org/content/nordic-way-shared-values-for-new-reality) retrieved at 23rd of August 2013.
16. Social science dictionary (2013), (http://sociology.socialsciencedictionary.com/Sociology-Dictionary/VALUES) retrieved at 20th of August 2013.
17. Vindeloev, V. (2003), *Mediation in Danish law — in retrospect and prospect*, ADR Bulletin: Vol. 6: No. 3, Article 3. (http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1241&context=adr) retrieved at 22nd of August 2013.
18. Young, H.P. (2008), *Social norms - The New Palgrave Dictionary of Economics*, 2nd Edition.

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.

References

1. Altman, A. (2012), *France- Current State of Arbitration and Mediation* (http://business-conflictmanagement.com) retrieved at the 4th of Augut 2013.
2. Bowcott O. (2011), *Compulsory mediation angers lawyers working in Italy's unwieldy legal system* (http://www.theguardian.com/law/butterworth-and-bowcott-on-law/2011/may/23/italian-lawyers-strike-mandatory-mediation) retrieved at the 5th of August 2013.
3. Bruni, A. (2013), *Mediation in Italy* (http://www.mediationeurope.net/eng/italy.html) retrieved at the 5th of August 2013.
4. Centre de Médiation et d'Arbitrage (2013), (http://www.cmap.fr/Qui-sommes-nous/Nous-Connaitre-49-fr.html) retrieved at the 6th of August 2013.
5. De Palo, G., Carmeli, S. (2005), *Mediation in Continental Europe* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230941) retrieved at the 5th of August 2013.
6. Dubois, E., Schurrer, C., Velicogna, M. (2013), *The Functioning of the Judicial Systems and the Situation of the Economy in the European Union Member States* reported for the Bureau of the CEPEJ.
7. Hydle, I. (2011), *The Development of Restorative Practices in a Human Security Perspective in Northern Europe*, Norwegian Social Research, Oslo and UiT (University of Tromsø) (http://www.nova.no/asset/4954/1/4954_1.pdf) retrieved at the 6th of August 2013.
8. *Italian Mediation Law* (http://www.adrcenter.com/procedure/international-procedures/mediation-italian-law/) retrieved at the 7th of August 2013.
9. Schramm-Nielsen, J. (2002), *Conflict Management in Scandinavia* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=305153) retrieved at the 5h of August 2013.

Mediation
Building Trust

Ciprian SANDU

Abstract. *Mediation is a relatively new procedure in Romania, and because of that, as well as of the mediator's lack of experience, the clients encounter several problems regarding this procedure, most of them because they lack trust in the procedure and the mediator. The relationship of trust between mediators and parties is a key element of the mediation process. Psychologists have found that trust is vital to people's willingness to contribute their time and attention to reach common goals and to reveal useful information in order to do that. How we can build this trust will be the subject of the following article.*

Key words: *mediation, trust, Transylvanian Institute of Mediation, agreement, confidentiality, Romanian Mediation Law.*

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Being a young mediator, and having as mentors two very experienced mediators, I'm like a sponge, trying to gain as much information and experience from them. One piece of information caught my attention straight from the beginning: if you are professional, the parties will trust you throughout the mediation process, and at the end of the day, that trust will bring you more clients.

Virtually all authors on mediation agree that trust is an essential factor in the successful outcome of the process (Lewicki and Tomlinson, 2003; Moore, 2003); some of them went a little bit further and defined mediation in terms of trust. According to Michael Leates, mediation is consensus facilitated by a trusted neutral party. I think nobody can argue that trust is the defining

element of mediation, setting it apart from judicial dispute resolution, in which trust between the parties, personal willingness to cooperate, or even faith in the fairness of the process need not exist at all, as long as there is sufficient confidence in the power of enforcement. Speaking in general terms, the role of the mediator is to assist the parties to find a mutually acceptable solution to their dispute. The practical implications of such a task vary from one situation to another. Sometimes the parties expect the mediator to play an active role; sometimes they prefer a more discreet way that does not put them in a position of having to determine a formal proposal (Poitras, 2009). One of the biggest challenges faced by a person responsible for mediation is to gain and maintain the confidence and trust of the parties. So what do we mean by this word – trust? The English word "trust" is a widely encompassing term. The Oxford English Dictionary gives us this definition: the "firm belief in the reliability, truth, ability, or strength of someone or something." Its essence is the expectation that promises will be fulfilled. What I've learned during these years as an apprentice is that if you behave in a professional and ethical manner, even if the mediation failed, the parties involved will thank you for your efforts and will recommend your services to others because you will not have had lost their trust.

In Moore's description of the mediation process, the trust problem is centered on the mutual perception of the unreliable behavior of the disputing parties - as is the truthfulness or accuracy of the statements that are the object of their dispute. The mediator, as an unbiased third party, exists outside of this distrust circle, thus safely positioned to help mitigate mistrust by creating "perceptions, if not actual behavior, that induce trust between disputants," such as encouraging a climate of openness and honesty (Moore, 2003). Moore's definition takes as a given that the disputants do not question the actual mediation process itself, accepting it to be transparent and fair to all. In this fair and neutral environment, the role of the mediator is to facilitate non-judgmental interaction between the disputants so that they can safely communicate and act collaboratively to rebuild trust in each other, paving the way for the resolution of the dispute (Poitras, 2009).

When two parties come together for mediation, it is generally after some sort of dispute, disagreement or dissatisfaction damaged the relationship. In most cases, a level of distrust has already been established. Each of these factors causes stress, confusion, anger, and resentment- hardly the best conditions in which to make sound decisions that can lead to a resolution. Throughout the process of mediation, however, negotiations can take place in an atmosphere of fairness, and both sides can eventually feel satisfied with the outcome (Poitras, 2009). But first, trust must be established. The essential role of trust has been a popular topic in the mediation literature; all authors continuously identified different techniques in order to gain the parties' trust. For me, at this stage of my professional life, the following are the most important ones:

Chemistry

Trust may be based on such things as attraction to the mediator. Because of chemistry, parties instinctively trust the mediator from the initial contact, or the mediator's tone of voice or other less noticeable factors can incite the parties' trust (such as publishing your résumé on your web page in order for the parties to find some common values with the mediator. At one point one of my mentors was chosen for the fact that he is a professor at the Political Sciences Faculty, the phrase being "I trust you because you're a teacher at one of the most important institutions in Cluj-Napoca". Also, chemistry can be based on the tone of our voice: sometimes a warm tone can favor us, mostly in the case of family disputes, while sometimes a more direct approach can help the parties to choose that specific mediator for a commercial or institutional dispute. The emphasis here is primarily on a feeling, intuition, or instinct.

Credibility and reputation

In this regard, the mediator's professional and intellectual credibility can be a significant source of trust. More and more mediators with a webpage publish their résumés in order for the clients to choose a mediator with expertise, life experience, or background education in the field of their conflict. Lastly, according to Sheppard and Sherman, trust may also derive from the mediator's reputation for settling cases. In a simple case of mediation, there are at least two parties involved. If the mediation was a success, we now have two parties who will talk about their success to some other people – family, work mates, or simply friends who can be potential clients (Sheppard and Sherman, 1998). For example, my colleagues and I have mediation cases not from the Mediators Table, not from the Phone Book, but from former clients or former students from our mediation training courses, based on our reputation as mediators and trainers. Also, in our field there are some mediators, like my mentors, who became even national evaluators, the highest rank in Romania for a mediator. From this perspective, the mediator's credibility and reputation can be major assets in inspiring the parties' trust. Also, here we can discuss a bit about life experience and age. As a young mediator, there were some cases where my young age was my biggest enemy. For example, at one point, a couple needed to mediate some aspects regarding their divorce. At the beginning of the meeting I didn't have their trust because I was too young and I'm not married. For the parties it was very difficult to understand how a young boy, with no life experience in a marriage can mediate their dispute regarding aspects of a divorce, so I had to compensate my lack of experience with my knowledge.

Neutrality and impartiality

Individuals are more likely to trust someone if they believe that person has nothing to gain from untrustworthy behavior. It is therefore important for the mediator to show

the parties that he or she has no interest in favoring one party over another (Poitras, 2009). Simply put, the parties will only trust the mediator if they believe the mediator will act impartially. In the context of mediation, the mediator's impartiality signifies that he or she is giving both parties an equal chance to express themselves without favoring one party at the other's expense and without making judgment calls. Which is the risk of not being impartial? When the mediator seems to favor one party, either by paying closer attention to that person, placing more value on that party's point of view, or favoring that party procedurally, he or she loses the trust of the other party, who starts to see two enemies – the other party and the mediator. Impartiality and neutrality are basic principles of mediation accepted all over the world for ethical reasons but also as a way to gain the trust of the parties.

Goodwill and empathy

Pruitt has noted that, to feel at ease, parties must have the impression that the mediator has a positive image of them and must feel that the mediator cares about their concerns. From this point of view, the parties will trust their mediator based on his or her "benevolence". The mediator inspires trust by being warm and showing consideration toward the parties. The mediator inspires confidence through her/his capacity to thoroughly grasp the facts and the parties' perspective and also by demonstrating the ability to fully understand the parties in mediation (Pruitt, 1983). Usually, this is shown through active listening, asking pertinent questions to ensure that he or she completely understands the facts and the parties' points of view, verifying that they have said everything they needed to say, framing and re-framing in order for the parties to realize that the mediator is there with them not only physically. At one point one of my mentors and I participated at a mediation process where an old lady from a rural area and a powerful manager, with political connections, had an environmental problem generated by the manager's organization. In the area, due to the manager's political connections, there were a lot of rumors about the way he treated the others in the village (like slaves) and about him conducting some illegal activities. Showing goodwill and empathy for both parties, at the end of the meeting, the parties thanked us because we had done everything in our power to make everyone feel as comfortable as possible and because we had showed respect for both of them.

Management of the mediation process

This topic implies the way in which the mediator manages the mediation process. The first discussion here will be about welcoming. Welcoming is our term for the mediator's ability to quickly create a climate that puts the parties at ease (Poitras, 2009). The mediator must be able to be perceived closer to the parties than a judge or an arbitrator, and the climate is the first thing to set, from the small off-topic discussion full of joy and optimism, to the protocol served to the parties and continuing to the manipulation

(in a constructive sense) of the space, in order for both the parties and the mediator to be perceived as equals. Some scholars have divided mediators' styles into two broad categories: *dealmaker* and *orchestrator* (Kolb, 1983). The first type, the dealmaker, seeks largely to achieve settlement and will intervene strongly if necessary to "help" parties move toward an agreement. The second type, the orchestrator, focuses more on building a relationship and developing understanding as a first step toward reaching consensus. If the orchestrator style seems to be more conductive to building a reliable relationship, it may be because the parties need the mediator to compensate for their own poor relationship with each other (Kolb, 1983; Poitras, 2009).

In fact, in the context of a conflict, parties often denigrate each other's needs. It is possible that parties respond to a mediator who can improve their relationship. However, there may be some cases in which the relationship matters less to the parties, and cases in which the settlement is more important than the ongoing relationship. In such cases, parties may simply be more likely to trust someone who is nice to them. From both perspectives, when a mediator shows warmth and consideration, he or she is meeting this need and inspires trust. The second discussion here, in my opinion, should be about the explanation process, which includes the degree to which the parties understand the process, as presented by the mediator, the role of confidentiality rules in building trust, and the establishment of the perception that the mediator is shielding parties from abuse during the process. Parties develop trust in the mediator when they trust his or her ability to manage the process. When the mediator effectively explains the mediation process to the parties, he inspires confidence. Such explanations help parties get orientation, particularly if they are unfamiliar with the procedure. Today we have in our legislation the "informative meeting" – a mandatory session before the parties turn to the traditional justice, during which the mediator explains the parties what mediation is and its principles, both the parties' and the mediator's rights and obligations, advantages and disadvantages of the mediation, the structure of the mediation, and the legal status of their agreement, if reached. This "informative meeting" used to be held, before this year's modification of the Mediation Law, firstly for ethical reasons, and secondly in order to gain the parties' trust in the process and the mediator; this is why this explanation of the process should be done in every case, not just the mandatory one. Let's imagine that in front of the mediator will stand an old lady from a rural area and a medium-age man, with medium education, knowing about the mediation just the fact that it is mandatory (unfortunately more and more persons tend to misunderstand this aspect – that just the informative meeting is mandatory, not the process itself). In order for those parties to have trust in "this new method of conflict resolution" we need to explain the process to them, explaining here the importance of the informal and mutual way used to deal with the conflict in mediation. Continuing, we must explain the three principles of mediation – neutrality, impartiality, and confidentiality, adding here also the volunteering and self-determination of the parties

in order to attend the mediation process or reach an agreement. After that, we must explain the advantages and disadvantages of mediation (in all of my cases, I saw that the parties were more satisfied when I told them the disadvantages, rather than the advantages, because clearly we don't work with utopia and all good things also have a negative side, but most importantly, the parties felt that I didn't lie to them, selling them a service only with advantages).

The next discussion must be about the two way relationship – the one between the parties, and the one between the parties and the mediator – again, not only the right but also the obligations. Here, from my experience, the parties gained trust in me, as mediator, and the process, when I told them they would have to reach a solution by themselves, they had the right to be assisted or represented by a lawyer or even a friend or a member of their family as a moral support, to name just a few of their most important rights.

As for obligations, the parties are always pleased to see that they have the same obligations, so they trust the mediator to be impartial to them, but also they trust the mediator because he/she also has obligations regarding the process and his/her relation with the parties during and after the process. It is no secret that transparency creates trust. Just as mediators seek to create an atmosphere of honesty and transparency within the mediation process, they should be open about their own backgrounds. The goal is to create a possible sense of identification and thus to create a connection with the disputants. Lewicki has defined three types of trust: calculus-based (based on a sense of control over the other party), knowledge-based trust (based on having sufficient information about and so a sense of understanding of the other party), and identification-based - a true sense of connectedness (Lewicki. and Tomlinson, 2003).

Mastering the process

According to the parties, the mediator can inspire trust through his or her mediation experience, mastery of the case, and level of confidence (Poitras, 2009). The mediator can reassure the parties of his/her professionalism by carefully reviewing the case prior to the mediation session and by demonstrating their familiarity with it. Referring to past mediations, the mediator can also demonstrate their experience. The mediator inspires confidence due to his experience with the mediation process and grasp of the case. The mediator's mastery can be expressed in a variety of forms, from their life experience, to their way of responding to questions in a joint or separate meeting.

It is sometimes argued that trust is not a prerequisite for negotiations, and in fact a healthy dose of skepticism toward one's adversary is advisable. Fisher and Brown advise negotiators to be trustworthy, but not blindly trusting. However, they also acknowledge that a lack of trust keeps many from negotiating at all. Moreover, mediators who do not deal with the distrust between the parties will feel increasingly pulled into a world of

conflict, where there are no neutrals, only allies and enemies. There is no guarantee that the parties in mediation will ever truly trust each other. In many cases, there are good reasons not to. But even individuals entrenched in mutual suspicion can come to trust a third party: the mediator (Fisher and Brown, 1988). It is vital that mediators work to earn the trust and confidence of each party. Without the participants' trust in both the mediator and the process of mediation, the outcome will be less than ideal - if an outcome is even reached. Parties who trust in their mediators and in the process of mediation are:

- More likely to share important information;
- Less defensive in relation to the mediator and the other party;
- Able to state their interests and needs, not only their positions;
- More willing to offer and receive compensations in negotiations;
- More willing to accept the mediator's actions;
- Better able to close the gaps between them.

Although it is clear that establishing trust is vital in mediation, in stressful situations, there may not be enough time to do so before negotiations fall apart. Fortunately, there are effective ways to create trust in a relatively short time. This process-based approach coincides with the "principled negotiation method," developed at Harvard University, in which trust is not a prerequisite to negotiation or even to agreement. Principled negotiators, write Profs. Roger Fisher and William Ury in their work, *Getting to Yes*, "proceed independent of trust," as trust is developed through the negotiation process itself. "If you have established a basis for mutual trust, so much the better. But, however precarious your relationship may be, try to structure the negotiation as a side-by-side activity in which the two of you—with your different interests and perceptions, and your emotional involvement - jointly face a common task." According to them, although an important goal of the negotiation is to create a strong working relationship, an agreement does not require personal trust, as mistrust can be alleviated.

Thus, both in fact and in the perception of the disputants, "the mediator can no longer be considered simply as a detached observer, but is a party to the process of the mediation (Shah-Kazemi and Nourin, 2000). This broader conception of trust puts the mediator at the heart of the equation. In contrast with the Western style of mediation, in which the mediator fulfills the impersonal role of an objective part of the facilitative process, within the Asian cultural perspective, for example, once the mediator gets involved into the disagreement, he or she is no longer viewed merely as a process facilitator, but rather becomes an active participant in the effort to seek a solution (Billings-Yun, 2009). The mediator personally enters into an interdependent relationship with the disputing parties, who rely on the mediator's goodwill and expertise to help them obtain, or at least not hinder, a positive outcome.

As an active and influential participant in mediation, the mediator becomes yet another source of risk and vulnerability for the disputants, raising core value concerns about the mediator's own motives, beliefs, and general fairness (for example, we always hear at our mediation training courses about success fees for the mediator, like in the case of a lawyer. If in the case of lawyers this fee can be perceived like a motivational element, in the case of mediation this is about misleading the trust of the parties in you, promising them something that is entirely dependent upon them – reaching a solution in a certain amount of time – just for the mediator's financial reasons). Therefore, before the mediator can facilitate and induce trust between the disputants, he or she must first reduce the disputants' sense of vulnerability by giving them the confident expectation that the mediator's own motives are pure and benevolent (Billings-Yun, 2009). Without personal trust in the fairness and goodwill of the mediator, the parties of the dispute would be less likely to share information, move from positional to problem-solving thinking, respond positively to cooperative messages, or engage honestly in the sorts of side-by-side activities recommended by the process-oriented school. Indeed, they would be less likely to participate at all.

Equally important, the mediator must help the parties establish at least a minimal level of trust between each other, if any sort of collaborative problem solving is to take place. But how to do that as a mediator? Being impartial, or transparent regarding the mediation process is entirely dependent on the mediator, but what can he/she do in order for the parties to build and maintain a certain level of trust during the mediation process?

In his book *The Mediation Process: Practical Strategies for Resolving Conflict*, Moore says trust is based on the experiences of the negotiators with past negotiations, the similarity of current issues to those in past negotiations, past experience with a particular opponent, rumors about a current adversary's trustworthiness, and the opponent's current statements or actions. Mediators must often respond to all these variables in the process of building minimal trust between the parties. The past experience of negotiators, their personality, and their needs, beliefs, values, and predispositions toward other parties will strongly affect their ability and willingness to trust another party.

Mediators usually do not make any efforts to change or modify a negotiator's psychological makeup on the basis of experience with previous and different negotiating opponents. However, the mediator may attempt, through careful questioning, to modify and clarify a negotiator's perceptions of the current negotiation, and another party may assist him or her in identifying similarities and differences between the present situation and the past. A negotiator's past interaction with an opponent can constitute a base for either trust or distrust. Mediators negotiating with parties who have a history of negotiations between them may begin the trust-building process by asking questions that assess whether a positive or negative relationship has been built over time. If the parties have a positive trust relationship, and have been able to depend on the other

party's veracity and count on the other party to follow through on agreed commitments, the mediator's task becomes simpler. In this case, the mediator may merely remind the parties of their positive and productive history. Should the mediator discover that parties have a highly negative relationship and that there are few instances where past trust has been reciprocated, he or she can assist the parties in determining if the breach of trust arose from a joint misinterpretation of the situation or an unintentional misunderstanding. If either of these is the cause, accurate communication may remove the perceptual barriers to a new trusting relationship.

Trust in relationships is usually built incrementally over time. Through a succession of promises and consistent actions that reinforce the belief that commitments will be carried out, negotiators gradually build a relationship of trust. Mediators may assist negotiators in building a trusting relationship by encouraging them to make a variety of moves designed to increase credibility. Some moves that encourage negotiators to increase their trust in each other can be making consistently congruent statements that are clear and that do not contradict previous statements or perform symbolic actions that demonstrate good faith in bargaining, for example, providing for an adversary's physical comfort, negotiating at a time or place that is convenient for another party, making a minor concession that indicates a willingness to negotiate, paying the cab for the other party in order for him to reach the place of the mediation. Mediators can also make specific interventions that will build trust between parties and change their perceptions. Among these moves is creating situations in which the parties must perform a joint task, translating one party's perceptions to another, vocally identifying commonalities, verbally rewarding parties for cooperation and trust, and facilitating a discussion of their perceptions of each other (Moore, 2003).

If, however, the trust of one party was misplaced and intentional exploitation rather than reciprocity resulted, the mediator must pursue another strategy and start from a point of no or little trust to build a positive relationship between the parties. But what could this strategy be? We hear more and more about CBM (Confidence-Based Measures), especially within the field of international conflict resolution, where mediators employ CBMs to de-escalate conflicts between states, but it can also be usefully applied in other spheres of mediation. In any situation where trust is lacking, mediators can use these measures to repair some of the relationship problems at the beginning of the process, and place the parties in a cooperative mindset. Mediators who effectively build goodwill at the beginning of the process will be more likely to see the process reach completion, and more likely to see the parties fulfill their agreements afterward. Confidence-building measures are gestures of goodwill made by one party to another, usually prior to engaging in substantive negotiations, for the purpose of gaining the trust of that party. The discussion and application of CBMs originated in the sphere of nuclear disarmament negotiations in the 1970s as efforts to achieve comprehensive

agreements failed (Landau&Landau, 1997). The concept of CBMs most likely evolved from the negotiating model of Charles Osgood who recommended that the two superpowers adopt a strategy of de-escalation that he termed G.R.I.T., or Graduated and Reciprocated Initiatives in Tension reduction. Essentially, the G.R.I.T. strategy advises each party to make a unilateral gesture of goodwill and wait for the other to respond (Landau&Landau, 1997). Once several exchanges have been made, substantive negotiations can commence. These exchanges are now known as CBMs, and they have become increasingly important tools in resolving international disputes. In the literature to date, much of the discussion of goodwill gestures assumes the context of a traditional negotiation with no third party. In this context, the parties themselves control the exchange of gestures. Experimental evidence suggests that these gestures should be offered unilaterally and unconditionally by one party at a time, that they should involve risk on the part of the giver (to prove sincerity) and that they should be unanticipated by the receiver (Landau&Landau, 1997). However, the risks are very high with unilateral gestures of this kind. An untrusting adversary would be just as likely to interpret the gesture as a ruse, a sign of weakness, or dismiss it as meaningless. Some gestures may be inappropriate and cause offense to the other party. For these reasons, a neutral third party could be quite useful in overseeing the exchange of gestures. The mediator would help to ensure that the offers are appropriate and are interpreted positively by the other party.

The manner in which CBMs would be exchanged in a mediated process would differ from a traditional negotiation process. In Charles Osgood's G.R.I.T. strategy, one party would begin the process with a small gesture, and then wait for the other side to reciprocate. In a facilitated process, however, the emphasis should be on the symmetrical exchange of CBMs for two reasons: symmetry, asking both sides to make roughly equivalent gestures at the same time, helps maintain the mediator's neutral image; second, parallel and coordinated CBMs give parties the assurance that their gestures will be reciprocated, and therefore embolden them to make more significant moves. Measures taken by one party should lead to similar gestures being made by the other one in a balanced way. Both of them must feel that they are deriving equal advantages from the implemented CBM's effect. Reciprocity is needed for two reasons: it is a signal for the first party that the other is seriously engaged in the process, and secondly, the continuation of unilateral gestures, without reciprocity, will become at one point useless (Landau&Landau, 1997). Reciprocity cannot be expected instantly. At one point we had a mediation process between an 18-year old boy and an old man, in a car accident case. The driver, being the initiator of CBM must be prepared to make several unilateral steps without receiving anything in return. Even if, in short term, the other party will gain more, this asymmetry must be contained and balanced by long-term perspectives, like the possibility to reach a mutually acceptable agreement without a penal charge. He started by paying a taxi driver to bring the old man to the mediation,

he helped him to move around our mediation space, he offered to cover the mediator fee entirely, all of them being CBMs which, in long term, helped the young boy to reach an agreement with the old man, without legal repercussions. Some other examples of CBM in mediation could be:

Demonstrate a willingness to talk

A good place to start is by asking both parties to make a clear statement to each other about why they would like a peaceful and collaborative settlement of the conflict. In particular, they should emphasize the costs (in terms of emotions, money and time) of continuing the conflict. The mediator could ask both parties about the stress they have suffered from the dispute, and about their inability to resolve the dispute through more adversarial means. Without an admission of the destructiveness of the conflict, each side is free to impute less noble motives to the other's participation in the negotiations (Landau&Landau, 1997).

Demonstrate a willingness to listen

Showing a willingness to listen is a confidence-building measure of considerable importance. The parties should be encouraged to demonstrate a willingness to hear all of the other party's grievances, and not to react defensively (Landau&Landau, 1997). For example, in a recent case involving a dispute between a company and an old lady from a rural area, the lady was very skeptical of the manager's ability to change his aggressive managerial style in terms of destruction of the environment. However, the manager demonstrated a genuine interest in hearing the personal grievances of the lady. With my mentor, we coached the manager to listen without comment, and to thank each person after she/he had spoken. The result? The manager's willingness to listen was seen as a very positive step by the lady, who started to trust the other party a little bit more than at the beginning of the mediation session.

Demonstrate a willingness to meet the other needs

There are often immediate issues of conflict that exacerbate the conflict between two parties. These issues do not go to the core of the dispute, but so long as they exist, they will continue to fuel the conflict. The mediator should try to obtain some short-term agreement to remove some of these irritants. If progress is quickly made on small issues, that builds the confidence of the parties for resolving larger issues (Landau&Landau, 1997). In the case involving the conflict between the manager and the old lady, the latter quickly raised a concern about the manager's intent to continue his activity which damaged the environment and the property of the lady. When the manager agreed to suspend the performance reviews until the issue could be dealt with in mediation, it marked the first step toward breaking down the staff's distrust.

Demonstrate a willingness to improve the relationship

The most basic confidence-building measure for healing conflicts is the apology. Most everyday conflicts are resolved with apologies, yet mediators have not made sufficient use of them. Our training school at the Transylvanian Institute of Mediation has some role-plays for the participants where the parties just want to receive apologies at the end of the sessions and the mediator must facilitate the parties to reach this stage. Of course, there are difficulties. First, apologies might bring the connotation of blame. Second, they could be insincere. Third, exchanges of "I'm sorry" might seem like a trivialization of the conflict. All of these concerns can be addressed with the appropriate techniques.

Rather than expressing culpability, apologies must express recognition of, and regret, for harm suffered by the other in the past and a willingness to try to avoid causing such harm in the future. From the information provided about the history of the dispute, the mediator should select small incidents that were particularly hurtful to one side or the other so that he can ask them if there was anything they might have done to handle the situation better, building so the moment when the parties can make apologies in a trustworthy way (Landau&Landau, 1997).

In conclusion, a key function of the trust relationship is to enable the mediator to gain access to parties' confidential information, which can help the mediator identify zones of possible agreement and other options for resolution. But before they will provide this information to the mediator, the parties must first believe that the mediator will use the information effectively (procedural expertise), accept the information nonjudgmentally (warmth, consideration and empathy) and not use the information against them (impartiality). The factors that encourage the development of trust thus also imply open discussion and the development of solutions. Trust is generally demonstrated by a willingness of parties to place themselves in some position of risk in a negotiation, such as by being open by information sharing.

References

1. Bullings-Yun, M. (2009), *Trust and Mediation in Asia: The Process or the Person?* in *An Asian Perspective on Mediation*, Singapore Academy of Law.
2. Fisher, R. & Brown, S. (1988), *Getting Together: Building a Relationship that Gets to Yes*, Boston: Houghton Mifflin Co.
3. Fisher, R. & Ury W. (1991), *Getting to Yes: Negotiation Agreement Without Giving In*, 2nd ed., NY: Penguin Books.
4. Kolb, D. (1983), *The mediators*, Cambridge, MA: MIT Press.
5. Landau, D. & Landau, S. (1997), *Confidence Building-Measures in Mediation*, Conflict Resolution Quarterly.
6. Lewicki, R. J. & Bunker, B. (1995), *Trust relationships: a model of trust development and decline*, Conflict Cooperation and Justice, San Francisco: Jossey-Bass.

7. Lewicki, R. J. & Tomlinson, E. C. (2003), *Trust and Trust Building, Beyond Intractability*, Conflict Research Consortium, University of Colorado.
8. Lewicki, R. J. and. Wiethoff, C. (2000), *Trust, trust development, and trust repair* in *The handbook of conflict resolution: Theory and practice*, San Francisco: Jossey-Bass.
9. Moore, C. W. (2003), *The mediation process: Practical strategies for resolving conflicts*. San Francisco: Jossey-Bass.
10. Poitras, J. (2009), *What makes parties trust mediators?* Negotiation Journal, Harvard College.
11. Pruitt, D. G. (1983), *Achieving integrative agreements*, in *Negotiation in organizations*, Thousand Oaks, CA: Sage.
12. Shah-Kazemi & Nourin S. (2000), *Cross-cultural Mediation: a Critical view of the dynamics of culture in Family Disputes*, International Journal of Law, Policy and the Family.
13. Sheppard, B. H. & Sherman, D (1998), *The grammar of trust: A model and general implications*, Academy of Management Review.