Srđan ŠIMAC, Ph.D.
Judge of the High Commercial Court of the Republic of Croatia
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Mediation as a Tool for Socialization of the Law, the Courts and Legal Profession and for Democratization of Disputing

The secret of change is to focus all of your energy, not on fighting to old, but on building the new."

Socrates

Introduction

The court system, legal institutions, judicial proceedings and legal professions that serve them, did not follow the great changes which occurred in modern societies. Therefore it is believed that they have not been able to meet the needs and interests of the users of their services. The law has almost completely replaced the justice[1], the parties become observers in their own disputes[2], and the courts, forums for representing the the public interests and the values of the legal profession. Judicial procedures are more complex and legal language more and more unintelligible to the parties. The quality of justice is increasingly giving way to efforts for increased efficiency, and the law has become a business in which the interests of clients are not the primary one. Law and legal professionals seem to have lost its purpose. The result of such a situation is the confusion of clients in legal labyrinths, their deep dissatisfaction with the system over which they have no control, and alienation of the legal system and the legal profession of the citizens and of the society.

This state of the legal system and the state of judiciary has acquired some serious proportions to the extent that it claims to have become a brake to the further development of society. It is a kind of self-capitulation of the self-sufficient legal system in terms of the mass modern societies. Although it would be quite an exaggeration to say that such a state only contributed by legal pro-

[1] ... There is something related to justice which is scary. Justice does not aim to be reasonable. Its main objective is to be neutral. "HOWARD, Philip K., Life Without Lawyers, Liberating Americans from too much law, W. W. Norton / Company, Inc., New York, 2009, p. 74th

[2] See, AUERBACH, Jerold S., Resolving Disputes Without Lawyers, Oxford University Press, Oxford, New York, Toronto, Melbourne, 1983., pg. 12.

fessionals, there's no denying that the holders of the legal profession as carriers of the legal system, through their daily and largely unchanged practice, very often neglect the real interests and needs of the parties in the disputes, as well as the need necessary for positive change. Dissatisfaction with the growing number of representatives of the legal profession with such a state only confirms the proposed assessment.[3]

It seems that the judicial system and the legal profession in its traditional form, experienced the heyday of its historical activity and existence and that persistence in maintaining the *status quo* calls into question their relevance and the existence in society. It is believed that in order to maintain the democratic culture and civilization achievements of modern societies, legislative, executive, and judicial authorities as well as the legal professionals, they must not ignore the limitations of the traditional legal system and legal practice within it, as well as the negative evaluation of the community, including political and economic elites of their work. On the contrary, they should confront such a situation and decide on positive action. The representatives of the legal profession should not be only intermediaries between the law and the parties in a dispute nor should they count only on the fact that their special knowledge and skills and rigor and formality of treatment[4] or the mere affiliation profession, will guarantee a job position and the reputation in society. The position and reputation of the legal profession in society cannot be guaranteed, it must be earned.

Access to justice means not only access to the courts. Therefore, it is considered that the time has come to revitalize the legal system, legal institutions and the legal profession and to adapt them to the the environment in which they operate. On the way to the transformation of traditional dispute resolution system and its institutions, we have at our disposal a number of tools - new dispute resolutions led by mediation which has become a synonym for Alternative Dispute Resolution (ADR) movement.

The effects of mediation and its postulates achieved during the practice of resolving conflicts and disputes, compared with the traditional system of dispute resolution, indicate its significant potential as an agent of positive change in the entire legal system, legal institutions, the legal profession and society. The experience of the benefits of mediation both for the parties and the legal professionals[5], regardless of the current number of such procedures and barriers to their rapid development[6], make the peaceful resolution of disputes and mediation possibly the major signpost in which direction citizens, legal professionals, state dispute resolution system and its institutions, as well as the whole society, should go. We are in the middle of the process of construction

[3] AUERBACH, Jerold S., ibid., pg. 119-120

[4] "Form of the judicial procedure was conceived as a guarantor of fairness, equal treatment of all parties in the way of a just outcome of the case, based on accurate facts and the law prescribed. In practice, there has been a shift from an imaginary model, primarily due to utter inefficiency of the courts in the exercise of the primary tasks - dispute resolution. "BILIĆ, Vanja, Alternative Dispute Resolution and civil proceedings, doctoral dissertation, Faculty of Law in Zagreb, 2008, p. 195th

[5] Keva, Steven, Transforming Practices, Finding Joy and Satisfaction in the Legal Life, Lincoln (Chicago), 1999, p. 30; See Chapter 9, the results of research on perception and impression of lawyers of the conciliation procedure and civil procedure

[6] BELSKI, Scott, Making Ideas Happen, Overcoming the Obstacles Between Vision and Reality, Portfolio, 2010., str. 8-9.

significantly enhancing new version of the dispute resolution system wich will incorporate the best from two worlds, the public/formal and private/informal justice.

1. Introducing democracy into the law and the legal system

1.1. Introducing democracy into disputing

The blindfold on the Goddess of Justice should no longer be just a fashion accessory. The task of every modern society and all its citizens is to provide appropriate mechanisms for access and achievement of the highest possible degree of justice.[7] However, it turned out that this ideal in most modern societies is not nearly reached. It turned out that the traditional system of dispute resolution, its institutions and supporting legal professions, are not able to ensure the equality and equal justice for all in court litigations. With regard to the social reality that is reflected in the unequal material wealth, power and opportunity, no formal legal system, regardless of its level of objectivity and formality, simply cannot ensure such equality and justice.[8]

Every attempt to solve the problems of the judicial system by increasing their legalization in form of more substantive and procedural law, increased number of lawyers, judges and courts is in fact counterproductive and operated exclusively by unilateral interests of the legal system and the legal profession.[9] It seems that the legal professionals handeled the problems of the judicial system in a manner similar to extinguishing fire with gasoline.[10] When the system, in this case, legal, looses the function to serve, the only possible result is for it to begin to serve itself and function as an aeroplane flown by an auto pilot.[11]

[7] See, AUERBACH, Jerold S., Resolving Disputes Without Lawyers, Oxford University Press, Oxford, New York, Toronto, Melbourne, 1983., pg. 143.

[8] "Many people submit to the law simply because they beleive that the institutions administering it are just. But what if a law itself is unjust?" SAMMAR, Vincent, Justifying Judgment, Practicing Law and Philosophy, University Press of Kansas, Pittsburg, 1998, the beginning of the text at the inner cover of the book; „I have pointed out that the political responsibility of the courts in democratic society is to do justice.“ SAMMAR, Vincent, ibidem., pg. 61.

[9] See, AUERBACH, Jerold S., ibid., pg. 143-144.

[10] The world is changing ever more rapidly, and the reality in which legal concepts were created no longer corresponds to today's reality.." POHOJNEN, Soile, Peace Versus Justice, electronic copy available at: http://ssrn.com/abstract=1557890, pg. 18.

[11] FRITZ, Robert, The Path of Last Resistance, Fawcet Books, New York, 1989, pg. 263.

These problems of legal systems in most countries in the world, as well as failed attempts for their solution, with much effort and perseverance of their users, created mediation and the entire ADR movement whose goal is not to create a new, but to improve the existing system of dispute resolution and the conjunction of its real needs. The initial strong opposition of legal institutions and legal professionals to such initiatives was in many countries soon replaced by a selfish form of support, again through the prism of the benefits system and its potential relief from the case. Users of the legal system, their needs and interests are again being pushed into the background.[12]

How to resolve conflicts in the life of every community largely determines the requirements for its development, but also the satisfaction of its members. It seems that the time has come when the state and its legal system, for the sake of general well-being should ensure citizens and business subjects in disputes to have far greater autonomy in matters that are only important to them.[13] And what is more, provide them the opportunity to decide about it even before the court proceedings. In each community the majority of citizens is understandably excluded from the possibility of creating the law and legal institutions. However, what is unacceptable for them is their substantial exclusion of real influence on the resolution of their own cases in court litigations. This relation of the legal system and the legal profession to citizens in the conflict, is the principal basis for their dissatisfaction and distrust.

For the functioning of any society it is of utmost importance that the citizens trust its institutions, especially the legal institutions.[14] Neither the legal profession nor the government cannot wait any longer to have this trust between the citizens and the legal system restores itself, but must take on an active role in its restoration and demonstrate that they care about its users and their problems.[15] The easiest way to restore public confidence in the legal institutions and the legal pro-

[12] See, The development strategy of the judiciary, fundamental values and strategic directions of development of the judiciary in the Republic of Croatia for the period 2013-2018, p. 1st to 23rd among the strategic development guidelines of the judiciary in this strategy is indicated and Guidelines 2.16., which only superficially mentions mediation through the identification of certain shortcomings in the previous implementation of the mediation and expressed need for their removal, while the need for systematic promotion of mediation and alternative dispute resolution methods exclusively related to the reduction of inflow of cases in the courts. About the users of judicial services and their needs and interests, again a word (AN). See also, Panel of the Law Faculty of the University of Zagreb and the Club of Lawyers of Zagreb, Development Strategy of Justice, Authorized exposure keynote speakers Mr. Orsat Miljenić, Minister of Justice of the Republic of Croatian and prof. Ph.D., Josip Kregar, the president of the Judiciary Committee of the Croatian Parliament, 174 forums, Bulletin No. 94, Zagreb, 14 February 2013.

[13] Laws and institutions must go hand in hand with the development of human consciousness. (...) Institutions must improve together with the times. "Thomas Jefferson in a letter from 1816; "All should recognize the greatest freedom to regulate their relations with others ..." PADJEN, John, Maturing as a value: access to research, values of modern society, Croatia in XXI. century, CASA, Zagreb, 2011, pg. 74.

[14] „Trust is an essential feature in the public's perception of justice and fairness in the legal system. It is implicit in clients' subjective assessment of the experience. When people encounter the legal system voluntarily or not, the meeting is marked by process issues such as whether they felt respected, whether they experienced the legal professionals as fair-minded and nonjudgmental prior to the disclosure of facts, and whether they perceived that they had the opportunity to be heard.“ BROOKS, Susan L., MADDEN, Robert G., Relationship-Centered Lawyering: Social Science Theory For Transforming Legal Practice, Drexel University Earle Mack School Series, 2009, pg. 24.

[15] "The government wants to ensure citizens' participatory partnership' in decision-making." Josko Klisović, Assistant Minister of Foreign Affairs, TV shows Referendum on EU HRT 1, Sunday 22 January 2012, starting at 20:05 hours.

fession is the introduction of democracy into the dispute.[16] They are the elements that help the parties in a dispute and so enable them to participate in civil law matters which are only important to them.[17] In this way, the already very wide autonomy of the parties who are filing lawsuits would be completed by other autonomous and democratic elements which could give them a greater choice on how to resolve their disputes, and on the other hand, a much higher possibility of direct involvement and control of the proceedings and their solution.[18] Decision-making or co-decision making on matters essential to human life, liberty and the entire destiny, represent one of the fundamentals of a good life of every individual and in general of any democratic society.[19] The question is: what is the state or the public interest to control absolutely every, even the smallest civil initiative aimed at correcting temporarily or permanently disturbed relationship of citizens or businesses in a dispute.

Also, the question can be asked whether it is possible in the legal system to apply solutions that could, to a much greater extent than before, reconcile (restore balance) the public interest and the interests, needs and freedom of its users.[20] It seems that there are already solutions with the help of which is possible in traditional dispute resolution system and outside of it, help the parties in conflict to solve their problems and meet their interests and needs, and it does not jeopardize the public interest and social needs.[21] They are simple and do not require large-scale intervention in the existing legal system. This is more about changing the exsisting legal point of view that should adopt the idea that there are alternative solutions for every problem other than the legal ones.

[16] „Deliberative democracy introduces a different kind of citizen voice into public affairs than that associated with raw public oppinion, simple voting, narrow advocacy, or protest from the outside. It promises to cultivate a responsible citizen voice capable of appreciating complexity, recognizing the legitimate interests of other groups (including traditional adversries), generating a sense of common ownership and action, and appreciating the need fot difficult trade-offs. And one of the central argumenst of deliberative democracy theory is that the process of deliberation is a key source of legitimacy, and hence an important resource for responding to our crisis of governance.“ SIRIANI, Carmen and FIEDLAND, Lewis, Deliberative Democracy, Tools, Civic Dictionary, http:/www.cpn.org/tools/dictionary/deliberate.html, February, 2 2012, page. 2.

[17] "The democratic character of the methods of dispute resolution system can be estimated through the fundamental values of democracy. If these values are promoted by the method or process of resolving disputes, it seems reasonable to conclude that the method or process can improve democratic governance and to be more legitimate by the democratic perspective. Political values: these are values that are perhaps closest to democratic values, and include participation, accountability, transparency and rationality. in the context of dispute settlement, participation refers to the degree to which the process provides a party to a dispute the opportunity to actually participate in decision-making. Similarly, the responsibility of the the extent to which the process, or neutral as a substitute for the process, may be responsible. as the process of dispute resolution, which requires the consent of all parties before a dispute can be resolved, mediation can generally be viewed as inherently more democratic process, but crucial process. "Co-democracy" would mean the practice of democracy through consensus building and cooperation, instead of devastating battles. "Ury, William, The Third Side, Why We Fight, How We Can Stop, Penguin books, New York, 2000, pg. 212.

[18] "The point of democracy is not determined by a referendum, but through dialogue, negotiation, mutual respect and understanding and developing a sense of wholeness interest." Vranken, J. B. M., Six Constraints and preconceptions of Mediation, Does mediation change the common interpretative framework (paradigm) and private law? Tilburg Law School, S.A., Http://ssrn.com/abstract=905528, pg.13; "YES means to manage and NOT be managed. The decision is yours. "Vresnik, Viktor, Tjedni Komentar, Nedjeljni Jutarnji, 22 January 2012, pg. 6.

[19] „...civil humanists see participation as a neccessary "privelidge of a good life." SAMMAR, Vincent, Justifying Judgment, Practicing Law and Philosophy, University Press of Kansas, Pittsburg, 1998, pg. 50.

[20] BOWLING, Daniel, HOFFMAN, David, Bringing Peace into the Room, How the Personel Qualities of the Mediator Impact the Process of Conflict Resolution, Jossey-Bass, San Francisco, 2003, pg. 94.

[21] See, BROOKS, Susan L., MADDEN, Robert G., Relationship-Centered Lawyering: Social Science Theory For Transforming Legal Practice, Drexel University Earle Mack School Series, 2009, pg. 3.

Liberal democracy is founded on the ideal of the citizen participation in decision-making. It is believed that there are no obstacles to allow democracy in a much higher degree and allow it in the legal area of social life. Law and its institutions are the basis of each social community and are involved in all social pores. Therefore law, legal institutions and legal professions have massive potential to act as a social agents[22] with whose intervention it will be possible to provide citizens a greater degree of their active and direct involvement in the dispute resolution procedures. That can be enabled by transforming the traditional system of dispute resolution and its amendment of non-formal ways of resolving disputes. In doing so, the system of formal and informal justice system should form a single unit.

In this way, citizens can realize the first important democratic right in the world of law, to choose from more possibilities of resolving disputes.[23] Freedom of choice is a powerful attribute of any democracy.[24] Studies have confirmed that the possibility of free choice, even in trivial matters, makes people happier and even healthier. People generally find it difficult to experience a decline in the ability to choose, because they believe that having more choices provides a greater feeling of control in their lives, and better coping with their personal problems.[25]

By introduction of parallel and complementary informal ways of dispute resolution system or private justice system, citizens are allowed full and direct participation in own disputes ans full control over the proceedings and their outcome. In these procedures, among which mediation is in the lead[26], the parties exercise their right for self-determination, have the opportunity to present their side of the story that is relevant to them, to participate directly in a settlement of a dispute that both sides want and therefore experience it as fair. Such a solution accepted by the parties themselves, they usually voluntarily execute on their own. In this way the parties have a direct, quick and cost-effective access to justice that they create.

Parties consider achievement of customized solutions in mediation proceedings acceptable and therefore fair, and it usually promptly excludes any further confrontation, renews their temporary disturbed relationship and prevents similar conflicts in the future. The realization of their

[22] See, HARRINGTON, Christine B., Shadow Justice, The Ideology and Institutionalization of Alternatives to Court, Greenwood Press, Westport, London, 1985, pg. 22.

[23] "What is freedom? Freedom is the right to choose: the right to create alternatives in a choice. Without the ability to choose, a man is not a human, but only an instrument, an item." Archibald MacLeish, Pulitzer Prize-winning American poet.

[24] A word 'choice' always has a positive conotation'. IYENGAR, Sheena, The Art of Choosing, Little, Brown, London, 2010, pg. 179

[25] IYENGAR, Sheena, ibid., pg. 226 and 232.

[26] "The values of the mediation movement are identical to the key values in a democratic society: freedom, equality, reconciliation, trust and peaceful conflict management. Conflicts are not necessarily lower in democracy, rather the opposite. One of the characteristics of democracy is that increasing numbers of people involved in decision-making. This increases the number of possible disagreement. How there are more and faster changes in technology and society, the result is more decisions, more disputes and more conflict. This increases the need for conflict resolution methods that are more efficient, fast and cheaper - and that, at the same time affirm the values of democracy. (...) But more important is the fact that the conflict in mediation revitalize democratic values. These are people who are free and peacefully gathering together and respecting each individual, trying to solve a common conflict. Conflict mediation contains a protest against occupation and elites who are trying to steal the conflict of nations. The mediator is not there to judge or the government, but to the owners of the conflict allow decisions." HAREIDE, Dag, Conflict Mediation - a Nordic Perspective, manuscript, Helsinki Conference on Mediation and Conflict Management, 28 of May 2006.

interests and needs in the manner described in disputes which is permitted, is also the realization of public interest aimed at the highest possible level of harmony in society.

Any settlement reached in a dispute with whose subject the parties can freeley manage with their direct and active participation in the preparation of its content, is an expression of their freedom of choice and the exercise of the right to self-determination in matters that are important for them. The mediation procedure and possible settlement in this process allows them the realization of control over the decisions that affect their lives.[27] Is there a need to emphasize how this approach can improvs the position of the parties in their own dispute, their attitude and mood towards the legal system and the society that allowed them that.

1.2. Introducing democracy into litigation

The following possibility for the introduction of more democratic elements into the law and the legal system is able to increase the direct participation of the parties at court litigations. Numerous studies have confirmed that the parties, no matter the content of a court's rulling, are satisfied with the litigation, the court and the judge conducting the proceedings in all cases where they are allowed to present their own side of the story, regardless of whether it is legally relevant or not.[28] Parties' satisfaction is significantly increased in all cases in which they are treated with more care and humanity, dignity and respect.[29] Parties who experience such treatment in litigation are much more willing to express respect and trust in the judicial system[30] and what is equally important, are much more willing to voluntarily execute a court decision that has not been issued in their favor (without the need to impose it forcefully through judicial enforcement procedure).

It is believed that the introduction of such democratic elements in the court civil procedures cannot damage the legitimacy and authority of the courts and judges. On the contrary, it can only strengthen it, because in this way the element of repression is reduced and at the same time, the element of voluntariness is empowered. In the described way the legal system can achieve more valuable goals: increase access to justice for the clients, reduce the time and costs required for litigation, enable and facilitate speculation in disputes in and out of the court, relieve the courts, allow customers the choice between more opportunities to settle disputes and thereby teach them that before resorting to judicial civil proceedings there are other options available and finally, in-

[27] BOWLING, Daniel, HOFFMAN, David, op. cit., pg. 189.

[28] "One of the research showed that 94% of the parties in the mediation procedure very highly rated the possibility of presenting their side of the story, while the assessment of the existence of such a possibility in a civil action was reported by 54% of respondents." GROVER DUFFY, Karen, GROSCH, James W., OLCZAK, Paul W., Community Mediation, A Handbook for Practitioners and Researchers, The Guilford Press, New York, 1991, pg. 17.

[29] See, BRONSTEEN, John, Some Thoughts About The Economics of Settlement, Fordham Law Review, Vol. 78, 2009, pg. 1140.

[30] BROOKS, Susan L., MADDEN, Robert G., Relationship-Centered Lawyering: Social Science Theory For Transforming Legal Practice, Drexel University Earle Mack School Series, 2009, pg. 24.

crease users' satisfaction with public judicial system, as well with the legal profession.[31] It seems that this approach to law and the legal system to its users has a chance to reconcile what is at first glance irreconcilable - the public perception of the legal system and the legal profession, the personal perception of legal professionals as well as private and individual interests to the public. This is a real example of the evolution of a society in which its estranged legal system returns to its fold.[32] Therefore, Roscoe Pound sees this process and the new role of the courts, judges and the legal system, as the socialization of rights.[33]

2. Privatization of justice

In order to increase the efficiency of the courts, in modern states different measures are being taken. One part of them refers to the relief of the courts with a certain number of cases and transferring the jurisdiction for resolve them onto some other bodies. All cases which are not necessarily for courts are being removed from their scope. In Croatia, this trend began with public notaries who took on many cases concerning inheritance and enforcement. The next step was supposed to be the establishment of a public enforcemet service that would take over the major work on enforcement cases and in particular, the immediate implementation of enforcement. Although the process of the establishment of this service has been stopped, it is believed that it is only a matter of time when it will be re-introduced (in a more favorable political and social moment). In many countries, the registry of companies transferred to the jurisdiction of the special state bodies. Such efforts exisit and in Croatia.

All of these are useful unilateral measures primarily aimed at relieving the courts, but quite rare to meet the interests and needs of the users of their services. As a result, the clients have to address other bodies for certain actions, instead of addressing the courts. Not much has changed from their point of view.

You could say that the realization of the interests and needs of the parties in a dispute reaches its full expression only when consensual way of resolving disputes in courts and outside them is introduced, in processes of so-called informal or private justice, where mediation occupies a prominent place. It is a possibility for the clients to resolve their disputes in a peaceful manner, regardless of whether they have already initiated legal proceedings or not. They have such a possibility wether in front of the courts or any other public or private mediation center. In this way de-

[31] See SPAIN, Larry, PARANICA, Kristina, Considerations for Mediation and Alternative Dispute Resolution for North Dakota, North Dakota Law Review, 2001, pg. 3.
[32] See, SPAIN, Larry, PARANICA, Kristina, ibid, page. 3; OTIS, Louise, Judicial Mediation in Canada: When Judges Act as Mediators for the Benefit of Citizens and Lawyers, s.l., s.a., pg. 6.
[33] HARRINGTON, Christine B., op. cit., pg. 20.

mocracy in disputing is directly introduced into the institutions of the legal system.[34] Legal institutions are giving up their own monopoly for resolving civil disputes to the extent bounded by the autonomy of the clients and give some of these disputes over to informal - judicial, public or private bodies, which become an integral and complementary part of the dispute resolution system. In this way, the traditional system of dispute resolution is not being questioned, but only refined and updated.[35]

The described process of privatization of justice really is just a confirmation of how the market reacts much faster and more efficiently than the legal institutions and the legal system in general, to the needs of its users. Mediation is also a form of the privatization of justice and many authors who support its wider application indicate the superiority of justice that the clients can achieve in mediation in relation to its formal equivalent in court proceedings.[36] So, prof. Alan Uzelac believes that in private forms of dispute resolution, there is a more important a social moment - the importance of each individual case for the parties who represent their own values in the dispute. Informal forms of dispute resolution when successfully brought to an end, generally mean an end to the conflict and the dispute between the parties, whereas a verdict brought by a trial court, is only the beginning of the multiplication of the dispute or the number of cases in front of various courts due to different kind of legal remedies.

The informal procedure takes much less time, is much cheaper, parties are willing to execute what has been agreed and that agreement prevents any future disputes between them. Should they occur, the parties will try to solve them again in the same way, outside the court.[37] Based on the findings of prof. Alan Uzelac, it can be concluded that mediation is the most prominent form of informal dispute resolution which, in the way described above, complies with all basic democratic values. The settlement in mediation proceedings on one hand, allows maximizing the interests and needs of the parties involved (which are only of interest to them), but on the other hand, a settlement in mediation at the same time satisfies the public interest and the social values.

Informal or private justice or justice achieved in the mediation procedure (mediational justice[38]) and public or formal justice, co-exist independently of each other, and yet they are in constant interaction. By keeping their own integrity, systems of formal and private justice mutually con-

[34] "The privatization of the trial is part of a broader political pressure that is evident for example in the creation of private prisons..." LANDSMAN, Stephan, 2005 Stanford Law Review Symposium: The Civil Trial: Adaptation and Alternatives: Symposium Article: ADR and the Cost of Compulsion, Stanford Law Review, April, 2005, pg. 15.

[35] „Many have come to view ADR as „privatized justice", the evolution of public power to private authority that is byproduct of the downsizing of government at the close of the twentieth century." REUBEN, Richard C., Constitutional Gravity: A Unitray Theory of Alternative Dispute Resolution and Public Civil Jstice, UCLA Law Review, April, 2000, page 2; KLONOFF, Robert H., The Public Value of Settlement, Fordham Law Review, Vol 78, 2009, pg. 1179.

[36] See, VERKIJK, R., Mandatory Mediation: Informal Justice, Public and Private Justice, Dispute Resolution in Modern Societs, Interesentia, Antwerpen, 2007, page 189; see, CLARK, Bryan, Lawyers and Mediation, Springer, Verlag, Berlin Heidelberg, 2012, pg. 151.

[37] See, UZELAC, Alan, Editors, Public and Private Justice, Dispute Resolution in Modern Societes, Interesentia, Antwerpen, 2007, pg. 22-23.

[38] See, OTIS, Louise, cit., pg. 8.

firm and strengthen their legitimacy[39]. It is about systems that offer dispute resolution services on various grounds and enable the clients to each choose the one that most closely matches the specifics of their dispute, but also their personal needs and interests. Both serve the individual, but also the public interest. Every society needs to practice both systems, because one exsists because of the other[40], and the different feelings that arise from these systems are the formula of not only the survival of the healthy spirit of parties, but also the healthy spirit of lawyers in a contemporary setting.

3. Delegalization, dejudicialization, deinstutionalization and deetatization of disputing

The legal systems of modern countries are exposed to various delegalization, reform activities and at the same time, dejudicialization of disputes, deinstutionalization and deetatisation of the traditional system of dispute resolution. In Croatia, a part of the judicial affairs has been transferred to public notaries. Real estate agencies are allowed to close contracts on sales. Insurance agencies make insurance contracts. Law professors are allowed to give legal advice for a fee. The legal basis have been created for the courts to reopen the door for those mediators who are not judges by profession.[41] There was the first example of cooperation of the municipal court and the institution of mediation, when it comes to referring the clients to mediation outside the court.[42]

There is an increasing number of different mediation centers in public and private bodies and associations.[43] Organized bodies and institutions carried out by mediation between the victim and the juvenile or young adult perpetrators of criminal offenses.[44] Education about mediation is conducted among police officers in the community. It also began among social workers and members of other professions, with a tendency of applying the mediation skills and procedures in the social welfare centers or outside them - regarding the judicial proceedings for divorce and custody of minor children. Doctors have also expressed great interest in mediation training and the estab-

[39] See, STURM, Susan and GADLIN, Howard, Conflict Resolution and Systemic Change, Journal of Dispute Resolution, 2007, 1 J. Disp. Resol. 1, pg. 30

[40] Ivan Antic, from the private electronic correspondence with the author, December 3, 2010.

[41] After the entry into force of amendments to the Law on Civil Procedure ("Narodne Novine" No. 25/13), April 1, 2013, the law allowed that the mediators in Croatian courts can be persons who are not judges. Municipal labor court in Zagreb is the first Croatian court that in early April 2013, gave the initiative that its list of mediators was assigned to mediators who are not judges. Presidency of the Court addressed the Croatian Association for Mediation (HUM) for joint cooperation in the formation of lists of mediators. After such a successful practice before the Commercial Court in Zagreb and the High Commercial Court of the Republic of Croatian, which took place between 2006 and 2008 and that the intervention in the Law on Amendments to the Law of Civil Procedure ("Official Gazette" No. 84/08)was soon prohibited, this was the first time it was possible for the mediators in Croatian courts to be persons who are not judges. Those who are familiar with mediation in Croatia consider this to be historic moment in the development of mediation, with the expectation that the Municipal Labour Court will not remain alone in applying the new legal procedural provisions (Author's note).

[42] At the end of 2012 in terms of referral of the parties in the mediation out of court, began the collaboration between the Municipal Court in Velika Gorica and Croatian Mediation Association (Author's note).

[43] Mediation Centre of the Croatian Association for Mediation and Conciliation Centre of the Forum for Freedom in Education. At the time of writing of this paper two private centers for conciliation were founded and also accredited by the Croatian Ministry of Justice forthe training of mediators, one in Bjelovar, the second in Split (Author's note)..

[44] The Association for the out of court settlement and mediation in criminal proceedings against juveniles and young adults in cooperation with the State Attorney's Office (Author's note).

lishment of special centers for mediation to deal with disputes related to the complications and errors in treatment and medical interventions. In preparing stage is the establishment of the first center for mediation in construction disputes, as well as the first public center for mediation in neighborhood conflicts. In an incereasing number of kindergartens and primary schools mediation programs are being introduced in which peers mediators resolve disputes of their peers, and which address disputes between students and teachers and between teachers and parents.

Companies set up internal systems for the prevention, management and conflict resolution, wether by mediation or arbitration. Craftsmen have their own mediation center, as well as insurers, bankers and lawyers.[45] Even in the early days in disputes with the state and companies owned by the state, the clients had to conduct negotiations with the government to try to settle, and most recently adopted measures to encourage alternative and out of court settlement in civil cases in which one of the clients in the dispute is the Republic of Croatia.[46]

In an attempt to solve the increased illiquidity in the country and to introduce order in the deadlines of payments, for entrepreneurs (60 days) and for persons of public law (30 days), the Croatian Government has promoted the new institute of the out of court settlement, which procedure is obliged include for all companies that cannot comply with the given time limits.[47] Through this process, the debtors have the opportunity to make a deal with creditors and to survive in the market, especially now, in times of severe economic crisis. Within the court enforcement procedures upon the funds of the debtors, the active role is ensured for the state financial agency - FINA. In the construction disputes the parties while resolving disputes are assisted by the construction experts that operates at Construction Faculty in Zagreb, whom all the parties who make contact with, provide an optional expert opinion. Although this is not mandatory, it becomes such due to its powerful arguments and professional authority.

Collective labor disputes shall be resolved in mediation proceedings before the competent national authority. Various organizations, associations and student legal clinics, provide citizens with the service of free legal aid. Croatian Chamber of Commerce offers a service of arbitration[48] and mediation. A growing number of lawyers resolve their clients' disputes by negotiation, mediation and other means, with the aim to spare them from the difficulties and uncertainties of the court of civil proceedings, whenever it is possible. Lawyers are holders and initiators of the largest num-

[45] Mediation Centre of the Croatian Chamber of Economy in Zagreb and regional satellite centers in Koprivnica, Osijek, Puci, Rijeka, Split and Varazdin; Mediation Centre of Croatian Employers' Association; Mediation Centre in banking litigation at the Croatian Employers' Association; Conciliation Centre of the Croatian Chamber; Mediation Centre at the Croatian Insurance Bureau; Mediation Centre of the Croatian Bar Association (Author's note).

[46] Decision on measures to encourage alternative and out of court settlement in građanskompravnim cases in which one of the parties to the dispute the Republic of Croatia and the decision on the recommendations to encourage alternative and out-of-court settlement of disputes in civil cases in which one of the parties to the dispute trading company owned or majority-owned by the Croatian or a legal person with public authority, "Narodne Novine" No. 69/2012 (Author's note).

[47] See, the Law on financial operations and settlement, "Narodne novine" No. 108/12 and 184/12.

[48] Permanent Court of Arbitration of the Croatian Chamber of Commerce. In Zadar, operates the only private company in Croatia in its activities exclusively to arbitration proceedings - Pravdonoša Ltd. In Dubrovnik another such company is registered with the intention of carrying out the same activities in the near future - Arbitration Ltd. (Author's note).

ber of the described extrajudicial activities. The novelty is that the processes of negotiation and mediation increasingly include non-lawyers as a negotiators and mediators.

Finally, an increasing number of parties that do not use legal experts to represent them before the courts, and an increasing number of natural and legal persons who do not want to engage in judicial litigation, regardless of the expressed need for legal protection.[49] Results of a study conducted in the Netherlands from 1998 to 2003, indicate that 67% of all respondents have been involved in legal disputes. Only 4% of their cases referred to the courts. Further 4% of their disputes resolved in state agencies. 45% of them resolved their disputes through negotiations, while 47% of them did not resolve their disputes at all because they could not afford court civil proceedings or did not want to expose themselves to the difficulties of litigation.[50] Thus, 47% of participants of various disputes in the Netherlands at all costs avoid the courts and the law, as a way of resolving disputes even at the cost of losing the rights which they are entitled to under the law. If this is truly the case, it is a huge number of potential users of the system of informal or private justice or in other words, the large completely untouched "market" of potential users of negotiation and/or mediation.

The konowledge of the results of this research is certainly largely applicable to all countries including the Republic of Croatia. It can greatly reduce all the tensions associated with resistance to necessary changes in the system of dispute settlement and to the lawyers and non-lawyers, who pretend to be experts in resolving conflicts in the processes of negotiation and mediation (especially lawyers who are exposed to the market) is given the strong motive to encourage widespread use of mediation as a dispute resolution.

These processes of delegalisation, dejudicialisation, deinstutionalization and deetatisation of disputes are the result of primarily the inefficiency of the state judicial apparatus. The needs and interests of citizens and therefore the requirements of the market, strongly influenced the offering of a growing number of legal services from the originally non-legal bodies and persons, as well as the encroachment of originally non-legal services in the world previously reserved only for lawyers. What they all have in common is a quick response to the mentioned demands of the market, to which the traditional court system due to its inertia, is simply not able to respond.

It seems that these processes confirm the strong trend and the need to activate the mechanism of resolving disputes outside the courts.[51] In this way, capacities and capabilities for cooperation and peaceful settlement of disputes inherent to all people and communities, can be awakened.

[49] DAICOF, Susan, Law as a Healing Profession: The “Comprehensive Law Movement”, Pepperdine Dispute Resolution Law Journal, Vol. 6:1, 2006, pg. 8.

[50] DE ROO, Annie, JAGTENBERG, Rob, The Relevance of Truth, : The Case of Mediation V Litigation, s.l., s.a., pg. 4; DE ROO, Annie, JAGTENBERG, Rob, Mediation and the Concepts of Accountability, Accessibility and Efficiency, s.l., s.a., pg. 167.

[51] "One of the senior partner in a large law firm in New York, estimates that today almost half of their working time is spent in mediation proceedings, but a good part of the remaining working time is spent using ADR techniques in order to achieve a greater number of settlements in cases in which it represents. " WEINSTEIN, Jack B., Some Benefits and Risks of Privatization of Justice Through ADR, Ohio State Journal on Dispute Resolution, 1996, pg. 2.

These processes are proof of reaffirmation of cooperation as a fundamental principle in resolving disputes. The above mentioned public and private institutions, revitalize systems of peaceful resolution of disputes in the community, whose role was once played by family, elders, chiefs, church and priests, and others.[52] This historical model of resolving disputes in the community approaches the public mediation centers for the settlement of disputes between neighbors (neighborhood justice centers).

Prof. Sinisa Triva pointed out that if the content of clients' contracts could determine the content of civil relations, they should have the right to regulate the disputes with those dispositions, even if that ment excluding the dispute from the competence of the state of the judiciary and reffering it to the person of trust.[53] There are more and more of those who believe that it is time that the government, the courts and legal professionals return the conflicts and the disputes that they have monopolised, to their owners and to provide them other options to address them. In building this out-of-court complementary system of private or informal justice and its various forums, it is important to say that they should represent only a supplement to the traditional system of public or formal justice and by no means its replacement.[54]

4. Socialization of the traditional legal institutions and legal profession

Courts and judges usually do not seriously consider their rightful roles in society. They are first and foremost a public service to the citizens and the sooner they accept such a role, the alienation that exists between them and the parties or the general public, will disappear more quickly. The clients in a litigation still play a supporting role and have no power of control, which is in the hands of their lawyers, especially the judges. To exclude or reduce the so-called civilizational misunderstanding that exists between the parties and the courts, judges need to complete their current roles with new ones.

None of the parties are the same[55] nor are their disputes. Therefore, it is time that judges in civil proceedings abandon strict and formal roles. Judges should no longer be allowed to have equal access to all parties and to any dispute, without taking into account their differences. Parties address the courts when they need help in solving their major life and business problems. The role, the function, and even the mission of courts and judges, is to assist the parties in resolving these

[52] See, HARRINGTON, Christine B., op. cit., pg. 80.
[53] TRIVA, S, Civil procedure, Narodne novine, Zagreb, 1983, pg. 649.
[54] WEINSTEIN, Jack B., op. cit., 1996., pg. 2.
[55] "The problem with people is that none of them is the same." MACKNIGHT, John, BLOCK, Peter, The Abundant Community, Awekening the Power of Families and Neighborhoods, Berrett, Koehler Publishres, Inc. San Francisco, 2012, pg. 32.

problems for them which are much bigger problems than those that judges might have in the application of law.[56]

The task of the courts is not equally apply the law to unequal cases. They do this exclusively due to the imperative of efficiency. Such conduct may be possible to solve a large number of court cases, but also make great damage to the parties but also the reputation of the courts and judges in society. The task of the courts and judges is to give each case particular attention.[57] Likewise, the judges are obliged to pay equal and full attention to every party and every person. They should always invariably respect the needs of each party and the specifics of every dispute.

Nowadays it is already largely known that the courts are neither the only nor the best place to settle every dispute, nor is the legal solution the best solution for every party in every dispute. The latter may work very well for a certain number of parties, however, is not designed to work equally well for every party in every dispute.[58] It is believed that the judges, whenever neccessary, should enable the parties to be heard in court, precisely to allow them to freely present their side of the story, their view of the conflict, regardless of whether it is legally relevant or not. [59] Judges should be engaged in testing the interests of the parties hiding behind their dispute. It should also be allowed to the parties to feel safe in the courtroom during the hearing and for the judge, as well as for other participants, to treat them with respect.[60] Parties should be given a more active role and recognition to the importance of their own cases. Such treatment gives the parties a greater sense of control and influence over the course of civil proceedings. If these feelings are accompanied by the absence of significant frustration with litigation and impairment of confrontation between the parties, their perception of the courts and judges has a good chance to change from negative to positive[61].

The task of judges is not only to resolve the dispute or case, but also to assist the parties in resolving them. Judges rule on the basis of legal regulations, which are usually incomprehensible to the parties. The application of these regulations imposes specific solutions based on the law. However, the primary task of judges should as much as possible and hopefully, be directed to take actions towards a possible peaceful solution of disputes in the court or outside it. The settlement between the parties permanently ends the dispute between them. The settlement means fast and cost-effective solution that the parties often are able to preserve their relationship and therefore

[56] POHOJNEN, Soile, op. cit. pg. 8.
[57] See, BRAZIL, Wayne D., Court ADR 25 Years After Pound: Have We found a Better Way?, Ohio State Journal on Dispute Resolution, 2002, pg. 3.
[58] MOFFIT, Michael L., Customized Litigation: The Case for Making Procedure Negotiable, The George Washington Law Review, April, 2007, pg. 2.
[59] STOLLE, Dennis P., WEXLER, Bruce J., WINNICK, Bruce J., Practicing Therapeutic Jurisprudence, Law as a Helping Profession, Carolina Academic Press, Durham, 2000, pg. 320-321.
[60] „The first shift is away from what Carol Gilligan calls an “ethic of care” and toward a “rights” or “justice” orientation. The care ethic values preserving interpersonal harmony, maintaining relationships, attending to people’s feelings and needs, and preventing harm.” DAICOFF, Susan, op. cit. pg. 6-7.
[61] MOFFIT, Michael L., op. cit., pg. 8.

reduce the possibility of the occurrence of further mutual disputes. With the process of judicial settlement[62] or settlement in mediation in front of the court or outside it, the parties have the opportunity to leave the court after a relatively short time, trusting the institution that allowed them or referred them to quick access to justice.

The benefits of such treatment are manifold for the courts as well as the legal profession. Courts are becoming more efficient, the number of cases are decreasing, while the satisfaction of the parties with the work of courts and judges is increasing, but also the pleasure of the judges with their own work and contribution to resolving the dispute between the parties. As described above, the courts and judges may contribute significantly to the well-being of the parties and help them meet their needs. Allowing the parties an active role in legal proceedings and allowing them to have a higher degree of control over the dispute[63], wether they concluded a deal or not, judges may in many disputes reconcile private interests of the parties and the public interest, and thus significantly contribute to their sense of importance and satisfaction, but also the common good and harmony in the society.[64]

This modernised approach of courts and judges towards the parties in a civil action, which should be accompanied by significant simplification of procedural norms[65], can put the courts and judges in the social function for which they were intended. The courts in this way can significantly expand its own institutional and procedural capacity[66], however, this time, or perhaps for the first time, for the good of its users - their parties. Insisting on this approach, the courts and judges have the opportunity to replace frequent and mostly unsuccessful legal judicial reform activities, with successful reform results.[67]

56. Responsibility of citizens for their own disputes as well solving the disputes

The largest number of conflicts and disputes between private and legal persons does not reach the court. Despite this fact, the number of conflicts that turn into legal disputes, is still too high. When it comes to the Republic of Croatia, the Croatian courts mostly cannot handle that number. The parties have almost complete autonomy in deciding which dispute will be filled as a

[62] Liti-gotiation" - a process of negotiation, adjustemnet and accomodation." STIPANOWICH, Thomas J., ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution, Journal of Emprical Studies, Volume, Issue 3, November 2004, pg. 843-912.

[63] STOLLE, Dennis P., WEXLER, David B., WINICK Bruce J., op. cit. pg. 317

[64] "Rather than a sign of loss of legitimacy of the judicial norm, this new alternative systems reflect a democratic renewal. The fact that judges – guardians of societal order and democratic values – participate with the community in transformation of the classical system of civil justice bears witness to the reduction of the distance between judicial and social matters, and that society, better understood, will better served." OTIS, Louise, cit., pg. 12.

[65] "… lawyers are blocking efforts to simplify procedures …" RHODE, Deborah L., In the Interest of Justice, Reforming the Legal Profession, Oxford University Press, 2000, pg. 207.

[66] See, HARRINGTON, Christine B., op. cit., pg. 35.

[67] MEGARGEE BROWN, Peter, Rascals, The Selling of the Legal Profession, Benchmark Press, New York, 1989, pg. 22; It is believed that this statement applies to judicial reform activities undertaken in Croatia. (Author's note); see, HARRINGTON, Christine B., op. cit., pg. 33.

lawsuit before the court. In addition to its autonomy, parties also have the autonomy to choose the forum for resolving their conflicts or disputes. The parties do not use this autonomy of this kind and that is why it is recommended to find suitable ways to remind them and teach them that both before and after filing of the complaint, they have access to other opportunities and that court litigation procedure is not the only, and perhaps not the most appropriate solution for all their problems.[68]

The overloadness of Croatian courts with civil cases subsequently produced inefficiency, slowness, uncertainty, superformalizam (whose application the Croatian judges are being strongly encouraged by increasingly stringent procedural regulations in order to increase the number of solved cases) and general dissatisfaction with their work. The solution to such a state should no longer be searched for only among the courts and other legal institutions, judges and legal profession in general including the state responsible for the functioning of all parts of the social system, as well as the legal or judicial. Croatian citizens still largely live in a kind of patronizing illusion[69] that someone else will solve their problems, some higher authority[70], usually the state or in this case, more specifically, the state courts.[71] Every day we witness such behaviour of Croatian citizens.

People generally prefer to take their own care of themselves and decide on issues relevant to their lives. They generally usually take care of their immediate environment, such as the family, neighbors and colleagues at the workplace. However, naturally or not, when it comes to social issues or problems that burden the people outside their immediate environment, despite the fact that they are constantly exposed to the news media about their existence, or because of it, people show much less interest and compassion. In other words, most people are not seriously concerned about the serious social problems that directly affect them.

In this case we are talking about a particular problem of the inefficiency of the judicial system, its inertia, uncertainty and a general dissatisfaction with its functioning. Most people have an opinion about the state of the judiciary, as well as on other social issues, but they are most often based on superficial knowledge and information. Their interest in these problems usually does not go beyond declarations of their existence. People often do not feel responsible for the functioning of the society in which they live, as well as for the functioning of its systems and it seems like they do not want that responsibility. Every day people use social systems and at the

[68] „law begins where community ends" AUERBACH, Jerold S., Justice Without Law? op. cit., pg. 5.

[69] See, CLOKE, Kenneth, Mediating Dangerously, The Frontiers of Conflict Resolution, Jossey-Bass, San Francisco, 2001, pg. 203

[70] "The illusion of authority, safety, and immortality that ascribed to systems inspire loyalty and vigilant defense, based on a paterna-listic fantasy that individual will be taken care of by the system." KENNETH, Cloke, Mediationg Dangerously, The Frontiers of Conflict Resolution, Josse-Bass, San Francisco, 2001, pg. 203.

[71] Litigants seek justice and they identifyit with the confirmation that they are right. They do not know that the justice cannot be given to them by a third party, but only by the party with whom they are in dispute. It is impossible to get justice in the proceedings in which the clients attack each other, insult and harm each other. It is impossible to get it in the process that separates them and that increases their problem. The larger conflict, prolonged litigation, higher costs. Long-lasting disputes that have their own life. No one, not even the litigation does not want to die. (Author's note)

same time act as if they are something outside of them, something that they are not really involved in, something that is beyond their direct views or interests or as to the society in which they live and work, do not belong.

Without going into the reasons for such treatment of people of modern times, it should be pointed out that their interest in social problems or problems of society are growing in proportion to the degree of their use and their involvement. In other words, people do not pay serious attention to the problems of the judiciary, until they engage in the judicial system as a clients or otherwise. Only then do they become aware of the difficulties of the judicial system and the problems that accompany it.

The systems theory argues, according to which every system is made up of its parts. Each system or organization is not just a collection of its functions, but rather depends on the nature of its parts.[72] There is no system in a society that functions on its own, but its functioning and even the success, depends on the functioning of all its parts, whether they are the bearers of this functioning or its customers. It can be concluded that it is almost impossible to improve any system by repairing the system in general, and without fixing its parts. It is not effective, it is even counterproductive to try to change the justice system by overproduction of increasingly stringent substantive and procedural rules in the hope that the regulations will resolve all the problems on their own. Any general change in the judicial system can not have a positive effect on the system without a positive culture change in the behavior of all its parts, therefore, legal professionals and users of the system, and without their responsibility for its operation.

Citizens and businesses should not be only manufacturers of disputes, but also active participants in solving them. They should no longer be allowed to let only the courts deal with the disputes and shift all the responsibility and blame for their (not) solving on others - lawyers, courts, state. The country is faced with the fact that its citizens and businesses almost exclusively use state courts for soslving disputes. Therefore, the courts are swamped with cases, falling deeper into inefficiency. On the demands for efficiency, the state too often try to respond quickly only by increased efficiency of process rules.

Such regulations may increase the efficiency of the courts, but can not fix the position of the parties in the lawsuit, because more efficient courts will only quickly determine which of the client is in the wrong and thusly permanently destroy their relationship. Therefore, once again we point to the argument according to which the parties loyal only to the traditional dispute resolution system and the traditional service of lawyers who are not willing to alter confrontational elements by elements of cooperation, have to be prepared to the specified maximum which at this moment can

[72] "What is happening in the life of the system is that we are becoming a system we inhabit." MACKNIGHT, John, BLOCK, Peter, The Abundant Community, Awekening the Power of Families and Neighborhoods, Berrett Koehler Publishres, Inc. San Francisco, 2012, op. cit., page 66; See, PECK, M. SCOOT, M.D., The Road Less Traveled, A New Psychology of Love, Traditional Values and Spiritual Growth, A Touchstone Book, New York, 25th Anniversary Edition, 2002, pg. 30.

provide state and federal courts, and therefore the consequences of such a decision.

People love to have the freedom of choice and the biggest amount of control over all the decisions concerning their lives. Why would it be any different with their disputes? It seems that the time has come for the citizens and businesses in form of the parties, to take responsibility for their disputes, for their lives or for their business.[73] It is time for the clients to take responsibility for their own choices and their consequences, to directly face the conflict with life or business partners, with their friends, relatives, neighbors or strangers. Courts are always available as a final solution. Without the active involvement of the parties in resolving disputes in any court proceedings or outside them (they only know their own conflict, the reasons for which it was created, as well as the best solution possible – parties are the biggest experts in their own lives), they cannot expect help from others nor rapid progress in improving the existing the legal system cannot be expected.[74] Such participation of the parties in disputes should be allowed by the country, legal institutions and lawyers, but they also need active help in this.[75]

6. Look into the near future – the legal system is stabile only if it constantly develops

Peter Drucker, an expert on the system organization, on the occasion of the bankruptcy of the Penn Central railroad companies Road, said that the company made a mistake because their business was based on an inappropriate statements and the wrong issue: “We have trains. Do you want to get on board?” Instead of these claims and questions, Drucker argued that the claim and the question should be: „We are in the transport business. Where do you want to travel?“

If this view of the operations of the railway company is appropriately applied to the legal system, legal institutions and the legal profession, perhaps a suitable question can be found for them as well. In other words, if the legal services or services of dispute resolution we compare with a train ride to a predetermined destination, and travelers want to travel somewhere else (faster and cheaper), in which case the legal profession and legal institutions are not able to meet their needs. Therefore, it argues that the best question they can ask themselves is: „Do we have trains that can only drive in the direction that has been determined by the track or can we provide the transportation to destinations that travelers want to travel?“

[73] "We cannot solve life's problems except by solving them. This statement may seem idiotcally tautological or self-evident, yet it is seemingly beyond the comprehension of much of the human race. This is because we must accept responsibility for a problem before we can solve it we cannot solve a problem by saying "it's not my problem." "We cannot solve a problem by hoping that someone else will solve it for us." I can solve a problem only when I say "This is my problem and it's up to me solve it." But, many, so many, seek to avoid the pain of their problems by saying to them-selves: "This problem was caused me by other people, or by social circumstances beyond my control, and there for it is up to other people or society to solve this problem for me. It is not really my personal problem." PECK, M. SCOOT, M.D., The Road Less Traveled, A New Psychology of Love, Traditional Values and Spiritual Growth, ibid., pg. 32-33

[74] „...resolution requires more direct participation by the citiznery.“ SAMMAR, Vincent, Justifying Judgment, Practicing Law and Philosophy, University Press of Kansas, Pittsburg, 1998, pg. 67.

[75] „Rawls treats society as a „fair system of social cooperation“ SAMMAR, Vincent, ibidem, pg. 75.

The traditional legal institutions and legal professions need to ask themselves what it means to reduce the number of passengers only for the type of transport that they usually provide? What do destinations generally used only by its members, mean to the legal profession? Can the legal profession provide its customers other types of transport - to the destinations which they want to reach?

Aharon Barak stated that the stability of the legal system without changes is degeneration. Change without stability is anarchy. The role of the legal profession is to help bridge the gap between the needs of society and the law, not allowing the legal system to fall into anarchy. The legal profession must ensure the stability of the change of the legal system and its change with stability. The legal system is stable only if it develops. It's not about the tension between stability and change, but a decision on the rate of change. Likewise, it is not a decision between rigidity and flexibility, but on the degree of flexibility. The law has always been changed under the influence of changes in society, so it can be said that the history of law is also the history of its adaptation to social needs.[76]

Natural and social evolution is the sum of all changes. Every social change has always had its supporters and opponents, or those who wanted to maintain the *status quo*. Any request for positive change is a result of the changed circumstances and changing requirements, needs and interests, but also the mesanger of the new time. Evolutionary processes are based on the simple principle according to which everything is successful, it is becoming more accepted and more often in the future.[77] Any such change contains a moment, the strategic infliction point, after which there is no return to the old. It is a time when the fundamental positive changes prevail, and all those who do not adapt rapidly fall behind, until the possible disappearance.

Although both the society and the law have changed drastically, legal institutions themselves almost stayed unchanged. Until recently lawyers were the only providers of legal services in and out of court and were the only people who possessed the mystery of legal knowledge and legal skills, but also "the keys" to the front door of the courts as the only places where they could resolve legal disputes. It is argued that if the legal profession wants to keep its relevance in society, it should adjust to a much greater extent to the resulting changes that follow the technological

[76] BARAK, Aharon, *The Judge in Democracy*, Princenton University Press, New Jersey, 2006, op. cit., pg. 3-4.
[77] See, AXELORD, Robert, *The Evolution of Cooperation*, Revised Edition, Basic Books, Cambridge MA, 2006, pg. 116.

revolution, globalization and the new demands and needs of the users of legal services, which can no longer be met only by the traditional legal institutions and traditional legal profession.[78]

ADR movement and mediation, which has become its synonym, brought some entirely new winds into the world of resolving disputes, a world previously reserved only to lawyers. It is believed that mediation with its capacity has become a generator of changes in the judicial system and the legal profession. It is believed that mediation has the potential to release the judicial system, legal institutions and the legal profession of the deficiencies and problems that burdened them, the problems which present an even bigger burden on the clients in the dispute, the general public and society as a whole, as shown by the experience of mediation countries in which the mediation at this time is much more widely accepted than in Croatia.[79]

The idea is that parties take greater control over their disputes in court litigation and full control of the mediation proceedings, which seem to have evolutionary potential[80], but not in terms of replacing the still predominant traditional systems of resolving disputes, but in terms of its improvement and advancement.[81] It's about two different systems of public (formal) and private (informal) justice, each one of them, or both together, play an extremely important and complementary social roles.[82] No modern society can no longer be free of these systems which are becoming a common and equivalent parts of the unified system of dispute resolution.

Such a new system of resolving disputes with the help of new kind od legal professionals, allows the law more than ever before, to be much closer to the real needs of citizens and the whole society. Nor the law or the legal institutions, not even the legal profession, cannot fulfill its social role or justify their existence if they are separated from the society and the citizens.

Those who are faithful exclusively to traditional dispute resolution system and the traditional approach of the lawyers, should not see mediation as a threat but as an opportunity to promote

[78] "Just as it is necessary for individuals to accept and even welcome challenges to their maps of reality and *modi operandi* if they are to grow in wisdom and effectiveness, so it is also necessary for organizations to accept and welcome challenges if they are to be viable and progressive institutions. This fact is being increasingly recognized by such individuals as John Gardner of Common Cause, to whom it is clear that one of the most exciting and essential tasks facing our society in the next few decades is to build into the bureaucratic structure of our organizations and institutionalized openness and responsiveness to challenge which will replace the institutionalized resistance currently typical." PECK, M. SCOOT, M.D., The Road Less Traveled, A New Psychology of Love, Traditional Values and Spiritual Growth, A Touchstone Book, New York, 25th Anniversary Edition, 2002, page 53. "For individuals and organizations to be open to challenge, it is necessary that their maps of reality be truly open for inspection by the public. (...) Such honesty does not come painlessly."PECK, M. SCOOT, M.D., ibidem., pg. 55.

[79] See, AUERBACH, Jerold S., *Justice Without Law?* op. cit. , pg. 116.

[80] "Changes in general should arise by evolution, not revolution. "Barak, Aharon, The Judge and Democracy, ibid., Page 12;" According to this vision, mediation is a process that brings with it the promise of transforming society, and even the transformation of human nature. " BRAZIL, Wayne D., Court ADR 25 Years After Pound: Have We found a Better Way ?, Ohio State Journal on Dispute Resolution, 2002, pg. 20.

[81] See, OTIS, Louise, REITER, Eric H., Mediation by Judges: A New Phenomenon in the Transformation of Justice*, Pepperdine Dispute Resolutuion Law Journal*, Vol. 6:3, 2006, page 377**;** "...ADR is not surogate for public adjudication, but as an intervention strategy to promote what a trial is not designed to accomplish: (...) "...mediation and the judicial system are built on incompatible assumptions about human nature, human capacity, and goals of conflict interaction." STIPANOWICH, Thomas J., ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution, *Journal of Emprical Studies*, Volume, Issue 3, November 2004, pg. 848.

[82] This view reveals mediation not as a way of resolving disputes which is an alternative, but as a process that is exactly complementary to the court and that, if properly managed, can complement and overlap and highlight those aspects which the court proceedings ignored, and in view of more efficient treatment of the courts , professional and efficient work of lawyers and restoration of the public confidence in the judicial system. "NEDIĆ, Blazo, mediation and advocacy - prejudice or interest, tkest This is an integral part of the Manual for mediation, issued by the ABA / CEELI, which are used in the Republic of Serbia training programs for judges. sa., s.l., pg. 4.

their work, the quality and diversity of its legal services and client relations. Mediation arouses growing interest among citizens, but also lawyers, precisely because it encourages the establishment of a new system of dispute resolution based on cooperation, honesty, trust, common sense, good faith and the freedom of choice of each individual.[83]

The prevailing belief that mediation in the daily work of legal professionals[84] and the judiciary, helps complement the existing model/philosophy of dispute resolution based solely on the legal protection, a model in which the parties in a dispute take an active part in the solution, in the procedure as well as in the dispute resolution. The consequence of this new approach is changing the social functions of the judiciary. The judiciary ceases to be solely an attribute to the expression of state power and a strict form of the procedure and its implementers and increasingly takes on the attributes tailored to the needs of its users with the primary aim of meeting their protection needs.

Numerous activities described in the previous chapters on the field of mediation, including the activities of a growing number of legal professionals in this regard, point to the signs that the adjustment of the Croatian legal system and the legal profession is already in place.

It is time more than ever before for legal institutions and the legal professionals to compare the perception about themselves with the perception of parties and the public about them, to stop ignoring the unbalanced perception of those two parallel worlds[85] and strongly persist on the initiated processes of their maximum adjustment and transformation of their acts toward the real needs of their users as well as the modern society, if they still wish to keep the relevancy in that society.

Conclusion

Mediation definitely would help in restoring public confidence in the legal system and legal profession. Mediation has a tremendous potential as the mechanism for transformation of the traditional legal institutions, institutions in general, legal profession, all professions, people and societes. Mediators are early adopters of what is soon to become mainstream understanding.[86] There are more and more people, professionals or not, and institutions thet are adopting mediation and

[83] See, ERICKSON, Stephen K., MACKNIGHT, Marylyn S., *The Practitioner's Guide to Mediation, A Client-Centered, Approach,* John Wiley & Sons, New York, 2001, pg. 7.

[84] „...something had changed within lawyer-mediators' understanding of cases and ways of looking at the world. This highlighted an increasing gap in comprehensions and meanings between lawyers who remaind prectic ioners and those who become mediators..." RELIS, Tamara, Perception in Litigation and Mediation, Lawyers, Defendants, Plaintiffs and Gendered Parties, Cambridge University Press, New York, 2009, pg. 235.

[85] „...legal actors and lay disputanst occupy different, though parallel, worlds of meaning and understanding of disputes and how to resolve it. These parallel words evolve in tandem, yet really converge. Morover, there is little awarness between groups of the disparities prevaling." RELIS, Tamara, ibidem., pg. 229.

[86] BRADLEY, Spain Anna, an Associate Professor at the University of Colorado Law School. This sentence is extracted from the content of private electronical communication between Prof. Spain Bradley and the author (Author's note).

mediation programs as a complementary part of their personal, professional and organizational environment. We are witnesses of the process of integration of mediation (ADR) within the legal system and society. Mediation is permanent tool for on-going democratization, socialization and humanization of the institutions and organizations, traditional or not, step by step. It has become not just a process for solving diputes but the way of making life and doing business. In doing so, mediation offers unique opportunity to make world a better place. It works!

Mediation as a Tool for Socialization of the Law, the Courts and Legal Profession and for Democratization of Disputing

Srđan ŠIMAC, Ph.D., Judge of the High Commercial Court of the Republic of Croatia

KEY WORDS: mediation, socialization, democratization, law, courts, legal profession

BRIEF SUMMARY:

The effects of mediation and its postulates achieved during the practice of resolving conflicts and disputes, compared with the traditional system of dispute resolution, indicate its significant potential as an agent of positive change in the entire legal system, legal institutions, the legal profession and society. The experience of the benefits of mediation both for the parties and the legal professionals, regardless of the current number of such procedures and barriers to their rapid development, make the peaceful resolution of disputes and mediation possibly the major signpost in which direction citizens, legal professionals, state dispute resolution system and its institutions, as well as the whole society, should go. We are in the middle of the process of construction significantly enhancing new version of the dispute resolution system which will incorporate the best from two worlds, the public/formal and private/informal justice.

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