

ACCESS TO JUSTICE AND THE RISE OF MANDATORY MEDIATION: A NEW PARADIGM OR A FALSE EQUIVALENCE

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Abstract

In recent years, mandatory mediation has become a famous tool in civil justice reform, inspired by several clear advantages. However, as mediation moves from being an optional process to a required step, important questions emerge regarding the nature and extent of access to justice in modern legal systems.¹ In this paper, the growing matter of mandatory mediation through the lens of access to justice was discussed, questioning whether this change represents a real transformation in how legal systems deliver justice or it simply reduces the standards of access in pursuit of efficiency and effectiveness. Through a comparative approach in selected jurisdictions, the paper examined how different legal systems apply mediation in formal legal procedures, as a requirement for court access. It also discussed other contemporary issues. Additionally, the paper explores relevant case law within international human rights frameworks, critiques from access-to-justice research, and the ethical concerns around the role of mediators when mediation is

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¹ S Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice' (2015) 15(2) *African Human Rights Law Journal* 355–377.

compulsory. The paper further argued that while mediation can enhance access to justice when appropriately structured, but mandatory mediation must as a matter of compulsion, include strong procedural protections, clear options for opting out, and respect for the right to a court proceeding, or it risks affecting the justice it aims to support.

Keywords: Access to justice, mandatory mediation,

1.0 INTRODUCTION

Access to justice has always been a key part of democratic legal systems. Traditionally, it refers to the right of individuals to bring forth their cases before an independent court. Access to justice is more than just following legal procedures; it also signifies that people can understand their legal rights and actually apply them in real situations. However, in recent years, the idea of access to justice has changed a lot. With increasing monetary costs of legal disputes, longer court delays, and ongoing inactivity in the justice system, many governments and courts have turned to alternative dispute resolution, especially mediation, to help make justice more accessible and available.²

What began as a voluntary and careful process initiated by political parties is now becoming a required step in many regions. Those in favor believe that mandatory mediation helps lessen the number of cases in courts, lowers legal expenses, and allows involved parties to

² Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27(2) *Buffalo Law Review* 181.

reach agreements that satisfy both sides.³ In the European Union, Australia, and various common law and civil law systems, mediation has been a major reform which is aimed at improving access to justice. However, this change raises important concerns, does mandatory mediation truly access to justice, or is it merely a practical or symbolic alternative?

In this work, we have approached issues by looking into whether the increasing reliance on mandatory mediation represents a new approach to justice that emphasizes settlement, speed, and informality, or if it mistakenly equates consensual resolution with the right to have a court decide the matter. The analysis draws on examples from the EU Mediation Directive and Italian law.⁴ In selected common law jurisdictions, it evaluates whether such schemes expand or restrict access to effective legal remedies.⁵

It also applies the decision from the European Court of Human Rights and the Court of Justice of the EU, especially regarding how mandatory mediation work with the right to a fair hearing under Article 6 of the ECHR.⁶ Ultimately, the argument suggests that although mediation plays an important role in today's justice system, viewing it as the same as access to justice could weaken the concept of access to justice. Access to justice should still be based on legal rights,

³ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 74–78.

⁴ 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 [2008] OJ L 136/3.

⁵ Legislative Decree No 28/2010 (Italy).

⁶European Convention on Human Rights art 6.

fair procedures, and the ability to choose how to settle disagreements.⁷

2. CONCEPTUAL FOUNDATIONS: MEDIATION, JUSTICE, AND THE EVOLVING MEANING OF ACCESS

2.1. Mediation and Its Core Principles

Mediation is a form of alternative dispute resolution (ADR) in which a neutral third party, known as the mediator, assists disputing parties in talking to each other and working out a solution that both can agree on. In contrast to processes like adjudication or arbitration, the mediator does not make a ruling or verdict but instead supports the parties in developing their own resolution. The rationale behind mediation is that it is voluntary, confidential, fair, and allows the parties to maintain control over the outcome. These principles are what make mediation different from traditional court proceedings and are important for its credibility.

International agreements such as the UNCITRAL Model Law on International Commercial Mediation and the Singapore Convention on Mediation mentioned the voluntary, adaptable, and effective nature of mediation in handling commercial disagreements between parties from different countries.⁸ Mediation is often viewed as a less adversarial,

⁷ *Menini and Rampanelli v Banco Popolare Società Cooperativa* (C-75/16) EU:C:2017: 457.

⁸ UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018); United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018, entered into force 12 September 2020) UN

cost-effective alternative to litigation, especially in places grappling with court backlogs and procedural delays.

However, mediation is not uniform or general. It varies along a spectrum from facilitative models prioritizing party empowerment to more evaluative ones where mediators provide substantive input or suggestions. These differences influence how mediation aligns with formal justice standards and its compatibility with broader ideas of access to justice.

2.2. Reframing Access to Justice: From Courts to ADR

Traditionally, access to justice has meant access to courts the right to bring legal claims before an impartial judge and have them adjudicated fairly and openly. This model is established in various international legal documents, including Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which affirm the right to a fair hearing before a legally constituted tribunal.⁹

However, from the late 20th century onward, scholars and policymakers began to critique this court-centric model as too narrow and exclusionary. Legal access in theory did not always mean or equate to justice in practice, especially for economically disadvantaged individuals, those without representation, or those facing systemic discrimination. Scholars like Cappelletti and Garth argued that access

Doc A/RES/73/198 ('Singapore Convention').

⁹ European Convention on Human Rights art 6; International Covenant on Civil and Political Rights art 14.

to justice should develop through three stages:

- i. Access to legal representation and courts
- ii. Access to effective procedures and outcomes
- iii. Access to a broader set of fairs, efficient dispute resolution mechanisms that meet user needs¹⁰

In this third phase, ADR, especially mediation, has become important to delivering justice. Instead of being seen as an inferior substitute, it is increasingly viewed as a legitimate and often preferable path to resolution, particularly where relationships are ongoing or adversarial processes would be unproductive.

2.3. ADR as a Tool of Justice or Its Erosion?

The growth of ADR has shifted how justice is understood. Mediation is praised for its procedural informality, emotional release, and potential for restorative outcomes that are often absent in litigation. In areas like family law, employment disputes, and some commercial contexts, mediation is recognized as an effective and efficient process that promotes party involvement and dignity.¹¹

However, this redefinition is not without negativities. Detractors warn that the rise of ADR, especially when incentivized or mandated by the state, may weaken formal legal protections, especially for vulnerable populations. The praised informality of mediation can disguise power

¹⁰ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27(2) *Buffalo Law Review* 181.

¹¹ Lisa B Bingham, 'Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution' (2000) 2000(1) *Journal of Dispute Resolution* 101.

imbalances, and the absence of a binding legal decision may deprive parties of the substantive justice they might obtain in court. Hazel Genn famously warned about the “*vanishing trial*” and raised a fundamental question: “*What is justice if no judgment is ever delivered?*”¹²

Moreover, as mediation becomes integrated into formal court processes, the distinction between choice and compulsion becomes increasingly unclear.

2.4 The Paradox of Mandatory Mediation and Access

Mandatory mediation introduces a paradox. It seems to encourage access by providing alternatives, but it can also delay or complicate access to the courts. Supporters say it promotes justice by directing minor disputes away from overcrowded courts, cuts costs, and boosts satisfaction among parties. However, critics argue that this reasoning wrongly links efficiency to justice. It can push parties into unfair settlements, especially when mediation is a requirement for going to court.

In many regions, not participating in mediation may lead to penalties like dismissed cases or costs imposed on the losing party.¹³ In these systems, access to justice risks becoming a bureaucratic hurdle, forcing individuals through a process they may not understand or want,

¹² *ibid.*

¹³ Civil Procedure Rules 1998 (UK), Practice Direction on Pre-Action Conduct and Protocols; Law No 6325 on Mediation in Civil Disputes (Turkey); Mediation Act 2023 (India).

simply to meet procedural requirements.

As this paper later discusses, mandatory mediation schemes differ. Some allow parties to attend without mandating a settlement, while others require good-faith engagement or specific outcomes. All of these schemes need careful examination and scrutiny to see if they protect the right to court access, uphold fairness, and ensure true access.

2.5 Toward a User-Centered Model of Justice

Recent discussions about access to justice increasingly view it not just as an institutional goal, but as part of the user experience. They ask if the legal system is accessible, understandable, and easy to navigate for the people it serves. In this framework, mediation can improve access, but only if it:

- i. Preserves party choice and the right to reject a settlement
- ii. Offers protections against coercion and inequality
- iii. Provides access to legal information or representation when needed
- iv. Works within a system that keeps open the option to go to court

In this broader view, access to justice is not the same as litigation, and mediation isn't necessarily unjust. However, mandatory mediation without proper protections risks turning access to justice into a simple procedural formality instead of a real chance to assert and enforce rights.

3.0 THE POLICY CASE FOR MANDATORY MEDIATION

To address ongoing issues in civil justice systems, like backlogged courts, high costs, and delays, many regions have applied mandatory mediation as a reform aimed at improving access to justice. The rationale behind these changes is based on public policy goals: to encourage early settlements, lower judicial workloads, and boost overall system efficiency. Yet, making mediation a required step marks a clear shift from its usual voluntary nature, raising key questions about how to balance efficiency with justice.

3.2. Efficiency and Cost Reduction

Mandatory mediation schemes are often defended as ways to relieve pressure on overloaded courts. Studies show that requiring parties to try mediation can lead to quicker resolutions and considerable cost savings for both courts and litigants.¹⁴ For example, the EU Mediation Directive (2008/52/EC) allows member states to promote mediation but expressly and explicitly avoids making it mandatory before litigation. Nonetheless, several EU countries have enacted laws requiring mediation attempts for certain types of disputes. Italy's Legislative Decree No. 28/2010 initially mandated mediation for many civil and commercial cases.¹⁵

The experience in Italy is telling. The reform aimed at helping to lessen the judicial load by requiring parties to mediate before court

¹⁴ Julia Hörnle, 'Mandatory Mediation: Balancing Efficiency and Justice' (2012) 58 *American Journal of Comparative Law* 463.

¹⁵ 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 [2008] OJ L 136/3; Legislative Decree No 28/2010 (Italy).

proceedings. However, the constitutional court later limited the reach of mandatory mediation, highlighting the need to protect the right to access courts and ensure that mediation remains voluntary.¹⁶ This shows the tension between gaining efficiency and safeguarding fundamental procedural rights.

3.3. Accessibility and Informality

Supporters claim that mandatory mediation increases and encourages accessibility by creating a less formal and intimidating setting for resolving disputes and disagreement. Mediation sessions typically take little time compare to court hearings, involve less conflict, and allow for flexible solutions that meet the parties' needs. This is crucial for those who find traditional litigation expensive, costly and difficult to access, such as small businesses or individuals without legal help.¹⁷

In Australia, court-connected mediation programs are well integrated into civil procedure rules. The Civil Procedure Act 2010 (NSW) encourages courts to refer disputes to mediation, sometimes making it a required step before trial.¹⁸ Research suggests that this integration has reduced delays and increased settlement rates, leading to perceptions of better access to justice.

3.4. Judicial Control and Party Empowerment

¹⁶ Corte Costituzionale [Constitutional Court of Italy], Judgment No 272/2015 (18 December 2015).

¹⁷ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, 2000).

¹⁸ Civil Procedure Act 2010 (NSW), ss 26–27.

Although mediation is usually voluntary, mandatory schemes often include judicial oversight to ensure that mediation attempts are serious and productive. Courts may impose penalties on parties that unreasonably refuse to participate, which encourages cooperation.¹⁹ This judicial control seeks to balance compulsion with the principle of party freedom, an essential aspect of mediation ethics.

However, this raises questions about whether mandatory mediation truly empowers parties or forces settlements. Critics argue that requiring participation undermines mediation's voluntary nature and may pressure weaker parties into unfair agreements. This concern appears in academic discussions and some court rulings, including the European Court of Human Rights' view that voluntariness is key to procedural fairness under Article 6 of the ECHR.²⁰

A significant case on the link between mandatory mediation and access to courts is the CJEU ruling in *Menini and Rampanelli v Banco Popolare*.²¹ The court ruled that mandatory mediation, when a requirement for litigation does not breach the right to access courts under Article 47 of the EU Charter of Fundamental Rights. However, this holds true only if parties can still take their cases to court if mediation fails and if mediation sessions are not excessively demanding.

Similarly, the European Court of Human Rights (ECtHR) in *Vasilescu*

¹⁹ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 100–103.

²⁰ European Convention on Human Rights art 6; Andrea Schneider, 'Voluntariness and Mandatory Mediation: The Ethical Quandary' (2015) 21 *Harvard Negotiation Law Review* 65.

²¹ *Vasilescu v Romania* App no 49755/99 (ECtHR, 6 November 2001).

v Romania emphasized that mandatory ADR should not deprive parties of their right to a fair hearing or create unreasonable procedural hurdles.²² These rulings highlight that while mandatory mediation can coexist with access to justice, it needs safeguards to ensure it is a real option and not an insurmountable barrier.

3.5 Recent Global Moves Toward Mandatory Mediation

In recent years, several regions have enacted legislative and judicial changes that indicate a trend toward mandatory mediation, often as a response to overloaded courts, cost barriers, and delays in the legal process. These changes differ widely in scope and enforcement, but they show a movement toward more firmly embedding mediation within civil justice systems.

One key development occurred in South Africa, where in April 2025 the Gauteng Division of the High Court issued a directive requiring that all civil cases undergo mediation before a hearing date can be set. This directive, issued by Judge President Dunstan Mlambo, aims to ease chronic court congestion and improve access to justice. While not set by national law, it is based on judicial powers under the Superior Courts Act 10 of 2013 and section 173 of the South African Constitution, which allows superior courts to manage their own procedures for justice.²³

²² *Menini and Rampanelli v Banco Popolare Società Cooperativa* (C-75/16) EU:C:2017:457.

²³ Directive by Judge President Dunstan Mlambo, Gauteng Division of the High Court (South Africa), April 2025; Superior Courts Act 10 of 2013 s 8; Constitution of the Republic of South Africa 1996 s 173. See also Centre for Effective Dispute

In Turkey, mandatory mediation has been more fully worked on through statutory changes. Since 2018, labor disputes must first go through mediation before any court action can start. This requirement expanded in 2019 to cover most commercial disputes and, as of 2020, consumer disputes under certain monetary limits. Under Law No. 6325 on Mediation in Civil Disputes, lawsuits filed without first pursuing mediation can be dismissed as procedurally invalid. The Turkish approach demonstrates a very comprehensive form of mandatory mediation, making participation necessary for court access.²⁴

The other jurisdictions have improved their legal systems with a more careful method of operation. The Mediation Act of 2023 which India had been waiting for because it would create complete regulations that govern both voluntary mediation and court-ordered mediation. The original draft required all matters to undergo mediation before starting any legal proceedings but this requirement was removed after the public and legal community expressed their disapproval. The Act's final version maintains voluntary participation rights for individuals yet it empowers courts and tribunals to send cases for mediation through established procedures that include time limits and protection of confidential information.²⁵ The change shows that legislators at this

Resolution (CEDR), 'Mandatory Mediation Comes to South Africa' (2025).

²⁴ Law No 6325 on Mediation in Civil Disputes (Turkey); Civil Procedure Code of Turkey arts 18–21; Ayşe Esra Akgemci, 'Mandatory Mediation: An Obstacle to Access to Justice?' CEE Legal Matters (2021)

²⁵ Mediation Act 2023 (India) s 5; 'Will the Mediation Act 2023 Change the Way Parties Resolve Disputes?' The Hindu Business Line (6 September 2023).

time of writing still oppose making mediation into an obligation because they want to protect people who require access to justice and fair legal processes.

Bangladesh operates an intermediate legal system which combines elements from different legal systems. The 2025 Legal Aid Act amendments require mediation for certain disputes which include divorce cases and maintenance cases and dowry disputes and particular civil claims. The law allows parties to approach the court after unsuccessful mediation attempts which shows a public interest in quick conflict resolution yet it also respects individuals' constitutional rights to legal judgment. The Legal Aid Amendment Act 2025 in Bangladesh establishes mediation as the required process for specific disputes which include divorce cases and maintenance cases and dowry disputes and particular civil claims.²⁶

The legal framework in England and Wales now requires mandatory mediation for all small claims cases which constitutes the most important development in common law systems. The Civil Procedure Rules (CPR) reforms which begin on October 2024 force all claims which total less than £10,000 to use the HMCTS Small Claims Mediation Service. The parties must attend the proceeding although they do not have to reach a settlement, and the court will impose penalties on parties who fail to appear. The model allows parties to choose their outcomes, but it requires them to complete mediation

²⁶ Legal Aid (Amendment) Act 2025 (Bangladesh); 'Path to Justice or Crisis?' New Age Bangladesh (July 2025).

before they can proceed with their court case.²⁷

Mandatory mediation has changed into a standard practice because it now exists as one part of a global trend which establishes hybrid systems to provide both adjudication and consensual dispute resolution. The mandatory systems face challenges and hindrances because they permit forceful behavior while creating situations that lead to unjust outcomes and place ethical duties on mediators who work in these environments.

4.0 A FALSE EQUIVALENCE? JUSTICE vs SETTLEMENT

Mandatory mediation allows faster resolutions for parties, but it introduces deep problems about what justice actually means. Does resolving a dispute through settlement necessarily equate to achieving justice? The process of mandatory mediation creates a situation where justice becomes a mere procedure because it focuses on reaching a settlement instead of protecting legal rights and due process rights.

4.1. The Distinction Between Mediation and Adjudication

Mediation essentially works as a voluntary procedure and pattern which assists two parties reach their negotiation objectives. The resolution process in mediation enables parties to reach outcomes through their own voluntary decisions while litigation results in mandatory decisions which a neutral judge makes. The core distinction

²⁷ Civil Procedure Rules 1998 (UK) (as amended in 2024); Practice Direction on ADR and Small Claims Mediation; ‘Mandatory Mediation: The Changing Landscape of ADR in England and Wales’ law Solicitors (2024).

between settlement and adjudicated justice exists because adjudicated justice requires an unbiased judicial body to determine case outcomes according to established legal principles.²⁸

Mediation offers less rigid and flexible solutions which help parties maintain their relationships, according to people who support its consensual process. The informal interest-based mediation process, according to critics, fails to achieve the legal protections which formal adjudication systems offers. Mediation results produce no legal precedents because they do not establish public rights and their details remain protected from public view.²⁹

4.3. Voluntariness as an Ethical Cornerstone

Mediation needs parties to participate because they want to participate and they should be able to choose whether to accept or reject their proposed settlements. The Model Standards of Conduct for Mediators and the UNCITRAL Model Law on International Commercial Conciliation both demonstrate this principle through their professional mediation standards.³⁰

The definition of mandatory mediation requires it to break the process

²⁸ Carrie Menkel-Meadow, 'Mediation: Theory, Policy and Practice' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass 2005) 347.

²⁹ Judith Resnik, 'Fairness in Numbers: A Comment on Access to Justice as a Goal of Civil Justice Reform' (2013) 67 *Washington and Lee Law Review* 927.

³⁰ European Commission, *European Code of Conduct for Mediators* (2004); American Bar Association, *Model Standards of Conduct for Mediators* (2005) Standard I.

of voluntary participation by forcing parties to join. Parties face mandatory participation requirements because of the threat of procedural penalties and potential cost-related judicial decisions that could end in negative consequences for them. The pressure that exists between parties creates situations which force less knowledgeable and economically weak individuals to make deals and contract which they would normally refuse. The transition from encouragement to coercion creates potential problems which affect both informed consent and equitable treatment of people.³¹

4.4. Power Imbalances and Vulnerability

Mandatory mediation creates power imbalances which already in existence between the involved parties. The stronger party in consumer and employment disputes uses the mediation process which operates outside of formal judicial proceedings to control their weaker opponent through confidential mediation. The absence of judicial protections creates a situation in which mediation serves as a platform for unequal negotiations instead of achieving fair solutions.³²

The problem becomes more serious because legal representation remains restricted while parties do not understand their rights. Mediation maintains its secretive and private atmosphere which gives room for unfair activities to escape examination whereas court trials

³¹ Andrea Kupfer Schneider, 'Mediation Ethics in Mandatory Settings: What's a Mediator to Do?' (2015) 21 Harvard Negotiation Law Review 1.

³² Emily Doskow, 'Power Imbalances in Mediation' (2010) 36 Fordham Urban Law Journal 543.

remain open to public view and permit appeals.³³

4.5. Judicial and Academic Critiques

The practice of mandatory mediation should not be replaced completely by adjudication according to judicial and academic objections. Professor Judith Resnik has warned that the efficiency-driven reforms will create a justice system which prioritizes speed and volume at the cost of fair legal outcomes.³⁴ Judging from her research, Professor Carrie Menkel-Meadow shows that people must assess every situation before choosing mediation as their best solution because they need to maintain access to court systems.³⁵

Judicial decisions further underline these problems. The European Court of Human Rights confirmed through its ruling in *Vasilescu v Romania* that all procedural reforms which include ADR must protect the right to a fair hearing. The court established that parties in mandatory mediation programs must have a clear and an unhindered path to judicial remedies which they can access without facing unnecessary obstacles.³⁶

4.6. Balancing Settlement and Justice

Mandatory mediation creates an untrue and false equivalence between settlement and justice because it lacks proper safeguarding procedures.

³³ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 88.

³⁴ Judith Resnik, 'Fairness in Numbers: A Comment on Access to Justice as a Goal of Civil Justice Reform' (2013) 67 *Washington and Lee Law Review* 927.

³⁵ Carrie Menkel-Meadow, 'The Trouble with Mandatory Mediation: A Response to Professor Guthrie' (2011) 17 *Harvard Negotiation Law Review* 45.

³⁶ *Vasilescu v Romania* App no 49755/99 (ECtHR, 6 November 2001).

The legal system requires three fundamental principles which must be fulfilled through effective efficiency and accessible services. The role of mediation in justice systems requires it to function as a support system for adjudication through which people can choose between two different methods of resolution.

5. COMPATIBILITY WITH THE RIGHT TO A COURT

The right to access court systems which exists through various human rights treaties including Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights is tested by the mandatory mediation requirement that courts use to resolve and settle disputes. The right to access courts guarantees that courts exist to hear cases but also requires that all cases must be handled according to fair procedures, which must be resolved without any delays. The procedural rules that adopt mandatory mediation need thorough examination because any negative impact on essential rights will result in serious damage to core rights protection systems.

5.1. Article 6 ECHR and the Right to a Fair Trial

Article 6(1) of the ECHR guarantees the right to a fair and public hearing by an independent and impartial tribunal. The European Court of Human Rights (ECtHR) has interpreted this right broadly to include both access to the courts and fair procedural safeguards during litigation.³⁷ The question arises whether mandatory mediation, by putting a requirement on court access, constitutes an impermissible limitation.

³⁷ European Convention on Human Rights art 6(1); *Deweere v Belgium* (1980) 2 EHRR 439.

The ECtHR recognized in *Vasilescu v Romania* that parties can use alternative dispute resolution methods which include mediation, in as much as these methods do not obstruct or excessively postpone their rights to approach a court, and do not impede the judicial process. The court ruled that mandatory alternative dispute resolution should not create barriers which prevent people from obtaining their legal rights through court systems.³⁸

5.3. EU Charter of Fundamental Rights: Article 47

The EU Charter Article 47 provides the same rights to legal protection which Article 6 of the European Convention on Human Rights guarantees. The Court of Justice of the European Union (CJEU) has addressed the compatibility and relationship of mandatory mediation with Article 47 in several cases, notably in *Menini and Rampanelli v Banco Popolare*.³⁹

In this case, the CJEU ruled that mandatory mediation does not violate the right to access courts as long as:

- (i) Parties can take their dispute to court if mediation fails.
- (ii) The mediation process does not involve excessive costs or delays.
- (iii) Mediation is truly accessible and not overly burdensome.

This ruling acknowledges that new procedures like mediation can

³⁸ *Vasilescu v Romania* App no 49755/99 (ECtHR, 6 November 2001)

³⁹ *Menini and Rampanelli v Banco Popolare Società Cooperativa* (C-75/16) EU:C:2017:457.

coexist with fundamental rights, as long as they allow for meaningful judicial review.

5.4 Balancing State Interests and Individual Rights

States have a valid interest in using judicial resources efficiently, effectively and promoting peaceful dispute resolution. Thus, procedural rules that encourage or require mediation may be seen as reasonable steps to improve access to justice for everyone.⁴⁰ However, this justification relies on adequate protections:

- (i) The mediation process must be free from coercion that compromises voluntary participation.
- (ii) Parties must have access to legal advice to understand their rights.
- (iii) Failing to mediate should not automatically block access to courts or impose unfair penalties.

Without these protections, mandatory mediation risks becoming a procedural trap that threatens the right to a fair hearing.

5.5 Comparative Jurisprudence and National Approaches

Different legal systems balance these interests in various ways. In England and Wales, the Civil Procedure Rules (CPR) promote mediation but do not fully compel or mandate it, highlighting the court's discretion and the parties' freedom.⁴¹

⁴⁰ Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 101–104.

⁴¹ Civil Procedure Rules 1998 (UK), pt 31 and Practice Direction on Alternative Dispute Resolution.

In contrast, Italy's initial mandatory mediation program sought to reduce court congestion but faced constitutional challenges for possibly infringing on access to justice.⁴² The Constitutional Court emphasized the need to uphold judicial recourse as a fundamental right.

Australia's model includes mandatory mediation with judicial oversight, typically allowing exceptions and stressing informed consent, aiming for a practical balance between efficiency and rights protection.⁴³

6. MEDIATOR ETHICS AND THE CHALLENGES OF MANDATORY MEDIATION

The growth of mandatory mediation raises not only procedural and legal questions but also significant ethical concerns, particularly regarding the role and responsibilities of mediators. As mediation becomes more institutionalized and sometimes compulsory, mediators navigate the tension between respecting party autonomy and meeting structural pressures to secure settlements. This section examines how core ethical principles like impartiality, voluntariness, informed consent, and self-determination are impacted by the trend toward mandatory mediation.

6.1 Voluntariness and Informed Consent

At the center of mediator ethics is the principle of voluntariness, which

⁴² Corte Costituzionale [Constitutional Court of Italy], Judgment No 272/2015 (18 December 2015).

⁴³ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, 2000) 150–155

holds that parties must choose to mediate and should be free to leave the process without pressure. This principle is outlined in many mediation codes of conduct, including the Model Standards of Conduct for Mediators (2005) and the European Code of Conduct for Mediators, both of which stress that mediation must be voluntary and that parties should never be forced into a settlement.⁴⁴

However, in mandatory mediation situations, voluntariness is greatly minimal. While participation may be required, the mediator must ensure that any agreement stems from informed and pressure-free consent. This creates a challenging dynamic; mediators may feel pressured to promote a settlement to show the program's success or meet institutional goals, yet they must avoid applying undue influence or becoming biased in favor of a particular outcome.⁴⁵

The ethical pressure intensifies when legal representation is uneven or when one party does not fully understand their rights. In such cases, mediators must carefully manage the process to ensure that participation is informed, a challenge complicated by the informal and confidential nature of mediation settings.⁴⁶

6.3 Impartiality and Power Imbalances

Impartiality is also a cornerstone of mediator ethics. The mediator

⁴⁴ European Commission, European Code of Conduct for Mediators (2004); American Bar Association, Model Standards of Conduct for Mediators (2005), Standard I.

⁴⁵ Andrea Kupfer Schneider, 'Mediation Ethics in Mandatory Settings: What's a Mediator to Do?' (2015) 21 Harvard Negotiation Law Review 1.

⁴⁶ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 Washington University Law Quarterly 787

must stay neutral, non partisan and avoid favoring or discouraging other party for the benefit of another party, either in substance or tone. However, power imbalances in many disputes can become even more pronounced in mandatory contexts, where one party may feel compelled and mandated to settle regardless of fairness.

For example, in employment or consumer disputes, a stronger party may dominate the process. Mediators must be attentive to such disparities and may need to intervene procedurally to level the playing field without crossing into advocacy or giving advice, which would compromise their neutrality.⁴⁷

This raises concerns about ethical training and competence. Mediators in court-connected or mandatory programs should receive specialized training to recognize when party autonomy and independence are threatened and know when to pause, stop, or put an end to mediation when ethical lines cannot be upheld.⁴⁸

6.4 Confidentiality vs Accountability

Mandatory mediation also tests the ethical balance between confidentiality and accountability. While confidentiality is necessary and important for open dialogue, it may conceal coercive or unethical behavior by parties or, potentially, by mediators who face pressure to produce outcomes.

⁴⁷ Jacqueline Nolan-Haley, 'Court Mediation and the Search for Justice Through Law' (1996) 74 *Washington University Law Quarterly* 47.

⁴⁸ Lela P Love and Kimberlee K Kovach, 'ADR Ethics in 2020: Progress or Regression?' (2020) 35 *Ohio State Journal on Dispute Resolution* 11.

Moreover, in court-connected systems where mediators report to judges for compliance or attendance, ethical issues arise regarding what can be disclosed without breaking confidentiality. Some jurisdictions allow only attendance reports, while others may require summaries or evaluations, placing mediators in ethically tricky situations.⁴⁹

6.5 A Need for Ethical Clarity and Institutional Safeguards

The evolving nature of mediation necessitates updated ethical guidance that is appropriate for mandatory situations. Regulatory organizations and professional groups should ensure that mediators working within compulsory programs have adequate support and clear ethical guidelines, including:

- (i) Training on handling coercion and power imbalances.
- (ii) Instructions on reporting obligations and limits on confidentiality.
- (iii) Institutional protections to maintain the mediator's independence.

Lacking this clarity poses a real risk of declining ethical standards, which could damage public confidence in mediation, particularly when it is imposed by the state.

7. CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion: A Paradigm Shift or a Procedural Shortcut?

The growing use of mandatory mediation in national and international legal systems marks a major shift in how justice is viewed and

⁴⁹ Bobette Wolski, 'Court-Connected Mediation in Australia: Balancing Efficiency and Fairness' (2013) 25 Bond Law Review 69.

delivered. Often promoted as a faster, cheaper, and more convenient option compared to traditional court proceedings, mediation has moved from being an optional process to a required step in many legal contexts. As this paper has explained, this shift brings up important questions about what it really means to have access to justice. In the past, access to justice was closely linked to the right to a fair and public trial in court. Today, it includes a broader set of methods, ranging from litigation to mediation, conciliation, and mixed approaches. This change is not inherently problematic; it reflects evolving social, economic, and institutional conditions. In many situations, particularly when courts are overburdened, mediation can offer a more accessible and kinder way to resolve disputes than lengthy and complicated legal battles.

That said, requiring mediation in some legal systems can create tension between reforms aimed at improving efficiency and the fundamental rights of individuals to fair treatment. Trends in legislation around the world, such as court rules in South Africa, procedural requirements in Turkey, and small claims procedures in the UK, suggest that mandatory mediation can either help people access justice more effectively or, in some cases, act as an unnecessary step that slows down or prevents meaningful legal resolution.

The key challenge lies in balancing the state's goal of efficient dispute resolution with the individual's right to decide how and when to handle legal matters. When mediation truly helps people take control of their situation, it can enhance the justice system. But when it becomes just another bureaucratic requirement, it may reduce justice to a series of

steps without real substance, particularly for those who are already at a disadvantage.

Therefore, the main issue is not whether mediation should be encouraged, but rather how it can be integrated into legal systems and under what circumstances it might be mandated without violating important rights.

7.2 RECOMMENDATIONS

Based on the analysis provided, the following recommendations are proposed for legislators, courts, and policymakers who are considering or putting into place mandatory mediation systems:

7.2.1. Maintain the Right to Adjudication

Any mandatory mediation system must ensure that access to courts remains available as an alternative. Mediation should not entirely prevent the right to go to court, particularly when legal rights are involved or when there are power imbalances. Laws and procedural rules should clearly define and protect this right.

7.2.2. Distinguish Between Mandatory Participation and Mandatory Settlement

When mediation is required, the focus should be on ensuring that parties attend or participate, rather than forcing them to agree to a settlement. Individuals should retain the freedom to reject a settlement without facing penalties that could hinder their ability to seek justice.

7.2.3. Safeguards, Power Imbalances, and Exit Options

Mandatory mediation systems should include protections such as:

- (i) Access to legal advice before and during mediation
- (ii) Clear and organized procedures with defined timeframes
- (iii) Mediators who have been trained to remain neutral and to recognize and manage power imbalances
- (iv) A way to leave the process without facing any punitive consequences

7.2.4. Selecting Appropriate Disputes

Not all disputes are suitable for mediation. Certain types of disputes, such as those in family law, consumer issues, and tenancy, have historically been more effective in mediation and should be prioritized. Disputes involving public interest, constitutional rights, or serious power imbalances should not be subject to mandatory mediation.

7.2.5. Monitoring Quality and Outcomes

Mandatory mediation programs should be subject to independent oversight and evaluation. Key metrics such as settlement rates, participant satisfaction, duration, and cost-effectiveness should be based on data to guide policy decisions. Although coercive and unfair practices may occur, and unethical behavior may be present, the standards of mediation and the conduct of mediators should offer some level of protection.

7.2.6. Cultural and Jurisdictional Considerations

Mandatory mediation depends on the current legal culture, the ability of institutions to function effectively, and the public's trust in the justice system. Jurisdictions should focus on developing their legal

traditions and understanding the expectations of the people they serve, to shape the mediation framework. A one-size-fits-all approach is not suitable.

7.2.7. Conceptual Clarity

In the end, legal principles should ensure fair access to justice. Mediation can help support justice and access when it is conducted with respect, provides choices, follows proper procedures, and upholds the core values of justice.