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COMPREHENSIVE REVIEW OF THE PRAGMA-DIALECTICAL CODE OF CONDUCT AND BULGARIA'S MEDIATION ACT. THEORETICAL AND LEGAL ASPECTS OF MEDIATION

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Abstract: *The adoption of the Mediation Act in Bulgaria in December 2004 granted Bulgarian citizens the right to seek and participate in the voluntary, informal, and confidential process of mediation. In the context of Bulgarian law, mediation is defined as an alternative method for resolving legal and non-legal disputes. This normative dimension is underpinned, in no small part, by the Dutch theoretical framework of pragma-dialectics – a process of analyzing and evaluating argumentative discourse in practice, whether political, media-related, community-based, or otherwise.*

The present report aims to analyze the points of intersection between mediation and pragma-dialectics by comparing the dialectical essence of dispute resolution with the practicality of mediated critical discussion. Additionally, a focus will be placed on critical observations regarding gaps in the regulatory framework related to the governance of mediation activities in Bulgaria.

Keywords: *Mediation Act, Argumentation Theory, Disputes*

1. A general overview of mediation through the lens of the Mediation Act and the applicable secondary legislation in the Republic of Bulgaria. Legal issues.

Mediation, as a method for the voluntary, out-of-court resolution of disputes in civil, trade, labor, family, and administrative matters, represents an alternative for achieving alignment in the declarations of intent between two or more disputing parties on a specific issue. The principle that mediation is based on the consent of the parties is enshrined in Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR, OJ, L 165/63, 18.6.2013). a.39 of the preamble explicitly highlights that "to ensure transparency of alternative dispute resolution (ADR) structures and procedures, parties must receive clear and accessible information necessary to make an informed decision befote initiating before initiating an ADR procedure."[1] At the same time, this dispute resolution method provides an additional option for parties, which, under the conditions outlined in the Mediation Act (MA), successfully assists courts in

[1] Ruling № 11/2024 of the Constitutional Court – https://www.constcourt.bg/bg/act-9840 – visited on 02.01.2025

managing their caseloads through judicial mediation. This aspect was acknowledged by the Legal Affairs Committee during the first reading of the draft amendments to the Mediation Act in 2023.

For years, Bulgaria's judicial system, particularly the Ministry of Justice, has sought and developed strategies to implement models aimed at alleviating the workload of courts nationwide. In this regard, the Mediation Act, which transposed Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, represents an initial step toward achieving the stated goal. A definition of mediation is provided in a.2 of the Act, while the requirements for obtaining mediator status are imperatively listed in Article 8. The administrative procedures for registration in the Unified Register of Mediators are outlined in a.8a. In this sense, the requirements related to training, registration, deregistration, and the status of mediators are further detailed in secondary legislation—Ordinance No. 2 of 15.03.2007 on the conditions and procedures for approving organizations that train mediators, for the registration, deregistration, and removal of mediators from the Unified Register, and for the procedures and ethical rules of conduct for mediators.

One notable observation in reviewing the secondary legislation is the absence of administrative penalties for mediators who violate ethical rules of conduct prescribed by the regulations. Professional ethics, in essence, constitute a set of rules and norms of behavior mandatory for professional organizations. For those practicing outside professional organizations, moral and ethical conduct in the workplace is most often governed by internal regulations. In this context, it is worth noting that modern European legal systems increasingly emphasize the positive approach of legislators toward ensuring the moral and ethical accountability of representatives of public administration, the judiciary, professional organizations, and others, supported by relevant administrative or disciplinary measures in cases of violations.

Another notable issue in the regulatory framework is the lack of a unified organization for mediators. Currently, there is no single association uniting existing non-governmental organizations, such as the National Association of Mediators, the Professional Association of Mediators, and the Chamber of Mediators in Bulgaria. From both practical and legal perspectives, this diversity of informal organizations, combined with insufficient regulatory representation, creates the impression of a lack of effective control over the professional and ethical conduct of mediators in their practice. In our opinion, this issue can be resolved through legislative intent and the active engagement of individual mediators. A step in this direction was the proposal to amend the Mediation Act submitted in 2023 by the Supreme Judicial Council. Key elements of the proposed amendments included introducing mandatory mediation in twelve types of cases, such as divorce (a.49 of the Family Code), disputes regarding parental rights, child residence, personal relations with the child, and child support (a.127, p.2 of the Family Code), and certain commercial disputes, such as those related to shareholder interests or managerial liability in limited liability companies (*a. 142, p. 3 TL and a. 145 TL).*[2] The draft law also proposed that courts could refer parties to mediation, albeit not mandatorily,

[2] https://news.lex.bg/%D1%81-%D0%BF%D1%80%D0%BE%D0%BC%D0%B5%D0%BD%D0%B8-%D0%B2-%D0%B3%D0%BF%D0%BA-%D0%B2%D1%8A%D0%B2%D0%B5%D0%B6%D0%B4%D0%B0%D1%82-%D0%B7%D0%B0%D0%B4%D1%8A%D0%BB%D0%B6%D0%B8%D1%82%D0%B5%D0%BB%D0%BD%D0%B0/-последно visited on 13.01.2025

for matters such as monetary or non-monetary claims arising from contracts, unilateral transactions, torts, unjust enrichment, and labor disputes.[3]

Despite the existence of judicial mediation, the number of mediated cases in Bulgaria remains modest, particularly in family law matters such as divorce[4], custody, and property division. This reality contradicts the notion that the number of legal disputes has decreased. According to data from the Supreme Judicial Council, between 2019 and 2023, while the population of Bulgaria decreased by 6.71%, the number of filed cases increased by 2.82%.[5] Following the adoption of the amendments to the MA, the provisions under Chapter VI —"Mediation in Pending Court Cases" (a.19–25)—were declared unconstitutional by the Constitutional Court's Decision No. 11 of 2024, citing a conflict with a.56 of the Constitution. The court's decision highlighted a significant issue: the necessity for mandatory judicial mediation stemmed from the *"lack of willingness and trust among the parties,"* identified as *"one of the greatest obstacles to conducting mediation."* This reasoning was also reflected in the report of the Legal Affairs Committee during the first reading of the draft amendments, where it was noted that, "*for the last 17 years, mediation in Bulgaria had not functioned effectively, necessitating its mandatory implementation to familiarize citizens with the process and integrate it into the legal system."*[6]

The outlined legal nature, challenges, and practical conclusions regarding the public's insufficient awareness of the benefits of mediation inherently obstruct the realization of its primary goal: a voluntary out-of-court procedure for dispute resolution facilitated by a third-party mediator, grounded in principles such as equality, voluntariness, neutrality, and impartiality, with the aim of achieving procedural, time, and financial savings for the parties involved.

2. Definition of argumentation in Pragma-dialectics

The field of argumentation is as wide as it is complex. While different frameworks exist for different kinds of argumentation, i.e. mathematical argumentation, scientific argumentation, legal argumentation, etc., each with its own set of considerations and processes, this paper will focus on argumentation within the context of pragma-dialectics. Dutch scholars Frans H. van Eemeren and Rob Grootendorst from the University of Amsterdam define *argumentation* as "a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forward a constellation of propositions justifying or refuting the propositions expressed in the standpoint"[7] . This technical definition of the term *"argumentation"* differs from the everyday use of the word. The main difference being that that pragma-dialectics, the former lends precision to the term, allowing students of argumentation to conduct more thorough analyses of argumentative texts, both theoretically and in practice. The pragmatic aspect of argumentation focuses on the resolution of a difference of opinion, while dialectics regard the process of arguing as an innate part of a critical discussion.

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[3] Op. cit. Ibidem.

[4] Stoyankova, D. Razlog legal monument from the XIXth century., UP "Paisii Hilendarski", Plovdiv, 2024, p. 317, ISBN 978-619-202-933-3; 126-146.

[5] https://news.lex.bg/%D1%81-%D0%BF%D1%80%D0%BE%D0%BC%D0%B5%D0%BD%D0%B8-%D0%B2-%D0%B3%D0%BF%D0%BA-%D0%B2%D1%8A%D0%B2%D0%B5%D0%B6%D0%B4%D0%B0%D1%82-%D0%B7%D0%B0%D0%B4%D1%8A%D0%BB%D0%B6%D0%B8%D1%82%D0%B5%D0%BB%D0%BD%D0%B0/-последно visited on 13.01.2025.

[6] Ruling № 11/2024 of the Constitutional Court – https://www.constcourt.bg/bg/act-9840- visited on 02.01.2025.

[7] van Eemeren, F.H., Greebe, H. A Systematic Theory of Argumentation, Cambridge University Press, 2004.

The ideal model and rules for a critical discussion

Conducting a truly critical discussion requires, first and foremost, a theoretical framework. Precision of speech, word choice, and linguistic thoroughness are to be emphasised, if any further exploration into the pragmatic aspect of the act of arguing is to be analyzed with objective clarity. With regard to argumentation theory, this theoretical framework is defined as *the ideal model for a critical discussion*.[8] The model features four stages, each facilitating the optimal resolution of a difference of opinion:

1. *Confrontation stage* – The confrontation stage introduces a dispute. A standpoint is advanced and questioned.
2. *Opening stage* – During the opening stage, the two opposing sides come together in an attempt to resolve the dispute by means of a regulated argumentative discussion. Prerequisites for the discussion, i.e. common starting points are established. Both parties have to agree on the starting points and a set of rules for discussion to progress in a meaningful way. One party assumes the role of protagonist, which means that they are prepared to defend their standpoint by means of argumentation. The other party assumes the role of antagonist, which means that they are prepared to challenge the protagonist systematically, requiring the latter to defend their standpoint. In a non-mixed dispute, the antagonist's role is to attack the protagonist's defense of their standpoint, without the former having to defend a standpoint of their own.
3. *Argumentation stage* – At the argumentation stage, the protagonist defends their standpoint and the antagonist elicits further argumentation from the former, if the latter has further doubts. Because of its crucial role in resolving the dispute, the argumentation stage is sometimes regarded as the "real" discussion. In a non-mixed dispute, there is only one protagonist who advances argumentation; in a mixed dispute, more protagonists should advance argumentation.
4. *Concluding stage*. In the concluding stage, it is established whether the difference of opinion has been resolved on account of the standpoint, or the doubt concerning the standpoint having been retracted. If the protagonist's standpoint is withdrawn, the dispute has been resolved in favor of the antagonist; if the antagonist's doubt is withdrawn, the resolution is in favor of the protagonist. In the case of the protagonist withdrawing their standpoint, the protagonist may adopt a standpoint that is the opposite of their original position, though this is not necessarily so: They may also water down or alter their original standpoint, or adopt a zero standpoint altogether. In the case of the antagonist withdrawing their doubt, the antagonist must accept the protagonist's standpoint.[9]

The above stages are governed by a set of fifteen pragma-dialectical rules. Though extensions of, these rules are not to be confused with the ten "commandments" for a reasonable code of conduct – a condensed summary of the initial fifteen rules, making the latter much more palatable to non-argumentation theorists.[10]

[8] van Eemeren, F.H., Grootendorst, R. Argumentation, Communication, and Fallacies: A Pragma-dialectical Perspective, Lawrence Erlbaum Associates, 1992.
[9] Op. cit. Ibidem.
[10] Op. cit. Ibidem.

Table of Argumentation Commandments

Commandment	Name	Description
1	Freedom rule	Parties may not prevent each other from putting forward standpoints or casting doubt on standpoints.
2	Burden-of-proof rule	A party who puts forward a standpoint is obliged to defend it if asked to do so.
3	Standpoint rule	A party's attack on a standpoint must relate to the standpoint that has indeed been advanced by the other party.
4	Relevance rule	A party may defend his or her standpoint only by advancing argumentation related to that standpoint.
5	Unexpressed premise rule	A party may not falsely present something as a premise that has been left unexpressed by the other party or deny a premise that he or she has left implicit.
6	Starting point rule	No party may falsely present a premise as an accepted starting point, or deny a premise representing an accepted starting point.
7	Argument scheme rule	A standpoint may not be regarded as conclusively defended if the defense does not take place by means of an appropriate argument scheme that is correctly applied.
8	Validity rule	The reasoning in the argumentation must be logically valid or must be capable of being made valid by making explicit one or more unexpressed premises.
9	Closure rule	A failed defense of a standpoint must result in the protagonist retracting the standpoint, and a successful defense of a standpoint must result in the antagonist retracting his or her doubts.
10	Usage rule	Parties must not use any formulations that are insufficiently clear or confusingly ambiguous, and they must interpret the formulations of the other party as carefully and accurately as possible.

The ideal model and rules for a critical discussion do not guarantee that a difference of opinion will be resolved in practice. They are merely a resolution-oriented *guide* which, if adhered to, is conducive to resolving (but not necessarily settling) a dispute between reasonable critics. The ten "commandments" constitute what van Eemeren & Grootendorst call *first-order conditions.*[11] The remaining multitude of factors bearing on the outcome of a critical discussion are defined as *second-order* (internal) and *third-order* (external) *conditions,* respectively.

3. Parallels between pragma-dialectics and mediation

Strategic maneuvering between reasonableness and effectiveness

Mediation as a subtype of argumentative discourse is simultaneously dialectical and rhetorical. In other words, removing doubt solely for the purpose of resolving a difference of opinion is rarely a party's only agenda during a dispute. Unlike mediators, who abide by the principles of impartiality and neutrality, the arguing parties in a mediated discussion are not bound by such considerations. The latter's communicative goal to convince their perceived opponents to change their stance on an issue is just as desirable, if not more so, than merely proving the validity of one's standpoint. This duality is what van Eemeren refers to as *strategic maneuvering*.[12] It presupposes a balance between argumentative reasonableness and applicable effectiveness. Participants in the discourse make use of various tools at their disposal in the form of speech acts (assertives, commissives, directives, and usage declaratives). These moves bear on different stages of the resolution process, are adapted to meet the target audience's specific demands, and attempt to present positions in a manner favorable to the communicative goal via available and, ideally, argumentatively sound means.[13]. The role of the mediator comes into play when the herein prescribed framework fails. In other words, when the participants engaged in the difference of opinion are unable (or unwilling) to abide by the ideal model and rules for a critical discussion.

Voluntary participation, freedom rule, and right of retraction

Several similarities are observed between mediation and argumentation's core tenets. For one, the process of mediation and the act of engaging in argumentation are voluntary activities. Parties assume their respective roles of protagonist and antagonist of their own free will, with neither side obliged to enter a regulated argumentative discussion. While not conducive to the goal of resolving a difference of opinion, this voluntary aspect guarantees the basic right of participants to refuse to take part in a dispute. This is especially pertinent in cases where one side is faced with a clearly unreasonable opponent who is unwilling to establish common starting points and/or commit to any rules.

Once prerequisites are established, an attempt at a reasonable exchange of standpoints and doubt can commence. In theory, this is achieved by the *freedom rule*. I.e. *parties may not prevent each other from putting forward standpoints or casting doubt on standpoints*. Within the

[11] van Eemeren, F.H., Greebe, H. A Systematic Theory of Argumentation, Cambridge University Press, 2004
[12] van Eemeren, F.H., Strategic Maneuvering in Argumentative Discourse: Extending the Pragma-dialectical Theory of Argumentation, John Benjamins B.V., 2010:40
[13] Op. cit. Ibidem.:93-96

normative dimension, the same premise expressed in Commandment 1 is present, albeit more vaguely, in Article 5 of the Mediation Act – *the parties shall have equal opportunities to participate in the mediation process.* Thus, it follows that for a fair and constructive dialogue to take place, participants must be allowed to express their standpoint(s) without limitations and in equal measure, so long as their conduct does not infringe on the opposing party's right to do the same.

Finally, a right of retraction is present in both the theoretical and normative dimensions. From a theoretical standpoint, a protagonist can retract their standpoint when said standpoint has been successfully attacked by the antagonist, or conversely, it permits an antagonist to lay their doubt(s) to rest when the protagonist's standpoint has been successfully defended. In practice, withdrawal of commitment can occur at any stage of the discussion, as stipulated by Article 5 of the Mediation Act – ...[the parties] *may withdraw at any time*. This act of withdrawing from the discussion does not, however, absolve the withdrawing party of the burden of proof, nor is it conducive to resolving the difference of opinion. Retracting one's standpoint, effectively withdrawing from the debate not as the result of a successful attack or, respectively, as the result of a successful defense, but merely as an extension of the right of retraction, serves only to postpone the process of mediation, making the latter not necessarily superfluous, but certainly more difficult.

4. Conclusion

Bulgaria's Mediation Act and the pragma-dialectical theory of argumentation provide a solid framework for out of court conflict resolution. The normative dimension, in parallel with a deeper understanding of what constitutes critical thinking and rational debate, has the potential to facilitate reasonable discourse, amplifying public trust in ADR practices and enabling an economy of resources. That said, more work is necessary in terms of institutional development, as well as in relation to the private sector and individual participants, if the value of said tools is to be effectively and consistently integrated into cultural reality. Better-defined ethical accountability standards and administrative penalties for mediators, a unified training association (as opposed to a handful of nonprofits), and an expansion of the body of relevant academic literature, may all serve as stepping stones toward wider adoption of the tenets hitherto alluded to.

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