

The role of judges at the pre-mediation stage of court-annexed mediation: A case study of the situation in the Czech Republic

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ABSTRACT

Mediation as an alternative dispute resolution mechanism has a very long history, especially outside of the adjudicative space. It has gradually also found its way as an adjunct to the court system in the form of court-annexed mediation. As proven by quantitative studies, mediation in the region of Central and Eastern Europe is still, however, a relatively novel and underutilized instrument. Thus, this study explores the role of judges in court-annexed mediation using the case of the Czech Republic. It presents a piece of empirical research built on a single qualitative case study of mediation practice as seen and understood through the experience of district court judges. The latter represent the core actors that contribute to shaping mediation practice through their attitudes and activities, influenced by their own interpretation of phenomena, when entering into the process at the pre-mediation phase – when the activity of the judge is foreseen by the legislative framework to be the most significant. Offering a comprehensive description of the research methodology, the study also aims to contribute to academic debate that calls for more case/comparative studies of relatively unexplored phenomena in the wider region of Central and Eastern Europe.

KEYWORDS

mediation, court-annexed mediation, qualitative research, civil litigation, judge

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1. INTRODUCTION

Mediation can be understood as a form of dispute resolution that generally happens outside of the adjudicative space associated with the courtroom, when parties in dispute utilize the assistance of a third party to attempt to resolve their conflicts.¹ Nonetheless, mediation is also gradually being used as an adjunct to the court system. In this sense, court-annexed mediation may be regarded as complementary rather than an alternative to litigation.² Sahala summarizes the different justifications for its development, such as its efficiency, reduction of caseloads, private and public sector cost reduction, as well as extrinsic factors, including relational, societal, and process-based considerations.³ Due to the specific added value of such processes, an increase in the use of mediation is often called for.⁴ However, in many European countries, especially in Central and Eastern Europe, this goal has not been achieved yet⁵ and, in addition, court-annexed mediation is often insufficiently scientifically researched.

In the Czech Republic (hereinafter 'CR'), more significant discussions about mediation in civil matters appeared in scientific literature only at the beginning of the millennia. One of the first monographs in a local context was published in 2003 by Lenka Holá, who focused on knowledge about the principles of mediation, the mediation process, and the potential of using mediation in practice.⁶ Other rather isolated monographic attempts at tackling the process and the application of mediation in the Czech context followed.⁷ Only recently has the academic literature started to develop a more profound analysis of local mediation practice, focusing on the aspects associated with the first meeting with a registered mediator (hereinafter 'first meeting').⁸ However, the role of courts in recommending and referring mediation remains unexplored not only in the CR, but also in the wider context of Central and Eastern Europe.⁹ The lack of accessible in-depth analysis on the subject has led to the abovementioned call from mediation practitioners and policymakers in the CR.

The presented study, framed by an empirical qualitative research design, aims at generating an in-depth understanding of the role of district court judges in mediation practice in the CR as seen and understood through their primary experiences with their everyday judicial practice. Judges in the CR are among those crucial actors that contribute to shaping mediation practice

¹Spencer and Brogan (2006) 3.

²Brown and Marriott (1993) 38.

³Sahala (2018) 48.

⁴This idea was supported by the worldwide law reform movement. See Cappelletti (1993) 282. At present, this effort is particularly relevant in the EU. See, e.g., the green paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, or European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation, and its take-up by the courts, 2011/2026 (INI). The use of court-annexed mediation is also envisaged in the Model European Rules of Civil Procedure. See Uzelac (2017) 11.

⁵See further the European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation, and its take-up by the courts, 2011/2026 (INI).

⁶Holá (2003).

⁷Holá (2011); Šišková (2012); Potočková (2013); Plamínek (2013); Cholenský (2013); Holá (2014); Brzobohatý, Poláková and Horáček (2016); Večeřa et al. (2017).

⁸Holá, Fiedor and Urbanová (2019) 876; Holá et al. (2020); Fryštenská (2017) 799.

⁹See, e.g., Joamets and Solarte Vásquez (2019) 109.



through their attitudes and activities that are influenced by their interpretation of phenomena and their experience of the related processes. Referring to the findings of Niemeijer and Machtedl,¹⁰ it is generally believed that one of the key components of the success of court-annexed mediation, and in a wider sense of resolving disputes and conflicts, depends on whether judges refer appropriate case to mediation. This is because it is judges who can initiate the process by sharing information, motivating the parties, deciding whether to pass a referral order, or recommending that parties take part in mediation. In order to deepen the understanding of mediation practice in the CR, it is therefore important to shed more light on the application of mediation in Czech judicial practice. The aim of the research is reflected in the central research question: How do district court judges in the CR reflect on their own practice and their roles vis-à-vis mediation process, especially in relation to the pre-mediation phase?

Although the automatic transferability of findings to different environments (i.e., to the wider region of Central and Eastern Europe) is problematic, we see the value of informing researchers about similar phenomena in the countries of the region which are, to some extent, characterized by a similar history and context, including the relatively recent introduction of mediation practice. The study thus has the potential to contribute to fostering more academic debate on the situation in the region through laying the ground for comparative studies of the relatively understudied practice of mediation in the post-socialist countries.

2. MEDIATION IN THE CZECH REPUBLIC – THE CONTEXT FOR EMPIRICAL STUDY

Ideas about modern mediation began to penetrate the CR only in the 1990s.¹¹ At that time, however, there was no legal regulation to frame it. It was not until 2008 that amendment No. 295/2008 Coll. to the Czech Code of Civil Procedure (Act No. 99/1963 Coll.) was adopted, thereby incorporating mediation into civil proceedings. Although there was political will to incorporate mediation into the civil process, the necessary financial resources were not available.¹² This rather minimalist initial legal regulation therefore only covered the possibility for a court to suspend its judicial proceedings for the purpose of mediation, presupposing the consent of the parties in the dispute to this.

The Mediation Act (Act No. 202/2012 Coll.) and related procedural regulations were adopted and entered into force in 2012. At that time, many legal orders of the EU Member States already included regulation-covering mediation.¹³ The enactment of legal regulation in the CR was primarily the result of the obligation to implement Directive 2008/52/EC¹⁴ into the national legal order.¹⁵ Thus, the very first Czech comprehensive legal regulation of mediation was created.

¹⁰Niemeijer and Pel (2005) 345.

¹¹Grygar (2015) 127; Urbanová, Holá and Lakomý (2020) 1.

¹²Grygar (2015) 127.

¹³European Commission (2016) 30–33.

¹⁴Directive 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.

¹⁵Pauknerová and Pfeiffer (2015) 116; Grygar (2015) 128.



Despite the legal framework, it seems that a mediation culture has not been created and integrated fully into the CR's dispute resolution practice so far. In addition to the generally small proportion of disputes resolved through mediation in the EU, recent empirical research conducted on a representative sample of Czech society also found a lack of knowledge about mediation among citizens: only 33.6% of respondents understood the idea of mediation.¹⁶ The courts could potentially play an important role in enhancing familiarity with and use of this process provided we can uncover the 'black box' and understand how the latter operate in practice vis-à-vis the use of mediation.

3. NATIONAL LEGAL FRAMEWORK OF COURT-ANNEXED MEDIATION

The court's obligation to lead the parties to amicable settlement is highlighted in the Czech legal literature.¹⁷ Thus, in court practice there is a preference for attempting the settlement of disputes before trial resulting in judicial decision. Berlemann and Christmann emphasize the general interest of governments in fostering high settlement rates in civil law litigation. This interest is primarily driven by economic goals. If litigants reach a settlement, legal resources are no longer exhausted by prolonging trials, writing judgments, and potential appeals. Hence, policymakers are interested in designing legal institutions that promote higher settlement rates, because taxpayers must finance the legal system.¹⁸ In addition, there are also societal goals associated with the concept of building a culture in which disputes are settled amicably.¹⁹

Despite the above-described intentions, the official statistics from the Ministry of Justice of the CR show that in 2019, for example, 200,969 cases on the civil agenda of district courts were closed through adversarial judgment, while only 8,445 cases were closed by settlement.²⁰ Accordingly, the ratio of adversarial judgments to in-court settlements was approximately 24:1.²¹

The judge has several options for influencing parties to conclude a desired in-court settlement and, consequently, to increase the settlement rate. There are several stages of judicial procedure, foreseen by the existing legal framework, at which judges can theoretically enter and act to contribute to settlement with the potential use of mediation. More specifically, their activity and attitudes can play a role at the: a) pre-mediation stage, b) mediation stage, and, c) the post-mediation stage.²² The role of the judge is most significant at the pre-mediation stage, therefore the paper will focus mainly on this phase of the process. On the other hand, the interaction between judge and mediator during the mediation process is expected to be rather

¹⁶Urbanová, Holá and Lakomý (2020) 9.

¹⁷Králík and Vašíček (2016) 412; Bureš (2009) 648.

¹⁸Berlemann and Christmann (2019) 143.

¹⁹Aguilar et al. (2017) 13–14.

²⁰See the following statistical report: Ministry of Justice of the Czech Republic, Report on the movement of the C register agenda in district courts' V(MS)-114 at [link1](#).

²¹However, it should be taken into consideration that this view is not comprehensive: some proceedings are terminated by the withdrawal of action due to out-of-court settlement; in-court settlement is not admissible with some types of proceedings, etc.

²²Svatoš (2015) 219.



limited due to the mediator's duty of confidentiality.²³ In order to provide space for an attempt at mediation,²⁴ court proceedings are usually suspended. During the post-mediation stage, certain forms of interaction between court proceedings and mediation are foreseen. In the event that the parties do not initiate mediation or reach an agreement through mediation, the court will continue with the court proceedings. Should the mediation end with the conclusion of a mediation agreement between the parties, several situations may arise: a mediation agreement may suffice for the parties who will then decide to end the court proceedings, or they may decide to conclude an in-court settlement based on the mediation agreement. The mediation agreement can become enforceable if it is ratified by the court. The statutory condition for its approval is compliance with the law.²⁵

3.1. The pre-mediation stage as foreseen in formal frameworks

The pre-mediation stage is the period between when the conflict arises and the commencement of the mediation procedure. Before the parties eventually meet for mediation, they need to be informed about the possibility to resolve their dispute out of court. Ideally, the parties should be aware of the possibility of resolving the dispute through mediation, or at least be informed of this by their legal representatives, before filing a lawsuit. However, especially in states in which mediation does not have a long tradition, the CR being an example, the courts can also potentially be very helpful.²⁶ If such mediation develops in the frame of or in connection with a judicial procedure, we can talk about court-annexed mediation.²⁷

There are basically two methods of commencing court-annexed mediation: i) following recommendation to attend mediation, or ii) through court-referral order. In the former instance the judge may informally advise the parties to try mediation, and the parties agree to this, or mediation may be proposed jointly by the parties themselves. In such a case, the judge shall suspend the proceedings and wait for the result of mediation. In the latter instance, the judge may order the parties to the dispute to attend a first meeting with a registered mediator.²⁸ Mandatory mediation is not applied in the CR; there is no obligation to initiate mediation before filing a lawsuit, nor can the court order mediation in contentious civil proceedings. The aim of a first meeting is mainly (as it is in Hungary)²⁹ to familiarize the parties with the mediation, but they do not have to initiate it.³⁰

²³See Article 9 of the Mediation Act.

²⁴Mediation is defined in Article 2 of the Mediation Act as a procedure for resolving a conflict involving mediators who support communication between the parties to the conflict in order to help them reach an amicable solution to their conflict by concluding a mediation agreement.

²⁵See Article 67 or 99 of Code of Civil Procedure or Svatoš (2017) 232.

²⁶Svatoš (2015) 219.

²⁷Esplugues (2015) 37.

²⁸Alexander (2009) 148.

²⁹Grosu (2017) 412.

³⁰Holas (2022) 117–18.



3.1.1. Referral criteria and selection of mediator. Alexander defines referral criteria as the factors upon which a decision is made as to the suitability of a dispute for mediation.³¹ Svatoš points out that the discretion of the court to mandate mediation, nevertheless, does not usually depend on any objective criteria.³² The statutory referral criteria in the Czech legal regulation – efficient and appropriate – are an example of this. These criteria are vague and give the court a wide margin of discretion.

The court may refer the parties only to a first meeting with a registered mediator; i.e., to a natural person who is registered in the register of mediators administered by the Ministry of Justice.³³ The parties can choose amongst the registered mediators therein. However, if the parties fail to do this, the court will select a registered mediator for them from the register of mediators.³⁴

3.1.2. The first meeting with a registered mediator. The main purpose of the first meeting is to acquaint the parties with mediation and its benefits.³⁵ The ideal goal of the first meeting is to conclude an agreement to mediate, by which mediation is initiated. Courts refer the parties to a first meeting lasting three hours. However, the agreement to mediate is often concluded earlier, creating space for mediation to follow. In the case that parties are not willing to begin mediation after/during the first meeting, the mediator will issue a confirmation of participation to the parties that they have fulfilled the obligation to attend the first meeting.³⁶

As seen in the [Table 1](#), the statistics from the Ministry of Justice show a steady increase in the number of court referrals.³⁷ Along with this, the number of settlements that have been concluded as a result of a first meeting is also growing. Recent empirical research based on spatial analysis, however, has highlighted the uneven imposition of the requirement of a first meeting, depending on the court district, as a complex problem.³⁸

Table 1. Court referrals in the Czech Republic¹

	2015	2016	2017	2018	2019
Number of orders to attend the first meeting	315	658	894	1256	1279
Number of settlements in cases where first meeting was ordered	87	254	334	452	425

¹See statistics of court referrals in civil cases: [Márová \(2020\) 98](#).

³¹Alexander (2009) 159.

³²Svatoš (2015) 220.

³³See Article 16 of Mediation Act or Svatoš (2017) 178.

³⁴Svatoš (2017) 173.

³⁵Hájková and Potočková (2018) 13.

³⁶Svatoš (2017) 173.

³⁷Márová (2020) 98.

³⁸Holá, Fiedor and Urbanová (2019) 886.



4. RESEARCH METHODOLOGY: DATA COLLECTION, SAMPLING AND ANALYSIS

In line with the qualitative research strategy,³⁹ data was collected through 15 in-depth semi-structured interviews (out of which two were group interviews) with a total of 21 communication partners. The data collection was completed in 2019. The interviews were recorded and transcribed.⁴⁰ The process of data collection and analysis was recursive and dynamic, as suggested by Merriam.⁴¹ It was important to allow enough space for communication partners to share their own perceptions and experiences, including the aspects of their experience that were not covered by the interview guide but were important in relation to answering the research question. All the transcribed data were coded using thematic analysis. The predominantly inductive codes are grouped into categories. In accordance with Boyatzis,⁴² the type of analysis that was employed allows not only for the identification of commonly recurring themes but also for the interpretation of various aspects of the researched topic. The empirical categories that emerged from the analysis are supported by relevant quotes from the interviews.

The research sample was developed gradually in accordance with the process of interim analysis of the collected data. Starting with the degree of heterogeneity, the purpose of the selected sampling strategy was to obtain a better understanding of the characteristics and possible variations in the studied phenomena. The decision to include specific communication partners into the sample, representing the characteristics defined by the criteria, was done with the help of gatekeepers.⁴³ The interviews were conducted with judges associated with diversely located district courts⁴⁴ in different regions of the CR marked by their different incidence of instigating the practice of first meeting.⁴⁵ The research sample included male and female judges of different ages (associated with different lengths of experience in the judiciary); working in

³⁹This study was conducted as a part of much wider piece of research about the conditions for mediation implementation in practice in the Czech Republic under GACR (Czech Science Foundation) Research Project no. GA18-01417S. The data collected from the sample group of judges within the wider research effort were specifically analyzed (re-coded using the thematic analysis) for the purpose of this paper.

⁴⁰All communication partners agreed to their participation in the research. The agreement of participation (informed consent) was signed by participants, and the researcher promised that personal and geographical signifiers would be strictly anonymized. Names of participants have been substituted by the codes J1–J21.

⁴¹Merriam (2009).

⁴²Boyatzis (1998).

⁴³In order to minimize the bias in the research sample we tried to diversify the gatekeepers who were involved and to i) select them from different groups of actors, i.e., judges, lawyers/attorneys, mediators; and, ii) employ a number of different gatekeepers from each of the distinctive groups of actors. The gatekeepers played an important role not only in the identification of the participants but also in facilitating first contact with them, including contributing to the establishment of a basic level of trust between the researcher and the communication partners.

⁴⁴The system of civil courts in the CR consists of four levels: district courts, regional courts, high courts, and the Supreme Court. District courts hear most civil cases (civil and family agenda) in the first instance, which is why court referral is by far the most frequent in this area.

⁴⁵The judges who were interviewed had throughout their careers at district courts referred only tens of cases to first meetings. For the research, however, it proved not to be relevant how many cases they had referred to first meetings, but rather what their attitude was towards the use of the institute of mediation within court practice, and the fact whether they referred cases at all.



courts of different sizes (with respect to different climates and opportunities for resolving conflicts through settlement); with different degrees of experience with mediation and different perceptions about its use (to counterbalance the representation in the sample of proponents of mediation with those who are known to have more reserved or even critical attitudes about the value and use of mediation); and experience with civil and/or family cases.

5. RESEARCH FINDINGS

The process of the application of mediation within judicial practice as described through the reflected experience of the judges who were interviewed occurs during three different stages (which mirror the phases of activity of judges as foreseen by the formal legal framework described in Chapter 3). As mentioned above, the most significant role is played by judges at the pre-mediation phase, thus this is the focus of the study. On the other hand, during mediation the role of the judge is not very important in practice. Due to the duty of confidentiality, the mediator cannot provide judge(s) with information on the course of the mediation. Despite the judges' awareness of this defining principle of mediation, two typical characteristics were observed: either relatively strong trust in the process happening outside of the courtroom, thus the judge does not perceive the need to check the process; or a preference for a much closer relationship with the mediator, and seeking information about the process in order to maintain trust. Last, at the post-mediation phase the role of the judge is mostly associated with how they approach the results of mediation. If the parties to the dispute do not withdraw the action after successful mediation, the agreement is usually approved in the form of an in-court settlement. Regardless of the judges' general attitude towards mediation and their level of commitment to the process, they shared a general preference for the withdrawal of action because in such cases they perceive that the parties are most likely to have internalized the essence of the concluded agreement. If the agreement presented in the courtroom is not in accordance with substantive law, the judges are able to support its reworking by the parties. Nonetheless, in such cases there is an observable difference in their active willingness to do so. However, the judges' opinions showed consistency with respect to the perceived importance of such heartfelt agreements concluded without any kind of pressure.

5.1. Reflected practice at the pre-mediation phase of court-annexed mediation

During the pre-mediation stage – i.e. prior to the potential decision by the judge to refer/recommend the case to first meeting – several aspects affect the process according to the judges: i) their reflections on the relevant case to be resolved with the help of mediation; ii) their reflection about the context and specific situation(s) influencing the possibility to refer the parties to a first meeting; iii) reflection about the relevance of voluntary participation in mediation/first meeting as materialized in their decision to recommend participation in mediation and/or referral to first meeting; and, iv) the selection of an appropriate mediator.

5.1.1. Cases perceived to be appropriate for mediation. In their reflections about the cases they perceive to be appropriate for referral to a first meeting – i.e., the cases that appear to have the potential to be resolved through mediation – the judges employ the following approaches, and assess the cases fit for mediation to be the following: i) when it is important to maintain



and/or transform the working relations among the parties for reasons of likely future interaction; ii) when it is indispensable to resolve wider and more complex conflicts that extend beyond the problem defined in the lawsuit, since such wider aspects of conflict influence the possibility to resolve the dispute through adjudication; iii) cases that are relatively complicated to understand and difficult to untangle even for the parties who are themselves involved; iv) when the general will to seek agreement theoretically exists, but it is difficult to reach agreement because of the potential for the escalation of conflict and/or emotional excitability; and, v) cases that are largely characterized by communication problems that have escalated into misunderstandings, although there is still potential to restore relations and modes of communication if the parties can agree and find a way to do this.

'I normally use it [mediation] when the conflict between parties is larger than the case itself, when it's more long-lasting, when you've got neighbours blaming each other for something that happened thirty years ago, and it doesn't even concern the case that I'm doing, and I know these people are notorious court-goers, and we'll be meeting them every day, and it'll take ages and neither of the parties has any relevant arguments'. (J20)

'Where there's relevance with regard to their future relationship. If the employee wants to keep their job, but the issue brought up in court is a fundamental one, and likewise, the employer wants to keep the employee, but there is a major problem that sets them apart'. (J16)

'I don't use it all the time, in every court case. Basically, as I've been doing this for twenty years, if there's some sort of potential for them [the parties] to find a solution together, if there's space. I order it when the parties insinuate that they would be able to reach an agreement under different circumstances, or if the facts of the case are relatively complex and it's a good idea for the two parties to actually sit down and analyze the situation and their different perspectives'. (J11)

On the other hand, the judges shared that it is not useful to refer cases when i) it is essential to prove a claim (e.g. amount of alimony, delivery of goods, paid invoice), ii) status-related conflicts, as well as iii) cases when the parties *a priori* declare that they do not want to seek agreement and are not willing to change their opinion, even given a potential change of atmosphere.

'Well with some people, you can see, I mean, you can always be wrong, but you've got a pretty good idea about the person, and you know he just won't settle, or neither of them will, even if they were offered (...) well simply because he doesn't want to, his mind is stuck and he won't do it (...) so it's kind of pointless to waste time trying to get them to go somewhere and find out that it's useless. Especially when I see there's virtually no will to come to an agreement'. (J3)

'If it's a strictly legal case, like, for example, [concerning] a heat exchanger station in a house, it's pointless to send these people to a mediator; these status [ownership]-related issues are our responsibility as judges. The two parties can't simply agree that the exchanger station either is or is not part of the house'. (J2)

5.1.2. Specific atmosphere and relations among parties. Taking into account the relations among parties to a conflict and the level of conflict escalation, the judges who were interviewed shared that they usually resort to raising the issue of the possible use of mediation to support parties to resolve their disputes when they perceive: i) the parties seem to still believe that it is possible to maintain their cooperation in future; ii) the parties are not able to reach agreement at



the moment due to their fear of losing face, although the judge feels that there is still potential for agreement to be reached; iii) there is a lack of communication conducive to resolution; the parties are stuck, although there is no explicit pathology in the relations among them; iv) there is an evident need for the external intervention of someone who can help the parties attain an overview of the situation (which is perceived to be within the capacity of a mediator rather than a lawyer/judge, and/or there is not enough space and time for the judge to be able to play the role of facilitator).

‘When you meet them in the courtroom and you can see there is a block between them, they do not communicate but they are normal personalities, there is no pathology, and the only issue is finding an acceptable compromise, then I order mediation immediately. And then there are other situations when you can see these people need more time; they’ve been fighting for a long time, and they’ve come to court thinking that the institution will deal with their problem and they needn’t do anything. Now, if it was [if it ends in] a court ruling, at least one of the parties would be dissatisfied’. (J16)

‘Well because it’s clear to you that it’s not a legal issue at all, after a few hearings you realize that they really need to step back and review the whole situation, and that this is a mediator’s job, not something a judge or a lawyer can help them with’. (J15)

‘Well, a typical example would be people who just can’t reach an agreement, so generally it would be cases where I’d feel there is some will, or that there isn’t a major obstacle that would prevent them from reaching a settlement, but at the same time it would require an investment of time which the court cannot provide. However, I’d definitely need to feel there is a chance for an agreement. Or, I’d have to feel it might be viable to use some methods that I don’t have in my arsenal – for instance, motivating them psychologically so that they are more likely to agree, something I can’t really do here’. (J3)

5.1.3. Recommendation versus referral. Reflecting on the specific strategies through which the parties are directed to a first meeting, the communication partners shared that they generally believed that it is more convenient to ‘suggest’ that the parties think about the possibility to resolve their disputes using the institute of mediation. The judges believed that referral through ‘order’ is inherently associated with the risk of failing in terms of promoting the search for mutually beneficial solutions. Sharing their experience, the judges concluded that in cases when people feel that they are being pressured, and in cases when they do not see the potential value-added of conflict resolution through mediation, referral to a first meeting is rather useless. Their experience shows that in such situations people either do not arrive at the meeting with the mediator at all, or if they do so, they tend not to cooperate.

‘Well, ordering a mediation – that in itself is a contradiction in terms because I get to meet mediators, and the experience is that when a court orders a mediation, [the two parties] sometimes come and they’re like we’ve been ordered to come here, so we’re gonna suffer through this hour somehow and that’s it, and it doesn’t really have the desired effect. It’s a waste of time for the mediator, and for the parties as well. That’s why I haven’t ordered any mediations, and instead, I’ve tried to encourage the parents [parties] to choose a mediator themselves, or at least consider that option’. (J14)

On the other hand, the judges also shared their own lived experience with specific situations when it proved to be rather functional to refer the parties to a first meeting through a court ‘order’.



The following situations were mentioned in this regard: i) when the parties seem to be only responsive to orders (often in a formalized written form) rather than to general recommendations; ii) when the judges perceive there is a potential for reaching agreement given the parties are dealt with in a conducive environment, even if at the moment the parties cannot imagine participating in any alternative process outside of the court due to strongly felt emotions, thus, if given a formal order they might at least try the alternative.

‘You see potential for agreement in those people, but at the same time, paradoxically, they don’t have the will to go and seek out help elsewhere, because it comes at a cost’ (J3)

‘We only need to observe the participants’ behaviour. Some people are totally immune to recommendations, like “go and see this or that person” – no, they need it written down and stamped and signed – they only accept orders. Even though every mediation is, by nature, a voluntary activity. There needs to be goodwill and intrinsic motivation, not a court order. But sometimes the context is different – people are feeling uncertain, they need clear rules or guidelines, and they don’t understand that they could find a mediator on their own. No one’s stopping them. And yet, sometimes, they need guidelines, and encouragement’. (J16)

The communication partners have also agreed that if they are confronted with the parties to a conflict openly and strongly refusing to participate in an out-of-court process, they do not resort to referring them to mediation since it is assumed that this will result in a loss of time for all parties that are involved.

5.1.4. Selection of mediator. Another issue that is relevant in the pre-mediation phase is the selection of the mediator. The process of assigning a particular mediator is guided by the judges’ general belief in the importance of the parties’ proactive behaviour, expecting them to come up with their own suggestion(s) for a mediator. Such an approach is believed by the judges to contribute to the enhancement of ownership of the process and commitment to seeking the amicable solution of their dispute, and at the same time demonstrates mutual agreement about the selection of a particular person the parties can trust and are willing to respect.

Despite such general beliefs, the judges reported that their most common experience is that the parties often do not come up with their own suggestions. The judges therefore need to assign a mediator themselves. They spoke about several criteria that are involved in their choice of a particular mediator: i) an awareness of the previous preferences of the parties, including any experiences with the verbalized fears of the parties; ii) the judges’ own fears and insecurities based on their experience (and/or understanding of the experience of others) with mediators and mediation practice; iii) the judges’ general expectations vis-à-vis a ‘good mediator’; and iv) contextual constraints.

The interviewees shared that it is important to take into consideration the trust of the parties vis-à-vis the perceived independence of a suggested mediator. For example, one judge shared their experience through the following story:

‘Of course they were suspicious of one another; they thought that it would all be arranged, manipulated, so they wanted me to select someone else. I had one case here, well there was this trial where the municipality [was in dispute] with a private company about some land. It was a rather confusing case, a lousy dispute, and the municipality definitely disagreed with [choice of] the selected mediator, the one that was located in the defendant’s district, and the defendant disagreed with the [choice of] another mediator located somewhere else, and in the end I had to therefore assign someone completely different who resided outside the two regions. So I had to reach outside’. (J6)



The other example of the parties' preferences and fears mentioned by the judges that need to be taken into consideration is the accessibility and time availability of the mediator (as the parties oppose having to make extra effort travelling unnecessary distances and waiting an excessive amount of time to meet the mediator).

'It's important that [the mediator] is at their disposal, so [they are] close and easy to reach and also in some other cases [that it's convenient to get] from here to get to the capital where they can get an easy connection. Here it's quite easy – in an hour they are in the capital, where they can move around conveniently by subway, so it is [easy] for them to get to the mediator. But if they are from some remote areas where they can rely only on public transport, then even thirty kilometres, even if it looks like nothing to you, could really mean it's completely out of reach'. (J14)

In relation to their constructed image of mediation practice and the related perceptions of the mediators, the judges mentioned that they find it quite risky to select mediators strictly based on the list of registered mediators without having a previous reference about their performance from either fellow judges or their own positive experience – for example, based on particular mediators who had previously performed well⁴⁶ and/or otherwise created trust (e.g. during a personal meeting and deliberation with the mediator prior to their selection, or through giving a positive impression during a seminar, etc).

'It also happened to me that, in relation to this particular mediator, after the parties spent time there, after the people came back to me and to the court, although they didn't strike a deal in the end, still they came back to me having the feeling that it had been beneficial for them anyway and I think, if I remember right, they said, specifically, that [the mediator] was very professional and both parties were happy with her – that no one who took part in the mediation felt like they had been oppressed. I think the main thing is for people to leave the mediation having the feeling that it was okay, that it had some benefit for them, maybe in the end there's no agreement, but maybe the experience will help them to move in some direction'. (J1)

'So I have two [mediators] that I usually assign. One who lectured to us during a seminar sometime in the past, another who impressed me during a lecture [...]. Or, in other situations, I'll ask a colleague informally, when we chat about these mediations, you know, which one of the newly available mediators, for example, is successful and with whom he and his people are simply satisfied. Even the participants, of course. Not just judges'. (J4)

In the absence of previous personal or mediated positive experience with a particular mediator, the judges shared different strategies for approaching the mediators from the 'list' to test them – for example, contacting the newly accredited mediators for a meeting/interview, assigning mediators known to be available and in proximity to the court/residence of the conflict parties on a rotational basis, etc.

'If I only used the list to decide whom to select, I wouldn't learn anything about the person, and I would not have any clue how to decide. Even if I Googled them somewhere, found something about them online, it's not enough. So, we will definitely have to arrange a personal meeting, [and] we did it this way now in the very first case, I can't tell you for sure – but I think that's the best way. And if

⁴⁶The positive reference may not always be linked to 'reaching a formal agreement'; it may also be related to having a subjectively positive feeling about the process; having 'done something' positive with regard to the dynamics of the conflict.



that person convinces you that he is able to communicate with those people, to act to find a solution, then why not, why not select them? And we [can] get to know him or her quite well [at such a meeting]'. (J16)

The choice of a particular mediator is also influenced by the more general expectations associated with the profession of mediator and by the image(s) of a 'good mediator' constructed by the community of judges. The primary description of a 'good mediator' proposed by the communication partners is that they have a history of producing 'quality mediation agreements'. However, this perception was deconstructed relatively rapidly through the presentation of judges' extended understanding of 'agreement'. An agreement in a wider sense is characterized by the ability to create an environment in which the parties are able to seek agreement through starting to communicate again; to transform their relations to enable potentially functional future arrangements; to transform conflict dynamics so even if a formal agreement is not achieved through the mediation process, and the judge needs to make an authoritative decision, it is clear that all the different possibilities for seeking agreement have been exploited. The mediators should therefore have: i) a command of the specific sector related to the area of the dispute to be resolved (i.e. need to be specialized in a sector such as family, trade, health, construction, etc.);⁴⁷ ii) good communication skills; iii) the ability to work with emotions, and good listening skills; iv) the ability to navigate through the different stages of conflict dynamics and to deal with the conflict; v) the ability to generate a feeling of trust through a specific form of charisma. However, there is no agreement about the necessity of a specific legal background. Generally, this is perceived as an advantage especially vis-à-vis the formulation of agreements. In other cases, other qualities are perceived to be more useful.

'A capable mediator is one who achieves a maximum number of agreements; one who is successful in getting people to reach agreements, [but also one about whom you hear about the parties' experience] – you hear feedback only indirectly, like she was nice, kind, she was pleasant, helpful, she led us to the agreement, managed it well and the result came out, and even if the result was not reached, if the positive result did not come, it can be said that it was still a good mediation, it was not the mediator's fault if an agreement was not reached'. (J17)

'[They should be] good speakers, and they must be responsive to emotions, to know when to let people talk, to be able to make use of some basics of psychology and rhetoric, and to be able to convince those people that they command the situation, inspire trust, are able to respond to the situation, not be caught by surprise, they must be able to express themselves well, I don't know if such qualities can be learned through education, or if it is also – or even more so – a question of personality'. (J2)

As for the contextual constraints, the interviewees shared how they were confronted with the reality of the lack of registered mediators for court-annexed mediation, or lack of those operating at a convenient distance from the court and/or residence of the parties in the conflict. The judges spoke about their experience of not being able to assign a registered mediator due to i) the lack of availability of registered mediators operating in the court district and/or lack of registered

⁴⁷Despite the fact that the communication partners (the interviewed judges) are aware of the fact that the mediator is primarily responsible for the process rather than the content of the dispute, they shared a preference for the sector-specific experience of mediators since they believe this can enhance their credibility in the eyes of the parties in the conflict, and they also mention that it contributes to their own perception of credibility.



mediators within the district that had a positive reputation (see above); ii) a lack of availability of registered mediators disposing of the relevant sector specialization (e.g. commercial disputes, building industry disputes, health-related disputes, etc.); iii) the extensive burden of registered, appropriately specialized, and well-respected mediators (meaning a considerable waiting time before the date for the first meeting would be possible); iv) the unwillingness of registered mediators from distant districts to travel and provide services in areas with no or a limited number of mediators.

'Time wise, it will take at least three or four months, depending on their workload, but at the beginning, in the past, when there weren't that many mediations yet, people might have booked meetings with them, I don't know, within a fortnight. Now I think that the booking period for the first meeting is at least a month, maybe two months before their turn comes at all and before the mediator starts working with them, it sure takes time'. (J15)

'Well, you encounter most of the mediators in Brno and in South Moravia, and also around Prague, while in the rest of the country there are none. This is also due to the lucriveness of those localities, which is true, but Ostrava is the third largest city, yet it has only a small number of mediators'. (J16)

6. CONCLUSION

In recent years, the importance of using mediation in resolving civil disputes has been emphasized. One way to promote a higher level of mediation is through court-annexed mediation. In case of the CR, the district court judge recommends/refers disputants to the first meeting with a mediator during civil proceedings. The empirical qualitative research described here responds to the compelling need to fill the gap in the knowledge through focusing on creating a deeper understanding of the role and experience of judges, the actors uniquely positioned to comment on the studied phenomena from an emic perspective. It is they who instigate the process of court-annexed mediation in its three distinctive phases (before, during, and after mediation) through deciding whether to recommend/refer disputants to a first meeting, selecting the specific mediators, creating the time for the parties to undergo the mediation process if they decide to, and working with the mediation outcome after the parties return to the courtroom at the end of the mediation.

Although Czech district court judges operate within the legal framework that defines the general rules for their activity, their role and specific practice, as they experience and reflect on it, appears not to be reduced to the strict application of such rules and regulations. It is largely shaped by their perceptions and their lived experience of everyday judicial practice. The study uncovers the particular experiences and perceptions that affect their decision-making in relation to court-annexed mediation, especially in the pre-mediation phase.

In the pre-mediation phase, the role of the judge proves to be most significant. Although the criteria for defining the suitability of a case for mediation are vague in the Code of Civil Procedure, it turns out that judges do not recommend or order mediation at random. On the contrary, based on their lived experience they distinguish cases in which the use of mediation would be beneficial. They also take into consideration the particular context and the specificity of cases at the time of making decisions (such as the perceived level of conflict escalation and potential for re-establishing communication based on the will to seek agreement despite the



current inability to communicate, etc.). The research has also shown that judges prefer to recommend mediation rather than order it. However, they also distinguish specific types of situations when it proves to be rather functional to order the parties to attend a first meeting. This fully corresponds to the nature of mediation, which is based on the self-determination of the parties to the dispute. In relation to the selection and assigning of the specific mediator, although judges prioritize the ownership of the decision by the parties, the most common experience is that the parties are unable to agree, and the judge needs to take the initiative. The assigning of a mediator is further complicated by several factors such as the concerns of the parties related to trust and cost, and the availability of the mediation services; moreover, to judges' own (or mediated) experience with the mediator's practice; their own expectations vis-à-vis the image of a 'good mediator'; and further contextual constraints. Judges' statements confirmed the negative fact that the location of mediators and their activities are disproportionate to the demand. On the other hand, the gradually increasing quality of mediators – especially mediators that produce higher quality mediation outcomes – was acknowledged.

Apart from the findings based on judges' self-described role in mediation practice in the case of the CR, the study has also provided an in-depth description of the research methodology (focusing, inter alia, on detailed sampling strategies, including the building of rapport vis-à-vis a specific research target group characterized by limited trust in the research processes) with the intention of inspiring similar qualitative studies on mediation practice in the wider region of Central and Eastern Europe. The present authors call for opening up the academic discussion and fostering exchange about the situation in the region and beyond, thereby helping to lay the ground for further comparative studies of court-annexed mediation practice.

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