Should Mediation Be Regulated?

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Introduction

With expeditious rise of mediation as an alternative dispute resolution (ADR), serious debate has emerged as to whether mediation should be regulated and if so, to what extent? The evolution of mediation from an informal and voluntary dispute-resolving tool into an institutionalized mode of conflict resolution requires a close analysis into the merits and demerits of its regulation. Legal systems across the globe have varied and at times, conflicting regulatory approaches regarding mediation, with models ranging from comprehensive statutory schemes to restrained, market-driven frameworks. This essay delves into various jurisdictions' regulatory approaches and conducts a comparative analysis to evaluate the case for and against regulation and proposes a balanced, context-sensitive approach.

I. Definition and Core Characteristics of Mediation

Mediation is characterized by four common pillars across most jurisdictions: (1) a dispute; (2) voluntary participation of parties; (3) a neutral intermediary without adjudicatory powers; and (4) a resolution responsibility taken by the parties themselves.[1] The European Mediation Directive incorporates this in defining mediation as a structured process whereby two or more parties attempt, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.[2]

A paramount hallmark of mediation is the absence of adjudicatory authority. Unlike arbitration or judicial proceedings, mediators do not issue decisions but facilitate communication and negotiation. The free will of the parties underpins the legitimacy of any resolution achieved.[3] Although all legal definitions do not include confidentiality and neutrality but they are considered important operational principles.[4]

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[1] Hopt, K. J., & Steffek, F. (Eds.). (2013). *Mediation: Principles and regulation in comparative perspective* (p. 12). Oxford University Press.

[2] European Parliament and Council. (2008). *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, Article 3. Official Journal of the European Union, L 136, 3–8.

[3] National Conference of Commissioners on Uniform State Laws. (2003). *Uniform Mediation Act § 2(1)*. https://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf; see also *4 Am. Jur. 2d* Alternative Dispute Resolution § 6 (2007) (citing Grenig & Davies, *Alternative Dispute Resolution* § 2:16).

[4] Deason, E. E. (2001). The quest for uniformity in mediation confidentiality: Foolish consistency or crucial predictability? *Marquette Law Review, 85*(1), 79–82; Freedman, L. R., & Prigoff, M. L. (1986). Confidentiality in mediation: The need for protection. *Ohio State Journal on Dispute Resolution, 2*(1), 37–38.

II. The Rationale for Regulating Mediation

1. Ensuring Quality and Professional Standards

In jurisdictions where mediation is not regulated, concerns often arise regarding the quality and ethical conduct of mediators. Austria, for instance, adopted an extensive regulatory model through the Zivilrechts-Mediations-Gesetz and the Zivilrechts-Mediations-Ausbildungsverordnung, setting comprehensive rules on training, registration, and conduct.[5] Such legislation enhances public confidence in mediation particularly when sensitive and enforceability matters are under dispute.

Compared to Austria's extensive regulation, the European Mediation Directive is limited in scope, but it still requires member states to ensure enforceability of agreements and maintain strict confidentiality, thereby implementing basic standards.[6] Member States like Germany and France have transcended the Directive by implementing broader frameworks, incorporating training, accreditation, and ethical codes into their respective state laws.[7] Outside Europe, Australia has effective mediation regulation system in the form of National Mediator Accreditation System (NMAS) which sets standards for training, assessment and continuous professional development of mediators. This system is voluntary in nature but still has wide adoption.[8]

2. Facilitating Access to Justice

The core reasoning behind implementation of ADR mechanisms like mediation is not merely procedural efficiency but strengthening access to justice. Mediation regulation by states can institutionalize it, making it a viable option alongside litigation. The European Mediation Directive endeavors to create a balance between mediation and court proceedings and improve judicial cooperation across Member States. It

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[5] Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz — ZivMediatG) sowie über Änderungen des Ehegesetzes, der Zivilprozessordnung, der Strafprozessordnung, des Gerichtsgebührengesetzes und des Kindschaftsrechts-Änderungsgesetzes 2001, **BGBl. I Nr. 29/2003**, 123–133; Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil- und Handelssachen in der Europäischen Union (EU-Mediations-Gesetz — EU-MediatG), **BGBl. I Nr. 21/2001**.

[6] De Palo, G. (2018). *A ten-year-long "EU mediation paradox" when an EU directive needs to be more… directive* (European Parliament Briefing, 1(6)). p. 2. European Parliament.

[7] Bonafé-Schmitt, J. P. (2010). *Global trends in mediation training and accreditation—the case of France*. *ADR Bulletin*, *11*(3), 46–50.; Carle, D. H. (2015). *A comparative analysis of mediation by examination and critique of the theory and practice thereof in Germany, Scotland and Switzerland* (Doctoral dissertation, University of Glasgow).

[8] Alexander, N. (2010). Four mediation stories from across the globe. *Rabel Journal of Comparative and International Private Law, 74*(4), 732–758.

offers a harmonized yet flexible model and considers the need for structural integration of mediation without compromising national autonomy.[9]

3. **Institutional Integration and Legal Certainty**

Comprehensive regulation aids the integration of mediation within existing legal systems. Jurisdictions such as Japan and France have enacted procedural rules within their civil codes and labour laws, thus ensuring consistency and predictability.[10] Regulation also resolves the confluence between mediation and litigation or arbitration, including issues of admissibility, enforceability, and judicial referral.[11]

4. **Promoting Usage through Incentives**

Certain jurisdictions utilize legal and financial incentives to encourage mediation. The province of Ontario, Canada mandates mediation in particular civil matters. This mandatory mediation has resulted in reduced caseloads and timely settlements.[12] German law requires parties to attest before the court in their statement of claim whether mediation was attempted and if it was not, the reason why it was not attempted, thus promoting awareness and strengthening consideration of ADR.[13] Such mechanisms, supported by legislation, create a conducive environment for mediation.

III. The Case Against Regulation

1. **Preservation of Flexibility and Innovation**

Procedural informality is one of the most prominent hallmark of mediation. Overly prescriptive regulation may stifle the creativity and adaptability that characterize successful mediations.[14] The Netherlands and England utilize restrained regulatory models wherein mediation is orinted by soft law and professional

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[9] De Palo, G., & Trevor, M. B. (2012). Introduction. In G. De Palo & M. B. Trevor (Eds.), *EU mediation law and practice* (p. 10). Oxford University Press.
[10] Takatori, Y., & Claxton, J. (2023). Mediation in Japan. *Revista Brasileira de Alternative Dispute Resolution–Brazilian Journal of Alternative Dispute Resolution (RBADR)*, *5*(9), 93–101.
[11] Hopt, K. J., & Steffek, F. (Eds.). (2013). *Mediation: Principles and regulation in comparative perspective*. Oxford University Press.
[12] Richler, J. (2011). *Court-based mediation in Canada*. *Judges Journal*, 50, 14.
[13] Trenczek, T., & Loode, S. (2012). Mediation «made in Germany» – a quality product. *Australasian Dispute Resolution Journal*, *23*(2), 61–70, p. 69.
[14] Nussbaum, L. (2016). *Mediation as regulation: Expanding state governance over private disputes*. Nevada Law Journal, 16(1), 1–56, p.9.

self-regulation.[15] These jurisdictions stress voluntary codes, market incentives, and court encouragement instead of rigid statutory directives.

2. **Autonomy and Voluntariness of Parties**

Party autonomy is an intrinsic principle of mediation. Mandatory regulation, especially compulsory participation, risks undermining this autonomy.[16] The oft-cited maxim "You can lead a horse to water, but you cannot make it drink," captures the need of party autonomy in mediation cases, as forcing parties to mediate only results in formality without substance. The success of mediation lies in the willingness of parties to engage in a genuine and sincere discussion to reach an amicable settlement.

3. **Self-Regulation by Professional Bodies**

In established mediation markets, private institutions can effectively regulate and maintain quality through accreditation, standards, and ethics codes. England's Civil Mediation Council is an excellent example of a state-supported but independently run organization that assigns a quality mark and ensures consistency among mediation providers.[17] Australia has an impressive mediation regulation system in the form of National Mediator Accreditation Council (NMAC) which sets standards for training, assessment and continuous professional development of mediators. This system is voluntary in nature but still has wide adoption.[18] Such self-regulatory frameworks allow for monitoring of mediations and mediators while circumventing bureaucratic rigidity.

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[15] Schonewille, M. A., & Schonewille, F. (Eds.). (2014). *The variegated landscape of mediation: A comparative study of mediation regulation and practices in Europe and the world.* The Hague, Netherlands: Eleven International Publishing, p. 385-386.
[16] Gren, N. M. (2016). The principles of mediation. *Journal of European Law*, *75*.
[17] Bogda, M. (2024). *Mandatory Mediation in England and Wales: A Paradigm Shift in Dispute Resolution*. J. Disp. Resol., 151.
[18] Alexander, N. (2010). Four mediation stories from across the globe. *Rabel Journal of Comparative and International Private Law, 74*(4), 732–758.

IV. Comparative Models of Regulation

Regulatory approaches to mediation can be chiefly classified into two categories: extensive and restrained.[19]

- **Extensive Regulation:** Countries like Austria and France have comprehensive legislation in place, covering training, registration, ethical conduct, and procedural integration. Japan's "Act on the Promotion of the Use of Alternative Dispute Resolution" provides a detailed legislative framework for private institutions, recognizing various models while placing a baseline criteria.[20]
- **Restrained Regulation:** The Netherlands, England, Australia and Switzerland favor minimal statutory control. Instead, mediation is regulated through self-regulatory bodies, private agreements, codes of conduct, and market forces.[21] Legal intervention is largely limited to cost rules or court referrals.

Both models are reflection of valid policy choices driven by cultural, legal, and institutional realities. The Austrian model ensures uniformity and public oversight, while the Dutch model preserves market dynamism and flexibility.

V. Mandatory vs. Voluntary Mediation

The question of mandatory mediation has given rise to a heated debate among experts. Some argue that it infringes on party autonomy while others see it as a necessary step to eliminate information asymmetries and litigation inertia.[22] Italy mandates mediation for specific disputes such as medical

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[19] Klaus, J. H. O., & Steffek, F. (Eds.). (2013). *Mediation: Principles and regulation in comparative perspective* (p. 17). Oxford University Press.

[20] Government of Japan. (2004). *Act on the Promotion of the Use of Alternative Dispute Resolution (Saiban-gai funsō kaiketsu tetsuzuki no riyō no sokushin ni kansuru hōritsu), Law No. 151 of 2004, as amended by Law No. 53 of 2011*.

[21] Alexander, N. (2010). Four mediation stories from across the globe. *Rabel Journal of Comparative and International Private Law, 74*(4), 732–758.

[22] Dewdney, M. (2009). The partial loss of voluntariness and confidentiality in mediation. *Australasian Dispute Resolution Journal, 20*, 17–18; Nolan-Haley, J. (2009). Mediation exceptionality. *Fordham Law Review, 78*, 1247–1275.

malpractice and land use to reduce court backlog.[23] Germany allows Federal states to impose mandatory ADR in limited areas.[24]

A balanced approach is found in Quebec where parties in certain family disputes must attend an informational session about mediation before proceeding to court. This session guides the parties in dispute regarding cost and efficiency of opting for mediation before litigation.[25] This ensures voluntariness while promoting awareness.

VI. A Balanced Approach

The diversity of legal systems and mediation practices requires a harmonized but a flexible approach. Regulation should focus on:

- Guaranteeing minimum standards of training, ethics and accreditation of mediators and binding them to maintain confidentiality of mediation proceedings.
- Providing legal recognition and enforceability of mediated settlements.
- Allowing for private regulation and professional autonomy where it is necessary to protect the interest of all parties involved.
- Promoting judicial integration of mediation through clear procedural rules and incentives.

The European Mediation Directive outlines a model of limited but strategic regulation. It sets a framework without imposing a rigid and exhaustive regime which allows Member States to adapt provisions in line with their legal and cultural norms. Comparative experiences from various jurisdictions accentuate that both legislative clarity and procedural flexibility are indispensable for building a robust and efficient mediation system.

Conclusion

Regulation of mediation is both necessary and complex. Unregulated mediation risks inconsistency and reduced public confidence. On the other hand, overregulation may compromise the very qualities that

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[23] Legislative Decree No. 28/2010 on Mediation Aimed at Conciliation of Civil and Commercial Disputes (Italy).

[24] Alexander, N. M., Gottwald, W., & Trenczek, T. (2003). Ch. 9. Mediation in Germany: The long and winding road. In G. Kaufmann-Kohler & M. Wirth (Eds.), *Global trends in mediation*. Kluwer Law International.

[25] Guillemard, S. (n.d.). *Les diverses facettes de la médiation au Québec : Présent et avenir*. In C. Esplugues & L. Marquis (Eds.), *New developments in civil and commercial mediation: Global comparative perspectives* (pp. 557–...). Springer.

make mediation effective such as party autonomy, neutrality and confidentiality. A context-sensitive, hybrid model that harmonizes minimum legal standards with latitude for private initiative appears to offer the most promising way forward. Jurisdictions must navigate judiciously between the poles of structure and spontaneity to ensure that mediation remains autonomous, credible and constructive.

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1. De Palo, G., & Trevor, M. B. (2012). *EU mediation law and practice* (Introduction, p. 10). Oxford University Press.
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3. Hopt, K. J., & Steffek, F. (Eds.). (2013). *Mediation: Principles and regulation in comparative perspective* (pp. 12, 17, 21). Oxford University Press.
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14. National Conference of Commissioners on Uniform State Laws. (2003). *Uniform Mediation Act* § 2(1). PDF
15. Deason, E. E. (2001). The quest for uniformity in mediation confidentiality: Foolish consistency or crucial predictability? *Marquette Law Review*, 85(1), 79–82.
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17. Gren, N. M. (2016). The principles of mediation. *Journal of European Law*, 75.
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19. Kaufmann-Kohler, G., & Wirth, M. (Eds.). (2003). Ch. 9. Mediation in Germany: The long and winding road. In *Global trends in mediation*. Kluwer Law International.
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