



# The History of Regulating Mediation

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## Abstract

**Aim:** Conflict and conflict resolution are as old as humanity. At different ages, people try to remedy conflicts between individuals or groups in different ways. The sending of ambassadors or the court of the king's bench, as an institution of arbitration, or even the archaic form of mediation, can be found in thousands of years of historical sources. In this study, the focus is exploring the processes.

**Methodology:** In this paper, we follow alternative dispute resolution methods from the ancient Greeks' conflict management tools to the development of modern mediation and the EU legal harmonization. Methodologically, we used the processing and comparison of contemporary sources.

**Findings:** In both Hungarian and European cultures, there is a tradition of a type of mediation process. In several European cultures, this can still be felt.

**Value:** This article highlights the fact that the third neutral party's presence in the interpersonal dispute resolution is an archaic human need. Its role is inevitable in everyday (alternative) dispute resolution.

**Keywords:** history of mediation, conflict management, facilitation, EU regulation in the field of mediation

## The historicity of mediation

Mediation can be described as an approach and as a problem-solving protocol (Németh, 2014). The latter can be seen as the next stage of problem solving and conflict resolution alongside law and arbitration. An arbitral tribunal with special knowledge and training still carries the tools and rules of law within itself

in a recognizable way. However, mediation as a protocol differs significantly from this to the extent that when the agreements reached there are incorporated into a judgment, the court does not examine the circumstances in which they were reached, but only the reasonableness of their content.

The desire to reach agreement between people, to resolve disputes, to solve problems is as old as humanity itself. In different times and in different cultures, different ways have been tried to resolve differences between individuals or groups of individuals. In cases where the parties were unable but willing to agree, a third party was involved, whose worldview they both accepted. In other words, the third party was involved, acting either as an arbitrator or as a mediator, or both, in the problem-solving process.

In the ancient Greek world, the Sibyls<sup>1</sup> mediated the will and opinion of the gods regarding a controversial issue. They were the embodiment of transcendent revelation; thus their judgement was unquestionable.

Later Aristotle considered the institution of arbitral tribunals to be a more humane solution than that of the gods: ‘...the arbitrator has equity in mind, and that is why arbitration was invented, so that equity might prevail...’ (Dörömbözi, 1999). Seneca also emphasises the more complex vision of the arbitrator over the application of the law, because it contains humanity and compassion.

In the Hungarian context, the institution of the arbitration of the royal court<sup>2</sup> was also based on the principles of royal wisdom, understanding and compassion. While on Progress, the kings of the Árpád dynasty provided the inhabitants of the area with the opportunity to resolve their disputes, regardless of rank. The king listened to the parties and then gave a verdict. This was accepted and enforced by the parties without further ado. Here the parties accepted the superiority of the king, that is the decision-maker, and hence the acceptance and compliance with the decision. The king or, in other cases, the tribal leader - as the rhetorician Priscos<sup>3</sup> refers also to Attila the Hun - was above the parties, but he solved the problem taking into account their specific interests and life situation.

This type of decision-making mechanism can still be observed in many archaic cultures today. In Hungary, the closest example is the specific system of justice with ancient roots in the Roma community, the institution of the *Romani kris*. The *Romani kris* serves as a ‘dispute resolution’, ‘conflict resolution’, ‘justice’

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1 Sibyls (sybillas) were ancient Greek and Roman oracles who mediated the will of the gods for the future, making known what mortals on earth should do in a controversial situation. The institution of the sibyls operated for many centuries, not to be confused with the Pythias.

2 Most of the written records of royal court judgments are related to our second founding king, Béla IV.

3 The eastern Roman historian Priscos the Rhetorician visited Attila's court in 448-449 and wrote a book on his memories (Kézai, Priscos, 1999).

and 'court' forum among the Olah Gypsies. It functions as a community institution, the decisions made here are binding (Lőrincz & Loss, 2002). *'The justice mechanism is an integral part of the Olah Roma culture. It does not only provide solutions to problems that arise, but also has a major impact on everyday life. The Romani kris is held in high esteem. The decisions they make are automatically accepted and implemented. There is no need for separate executive institutions. The kris operates according to a specific set of rules. Mostly elderly and wise ('highly honoured') people are involved in the decision-making. It does not meet regularly, but is only convened when a problem arises, the Romani kris still exists today and still has a very strong influence. In the case of minor disputes between themselves, the Roma do not rush to the Hungarian court to seek justice, but rather call the elders together to hold a kris and do justice between them. One of the reasons for this is that they make every effort to avoid that even one of their peers is sent to state prison or faces the consequences of a state decision or sanction. Another reason is that litigation is very expensive: one has to take into account the cost of travel, the legal costs established by the court, and especially the amount paid for the assistance of a lawyer'* (Lőrincz & Loss, 2002).

Even in the ancient world, the basis of arbitration was the intervention of person who is above the participant, a superior or a person capable of transmitting directly or indirectly the revelation of the superior. The Sibyllas directly conveyed the unquestionable decision, while the wise men and sorcerers of the tribes, or kings, though divine in origin, had already declared the unquestionable decision by their own wisdom. The parties often did not even understand the exact reasons for the decisions, but this did not prevent them from carrying them out, because they accepted its origin with conviction, as coming from a source above them. Here, then, faith, tribal, or any other form of communal sentiment - in the vast majority of cases - meant an unquestioning commitment to abide by the verdict.

In connection with the mediation of a higher source, the clergy also vindicated the right to universal decision-making and judgment, which for many centuries defined the logic and protocol of the problem-solving process on the European continent. Any cause-and-effect relationship that could not be resolved by the logical system of the Athenian three was explained by divinely ordained, predestined causes. Thus, law, organised along the lines of logic, explained the gaps by the revelation of a higher entity.

In Eastern cultures, the problem and also its remedy appear in a completely different context. In China, the maintenance of harmony can be found in many religious and philosophical traditions. It has influenced architecture, the

spatial placement of objects, clothing, medicine, martial arts, and of course human thinking and consequently behaviour. The Chinese social order was permeated by the norms of 'li' (moral and customary rules of polite behaviour) and 'yang' (flexibility, indulgence) (Bush & Baruch, 2004). This facilitated the prevention and resolution of crisis situations. The Eastern pattern of approach to conflicts and crises is well illustrated by the fact that the Chinese traditionally use the same characters to denote crisis and opportunity (Bush cited in Gyengéné, 2009).

The first written record of mediation in Judeo-Christian culture is found in the Bible, in Genesis. When the Lord plans to destroy the city of Sodom, Abraham begins to plead and bargain (*Bible, Genesis 18*). The point of the bargain is that the whole city is not collectively bad, but that there may be good people in it, perhaps. This teaching is the appearance of generalisation, stereotyping, and prejudice arising from anger, rage, i.e., from excessive emotional saturation, and, in the course of the dialogue, the emergence of a step-by-step rationalisation that goes hand in hand with the elimination of emotions.<sup>4</sup>

The first Hungarian written record of mediators, or more precisely of 'intercessors', is the *Second Book of the Decretals of King St. Stephen*, in which the first paragraph of chapter sixteen<sup>5</sup> deals with voluntary manslaughter<sup>6</sup> (Filei et al., 2003).

An official mediation was valid if the mediator was credible to the parties and also to the rest of the community. Within a country, this person was typically the king or his envoy.

Mediation between states or kingdoms was typically left to the church leadership in Europe. The Pope of the day, or his delegates, acted as mediators. One of the most famous mediation agreements of the Age of Discoveries was reached between the two Iberian states at Tordesillas, Spain, on 7 June 1494. The subject of the proceedings was the division of the territories discovered. It was also significant because it excluded the other states from the discoveries (Gyengéné, 2009).

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4 Abraham stepped forward and said, 'Will you really sweep away the righteous with the wicked? What if there are fifty righteous people in the city? Will you really sweep it away instead of sparing the place for the sake of the fifty righteous people who are in it? You could not possibly do such a thing: to kill the righteous with the wicked, treating the righteous and the wicked alike. You could not possibly do that! (...) Then he said, 'Let my lord not be angry, and I will speak one more time. Suppose ten are found there?' He answered, 'I will not destroy it on account of ten.' (Genesis 18:16-18-18:33)

5 § 1 Of these, fifty shall be given to the king's treasury, the second fifty to the relatives, and ten to the judges and mediators. (arbitris et metiatoribus) And the murderer himself shall fast according to the ordinances of the canons (Filei et al., 2003).

6 If any man, being enraged and puffed up with pride, commits voluntary manslaughter, let him know that he will pay for it a hundred and ten gold coins, as our council has ordered. (Filei et al., 2003).

The first European mediator whose name and portrait have survived was Aloysius Contareno, Ambassador of the Republic of Venice, who participated as a neutral mediator in the 1648 peace treaty of Westphalia, which brought the 30 Years' War to an end, alongside 148 envoys sent by the parties.

Mediation, as part of the enlightened legal system, was not institutionalised until the first half of the 20th century.<sup>7</sup>

According to the surviving contemporary reports, the mediation procedure was used in Europe also in the 1800s. The most talked-about mediation was the mediation between the Spanish Empire and Germany by the Holy See under Pope Leo XII, which focused on the disputed colonial islands (Gyengéné, 2009). International mediation was revived at this time also because the territorial disputes that had developed around the territories acquired during the former colonialism had dragged on for decades without a significant shift. These conflicts often had a negative impact on the European relations of the mother countries.

One of the most famous successful international mediations of the twenty-first century is the resolution of the Israeli-Palestinian conflict over the Bethlehem church in 2002.<sup>8</sup> In the late twentieth and early twenty-first century, mediation, or elements of it, are being used in more and more cases such as the Israeli one, whether it is a hostage-taking operation or an attempt at international peace-building. The most typical example is when a famous politician or former leader acts as a third party. One of the most famous of these cases occurred in 2000, when former US President Bill Clinton mediated between Ehud Barak and Yasser Arafat at Camp David.<sup>9</sup>

## The development of modern mediation

The formalisation of mediation and its incorporation into the legal system clearly stems from the recognition that law cannot fully address all interpersonal conflicts. It cannot formalize interpersonal situations at the level at which problems arise.

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7 It was certainly present at local level and, on an ad hoc basis, at international level. However, it was only adopted as a legitimate part of the legal system in the USA in 1947.

8 'On 29 March 2002, the Israeli army launched Operation Defensive Shield, aimed at dismantling terrorist infrastructure in the Palestinian Autonomous Territory. This was the first time that the Israeli army made a deep and sustained incursion into Palestinian territory, including Bethlehem, where a majority of Palestinian gunmen, some 200 people, fled to the Church of the Nativity on 3 April and barricaded themselves inside the church along with Levi priests and nuns. The Israeli army surrounded the church, but could not launch any armed action, as the building is one of the holiest places in Christianity, where Jesus is traditionally said to have been born. The stand-off lasted for a month and was finally ended by a compromise solution: The Palestinians in the church, whom the Israelis wanted to arrest, went into 'exile' in European countries. The rest of the Palestinians were released by the Israeli army after interrogation' (Gyengéné, 2009).

9 11-25 July 2000. The Israeli-Palestinian summit served as a platform for the Middle East peace process.

On the other hand, both in the United States and in Europe, it has taken more and more time to conclude legal processes that have dragged on for years, which also meant increased costs. Today, the average duration of a litigation in Hungary is four to five years, which is not in the same category as the possible 1–2-month outcome of a mediation.

These difficulties have increased the focus on finding new, alternative options. This is how it came to be inserted, as a possible gateway - as an intermediate platform - between the formalised legal system and the world of interpersonal problems that cannot be understood there.

## The beginning of formalisation

The mediation protocol, which is currently widespread and used, was developed in the United States of America in the last century. Initially, as a movement representing a particular approach to alternative dispute resolution (ADR<sup>10</sup>), and then, in 1947, the *Taft-Hartley*<sup>11</sup> [URL1] Act, named after the congressmen Robert Taft and Fred A. Hartley Jr, was passed, which provided the legal conditions for the creation of institutions such as the Federation Mediation and Conciliation Service, the first publicly funded institution performing also mediation functions in accordance with its profile. These institutions were independent of the government of the day. The main area of their activity is conciliation between employees and employers, but mediation is also included. (The first significant mediation - in modern times - was between the representatives of the Bethlehem Shipyard and the shipyard workers in 1947.)

In the United States of America, the Anglo-Saxon legal system was applied. Compared to the continental legal system: from the point of view of its logic, precedent law always fills in the gaps, ergo, judicial legislation appears. This practice and its process, which is not applied in the continental legal system, is fundamentally determined by a pre-determined system of rules, taking of evidence, system of categories and the related liability. Compared to the Anglo-Saxon legal system, a very active and, compared to the continental one, a more direct and more human communication has developed in the court.<sup>12</sup> This directness has played a significant role in openness to cooperation with alternative dispute

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10 Alternative Dispute Resolution.

11 Taft-Hartley Act was ratified by President Harry S. Truman on 23 June 1947.

12 At the same time, communication is more manipulative, as the need to persuade the judge or, in some cases, the jury, has led to the development of a particular way of presenting the case among legal representatives.

resolution methods, because of the dynamic nature of the process of the Anglo-Saxon legal system applied. Through the closest possible cases that have already happened, the intentional case analysis looks for the most similar case, constantly improving, or if you like, building itself. Even this continuous improvement is not sufficient to formalize in the system of law the possible variants of interpersonal problems. This is how mediation emerged as a possible extra-systemic solution to the shortcomings of the system.

The prolonged litigation process has meant increasing losses and financial burdens for the litigant parties, both directly and indirectly. Another factor contributing to the prolongation of litigation was that the parties wanted to maximise their profits in their proceedings through their legal representatives. The legal practitioners fought in the language of the law and the client, who was the protagonist of the original conflict or problem, was forced into an almost marginal role. Thus, the knowledge of the law and legal history, as well as the degree of preparedness thereon determined the successful outcome of the case, which was less and less congruent with the client's goals.

## **Harvard Cooperative Negotiation Technique**

As organisational and corporate cultures have changed, so have the associated problem-solving protocols. One of them was the arbitration discussed in the previous chapter. However, alongside arbitration, problem solving and dispute resolution within firms have also evolved. Basically, the competitive negotiation technique was present in the organisational cultures. Competitive negotiation technique, as defined by Katalin Pallai, is: *'When the debater listens to the other party, instead of trying to take his point of view, he focuses on how he can refute the other's arguments and defend his own position. Since the debater usually measures success by the extent to which his position has won, his attention is essentially tactical, rather than open and receptive to the other party. This strategy is called position-based competition. The position is the position that the debater or negotiator has established and is fighting for. The subject of competition is to defend and gain greater acceptance of one's own position'* (Pallai, 2010).

The competitive approach did not represent a change of approach compared to social and moral standards. Defending one's position was part of Western culture, whether in everyday life or in court. It was a kind of verbal battle with two outcomes, the loser and the winner. A paradigm shifts from the above is the

cooperative<sup>13</sup> or interest-based negotiation technique. The cooperative negotiation technique differs from the competitive one in that the first step is a mutual understanding of the parties' interests and intentions. This way, before the parties begin to divide up the assets in the hearing, they see a bigger, comprehensive picture which they can expand on the basis of their own skills and knowledge in order to increase the common assets to be divided.

It is important to point out that, compared to a competitive negotiation, here, the parties do not conceal information about each other's intentions or use such information to gain an advantage. On the contrary, the goals and intentions are openly presented in the common arena. As a result, the dynamics of the negotiation change; the knowledge, preparation and knowledge systems of the parties involved are combined in the search for a solution or in the distribution of benefits. In this way, the parties turn towards the common problem to be solved instead of weakening each other. In effect, a change of scene takes place, where instead of attacking and defending the other person, they move into the dimension of a problem-solving task with the other party. This move allows for an increase in the goods to be distributed as a result of the pooling of common resources. At this stage of cooperative negotiation, the parties are already cooperating by accumulating a larger common good.

By revealing one's own interests and goals, the either-or game is eliminated and replaced by the 'fifty-fifty' logical solution. Thus, the first stage predetermines the logical outcome of the rest of the negotiation. It is very important for the parties also at organisational level that the good relationship that has been established is maintained, even in a modified form, or that if the relationship is terminated, this does not constitute an obstacle or have a destructive effect in the future.

The cooperative negotiation technique was first introduced by *Roger Fischer and William Ury* in the book *Getting to Yes*. According to the authors' division, the process consists of four main phases, the first of which is to separate the problem from the individual by identifying interests. In the second phase, the focus is on the realisation of interests and the achievement of goals. The third phase is to identify those opportunities which can be used to increase the common good, the assets to be divided. In the fourth stage, the distribution of the goods is carried out, using objective criteria. It is also important to mention the term *BATNA*<sup>14</sup>, which refers to the best outcome of the negotiation.

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13 'Principled negotiation' in English. However, this term has not spread at all in Hungary. Instead, the term cooperative is used in Hungarian literature.

14 Best Alternative to Negotiated Agreement.



This outcome to be achieved is defined by the parties before the cooperative negotiation and they can represent their interests with this in mind (Fischer & Ury, 1991).

Cooperative negotiation has given a huge boost to the development of mediation processes. Transformative mediation, as we will see later, evolved from this negotiation technique. Its influence spread also to the European continent. It is important to note that the use of facilitative or narrative types of mediation is also present alongside the transformative one (Németh, 2020).

## European realities

After the United States of America, the institutionalised ADR protocols were adopted by the Member States of the United Kingdom, one after the other, as the Anglo-Saxon legal system was applied here too. Once the mediation approach was learned of in Europe, it was adopted in Western European countries within a few decades. As it became more widespread as a problem-solving protocol, the scope of mediation's use broadened and increased. It was not only used to settle disputes of a workplace and disputes of financial nature, but family mediation, community mediation, school peer mediation, health mediation, intercultural mediation also emerged, and it also appeared in criminal proceedings, labelling it as restorative justice (Németh & Szabó, 2021).

Different trends of mediation have become significantly important in different regions, such as labour mediation in the UK, family mediation in Germany, school and peer mediation in the Nordic countries, especially in Sweden, and intercultural mediation mainly in southern countries such as France, Italy and Spain (Németh & Szabó, 2021). These specialisations have come to the fore in each country because of their relevance. In Italy, conflicts have arisen with Albanian and Romanian immigrants, and this is clearly the area where the greatest emphasis has been placed also in relation to alternative dispute resolution. In Hungary, community or settlement mediation is also spreading more and more dynamically across the country, for example, it is used for community discussion of settlement zoning plans (Németh & Szabó, 2021).

## Regulatory situation in Hungary

In the former socialist countries, mediation as an approach emerged after the change of regime and was enshrined in law at the turn of the millennium. In

Hungary, it is *Act LV of 2002 on Mediation* that regulates the legal framework for mediation in civil litigation.

Part IV of Act I of 2012 provides for labour disputes, Act CXVI of 2000 for health disputes, and finally Act XC of 2017. and Act CXXIII of 2006 for criminal matters. The most important of these are the Acts adopted in 2002 and 2006, which provide the most precise guidelines and indications for both mediators and practitioners. The other legal provisions have not been invoked, or have been invoked only very rarely, in the last decade, due to their complementary nature (Filei, et. al., 2003).

The Hungarian legislation is based on the relevant European Union recommendations. The website of the National Association for Mediation (in Hungarian: *Országos Mediációs Egyesület*) ([mediacio.hu](http://mediacio.hu)) contains a collection of these recommendations, listed by name<sup>15</sup> [URL2]:

- Recommendation Rec (2002) 10 of the Committee of Ministers of the Council of Europe to Member States on mediation in civil matters;
- Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe to member states on alternatives to litigation between administrative authorities and private parties;
- Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe to member states on Family Mediation;
- Recommendation No. R (99) 19<sup>16</sup> of the Committee of Ministers of the Council of Europe concerning mediation in penal matters.

In relation to mediation, Article 10 of the EU Framework Decision of 15 March 2001 obliges the Member States to develop the legal and institutional framework for mediation in criminal matters. The Guidelines of the European Commission for the Efficiency of Justice (CEPEJ) for a more effective application of the Council of Europe's directives on penal matters<sup>17</sup>, family law<sup>18</sup> and administrative matters<sup>19</sup> were published on 7 December 2007. These Guidelines help individual Member States in the initial steps. They put forward proposals

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15 <http://www.mediacio.hu/nemzetkozi-jogszabalyok/>

16 Recommendation No. R (99)19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.

17 European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.

18 European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters.

19 European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters.

as to which main points, which elements of the mediation process should be emphasised and how for each type of mediation.

Currently, in Hungary, the Ministry of Justice is responsible for both the issuing of official mediator licences and the certification of mediator training centres.

The Hungarian legislation very quickly followed the European one, which was received with great expectations by many Hungarian NGOs and other organisations promoting mediation. However, these laws came into force automatically, from above, and not through their own evolutionary path. The constraint was due to the fact that Hungary joined the European Union in 2004, thus it has obligations to introduce common legislation.

However, this unnatural, top-down – imposed – legislation is very difficult to implement. In practice, this means that neither judges, nor prosecutors, nor even attorneys-at-law are able to understand the institution of mediation and its place in conflict resolution and in the law. There is considerable aversion to mediation among legal professionals. Those who support it seek to integrate it into the system of legal logic, as a complement to law practise. Time is needed for the representatives of NGOs and associations working in the field of mediation and ADR and their results to become sufficiently well known in the country.

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## Online links in this article

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- URL1: *Taft-Hartley Act by Adam Hayes*. <https://www.investopedia.com/terms/t/tafthartleyact.asp>
- URL2: *Országos Mediációs Egyesület: Nemzetközi jogszabályok, dokumentumok*. <http://www.mediacio.hu/nemzetkozi-jogszabalyok/>

## Laws and Regulations

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- Recommendation No. R (99)19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.
- European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.
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