CHAPTER 1

MEDIATION AS GENERATOR OF CHANGE IN JUDICIAL SYSTEM AND LEGAL PROFESSION

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

Socrates

Introduction

The court system, legal institutions, judicial proceedings and the legal profession that serve them, did not follow the significant 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. The law has almost entirely replaced justice;[1] the parties have become observers in their disputes[2] and the courts' forums for representing the public interests and the values of the legal profession. Judicial procedures are more complex and the legal language more incomprehensible 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 primary. The Law and legal professionals seem to have lost sight of their original purpose. The result of which is confusion on several dimensions; the disputants tangled in legal mazes, their deep dissatisfaction with the

[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, pg. 74.

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

system over which they have no control, and the alienation of the legal systems and the legal profession from citizens and society.
The current state of the legal system and the state of the judiciary has become distorted to such an extent that it claims to have become a barrier to further development of society. It is a kind of self-capitulation of the self-sufficient legal system regarding modern mass societies. It would be quite an exaggeration to say that such a state was only the contribution made by legal professionals. There is no denying that the holders of the legal profession as carriers of the legal system, through their daily and mostly unchanged practice, very often neglect the real interests and needs of the parties in the disputes, as well as the necessary need for positive change. The dissatisfaction with such a state among the growing number of representatives of the legal profession, only confirms this assessment.[3]
It seems that the judicial system and the legal profession in its traditional form experienced the peak of its historical activity and, also, the persistence in maintaining the status quo calls into question its relevance and existence in society. It is believed that to preserve the democratic culture and achievements of modern societies, legislative, executive, and judicial authorities, as well as the legal professionals, must not ignore the limitations of the traditional legal system and legal practice within it. On the contrary, they should confront such a situation and decide on affirmative action. The representatives of the legal profession should not only be intermediaries between the law and the parties in a dispute. They should not only count on the fact that their specialized knowledge and skills, rigor and formality of treatment[4] or the mere affiliation that a profession will guarantee a job position and reputation in society. The place and status of the legal profession in society cannot be guaranteed; it must be earned.
Access to justice does not only mean access to the courts. Therefore, it is considered that the time has come to revitalize the legal system, legal institutions, and legal profession and to adapt them to the environment in which they operate. Towards the transformation of traditional dispute resolution system and its institutions, we have, at our disposal, a number

[3] AUERBACH, Jerold S., ibid. pg. 119-120.
[4] "A form of the judicial procedure was conceived as a guarantor of fairness, equal treatment of all parties by 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, University of Zagreb, Faculty of Law in Zagreb, 2008, pg. 195.

of tools - new dispute resolutions tools led by mediation, which has become the synonym for the Alternative Dispute Resolution (ADR) movement.
The effects of mediation and the postulates it achieves during the practice of resolving conflicts and disputes, compared with the traditional system of dispute resolution, indicates its significant potential as an agent of positive change in the legal system as a whole and society. The benefits of mediation for the parties and the legal professionals,[5] regardless of such procedures, and barriers to their rapid development,[6] make peaceful dispute resolution and mediation possibly the most significant indicator in which direction society, the judicial system and its institutions should go. We are in the middle of the process of creating a dramatic shift in the dispute resolution system, which will incorporate the best of worlds, the public/formal and the private/informal justice.

Cooperation – a basic principle in dispute resolution

Conflicts are an integral and indispensable part of life and are not, in themselves, negative.[7] Only the attitude towards conflicts can be negative, as well as the approach to their resolution. The most common and most potent civilized way of resolving severe conflicts is their conversion into legal disputes - litigation. In court disputes, the emphasis is given to a legal war between the opposing parties and their further confrontation. This is an increasingly less desirable approach to resolving disputes.

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[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, pg. 8-9.
[7] "At the beginning of a conciliation session, the parties must acknowledge that the conflict is a normal state of being. Only when it becomes deeply-rooted and engrained does conflict become unhealthy, even pathological, and lead to endless judicial fighting. The task of the judge-conciliator is to break the deadlock and foster a meeting of minds. (...) Not surprisingly, experience often shows one conflict is hidden within another. The trick is to identify the one fundamental conflict". OTIS, Louise, The Conciliation Service Program of the Court of Appeal of Quebec, *World Arbitration and Mediation Report*, Vol. 11, No. 3 March 2000., pg. 83.

There are two biological evolutionary theories about human interactions. The first theory is predominantly conflicting and advocated by *Charles Darwin*. The other is predominantly cooperative, and its founder is less known, *Peter Kropotkin*.[8] Darwin's theory is based on natural selection as the primary mechanism of reproduction and self-sustainability. The strength, ability, resourcefulness and personal interest of an individual or group are primary for self-sustainment. The strongest do not have compassion for the less powerful, the less capable or, the less resourceful. This theory was reinforced by the development of capitalism and became the subject of an interpretation of many economic theories. Simplified, the market provides everyone with equal chances of economic success, however, only the strongest and the most capable win. Equal access has been translated into many aspects of social life. It is claimed that today, in capitalist social systems, Darwin's theory of natural selection, competition and confrontation has reached its climax (with the accompanying negative consequences).

Where Darwin sees competition, personal interest and the strength of the stronger as the human driving force, Kropotkin considers cooperation. Kropotkin argued that human collaboration in relationships through history enabled the survival of the human species, its every success and progress.[9]

In everyday social life, individual interests prevailed over the interests of the community and the general good. In the mutual encounter and collision of the interests of individuals and their clash with public interests and vice versa, there have been countless new relationships, but also disputes that are often solved in one way - by judicial means. Such a method of resolving disputes seems to satisfy very few people. It is believed that precisely because of all these circumstances, the cooperation between people today is needed more than ever before, starting from individual to

[8] See, KRPOPOTKIN, Petr Harry, *A Mutual Aid, A Factor of Evolution*, ReadaClassic.com, s. l., 2009.

[9] "Cooperation-not competition-underpins innovation. To spur creativity, and to encourage people to come up with original ideas, you need to use the lure of the carrot, not fear of the stick. Cooperation is the architect of creativity through evolution, from cells to multicellular creatures to anthills to villages to cities. Without cooperation, there can be neither construction nor complexity in evolution". NOVAK, Martin A., HIGHFIELD, Roger, *Super Cooperators, Altruism, Evolution and Why We Need Each Other to Succeed*, Free Press, New York, 2011. Preface xvii.

global issues. However, it is considered questionable[10] whether the human species, after long-term movement in one direction, can run the other way?[11] If they were to use at least a part of the inexorable optimism of a mediator, the belief could be expressed as an affirmative answer to the question above. On what belief can this be based?

We witness countless examples of common, visible and invisible forms of co-operation among people. Every day people work well together and help each other, starting from simple tasks, to very complex ones, and finally to the noblest ones, regarding the salvation of human health and life. People cooperate in the majority of conflicts. Conflict is a part of every-day human life, and by far the most significant number of them never reach the courts. Even the most severe conflicts, when given due attention, will crystallize the moment it activates the natural human strength with the potential for cooperation and its resolution.[12] Collaboration takes place at all levels: individual, institutional, national, international and global. Individuals, groups, and institutions often cooperate without previously established rules, control or oppression by a higher authority. Cooperation and helping occurs spontaneously without organization, simply because they are needed at a given time.[13]

The exceptional ability to co-operate, biologists claim, is encrypted in human genes.[14] Every co-operation, aiding or receiving help, fills people

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[10] "Maybe Darwin is right"? NOVAK, Martin A., HIGHFIELD, Roger, ibid,, pg. 14.

[11] "Darwin's evolution refers to a mechanism of natural selection that ensures survival and reproduction. We all know that people are not angels and that they primarily think of themselves and their interests. We also know that there is cooperation between people and that our civilization is based on it, but, also in situations in which every individual is encouraged to be selfish, how to develop co-operation"? AXELORD, Robert, *The Evolution of Cooperation*, Revised Edition, Basic Books, Cambridge MA, 2006, pg. 3.

[12] See, OTIS, Louise, op. cit., pg. 83.

[13] "Why should the villagers have cared about a group of strangers"? When asked this question decades later, Roger Darcissac, a local pastor explained, "It all happened very simply. We didn't ask ourselves why. Because it's the human thing to do... something like that. That's all I can tell you". An elderly peasant echoed his explanation: "Because we were human, that's all". AXELORD, Robert, op. cit., pg. 25.

[14] "Our ability to cooperate is one of the main reasons why the human species can survive in every ecosystem on Earth "... NOVAK, Martin A., HIGHFIELD, Roger, op. cit., Preface xvi.

with a unique sense of satisfaction.[15] People are the most exceptional co-operatives among living beings.[16] They often help even complete strangers.[17] Cooperation among people can be a rarity or of a more permanent nature. One-time co-operation takes place daily and sporadically, and most often is not conditioned by reciprocity by the behavior of the others. One side is satisfied with the fact that they have been helping, and the other has received their help. On the other hand, reciprocity is an inevitable and an integral part of human life. As a rule, it is not possible to expect more permanent co-operation without reciprocity, more precisely without hoping that both sides make a gain in their ongoing relationship with each other, irrespective of their nature. In other words, the very offer of co-operation from one side to another, without acceptance and expected reciprocity, has no significant prospect of success. The expected reciprocity represents a sufficient basis for the beginning and continuation of a relationship, and therefore carries a rather powerful self-regulating mechanism for most interpersonal relationships. The extension of reciprocal behavior solidifies the continuation of the relationship.[18] For simplicity of understanding, the treatment described is most easily compared to the usual activities of business entities in the market.[19] Their relationships are based on mutual expectations and fair treatment within which both strive to achieve desired goals. Regardless of whether the parties have regulated their relationship legally, by contract or otherwise, they may not be in line with the law, but exclusively with business principles for the duration of that relationship. Their established

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[15] RICHBELL, David, *Mediation of Construction Disputes*, Blackwell Publishing, Oxford, 2008, pg. 114.
[16] NOVAK, Martin A., ibid.
[17] AXELORD, Robert, pg. 4.
[18] "The key factor is that the participants know that they will have to deal with each other again and again. Therefore every attempt to exploit such a relationship cannot succeed". AXELORD, Robert, ibid., 178 AXELORD, Robert, ibid., pg. 173, 174 and 178.
[19] Ordinary business transactions are also based upon the idea that a continuing relationship allows cooperation to develop without the assistance of a central authority. Even though the courts provide a central authority for the resolution of business disputes, thus authority is usually not invoked. A common business attitude is expressed by a purchasing agent who said that "if something comes up, you get the other man on the telephone and deal with the problem. You don't need to read legalistic contract clauses at each other if you ever want to do business again. (...) The fairness of the transaction is guaranteed not by the threat of a legal suit, but rather by the anticipation of mutually rewarding transactions in the future". AXELORD, Robert, ibid., pg. 178-179.

relationship does not develop due to legal or legal threats related to its execution, but to meet mutual expectations. Such self-regulating rules in human relationships function if the reciprocity works. Reciprocity is the most popular reason for the establishment and duration of most interpersonal relationships. A relationship, cooperation, reciprocity, and trust do not last forever. They grow and grow, fall and reestablish. In this way, examples of exceptional co-operation among people are continually changing with their conflicts of different nature and intensity.[20] Humans resolve conflicts starting from the time of establishment of social groups and the time before lawyers or courts.[21] In the same way today, the most significant number of individuals and business entities solve their conflicts - without laws, lawyers or courts.[22] The most significant conflicts in human history have just ended in this way.

Along with the described elements as a part of human nature, numerous authors express their beliefs about the existence of robust internal human capacity related to their ability to resolve conflicts between themselves.[23]That human ability has been endorsed countless times throughout history.[24] It is believed that people can still have this ability and apply it daily.[25] The technological advances, endlessly multiplied numbers of people and their complexity, including the strong support of the law, lawyers and courts have deprived many people of their capacity and ability to resolve their disputes. Through time, people became more and more reliant on law, and lawyers, to resolve their disputes. The consequence of such treatment, is the legal system, with which very few are satisfied. People should again find their own ability to cooperate, which appears to be lost. It is necessary that people again, regarding their problems and conflicts, reflect on, and cooperate respectfully without imposing their views on each other.[26] People need and want to apply their own life or

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[20] NOVAK, Martin A., HIGHFIELD, Roger, Preface xix.
[21] BOWLING, Daniel and HOFFMAN, David, pg. 188.
[22] "Termination of cooperation often results in expensive court battles". AXELORD, Robert, pg. 179.
[23] BOWLING, Daniel and HOFFMAN, David, *Bringing Peace Into the Room, How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution*, Jossey-Bass, San Francisco, 2003, pg. 5.
[24] POHOJNEN, Soile, Peace Versus Justice, electronic copy at http://ssrn.com/abstract=1557890, pg. 14.
[25] "The only thing that can break the human race is cooperation". Bertrand Russell
[26] "The primary idea is not to make others understand us, but to try and to improve our understanding of ourselves and one another. (...) a central starting point is the existence of difference and respect for this difference. Participants are not expected or assumed to have the same pre-understandings. No one is expected to become

business rules, as is customary, following their real needs.[27] The rules and logic of legal professionals and legal institutions designed to resolve disputes, cannot, as a rule, satisfy the human needs of the parties involved.[28]

Although it is commonly argued that it is difficult for individuals to resolve disputes, it is also argued that it is comforting that most people still have the internal capacity to deal with them and co-operate. The question arises, at the point of considering co-operating, is he willing to co-operate or to be selfish?[29] Biologists, neurobiologists, and sociologists teach us that every man has the choice of ways to deal with his conflicts.[30] The primary way of dealing with them, deeply rooted in people, is based on cooperation.[31] Resolving conflicts by opposing or clashing, even if civilized throughout the litigation, always remains as the last option.[32]

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convinced of another's viewpoint and consequently change their opinion. The goal is not a compromise but a flow that carries the participants to unknown paths and places". POHOJNEN, Soile, op. cit., pg. 13.

[27] "The bushes still living in the Kalahari Desert live under the same conditions as a few hundred years ago, have their own internal, highly effective system of solving more serious conflicts ('kgotla') involving all members of the community as a 'third party'. Their livelihood is: You never cause the problem you will have to deal with, try to live harmoniously". (...) "Every day in these horizontal societies becomes a prevention exercise". URY, William, *The Third Side*, op. cit., pg. 114; Regardless of the fact that this natural ability of small human communities seems to have been completely lost in living conditions in modern societies, it can be reliably argued that this ability to resolve disputes is still present in human beings as individuals and social communities. That potential and ability need only be awakened or released for its own disputes. Institutional dispute resolution is always available as the last option (author's note).

[28] POHOJNEN, Soile, pg. 18.

[29] AXELORD, Robert, op. cit., Preface, vii.

[30] URY, William, The Third Side, Why We Fight, and How We Can Stop, Including 10 practical roles we can play at home, at work, and in the world, Penguin Books, New York, 2000, pg. 42.

[31] "Conversely, the theory of positive law has a completely negative view of human nature. Collaboration is not considered a natural state. People are considered to be aggressive, uncontrollable and willing to take every opportunity to create their advantage over others. Even so, Thomas Hobbes, a supporter of this theory that prevails in the legal world today, claimed life in its natural state is characterized by loneliness, poverty, malice, brutality, and shortness of mind. A natural state exists where there is no civilization or society. It is a state of brutal competition and a state of war. According to Hobbes, the only way out of such a situation is right". See, NOLL, Douglas, *Peace Making, Practicing at the Intersection of Law and Human Conflict*, Cascadia, Publishing House Telford,

One of the most effective ways of supporting this rather robust but somewhat hidden co-operative aspect of human nature is for the parties, whose attention and ability for co-operation, have weakened, is to turn to lawyers with a reputation for cooperation to help them resolve conflicts.[33] Through various forms of co-operation or concessions, parties who are already in a conflict, can significantly assist in solving it, even if through litigation. Any form of co-operation that at least partially replaces confrontation,[34] whether expressed during outside litigation can significantly contribute to the well-being of the disputants and to the benefit of the legal system and the society. John Rawls treats society as a "*just system of social cooperation*".[35]
Derek Bok, a former Harvard University Dean, expressed that the legal profession was about to lose a great opportunity. To be the center of the most creative social experiment of modern times it must contribute to involving the parties in a new movement to resolve disputes in which confrontation increasingly is replaced by cooperation, as a primary approach.[36]

Pennsylvania co-published with Herald Press, Scottsdale, Pennsylvania, 2003, pg. 266.

[32] "The Court, in other words, replaces the war in a much more gentle form of combat". URY, *William*, op. cit., pg. 151.

[33] "The notion of cooperation in a litigation context reinforces our views on positive health effects. If the positive role of adversaries can be expanded, benefits would occur for society and the legal system". SELIGMAN, Martin E. P., VERKUIL, Paul R. and KANG, Terry H., *Why Lawyers are Unhappy*, Deakin Law Review 49, 2005, op. cit., pg. 12.
http://www.austlii.edu.au/au/journals/DeakinLRev/2005/4.html

[34] "The process of becoming mediator is not easy. The job of teaching peace has always fallen on those who are willing to make sacrifices and who are willing to swim upstream. In some quarters, you will not be welcome. We have inherited an ancient legal decision-making system that is deeply entrenched and based upon an adversarial model. In addition, you will find that humanity has a tendency toward violence and confrontation. Your job is to change that tendency and offer new thinking, cooperation, and peace". ERICKSON, Stephen K., MCKNIGHT, Marilyn S., op. cit., pg. 22.

[35] SAMMAR, Vincent, *The Practitioner's Guide to Mediation, A Client-Centered Approach*, John Wiley & Sons, Inc., New York, 2001, pg. 75.

[36] RISKIN, Leonard L., *Mediation in the Law School*, cit. (note 725.), str. 260; "Cancer is a fundamental mistake in the collaboration of body cells". NOVAK, Martin A., HIGHFIELD, Roger, op. cit., pg. 1; "According to Thich Nhat Hanha, "If we are peaceful, everyone in our family, our whole society will benefit from our peace". BOWLING, Daniel, HOFFMAN, David, pg. 39.

Mediation - a complementary part of the dispute resolution system

Negative public perceptions of the courts and legal professions in all modern societies have prompted activities aimed at finding the best possible solutions to the misunderstandings between the law and citizens.[37] The multi-year coexistence of various ADR forms of dispute resolution and court litigation leads to the conclusion that there are substantial prospects for harmony between the informal and formal '*two-track justice system.*'[38] A positive impact on their development, either individually or together is an additional benefits are achieved through their mutual interaction. It seems that this all points to the possibility of a symbiosis of both systems in a way that none of them diminishes the importance, value or reach of the other.[39] The goal of this mutual coexistence should be to maximize the benefits offered by these two controversial worlds of dispute resolution.[40] These benefits can be equally distributed to legal and judicial systems as well as the whole of society.

Mediation (negotiating with the help of a trusted third party) and litigation can no longer exist in a single society as separate dispute resolution systems.[41] No system can last forever without it listening to the needs of its users and understanding the demands that accompany new times and social relationships.

Mediation and other forms of ADR have no ambition to replace the traditional dispute resolution system but merely supplement it as a new option available to all parties in a dispute.[42] It seems that mediation does not want to play just a supporting role or, as it has been commonly said, to

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[37] ERICKSON, Stephen K., MCKNIGHT, Marilyn S., pg. 219.

[38] AUERBACH, Jerold S., *Justice Without Law? Resolving Disputes Without Lawyers*, Oxford University Press, Oxford, New York, Toronto, Melbourne, 1983., pg. 144.

[39] OTIS, Louise, REITER, Eric H., *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, Pepperdine Dispute Resolution Law Journal, Vol. 6:3, 2006., pg. 366.

[40] POHOJNEN, Soile, pg. 19; OTIS, Louise and REITER, Eric H., ibid.

[41] MENKEL-MEADOW, Carrie, Pursuing Settlement in an Adversary Culture: A Tale of Innovation coopted or "The Law of ADR": *Florida State University Law Review*, summer, 1991, pg. 2.

[42] OTIS, Louise, REITER, Eric H., op. cit., str. 357. i 378; 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.

have an alternative role. Mediation cannot in any way diminish the importance, the legitimacy or the authority of the courts and court proceedings. As today's modern architecture is becoming more and more successful, examples of the interpolation of new architectural solutions in old buildings achieve modernization in terms of appearance, quality, durability and usability. The use of new forms within the old dispute resolution structures, together, form a new, more valuable and a more efficient whole.[43] In this way, the ADR movement, aimed at the realization of informal or private justice beyond the traditional formal dispute resolution system, has turned into a move to reform the entire legal and judicial system as well as the legal profession.[44] That is why mediation and other forms of ADR, assuming the success of this "reformist" role, seem to require a change in approach within the dispute resolution system. Litigation should no longer be the norm and mediation just an alternative or exception.[45]

Changes in the judiciary confirm that mediation has already taken its place in the dispute resolution system and continues to develop until it becomes a full and equal part.[46] Alan Uzelac believes that public and private justices are not mutually opposed. They are neither a competition nor an alternative to each other. There is no alternative to either public or private law. They need to act together as partners in achieving the common goal - meeting the basic needs of the users of dispute resolution systems.[47] With maintaining the integrity of both ways of resolving disputes, and reaching a higher level of mutual respect, it is possible to achieve and permanently secure pluralism within a single dispute resolution system.[48] Potential

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[43] MENKEL-MEADOW, Carrie, ibid. pg. 2.

[44] AUERBACH, Jerold S., *Justice Without Law?* Op. cit., pg. 15.

[45] SEELS, Benjamin, The Soul of the Law, Vega, Element Books, London, 2002, pg. 85; OTIS, Louise, REITER, Eric H., Op. cit., pg. 401.

[46] "Moreover, we contravene the spirit of ADR if we insist on 'winning' – if we insist on establishing that ADR is necessarily better than traditional litigation. ADR is not about being better than; it is about being an addition to it. ADR is not about subtracting; it is about adding". BRAZIL, Wayne D., *Court ADR 25 Years After Pound: Have We Found a Better Way*? Ohio State Journal on Dispute Resolution, 2002, pg. 2.

[47] UZELAC, Alan, Public and Private Justice, cit. (note 216), pg. 22. See, SPENCER, David, *Mandatory Mediation and Neutral Evaluation: Reality in New South Wales*, s.l., s.a., http://ssrn.com/abstract1262094, pg. 10-11.

[48] "...it appears that clash between two justices is somehow fabricated. The question arises: who did it"? (...) "the coexistence of two justices (...) Paramount significance belongs to the attempt of providing the consumers of the justice system with as many remedies of conflict as is possible. ADR methodologies

further delays in the adoption of desirable changes in the traditional dispute resolution system would seem only to strengthen the further development of mediation and other ADR forms. These forms have already demonstrated their ability and the capacity for independent development and maintenance, irrespective of the traditional dispute resolution system.[49]

Mediation - the primary way to resolve disputes

With a sufficient degree of reliability, it can be argued that mediation has, to a lesser or greater extent, become part of the legal systems of most modern states. Mediation, however, has only partially evolved in its development. A further significant step is for mediation to become not only an integral and complementary part of the dispute resolution system but also the primary way to resolve disputes within that system.
There are authors among (Jay Folberg and Alison Taylor, for example), who believe that alternatives imply a deviation from the norm. Society can no longer afford to pursue lawsuits at courts as the norm. Mediation is based on the willingness of the parties and their consent to the desired solution of the dispute, without any imposition of authority, as is the case in lawsuits. Mediation promotes self-determination of the parties and their cooperation in solving the dispute instead of the courts imposing their decision. That is why litigation should become the last resort for all parties, the last solution in their dispute, after having unsuccessfully exploited all other consensual ways of solving it. Only then is it justified for the parties in a dispute to use the courts.[50]
Alan Uzelac is similarly approaching this question. He believes that modern legal systems, looking for methods that will enable states to fulfill their fundamental task and provide adequate and timely protection to citizens and legal entities, recognize the chances of out-of-court dispute resolution. Already in the term '*alternative dispute resolution*' there is an idea that there are methods that coexist with court proceedings because access to court should always be guaranteed. Court resolution of disputes, however, should be the last resort, and only used when there are no other

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contribute to that final result, and due to that they are valuable as much as public justice". KNEŽEVIĆ, Gašo, op. cit., str. 79-80; See, KOVACH, Kimberlee K., LOVE, Lela P., *Mapping Mediation: The Risks of Riskin's Grid, Harvard Negotiation Law Review*, Vol. 3:71, Spring 1998, pg. 89.
[49] Benjamin, op. cit., pg. 86.
[50] FOLBERG, Jay, TAYLOR, Alison, op. cit., pg. 335.

quicker, simpler, more convenient or cheaper methods available. That is why European, and many other countries in the world today support and promote mediation. It cannot entirely replace a trial. It can, however, make it easier to achievement three related goals: faster and better legal protection for citizens; relief of the state judiciary from the significant burden of many cases, and create a climate in which citizens and legal entities will actively and cooperatively seek the court solution of their dispute, only when it is essential.[51]

Introducing democracy into the law and the legal system

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 an appropriate mechanism for the achievement of the highest degree of justice.[52] However, this ideal in most modern societies has not been attained. It turns out that the traditional system of dispute resolution, its institutions and supporting legal professions are not able to ensure equality and equal justice for all in court litigation procedures. Concerning the social reality that is reflected in unequal material wealth, power and opportunity, there is no formal legal system, regardless of its level of objectivity and formality that can ensure such equality and justice.[53] Every attempt to solve the problems of the judicial system by increasing their legalization in the form of more substantive and procedural law increased the number of lawyers, judges, and courts. This is counterproductive and operates exclusively for the unilateral interests of the legal system and the legal profession.[54] It seems like the legal professionals handle the problems of the judicial system like extinguishing

[51] UZELAC, Alan, *Mirenje kao alternativa suđenju*, *Zbornik Hrvatske udruge za mirenje*, Hrvatska udruga za mirenje, Zagreb, 2011, pg. 11-12.
[52] See, AUERBACH, Jerold S., Resolving Disputes Without Lawyers, Oxford University Press, Oxford, New York, Toronto, Melbourne, 1983, pg. 143.
[53] "Many people submit to the law simply because they believe 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; "have pointed out that the political responsibility of the courts in a democratic society is to do justice". SAMMAR, Vincent, ibid. pg. 61.
[54] See, AUERBACH, Jerold S., ibid., pg. 143-144.

a fire with gasoline.[55] When a system, in this case the legal system loses the function to serve, the only possible result is for it to begin to serve itself and to function as an airplane flown on autopilot.[56]
These legal system problems, in most countries, created mediation and the entire ADR movement. The goal is not to create a new system, but to improve the existing system of dispute resolution in a way that can better address their real needs. The initial rigid opposition by 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 benefits to the judicial system and its potential relief from the significant number of cases. Users of the legal system, their needs and interests, are again being pushed into the background.[57]
How to resolve conflicts in 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.[58] Most importantly, the time has come to provide them with the

[55] "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.
[56] FRITZ, Robert, *The Path of Least Resistance*, Fawcett Books, New York, 1989, pg. 263.
[57] 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.
[58] "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*

opportunity to self-determine their disputes before the courts do. In each community, most citizens are understandably excluded from the possibility of creating the law and legal institutions. However, what is unacceptable for them is their substantial exclusion from a real influence on the resolution of their cases in court litigations. This relationship between the legal system and the legal profession to citizens in legal disputes 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 ones.[59] Neither the legal profession nor the government can wait any longer to have this trust between the citizens and the legal system restored. To regain this trust, the government and legal profession must take an active role in its restoration and demonstrate that they care about its users and their problems.[60] The easiest way to restore public confidence in the legal institutions and the legal profession is the introduction of democracy into dispute resolution.[61] This will help the parties in a dispute and enable them to participate in

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to research, values of modern society, Croatia in XXI. Century, CASA, Zagreb, 2011, pg. 74.

[59] "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.

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

[61] "Deliberative democracy introduces a different kind of citizen's voice into public affairs than that associated with a raw public opinion, 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 adversaries), generating a sense of common ownership and action, and appreciating the need for difficult trade-offs. And one of the central arguments 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 FRIEDLAND, Lewis, *Deliberative Democracy, Tools, Civic Dictionary*, http:/www.cpn.org/tools/dictionary/deliberate.html, February 2, 2012, pg. 2.

civil law matters, which are important to them.[62] In this way, the already extensive autonomy of the parties in filing the lawsuits would be completed by other autonomous and democratic elements which could give them a wider choice on how to resolve their disputes. On the other hand, these elements would give them a much higher possibility to their direct involvement and control over the proceedings and the solution to their disputes.[63] Decision-making or co-decision making on matters essential to human life, liberty and their destiny, represent one of the fundamentals of life for every individual and in general for any democratic society.[64] There is a question of what constitutes state or public interest to have absolute control over every initiative aimed at correcting temporarily or permanently disturbed relationships of citizens or business subjects in a dispute.

Also, the question can be asked whether it is possible in the legal system to apply solutions that could restore balance to the public interest and the

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[62] "The democratic character of the methods of a 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 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 an 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.

[63] "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.

[64] "...Civil humanists see participation as a necessary privilege of a good life". SAMMAR, Vincent, *Justifying Judgment, Practicing Law and Philosophy*, University Press of Kansas, Pittsburg, 1998, pg. 50

interests, needs and freedoms of its users.[65] It seems that there are already solutions available in which it is possible in a traditional dispute resolution system, and outside of it, to help the parties in a conflict to solve their problems and meet their interests and needs, and at the same time, does not jeopardize public interest and social needs.[66] These solutions are simple and do not require large-scale intervention in the existing legal system. This is more about changing the current legal point of view that should adopt the idea that there are alternative solutions for every problem other than the legal ones.

Liberal democracy is founded on the idea of citizen participation in a decision-making process. It is believed that there are no obstacles to allow democracy to a much higher degree and allow it in the legal area of social life. The law and its institutions are the basis of each social community and are involved in all social aspects. Therefore the law, legal institutions, and legal professions have a massive potential to act as social agents[67] with whose intervention, citizens will be provided with more active and direct involvement in dispute resolution procedures. This 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 systems of formal and informal justice should form a single unit.

In this way, citizens can realize the first crucial democratic right in the world of law - to choose among options for resolving disputes.[68] Freedom of choice is a powerful attribute of any democracy.[69] Studies have confirmed that the possibility of free choice, even in trivial matters, makes people happier and healthier. People find it difficult to experience a decline in the ability to choose because they believe that having more

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

[66] 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.

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

[68] "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

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

choices provides a greater feeling of control in their lives, and better coping with their problems.[70]

By introduction of parallel and complementary informal ways of a dispute resolution system or private justice system, citizens are allowed full and direct participation in their disputes and complete control over the dispute resolution processes and their outcome. In these procedures, among which mediation is in the lead,[71] the parties exercise their right for self-determination. They can present their side of the story and participate directly in the settlement of a dispute and therefore, experience it as fair. Such a solution accepted by the parties themselves is usually voluntarily executed. In this way, the parties have a direct, quick and cost-effective access to the justice they create.

The parties consider the customized solutions in mediation acceptable and therefore fair. This generally excludes further confrontation, renews their temporarily disturbed relationship, and prevents similar conflicts in the future. The realization of their interests and needs in the manner described also permits the realization of public interest at the highest possible level of harmony in society.

Any settlement reached in a dispute where the parties can freely manage their direct and active participation in the creation of its content is an expression of their freedom of choice. It is also their 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.[72] Is there a

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

[71] "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 disagreements. 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 revitalizes democratic values. These are people who are free and peacefully gathering together and respecting each 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, but to allow decisions to the owners of the conflict". HAREIDE, Dag, *Conflict Mediation - a Nordic Perspective*, manuscript, Helsinki Conference on Mediation and Conflict Management, 28 of May 2006.

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

need to emphasize how this approach can improve the position of the parties in their dispute, their attitude, and mood towards the legal system and the society that empowers them?

Introducing democracy into trials

The following possibility for the introduction of more democratic elements into the law and the legal system can 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 ruling, are satisfied with the litigation, the court and the judge conducting the process in all cases where they can present their side of the story, regardless of whether it is legally relevant or not.[73] Parties' satisfaction is significantly increased in all cases in which they are treated with care, humanity, dignity and respect.[74] Parties who experience such treatment in litigation are much more willing to express respect and trust in the judicial system.[75] What is equally important, is to be more willing to voluntarily execute a court decision that has not been issued in their favor (without the need to impose it forcefully through a judicial enforcement procedure).

It is believed that the introduction of such democratic elements in the civil court 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 empowerment is activated. In the described way, the legal system can achieve more valuable goals: increase access to justice for the parties in a dispute; reduce time and costs required for litigation; enable and facilitate settlements in disputes in and out of the courts; relieve the courts from the heavy burden of an excessive volume of cases; allow the disputants to choose between more options of solving their disputes, and thereby, teach them that before addressing the litigation in court, there are other options available. Finally, increase users' satisfaction with public judicial system,

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[73] "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.

[74] BRONSTEIN, John, Some *Thoughts About The Economics of Settlement*, Fordham Law Review, Vol. 78, 2009, pg. 1140.

[75] 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.

as well as the legal profession.[76] It seems that this approach to the law and the legal system for its users has a chance to reconcile what is at first glance, conflicting - public perception of the legal system and legal professions, and the personal perception of legal professionals of themselves, as well as private and individual interests with the public interests. This is a real example of the evolution of a society in which its alienated legal system becomes embraced again.[77] Therefore, Roscoe Pound sees this process and the new role of the courts, judges and the legal system, as the socialization of rights.[78]

Privatization of justice

To increase the efficiency of the courts in modern states, different measures are being taken. Some refer to the relief of the courts with a certain number of cases and transferring the jurisdiction for resolving them onto other bodies. All cases, which are not necessarily for the 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 enforcement service that would take over the primary 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 until it will be re-introduced (at a more favorable political and social moment). In many countries, the registry of companies is transferred to the jurisdiction of state bodies. Such efforts exist in Croatia, too. All of these are useful unilateral measures primarily aimed at relieving the courts, but rarely meet the interests and needs of the users of their services. As a result, the parties in disputes must address other bodies for specific actions, instead of addressing the courts. Despite that, from the point of view of the users of the legal and judicial system and its services, not much has changed. You could say that the realization of interests and needs of the parties in a dispute reaches its full expression only when a consensual way of

[76] SPAIN, Larry, PARANICA, Kristina, C*onsiderations for Mediation and Alternative Dispute Resolution for North Dakota*, North Dakota Law Review, 2001, pg. 3.
[77] 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.
[78] HARRINGTON, Christine B., op. cit., pg. 20.

resolving disputes in the courts and outside of them is introduced, where mediation occupies a prominent place. The parties can peacefully resolve their disputes, regardless of whether they have already initiated legal proceedings or not. They have such a possibility in front of the courts or any other public or private mediation center. In this way, democracy in disputing is directly introduced into the institutions of the legal system.[79] Legal institutions are giving up their monopoly of civil dispute resolution to the extent bound by the autonomy of the disputants and permits some of these disputes into 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 questioned, but only refined and updated.[80]

The described process of privatization of justice is 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 broader application indicate the superiority of justice that the disputants can achieve in mediation with regards to its formal equivalent in court proceedings.[81] So, prof. Alan Uzelac believes that in private forms of dispute resolution, a social moment is coming - the importance of each case for the parties who represent the value in it. Informal forms of dispute resolution, when successfully resolved, generally means an end to the conflict and the dispute between the parties. Whereas a verdict rendered by a court trial is only the beginning of the escalation of the dispute and the possibility of its multiplication in front of various courts due to the different types of legal remedies.

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[79] "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.

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

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

The informal procedure takes much less time, is much cheaper, parties are willing to execute what has been agreed, and the agreement prevents any future disputes between them. Should they reoccur, the parties will try to solve them again in the same way, outside the court.[82] 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 fundamental democratic values. The settlement in mediation, on one hand, allows the maximization of the interests and needs of the parties, but on the other hand, a settlement in mediation also satisfies the public interest and social values. Informal or private justice or justice achieved in a mediation (*mediational justice*[83]) and public or formal justice, co-exist independently of each other, and yet they are in constant interaction. By maintaining their individual integrity, systems of formal and private justice mutually confirm and strengthen their legitimacy.[84] It is about systems that offer dispute resolution services on various grounds and enable the disputants to choose the system that most closely matches the specifics of their dispute ads well as their personal needs and interests. Both serve the individual and the public interest. Every society needs to practice both systems since one exists because of the other.[85] The different feelings that arise from these systems are the formula of not only the survival of the healthy spirit of disputants but also the healthy spirit of lawyers in a contemporary environment.

De-legalization, de-etatization and de-judicialization of disputing

The legal systems of modern countries are exposed to various de-legalization reform activities and at the same time, the de-judicialization of disputes and de-etatisation of the traditional system of dispute resolution. In Croatia, as mentioned earlier, a part of the judicial affairs has been transferred to public notaries. Real estate agencies can close contracts on sales. Insurance agencies make insurance contracts. Law professors are

[82] UZELAC, Alan, Editors, Public and Private Justice, Dispute Resolution in Modern Societies, Interesentia, Antwerpen, 2007, pg. 22-23.
[83] OTIS, Louise, cit., pg. 8.
[84] STURM, Susan and GADLIN, Howard, Conflict Resolution and Systemic Change, Journal of Dispute Resolution, 2007, J. Disp. Resol. 1, pg. 30.
[85] ANTIĆ, Ivan, private electronic correspondence with the author, December 3, 2010 (author's note).

permitted to give legal advice for a fee. The legal basis has been created for the courts to reopen the door for those mediators who are not judges by profession.[86] There is also the first example of cooperation of the municipal court and the institution of mediation which refers clients to mediation outside the court.[87]

There is an increasing number of different mediation centers in public and private bodies as well as associations.[88] Organized bodies and institutions conduct mediations between the victim and the juvenile or young adult perpetrators of criminal offenses.[89] Education about mediation is conducted among police officers in the community. It also began among social workers and members of other professions, with the tendency to apply 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 establishment of specialized centers for mediation to deal with disputes related to the complications and errors in treatment and medical interventions. The first mediation center for construction disputes

[86] 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. A 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 Croatians for Mediation (HUM) for 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 a historic moment in the development of mediation, with the expectation that the Municipal Labor Court will not remain alone in applying the new legal procedural provisions (author's note).

[87] 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).

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

[89] 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).

has been established. The first neighborhood justice center is in the preparation stage. In an increasing number of kindergartens and primary schools, mediation programs are being introduced in which peer mediators help their peers resolve disputes. They also address conflicts and disputes between students and teachers and between teachers and parents. Companies set up internal systems for the prevention, management and conflict resolution by mediation or arbitration. Craftsmen have their centers, as well as insurers, bankers, and lawyers. [90] Even in the early days of disputes with the state and companies owned by the state, the disputants were required to conduct negotiations with the government for settlement purposes. Most recently, the state has adopted measures to encourage alternative and out of court settlement (including mediation) in civil cases in which one of the parties or companies in the dispute is in the Republic of Croatia.[91]

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 a new out of court settlement procedure. This procedure applies to all companies that cannot comply with the given time limits.[92] Through this process, the debtors can make a deal with creditors to survive in the market, especially now, in times of severe economic crisis. In the construction disputes, the construction experts that operate at the Construction Faculty in Zagreb assist the parties. Although this is not mandatory, it becomes so due to its compelling 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

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[90] The Mediation Centre of the Croatian Chamber of Economy in Zagreb and regional satellite centers in Koprivnica, Osijek, Pula, Rijeka, Split and Varaždin; 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).

[91] Decision on measures to encourage alternative and out of court settlement in civil 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 ("Official Gazette" No. 69/2012 and the new one No. 62/2016; author's note).

[92] The Law on financial operations and settlement ("Official Gazette" No. 108/12 and 184/12).

free legal aid. Croatian Chamber of Commerce offers a service of arbitration and mediation.[93] A growing number of lawyers resolve their clients' disputes by negotiation, mediation, and other means, with the aim of saving them from the difficulties and uncertainties of the civil court proceedings, whenever possible. Lawyers are the holders and initiators of the most substantial number of these described extrajudicial activities. The novelty is that the process of negotiation and mediation increasingly include non-lawyers as negotiators and mediators.

Finally, there are an increasing number of parties that do not use legal experts to represent them before the courts, and a growing number of natural and legal persons who do not want to engage in litigation, regardless of the expressed need for legal protection.[94] 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 were referred to the courts. Further, 4% of their disputes were 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 litigation nor did not want to expose themselves to the difficulties of litigation.[95] Thus, 47% of participants of various disputes in the Netherlands 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 indeed the case, it is a massive number of potential users of the system of informal or private justice, or, in other words, a vast, completely untouched "market" of potential users of mediation.

Knowing the results of this research is undoubtedly mostly important and applicable to all countries including the Republic of Croatia. It can significantly reduce all the tensions associated with resistance to necessary changes in the system of dispute settlement and to the lawyers and non-lawyers, who consider themselves to be experts in resolving conflicts.

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[93] 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).

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

[95] 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.

These processes of de-legalization, de-judicialization, deinstitutionalization and de-etatization of disputes are the result of the inefficiency of the state judicial apparatus. What they all have in common is a quick response to the mentioned demands of the market, to which the traditional court system is simply not able to respond.
It seems that these processes confirm a strong trend and a need to activate the mechanism of resolving disputes outside the courts.[96] In this way, capacities and capabilities for cooperation and peaceful settlement of disputes inherent to all people and communities can be awakened. These processes are the 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, the elders, chiefs, priests, and others.[97] This historical model of resolving disputes in the community approaches the public mediation centers for the settlement of disputes between neighbors (neighborhood justice centers).
Siniša Triva pointed out that if the parties can freely determine the content of their contracts by their autonomous dispositions, then they should have the right to regulate their disputes with their dispositions freely, even if that meant excluding the dispute from the jurisdiction of the state judiciary and referring it to a person of trust.[98] There are more and more who believe that it is time that the government, the courts, and legal professionals return the conflicts and the disputes that they have monopolized, to their owners. In building this complementary out-of-court system of private or informal justice in its various forms, it is important to say that they should only be a supplement to the traditional system of public or formal justice and by no means its replacement.[99]

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[96] "One of the senior partners 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.
[97] See, HARRINGTON, Christine B., op. cit., pg. 80.
[98] TRIVA, Siniša, Civil procedure, Narodne novine, Zagreb, 1983, pg. 649.
[99] WEINSTEIN, Jack B., op. cit., 1996, pg. 2.

Re-socialization of the traditional legal institutions and the legal profession

Courts and judges usually do not consider their real roles in society. They are first and foremost public services and public servants 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. The parties in litigation still play a secondary role and have no power or control, which is in the hands of their lawyers and especially, the judges. To exclude or reduce the so-called civilization misunderstanding that exists between the parties and the courts, judges need to replace their current roles with new ones.

None of the parties are the same[100] nor are their disputes. Therefore, it is time that judges in civil proceedings abandon their strict and formal roles when it is appropriate. Judges should no longer be allowed to have equal access to all parties and to any dispute, considering 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 are to assist them in resolving these issues.[101]

The task of the courts is not to equally apply the law to unequal cases. They do this exclusively due to the imperative of efficiency. Such conduct may solve many court cases, but also do great damage to the parties and the reputation of the courts and judges in society, too. The task of courts and judges is to give each case particular attention.[102] Likewise, the judges are obliged to pay equal and full attention to every party and every person. They should always respect the needs of each party and the details of every dispute.

Nowadays it is already widely 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.[103] It is believed that the judges,

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[100] "The problem with people is that none of them is the same". MACKNIGHT, John, BLOCK, Peter, *The Abundant Community, Awakening the Power of Families and Neighborhoods*, Berrett, Koehler Publishers, Inc. San Francisco, 2012, pg. 32.

[101] POHOJNEN, Soile, op. cit. pg. 8.

[102] BRAZIL, Wayne D., *Court ADR 25 Years after Pound: Have We found a Better Way*, Ohio State Journal on Dispute Resolution, 2002, pg. 3.

[103] MOFFIT, Michael L., *Customized Litigation: The Case for Making Procedure Negotiable*, The George Washington Law Review, April 2007, pg. 2.

whenever necessary, 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.[104] Judges should be engaged in testing the interests of the parties hiding behind their dispute. It should also be allowed for the parties to feel safe in the courtroom during the hearing and before the judge. Judges, as well as other litigation participants, should always treat the parties in the courtroom with great respect.[105] Parties should be given a more active role while recognizing the importance of their cases. Such treatment gives the parties a greater sense of control and influence over the course of litigation. If these feelings are accompanied by the absence of significant frustration with litigation and de-escalation of confrontation between the parties, their perception of the courts and judges has a good chance to change from negative to positive.[106]

The task of judges is not only to resolve the dispute or case but also to assist the parties in resolving them. Judges judge based on the law and this approach is usually totally incomprehensible to the parties. Judges impose specific solutions to the parties based solely on the law. However, the task of judges should be directed not just on applying laws but also on taking actions towards a possible peaceful solution of disputes in the courtroom or outside it. The settlement between the parties permanently ends the dispute between them. The settlement means a fast and cost-effective solution that makes it possible for the parties to preserve their relationship and therefore, reduce the possibility of the occurrence of further mutual disputes. With the process of judicial settlement[107] or settlement in mediation inside the court or outside it, the parties can leave the court after a relatively short time, trusting the institution that allowed them quick access to justice.

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[104] 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.

[105] "The first shift is away from what Carol Gilligan calls an 'ethic of care' and toward a 'rights' or 'justice' orientation. The core ethic values preserving interpersonal harmony, maintaining relationships, attending to people's feelings and needs, and preventing harm". DAICOFF, Susan, op. cit. pg. 6-7.

[106] MOFFIT, Michael L., op. cit., pg. 8.

[107] "Liti-gotiation" - a process of negotiation, adjustment and accommodation". STIPANOWICH, Thomas J., *ADR and the "Vanishing Trial" The Growth and Impact of Alternative Dispute Resolution*, Journal of Empirical Studies, Volume, Issue 3, November 2004, pg. 843-912.

The benefits of such treatment are multifold for the courts, as well as the legal profession. Courts are becoming more efficient. The number of cases is decreasing, while the satisfaction of the parties with the courts and judges is increasing, as is the pleasure of the judges with their work and contributions in 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 more control over the dispute,[108] whether they reach a deal or not, judges may, in many disputes, reconcile private interests of the parties and the public interest. Thus they significantly contribute not only to their sense of importance and satisfaction, but also to the common good and harmony in society.[109] This modernized approach by courts and judges towards the parties in litigation, which should be accompanied by a significant simplification of procedural norms,[110] 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,[111] however, this time, or perhaps for the first time - for the good of its users, the parties. Insisting on this approach, the courts and judges can replace numerous and mostly unsuccessful legal, judicial reform activities, with successful reform results.[112]

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

[109] "Rather than a sign of loss of legitimacy of the judicial norm, these new alternative systems reflect a democratic renewal. The fact that judges – guardians of societal order and democratic values – participate with the community in a 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 be better served". OTIS, Louise, cit., pg. 12.

[110] "… 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.

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

[112] 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.

The responsibility of citizens for their disputes as well as solving the disputes

The most significant number of conflicts and disputes between natural and legal persons do not reach the courts. Despite this fact, the number of conflicts that turn into legal disputes is still too high. The parties have almost complete autonomy in deciding which disputes will be filed as a lawsuit before the courts. In addition to that type of autonomy, parties also have the freedom to choose the forum for resolving their conflicts or disputes. The parties do not use this autonomy, and that is why it is recommended that we find suitable ways to remind them and teach them that before and after filing of a lawsuit, they have access to other options and that court litigation is not the only, and perhaps not the most appropriate solution for all their problems.[113]

The courts overloaded with civil cases have become inefficient and slow resulting in uncertainty and general dissatisfaction. The solution need not come from the courts and other legal institutions, judges and the legal profession. Most citizens still live in a type of patronizing illusion,[114] that someone else will solve their problems, some higher authority[115] - usually the state or more specifically, the courts.[116]

People prefer to take care of themselves and decide on issues relevant to their lives. They 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 them outside of their immediate environment, even though they are regularly exposed to the news media about their existence, or because of it, people

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[113] "...law begins where community ends". AUERBACH, Jerold S., *Justice without Law*? op. cit., pg. 5.

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

[115] "The illusion of authority, safety, and immortality that ascribed to systems inspires loyalty and vigilant defense, based on a paternalistic fantasy that individual will be taken care of by the system". KENNETH, Cloke, ibid. pg. 203.

[116] Litigants seek justice, and they identify it with the confirmation that they are right. They do not know that 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 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 and higher costs. Long-lasting disputes have their own life. No one, not even the litigation does not want to die (author's note).

show much less interest and compassion. In other words, most people are not significantly concerned about the serious social problems that directly affect them.

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

Without going into the reasons for such treatment of people of modern times, their interest in social problems or problems of society is growing in proportion to a degree of their use and their involvement. In other words, people do not pay serious attention to the issues of the judiciary, until they engage themselves in the judicial system as parties 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 that 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.[117] There is no system in a society that functions on its own, but its functioning and even its success, depend on the co-operation of all its parts, whether they are the carriers of that function 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 strict substantive and procedural rules in the hope that regulations will resolve all the problems on their own. Any general change in the judicial system cannot have a positive effect on the system without a positive culture change in the behavior of all its parts, legal professionals and users of the system.

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[117] "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, Awakening the Power of Families and Neighborhoods*, Berrett Koehler Publishers, Inc. San Francisco, 2012, op. cit., page 66; 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.

Citizens and businesses should not be only creators 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. Most countries are faced with the fact that their citizens and businesses almost exclusively use state courts for solving disputes. Therefore, the courts are swamped with cases, falling deeper into inefficiency. Due to demands for efficiency, the state often tries to respond quickly only by increased efficiency of civil procedure rules.

Such regulations may increase the efficiency of the courts but cannot fix the position of the parties in a lawsuit because efficient courts will only determine who is in the wrong and permanently destroy the relationship of the parties. Once again we point to the argument wherein the parties are loyal only to the traditional dispute resolution system and the traditional service of lawyers. Unfortunately, the traditional lawyers are not willing to alter confrontational elements by elements of cooperation.

People love to have the freedom of choice and control over the decisions concerning their lives. Why should it be any different with their disputes? It seems that the time has come for citizens and businesses, in the role of disputants, to take responsibility for their disputes, for their lives and for their businesses.[118] It is time for the disputants to take responsibility for their own choices and their consequences, to directly face the conflicts in their life or with business partners, their friends, relatives, neighbors or strangers. Courts are always available as a final solution. Without the active involvement of the parties (disputants) in resolving disputes in any court proceedings or outside them (they are the only ones who know their conflict, the reasons for which it was created, as well as what are the best possible solutions – parties are the clear experts of their own lives), they cannot expect help from others nor can rapid progress in improving the

[118] "We cannot solve life's problems except by solving them. This statement may seem idiotically 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 themselves: "This problem was caused by me and other people, or by social circumstances beyond my control, and therefore 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., T*he Road Less Traveled, A New Psychology of Love, Traditional Values and Spiritual Growth*, ibid. pg. 32-33.

existing legal system be expected.[119] Such participation of the parties in their disputes should be allowed by the state, legal institutions and lawyers, and above that, all of them also should actively help parties in this matter.[120]

Look into the near future – the judicial system is stable only if it continually develops

Peter Drucker, an expert on system organization, on the occasion of the bankruptcy of the Penn Central railroad company, Road, said that the company made a mistake because their business was based on an inappropriate statement 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 have been: "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 judicial 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?" 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 only used 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 leads to degeneration. Change without stability is anarchy. The role of the legal profession is to help bridge the gap between the needs of the society

[119] "...resolution requires more direct participation by the citizenry". SAMMAR, Vincent, *Justifying Judgment, Practicing Law and Philosophy*, University Press of Kansas, Pittsburg, 1998, pg. 67.
[120] "Rawls treats society as a fair system of social cooperation". SAMMAR, Vincent, ibid. pg. 75.

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, it is about 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.[121] 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 a positive change is the result of altered circumstances and changing requirements, needs and interests, but also the messenger of a new time. Evolutionary developments are based on a simple principle according to which everything is successful, and it becomes more accepted and more frequent in the future.[122] Any such change contains a moment, strategic inflection 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.
Although both the society and the law have changed drastically, legal institutions themselves stayed almost unchanged. Until recently, lawyers were the only providers of legal services in and out of the courts. They were also the only people who held the mystery of legal knowledge and legal skills, but also 'the key' to the front door of the courts as the only places where disputants could resolve their legal disputes. It is argued that if the legal profession wants to keep its relevance in society, it should adjust to the changes that accompany the technological revolution, globalization and new demands and needs of the users of legal services, which can no longer be met only by the traditional legal institutions and the traditional legal profession.[123]

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[121] BARAK, Aharon, *The Judge in Democracy*, Princeton University Press, New Jersey, 2006, op. cit., pg. 3-4.
[122] AXELORD, Robert, *The Evolution of Cooperation*, Revised Edition, Basic Books, Cambridge MA, 2006, pg. 116.
[123] "Just as it is necessary for individuals to accept and even welcome challenges to their maps of reality and *modus 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.

ADR movement and mediation, which have become synonyms, brought entirely new winds into the world of resolving disputes, a world previously reserved for 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 also 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, problems which present an even bigger burden on the parties in disputes and the general public and society as a whole.[124]

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,[125] but not regarding replacing the still predominant traditional systems of resolving disputes, but regarding its improvement and advancement.[126] It's about two different systems of public (formal) and private (in-formal) justice, each one of them, or both together, play a vital and complementary social role.[127] No modern society

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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., ibid., pg. 55.

[124] AUERBACH, Jerold S., *Justice Without Law?* Op. cit., pg. 116.

[125] "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.

[126] OTIS, Louise, REITER, Eric H., Mediation by Judges: A New Phenomenon in the Transformation of Justice, *Pepperdine Dispute Resolution Law Journal*, Vol. 6:3, 2006, page 377**;** "...ADR is not surrogate 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 Empirical Studies, Volume, Issue 3, November 2004, pg. 848.

[127] "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. 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

can be free of these systems which are becoming a standard and equal part of the unified system of dispute resolution.
Such a new system of resolving disputes with the help of new types of legal professionals, allows the law to be much closer to the real needs of citizens and the whole of society more than ever. The law, the legal institutions, not even the legal profession, can fulfill its social role or justify their existence if they are separated from society and the citizens. Those who are faithful exclusively to the traditional dispute resolution system and the traditional approach of the lawyers should not see mediation as a threat but as an opportunity to promote their work, the quality and diversity of its legal services and client relations. Mediation arouses growing interest among citizens and businesses, 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.[128]

The prevailing belief is that mediation in the daily work of legal professionals.[129] The judiciary helps complete the existing model/philosophy of dispute resolution based solely on the legal protection and imposed solutions in which the parties in a dispute take an active part in finding their own solution of their dispute. The consequences of this new approach is changing the social functions of the judiciary and judicial system. The judicial system should stop being solely an attribute of the expression of state power followed by a strict and formal procedure and should implement the characteristics tailored to the needs of its users. It is time, more than ever, for legal institutions and the legal professionals to compare their self-perception with the perception of parties and the public and to stop ignoring the unbalanced perception of those two parallel worlds.[130] They must focus on the real needs of the users of their services

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in the judicial system". NEDIĆ, Blažo, *Mediation and Advocacy - Prejudice or Interest*. 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, s.a., s.l., pg. 4.

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

[129] "... increasing the gap in comprehensions and meanings between lawyers who remained practitioners 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.

[130] "...legal actors and lay disputants occupy different, though parallel, worlds of meaning and understanding of disputes and how to resolve it. These parallel

as well as the needs of the modern society if they wish to keep their relevancy in society.

Conclusion

Mediation definitely would help in restoring public confidence in the judicial system and legal profession. Mediation has tremendous potential as a mechanism for transformation of the traditional legal institutions and institutions, in general, legal profession, all professions, people, and societies. Mediators are early adopters of what is soon to become mainstream. There are more and more people, professionals or not, and institutions that are adopting mediation and mediation programs as a complementary part to their personal, professional and organizational environment. We are witnesses to the process of integration of mediation (ADR) within the legal system and society. Mediation is a permanent tool for on-going democratization, socialization, and humanization of the institutions and organizations. It has become not just a process for solving disputes but a way of life and doing business. In doing so, mediation offers a unique opportunity to make the world a better place. It works!

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words evolve in tandem, yet really converge. Moreover, there is little awareness between groups of the disparities prevailing". RELIS, Tamara, ibid., pg. 229