

THE IMPLEMENTATION OF MANDATORY FAMILY MEDIATION SCHEMES IN THE CONTEXT OF THE ISTANBUL CONVENTION

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Received: 9 April 2024; accepted: 12 June 2024
DOI: <https://doi.org/10.13165/j.icj.2024.06.011>

Abstract. The global rise in domestic violence has prompted international preventive efforts such as the Istanbul Convention, which bans mandatory alternative dispute resolution for all forms of violence. This created a challenge in aligning public justice policies and balancing mandatory mediation schemes with adequate victim protection. This article seeks to offer an in-depth analysis of the main concerns in the implementation of mandatory family mediation in domestic violence cases in the context of the Istanbul Convention, and to provide an overview of some of the practical solutions that can be deployed to overcome these issues. This research commences with a review of the existing scientific literature and an overview of international regulation in the field of the application of mediation in the context of domestic violence, focusing primarily on the provisions of the Istanbul Convention. This is followed by a comparative study that considers the national legislation of Lithuania, Bulgaria and Ukraine in order to highlight differences in the application of mediation in domestic violence cases and to determine how the Istanbul Convention has influenced mediation practices in the selected countries. This reveals that compliance with the prohibition on mandatory mediation in the Istanbul Convention has an impact on the level of protection afforded to domestic violence victims, but does not guarantee it *per se*, thus contributing to uncertainty regarding how victims will be treated during mediation. Additional guidelines, standards or protocols should be employed to assist mediators in determining domestic violence and in tailoring the mediation process accordingly. It is therefore strongly suggested that, to ensure effective measures for the protection of victims of violence, additional national legislation should be adopted to screen for signs of violence in mandatory mediation and to propose specific approaches to the necessary steps to be taken in mediation in the context of domestic violence.

Keywords: family mediation, mandatory mediation, domestic violence, screening, Istanbul Convention.

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Introduction

Mediation is considered to be particularly suitable for resolving family disputes due to their personal nature and emotional context, as well as their complexity and the inability, or even futility, of deciding who is 'right' and who is 'wrong' (Boulle *et al.*, 2023). It is also commonly recognized as an effective tool for solving family conflicts by improving communication between parties and lowering the socio-economic costs of separation and divorce. EU institutions are demonstrating increasing institutional support for mediation in family matters. The institutionalization of mediation as an alternative dispute resolution method can be considered to have begun in 2002 with the release of the Commission's Green Paper on alternative dispute resolution in civil and commercial law (COM(2002)196), where the importance and effectiveness of mediation was acknowledged for the first time. Another significant step in expressing institutional support for mediation within the EU was Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (hereinafter, the Mediation Directive). Although the scope of the Mediation Directive was aimed mainly at applying to mediation in cross-border disputes, para. 8 of the preamble indicated that its application can also encompass internal mediation processes, including family disputes. Later, in 2017, the European Parliament emphasised in its Resolution on the implementation of the Mediation Directive (2016/2066(INI)) the importance of mediation in the field of family law, where it can create a constructive atmosphere for discussions and ensure fair dealings between parents. It also invited all Member States to proactively encourage judges and lawyers to refer parties to mediation for resolving family disputes and to establish more effective tools to expand the use of mediation. One of the instruments employed to promote the use of mediation in a specific dispute area is mandatory mediation, where the disputants are compelled to mediate or to participate in an initial informational mediation session before applying to court, either by law or at a judge's discretion. Naturally, the mandatory application of mediation in family disputes has grown to become a trend in the European Union as a means for improving effective access to justice for family disputes. One recent study (Korsakoviene *et al.*, 2023) established that 20 of the 27 EU Member States already enjoy one or several models of fostering family mediation in its mandatory form, while at least 9 Member States are in the process of adopting or improving mandatory family mediation. Such movements indicate the gradual transition from purely voluntary mediation towards mandatory dispute resolution models which compel parties to engage with a mediator in order to gain an in-depth understanding of mediation and its application to their particular case.

The spread of mediation in different areas of life would make it difficult, if not impossible, to establish a comprehensive list of disputes eligible for mediation (Boulle *et al.*, 2023). On the one hand, mediation is considered to be a 'one-size-fits-all' solution, which means that there is in effect no specific list of disputes that are considered unsuitable for mediation. On the other hand, some scholars have identified factors that make mediation impossible or extremely complicated, and that require more commitment and effort from both the mediator and the parties concerned. One such factor is the existence of a power imbalance due to previous or ongoing forms of domestic violence (Murphy & Rubinson, 2005). Some authors state that the element of domestic violence may be treated as an important predictor of failure to reach an agreement (Ballard *et al.*, 2011), or reaching biased agreements that overly favour the aggressor. Others point out that obligatory participation in mediation for victims of abuse causes them to experience intimidation and control to such an extent that they cannot safely participate (Cleak *et al.*, 2018). Krieger (2002), for example, recognizes the setback caused by mandatory mediation regarding gender relations, and the hindrance that it may impose on the protection of the legislative rights of abused women. Other researchers share the belief that no mediation can take place if the parties are enmeshed in an abusive relationship (Steegh, 2003).

Levels of domestic violence are increasing globally according to a report by the World Health Organization *et al.* (2014), becoming a serious social problem which often remains hidden. At the EU level, domestic violence is defined as any act of physical, sexual, psychological or economic violence that occurs within a family or domestic unit, irrespective of biological or legal family ties, or between former or current spouses or partners, irrespective of whether or not the offender shares or has shared a residence with the victim (Directive (EU) 2024/1385 on combating violence against women and domestic violence). According to a report by the European Union Agency for Fundamental Rights (2014) on an EU-wide survey on violence against women, at least two women are killed every day in the EU as a result of this problem. At the same time, two in every ten women have experienced physical and/or sexual violence committed by a partner or a friend, whereas three in ten are victims of such violence perpetrated directly by a family member. These

alarming numbers put forth in the context of mandatory mediation pose the question of how domestic violence concerns are addressed in mandatory mediation processes, the prime objective of which is to preserve and restore communication between parties.

Amidst this debate, the Convention on preventing and combating violence against women and domestic violence (2011; hereinafter, the Istanbul Convention) was adopted as the first legally binding European regulation that creates a comprehensive framework of protection. Although the scope of the Istanbul Convention was the creation of a framework to protect women and children against domestic violence, Article 48 of the Convention explicitly prohibits mandatory alternative dispute resolution methods, including mediation, in cases where abuse is reported by one of the partners. Such a principled prohibition assumes, however, that the victim identifies themselves as such and has already taken proactive steps in seeking protection. This therefore places a burden on the abused party to come forward with allegations of abuse and, in some instances, prove those allegations in order to be able to justify why mandatory mediation would not apply to the case at hand. Therefore, some scholars share doubts as to whether victims of domestic violence have the willingness or ability to reject mandatory mediation, as in some case victims are not able to identify or prove abuse themselves, or might simply be afraid to admit it (Murphy & Rubinson, 2005). The Istanbul Convention, as much as it differentiates mandatory mediation models from purely voluntary mediation, still fails to provide clarity on how to proceed with mediation if domestic violence is revealed during the process. This is further coupled with the fact that various mandatory mediation models are being deployed on a national basis in the context of family disputes without embodying a uniform systematic approach to domestic violence concerns. The following question therefore arises: How can mandatory family mediation schemes be conducted while extending a sufficient level of protection for victims of domestic violence, and while at the same time enabling victims to choose mediation voluntarily if and when they are willing?

Therefore, this article delves into the differing treatment of domestic violence cases in mandatory mediation models in the context of the Istanbul Convention and the obligations stemming therefrom. Previous research on the topic has either sought to analyse the problem of domestic violence in the context of mediation, or has merely focused on the nature and implications of the Istanbul Convention. The current paper, however, seeks to reconcile these two issues and to offer some guidance to EU Member States with respect to the benefits and drawbacks of the mandatory family mediation models emerging in the context of the ratification of the Convention as of 1 June 2023. To achieve this, the article is structured into several chapters that seek to achieve the objective outlined above. The first chapter aims to provide a general overview of the legal background of the application of mediation in family disputes with a history of domestic violence between the parties. The following chapter provides a comparative analysis between three different states – Lithuania, Bulgaria and Ukraine. The choice of these countries was based on whether the particular state applies a mandatory mediation model or not, and whether the Istanbul Convention has been signed and/or ratified. Lithuania has not ratified the Istanbul Convention and offers a mandatory model of mediation in family cases; Ukraine has ratified the Istanbul Convention and offers non-mandatory mediation; whilst Bulgaria has declared the Istanbul Convention unconstitutional and exhibits an emerging mandatory mediation model. Based on this, conclusions are drawn in the third chapter as to the pros and cons of the various models that are being developed and their compliance with the requirements under the Istanbul Convention.

To achieve these objectives, the research process commenced with a review of the existing scientific literature and an overview of international regulation in the field of the applicability of mediation in the context of domestic violence in both voluntary and mandatory mediation models. This was followed by a comparative analysis of the national legislation of Lithuania, Bulgaria and Ukraine in order to highlight some of the main differences in approaching mediation cases where indicators of existing domestic violence are recorded. Desk research was also conducted to systematize the various practices being deployed in each of the examined jurisdictions. The analyses deployed sought to systematize some of the existing methods of addressing cases involving domestic violence in mediation and how the Istanbul Convention has impacted the mediation practices that have been established in the selected countries. This, along with the generalization method, enabled conclusions to be drawn regarding the pros and cons of mediation in the context of domestic violence, and key lessons learned were thus outlined.

1. The legal background of the application of mediation in family disputes with a history of domestic violence between parties

Currently, with the exception of the Istanbul Convention, there are no specific international or European standards or legal requirements that regulate the application of mediation in the context of domestic violence. The existing legal regulations are mainly country-specific, and vary from numerous extremes: from the adoption of mandatory mediation programs that subject family disputes to mediation while providing for an absolute exemption in cases of domestic violence, such as in the UK (Justice, n.d., para. 20); to other programs with conditional domestic violence exemption, as in the example of Lithuania; or those that leave this question fully at the discretion of the judge, as in Bulgaria.

1.1 The relevant international legal framework

Before the adoption of the Istanbul Convention, the only international instrument addressing domestic violence was the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, which did not include provisions on mediation in the context of domestic violence. The same approach was adopted in the U.N. Declaration on the Elimination of Violence against Women, which also failed to address the concept of mediation in the presence of domestic violence.

Thus, although these two international conventions have acquired special significance in the field of protection against gender-based violence, they do not include any references to mediation as a tool for addressing the underlying issues in domestic violence cases. In this respect, however, it is worth clarifying that domestic violence is not gender specific or limited to women *per se*, as it encompasses all genders. Thus, with the exception of the Istanbul Convention, no treaties or protocols have been adopted that tackle the problem of mediation in the context of domestic violence.

With reference to the EU regulations on the matter, currently, the only specific EU legislation explicitly addressing domestic violence is the recently adopted Directive (EU) 2024/1385 on preventing and combating violence against women and domestic violence. Its prime objective is to harmonise penalties and limitation periods that apply towards acts of domestic violence and to call for stronger laws against cyberviolence, better assistance for victims, and steps to prevent rape. Again, however, the new rules do not explicitly tackle the problem of mediation in the context of domestic violence.

The same approach is also deployed in other EU directives and regulations adopted in the field, in particular in the areas of judicial cooperation in criminal matters, equality between women and men, and asylum policy,⁴ based on the premise that mediation is an effective tool to improve justice (Elnegahy, 2017). However, neither the newly adopted Directive (EU) 2024/1385 nor any of the aforementioned acts make any reference to mediation proceedings and what may be required from a mediator if they become aware of any violent incidents as part of ongoing family mediation. Worth mentioning in this respect is Article 16 of the new Directive (EU) 2024/1385, which stipulates through a general requirement that Member States ensure that no confidentiality provisions should be deemed to constitute an obstacle for professionals to report to competent authorities if they have reasonable grounds to believe that there is an imminent risk that serious physical harm will be inflicted upon a person. Applying the above to mediation would ultimately mean that family mediators in the EU would be required to report any concerns that they may have with reference to the safety of the family members that they encounter as part of the mediation procedure. However, there are no further prerequisites towards family mediators that might require them to screen for

⁴ These Directives are: Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; Directive 2011/99/EU on the European protection order; Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters; Directive 2011/93/EU of the European Parliament on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA; Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2004/80/EC relating to compensation to crime victims; Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

any signs of domestic violence or undertake specific actions if establishing concerns of such a nature. The lack of such obligations is further reconfirmed by the Mediation Directive, which does not include provisions on the need to adopt a different approach if domestic violence is revealed in the context of family mediation. The above ultimately leads to the conclusion that when it comes to domestic violence, no particular international or EU requirements exist governing the mediation process.

1.2 The Istanbul Convention and its approach to mediation

Within this context, in 2011 the Council of Europe adopted the Istanbul Convention, which is a landmark treaty creating a legal framework at the pan-European level to protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence. This Convention officially entered into force on 1 August 2014 after its 10th ratification, 8 of which came from Member States of the Council of Europe. To date, the Istanbul Convention has been signed and ratified by 39 Member States, including the European Union, while 6 countries have not ratified the Convention since signing it (Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia). The text of the Convention has triggered conflicting opinions, particularly in Croatia, Bulgaria, Poland and Hungary (Đurković, 2022). In Poland, for example, resistance began as early as 2012, and intensified after the return of the Law and Justice Party to power. In Croatia, similar movements were recognized in 2016, which spread the following year to Hungary and Bulgaria. At the same time, the EU signed the Convention on 13 June 2017, but uncertainty around the legal basis and the Council's reluctance to proceed with ratification in the absence of a common accord among Member States blocked the process for several years. Upon receiving an opinion from the European Court of Justice clarifying the legal basis for the EU's ratification of the Istanbul Convention, the EU Parliament adopted a decision in favour of its ratification in May 2023, which was finalized on 1 June 2023. However, this ratification of the Convention concerns only matters falling under its exclusive competences following from agreed common rules in the area of judicial cooperation, asylum, and non-refoulement, as well as with regard to the institutions and public administration of the Union. Thus, on 1 October 2023, the Istanbul Convention entered into force for the European Union, which ultimately means that the six remaining EU Member States that still have not ratified the instrument will have to implement and follow the Convention. However, this notion of implementation can be presumed to fall only within the field of judicial cooperation, asylum, and non-refoulement, as suggested above, and should not be deemed to additionally encompass the ban on mandatory mediation in cases of domestic violence.

Regardless of the different discussions triggered by the text of the Convention, its role was to acknowledge that violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe, which remains shrouded in silence and which calls for urgent measures on a national basis. The seriousness of the problem of domestic violence is further supported by the empirical data in the Council of Europe's Explanatory Report on the Convention (2011), the analysis of which shows that approximately 12%–15% of all women over the age of 16 have experienced domestic abuse in a relationship. Many more continue to suffer physical and sexual violence from former partners even after the end of the relationship, indicating that, for many women, ending an abusive relationship does not necessarily mean physical safety. Given the worldwide nature of this phenomenon and the lack of effective measures to combat it, the Istanbul Convention seeks to offer legally binding standards on preventing, protecting against, and prosecuting the most severe and widespread forms of gender-based violence, all of which were previously recognized as missing.

In the context of mediation, it is worth mentioning Article 48 of the Istanbul Convention, which clearly bans mandatory mediation in cases of violence. The rationale behind such a ban is elucidated further in para. 251 and 252 of the Explanatory Report to the Convention (2011), which stipulate that while the benefits of alternative methods are not questionable, their application in cases of violence may have a negative effect, in particular if participation in such alternative dispute resolution methods is mandatory and replaces adversarial court proceedings. This notion is rooted in the concept that 'victims of such violence can never enter alternative dispute resolution processes on a level equal to that of the perpetrator' (Explanatory Report to the Convention, 2011), thus arguing that in order to avoid the re-privatisation of domestic violence, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge. Consequently, Article 48(1) of the Convention requires parties to prohibit mandatory participation in any alternative dispute resolution processes in domestic criminal and civil law.

The importance of this provision as an integral part of the protection of victims of domestic violence has been reaffirmed by annual reports of the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (hereinafter, GREVIO; Council of Europe, 2021). GREVIO has expressed its concerns in the case of Slovenia, where courts often encourage parties to conclude a settlement even if serious violence has occurred between them. Moreover, it found the system in Denmark to be inappropriate for couples whose relationships have been marred by violence with respect to decisions taken on custody and visitation, where it noted that family courts did not exist and that conflicts about custody and visitation were presided over through a system of joint meetings between the two parents, guided or mediated by the state administration. GREVIO's position is only strengthened by the conclusions of studies on the compliance of particular countries with the Istanbul Convention, where Italy was praised for the measures taken and progress achieved – in particular, the amendments made to family law proceedings within the civil procedure code to address cases of domestic and gender-based violence, including the prohibition of mediation in cases of domestic violence and the requirement for family judges to request information on pending proceedings against the perpetrator or on previous convictions (Conclusions on the implementation of Recommendations in respect of Italy, 2023). However, Norway and certain other countries were urged to take immediate action to recognise the power imbalances in relationships marred by violence and ensure that all offers of mediation are accepted entirely voluntarily and through all available means. These means include guidelines and training offered to mediators that focus on the gendered dynamics of domestic violence and its impact on the ability of victims to enter the mediation process on a par with the perpetrator (Recommendation on the implementation of Istanbul Convention, 2021).

Except for the above, however, no further references are made to the nature of the mandatory family mediation process and its intricacies as a tool for screening domestic violence cases. This aspect is of particular importance in the context of the evolution of mandatory mediation models in Europe, which often takes place with domestic violence in the background. Even if it is undeniable that the countries that ratified the Convention shall exempt cases where there are signs of domestic violence, the question remains as to how it is to be ensured that signs of domestic violence are acknowledged and addressed by a mediator or a judge hearing a family case in a manner that allows the process to continue only if participants are willing, truly empowered, and self-determined in the procedure, and if it is possible to ensure the safety of such a process. Elaborating on the above, the question of what type of screening is required for domestic violence protection measures should be considered and integrated as part of mandatory family mediation processes. However, the Istanbul Convention leaves this question without a unanimous solution, and it is for the national legislation and the practices that apply therein to handle this matter.

2. A comparative study of mediation practices in Lithuania, Ukraine and Bulgaria in the context of domestic violence

2.1 Lithuania

Lithuania is among the Istanbul Convention signatories, but has not yet ratified it. Since the country's president signed a decree on the ratification of the Convention in 2018, the impact of the Convention on Lithuania's legal system has been the subject of debate within both politics and broader society (Miliuvienė, 2023). While there are no doubts regarding the Convention's aim of eliminating discrimination and violence from human relations by all possible means, it is still assumed that national legislative measures will be sufficient to achieve this aim in Lithuania. On 14 March 2023, the Constitutional Court of the Republic of Lithuania declared that the Convention is in compliance with the Constitution of the Republic of Lithuania. While this decision does not guarantee that the Convention will be ratified, this should serve to dispel the doubts that prevail in society and stimulate a positive political movement in the future.

In Lithuania, as in many countries that have followed a similar path, the question of the compliance of the Convention with the Constitution was not about denying that the issue of domestic violence requires effective combating, but rather questioning whether the definitions used in the Convention would not distort the existing concept of gender, infringe on citizens' beliefs and freedom of expression, and affect their right to educate their children in accordance with these beliefs. Thus, the effort to accomplish the ratification of the Istanbul Convention in synergy with other initiatives in the field of the protection of domestic violence victims has stimulated a debate among the public. This has certainly been an impetus for the upcoming

changes to the existing framework of family mediation by excluding mandatory mediation provisions in cases involving elements of domestic violence.

In addition, changes concerning the scope of mandatory mediation were influenced by the Concluding Observations of the Sixth Periodic Report on Lithuania, produced by the United Nations Committee on the Elimination of Discrimination against Women (2019). The document mentions that while the Committee welcomes legislative measures adopted by Lithuania regarding gender-based violence against women, including sexual violence and domestic violence, it is still concerned by the failure to ratify the Istanbul Convention and the amended version of the Mediation Law. The latter law envisages mandatory family mediation, putting women and girls who are victims of domestic and gender-based violence at risk of being subjected to secondary victimisation. The Committee urged Lithuania to prioritise prosecution over reconciliation or mediation in cases of domestic violence, and to evaluate the potential negative impact of new mediation legislation on both victims of domestic violence and the criminal justice system.

At the same time, mediation development initiatives in Lithuania have resulted in a well-structured and explicitly regulated mediation framework (Tvaronavičienė *et al.*, 2022), which has become a strong basis for the further development of respected professional mediators. The process described above reached breaking point on 29 June 2017 with the adoption of the new Mediation Law, which: stipulated the clear institutional functions in the field of mediation administration; established the mediator profession; set the requirements for individuals seeking to become mediators; established the mediator's disciplinary liability; and provided the background for upcoming mandatory family mediation requirements. By 1 January 2020, out-of-court mediation had become a mandatory pre-litigation dispute resolution procedure for family disputes. The Lithuanian mandatory mediation model requires that, before going to court to resolve a family dispute, the plaintiff must offer the resolution of the dispute through mediation to the opposing party. The counterparty is given 14 days to accept the invitation or is deemed to have refused it. Therefore, the parties are not obliged to participate in mediation, but only to initiate it. A disputant who fails to comply with the mandatory mediation procedure imposed by law is deprived of the possibility of going to court to resolve the family dispute. Either by mutual agreement or at the initiative of one of the parties, a chosen mediator listed in the List of Mediators of the Republic of Lithuania may be applied to privately, with the costs borne by the applicant. Alternatively, the State Guaranteed Legal Aid Service may be applied to for the execution of state-funded mandatory mediation. Four hours of free mediation are available to all residents of Lithuania, with no exceptions.

As a result, from 2020, mandatory out-of-court mediation has been applied to all family disputes that are subject to litigation – i.e., disputes concerning: divorce in case of fault; the maintenance of children; the determination of children's places of residence or custody arrangements with a separated parent; as well as any other family disputes envisaged by the Code of Civil Procedure of the Republic of Lithuania (2002). In total, 2,751 family disputes were mediated in 2020⁵ – 18.3% of all family cases brought to courts of first instance in Lithuania. However, as in many countries, the introduction of mandatory mediation provisions was met with mixed feelings, either gaining public support or facing strong opposition. Among the most intense debates in the public arena is that which surrounds the potential harm of mandatory mediation in cases where a potential victim of domestic violence seeks to settle a family dispute through the courts (STRATA, 2022). The main concern here lies in the emerging power imbalance between the couple affected by domestic violence, which makes mediation a no longer appropriate and potentially endangering dispute resolution process.

As a response to a robust debate – influenced, *inter alia*, by the above-mentioned concerns emerging in society regarding the ratification of the Istanbul Convention as a consequence of the CEDAW recommendations – the decision was made to exclude the application of mandatory mediation requirements when the parties to a family dispute are the victims of domestic violence. Thus, the Law on Amendments to Articles 20 and 21 of the Law on Mediation of the Republic of Lithuania No. X-1702 was adopted on 22 April 2021, providing an exception to initiating mediation for potential victims of domestic violence. Consequently, since the amendments came into force, the requirement to use mandatory mediation is no

⁵ This data reflects only the number of cases of state-funded mandatory mediation, as no official data is available on private mediation.

longer applicable when a person who has experienced domestic violence and the other party is the alleged perpetrator seeks to bring the dispute to a court.

In order to minimise the potential negative impact on a potential victim of domestic violence of being confronted with their abuser during mediation proceedings, the obligation to initiate mandatory mediation is waived. It should be noted that the existing legal framework is not gender specific. However, this exemption can only be applied if the case meets at least 1 of the 4 necessary preconditions: the person who is the alleged perpetrator must already be the subject of a pre-trial investigation related to domestic violence; the case of domestic violence between those persons must already be pending at court; a conviction for domestic violence must already have been obtained against the potential defendant before the mandatory mediation obligation is raised; or there must be a certificate witnessing specialised comprehensive assistance to the person who may have suffered domestic violence issued by an entity authorised to provide such services. Where it is possible to prove one or more of the preceding conditions, the victim of domestic violence is not obliged to initiate mediation and can take the family dispute directly to court in accordance with the procedures laid down in the Civil Procedure Code. However, if a domestic violence victim voluntarily decides to initiate mediation, they have the right to obtain state-funded free mediation services. Therefore, only the victim, not the perpetrator, is exempt from the obligation to initiate mandatory mediation.

This shift in mediation regulation can be perceived in two ways. On the one hand, it could be viewed as an obstacle to the development of the legal mediation framework, as it reduces the opportunities for mediation to be carried out as often as possible. However, the *ex-post* evaluation report (STRATA, 2022) on the impact of the current legal framework for mandatory mediation in family disputes in Lithuania (Article 20(1) of the Mediation Law of the Republic of Lithuania) revealed that the application of this exception does not have a major impact on the overall use of mediation, and judges hearing family cases have observed that the number of cases brought before the court using this exception is decreasing. On the other hand, the legal regulation cannot be merely pragmatic whilst aiming to ensure that it does not undermine fundamental human rights. Therefore, the exemption from mandatory mediation for victims of domestic violence was not only 'a response by the legislator to the public debate, but also a way of protecting fundamental human rights' (STRATA, 2022).

It should be noted that in addition to categorical mandatory mediation, Lithuania also applies the discretionary mandatory mediation model. Article 231¹ (3) of the Code of Civil Procedure of the Republic of Lithuania (2002) provides for the possibility for the judge hearing a civil case, thus including a family case, to refer the parties to mediation on a mandatory basis (Article 231¹ (3) of a Code of Civil Procedure of the Republic of Lithuania). When a judge refers litigants to mandatory court mediation, no exceptions are envisaged, but the legislation instead obliges the judge to determine a high probability of an amicable settlement to the dispute being achieved. As in pre-trial mandatory mediation, either party may exercise the right to withdraw from the mediation at any time, and this does not prejudice the legal status of the disputants as the case is already pending before the court. Thus, the existence of domestic violence may influence whether the judge will exercise the discretion vested in them, but the law does not provide an explicit obligation to take this fact into consideration. However, from a systemic point of view, it would be appropriate to extend the scope of the exception beyond pre-trial mediation to judicial mediation. This would avoid the distinction between victims of domestic violence who have already entered into court proceedings and those who have not, and would allow them to decide whether they wish to engage in mediation regardless of the moment at which it becomes mandatory.

Therefore, the current legal regulation of mediation in Lithuania is in line with Article 48 of the Istanbul Convention, although the country has not yet ratified the latter document. A victim of domestic violence is not obliged to comply with the mandatory pre-litigation dispute resolution procedure, but may initiate pre-trial mediation voluntarily. However, this exemption provides only a partial solution to the problem under study. In Lithuania, 20% of citizens (24% of women and 14% of men) admit to having experienced domestic violence, and 59% of those who have experienced domestic violence have never sought help (Cibarauskienė *et al.*, 2023). Thus, a significant number of domestic violence victims do not have the possibility to utilize this exception because they do not have the formal evidence necessary to prove that they have suffered from domestic violence. In addition, as mentioned in the previous chapter, victims do

not always identify themselves as such because of their lack of understanding of domestic violence, and in some cases they are even unwilling to acknowledge that they are suffering from domestic violence due to fear of repercussions from the perpetrator. In all cases – whether the domestic violence victim engages in mediation voluntarily, is not aware of the existence of the exception due to their lack of a legal representative, or is unable to use it because of the absence of evidence of domestic violence – the necessity for the mediator to use reliable domestic violence screening techniques to ensure that mediation is conducted safely is undisputed. However, the existing legal regulation of mediation in Lithuania neither specifies how the mediator should identify the elements of domestic violence nor envisages how mediation should be conducted to ensure the safety of the parties involved in mediation. Moreover, mediators in Lithuania are not obliged to specialize as family mediators or participate in specialized training to be able to conduct proper violence screening and later adapt the dynamics of mediation accordingly. In the absence of national or international guidelines regulating how mediation should be conducted in cases of domestic violence, the course of mediation is exclusively left to the competence and discretion of mediators. This leaves the parties with no guarantee that, in such cases, the mediation process will be conducted in a safe manner and will ensure the protection of domestic violence victims.

2.2. Ukraine

Ukraine's path towards the ratification of the Istanbul Convention was fairly long due to the lack of understanding of the norms of the Convention and the ambiguous attitude of society to the provisions contained therein. Ukraine signed the Convention on 7 November 2011, and ratified on 20 June 2022 (Law of Ukraine 'On Ratification of the Council of Europe Convention', 2022). The date of entry into force for the Convention in Ukraine was 1 November 2022. The country's ratification of the Convention complies with para. 22 of the Action Plan for the Implementation of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their member states, of the other part (2017). Ukraine recognized that the aims of the Convention are to protect women from all forms of violence and to prevent, prosecute and eliminate violence against women and domestic violence, which is also committed against men and children (both boys and girls).

Notwithstanding the above, the Istanbul Convention was ratified by Ukraine with certain caveats. In particular, Ukraine stated that it does not consider any of the provisions of the Convention as measures that oblige it to change the Constitution of Ukraine, the Family Code of Ukraine, or other laws of Ukraine on the institutions of marriage, family and adoption, nor may the Convention interfere with the right of parents to raise their children in accordance with their own beliefs. Ukraine stated that it will apply the Convention in accordance with the values, principles and norms defined by the Constitution of Ukraine – in particular, on the protection of human rights and fundamental freedoms, equal rights and opportunities for men and women, gender identity, the formation of responsible motherhood and fatherhood, family support and child protection.

According to the current Ukrainian legislation, mediation is a fully voluntary procedure, with no form of mandate or coercion envisaged for one or more parties to the process. Obtaining mediation can be achieved via payment, on a pro bono basis, or as a social service. Its delivery in cases of domestic violence at the request of the affected party, however, is considered not to violate the provisions of Article 48(1) of the Convention prohibiting mandatory alternative dispute resolution processes, including mediation and reconciliation. The Law of Ukraine 'On Mediation' does not define the legal framework and procedure for mediation in the context of domestic violence, instead merely emphasizing its voluntary nature, the general principles for its conduct, the status of the mediator, and other issues related to mediation. Having said that, the law does not define criteria for the non-mediation of disputes in the presence of domestic violence, and does not define a list of actions to be performed by the mediator in conflicts (or disputes) aggravated by violence in family relations.

In cases where mediation is conducted as a social service, however, the State Standard of the Social Service of Mediation (2016) specifies restrictions on mediation, highlighting that mediation is not applicable between a victim of domestic violence and the perpetrator. Legislatively defined actions for entities providing mediation services include the recognition of the perpetrator, establishing the facts of domestic violence through relevant state authorities, and documenting these facts in appropriate court decisions or

the decisions of relevant entities regarding measures for preventing and counteracting domestic violence. However, challenges arise for the mediator if allegations of domestic violence are revealed during the mediation process and there is no way to verify the accuracy of this information. Currently, recommendations for such situations exist only within mediator communities, highlighting the need for research and generalization to establish these practices at the legislative level.

Examples of the additional practices that are being deployed in the country in the field of mediation are developed by the Association of Family Mediators of Ukraine, which unites mediators who specialize and provide mediation services in resolving family conflicts (or disputes). The abovementioned association has developed training webinars and recommendations, including 'Domestic Violence. How to Act as a Family Mediator' (2023). As much as they are helpful, these measures do not represent part of the regulatory framework. According to the aforementioned document, the association recommends that mediators do not commence the mediation procedure if one of the parties to the dispute: 1) has been issued a restraining order against the offender by the authorized units of the police of Ukraine in the event of an immediate threat to the life or health of the victim in order to immediately stop domestic violence; 2) has been issued with a restraining order in court against the offender, which is aimed at temporarily restricting rights or imposing obligations on the person who committed domestic violence and is aimed at ensuring the safety of the victim; 3) the party has been referred by the court and is registered as an abuser whose behaviour is monitored by authorized units of the National Police of Ukraine in order to prevent repeated domestic violence; or 4) the party has been referred by the court and is undergoing a program for the offender aimed at changing their violent behaviour and developing a new model of behaviour in family relationships. In addition, the recommendations highlight the signs that will help the mediator identify domestic violence and make a decision on whether the conflict (or dispute) addressed by the parties is eligible for mediation. These signs include include: 1) the client indicates that domestic violence is taking place; 2) the client is generally concerned about the safety or life of themselves, their children, or other family members; 3) the client is worried that mediation may worsen their relationships or make them more dangerous; 4) the client does not feel that mediation is safe for them or their family; or 5) the mediator notes the presence of signs of domestic violence. If the mediator identifies signs of domestic violence, their further actions depend on the age of the client. If the client is a minor, the mediator is recommended to: 1) stop the mediation; 2) report in writing to the police; and 3) report to the Service for Children and Families, which is responsible for ensuring and observing the rights of the child. If the client is over 18 years of age and has legal capacity, the mediator is recommended to inform the client about support services and centres for victims of domestic violence, along with their right to file a written report of domestic violence to the police or court.

At the same time, mediators understand that in addition to domestic violence in families, family members may have separate legal conflicts (or disputes) – such as the division of marital property, alimony obligations in respect of children or another family member, deciding on how to participate in the upbringing and maintenance of a child, the deprivation of parental rights, etc. – in which the affected party may apply for family mediation services. In these cases, if the benefits of mediation and its results prevail over other means of resolving these disputes and the clients insist and wish to conduct or continue the procedure, then the mediator may decide to mediate.

In terms of the practical application of mediation in cases involving domestic violence, some mediators report that in many cases they learned about the existence of such violence after the procedure had begun, as the parties themselves could not always identify violence against themselves or against children or other family members (Zalar, 2019). At the same time, mediators noted that they worked in terms of cases, namely in terms of resolving specific legal issues that caused legal conflicts (or disputes), and did not address the issue of the reconciliation or restoration of relationships (Maan et al., 2020).

Notwithstanding the above, there is currently no statistical data in the country regarding the quantity or results of mediation in conflicts (or disputes) involving domestic violence, either at the state level or at the level of mediators' associations. Thus, in the event of the introduction of mandatory mediation in Ukraine, careful consideration should be given to determining its possible form and implementation procedure (such as procedural consultations or pre-mediation meetings with the parties) in order to avoid potential conflicts between national and international legislation on the issues examined in this article.

2.3. Bulgaria

Bulgaria signed the Istanbul Convention on 21 June 2016. However, its ratification was blocked in 2018 when 75 members of the Bulgarian Parliament launched an initiative to assess its constitutionality. The arguments raised claimed that the Convention aimed to encourage homosexuality, which in its turn may lead ‘to calling into question the traditional values of the Bulgarian society’ (Vassileva, 2018). In its ruling, dated 27 July 2018, the Constitutional Court ruled that the Convention contradicts the Constitution because it uses ‘gender’ as a social construct, which is against the binary understanding of ‘sex’ as determined by birth enshrined in the basic law. The above ultimately resulted in the discontinuation of the process of ratification of the Convention, effectively blocking any prospect of a future change in attitudes that would first necessitate another interpretation to be passed on by the Constitutional Court (Ilcheva, 2020).

At the same time, mediation practices in Bulgaria have been developing for the last 20 years, with their official up-take marked by the adoption of the Mediation Act of Bulgaria back in 2004. However, in spite of the 20 years of application of mediation, the percentage of cases being mediated has not soared. These moderate results, coupled with measures to counter the negative effects of the COVID-19 pandemic, led to amendments to the Mediation Act and the Civil Procedure Code of Bulgaria in February 2023. Pursuant to these amendments, the country has transitioned to a mandatory mediation model effective as of 1 July 2024 for a listed number of cases. This implies that the court shall oblige parties to conduct a first session in a mediation procedure after court proceedings have been initiated and the deadline for the submission of an answer to the statement of claims has expired. In this way, the plaintiff receives initial protection related to the filing of the statement of claim (e.g., the suspension of the limitation periods, the meeting of preclusive deadlines, etc.), while at the same time, at this point, the initial positions of the parties under the dispute are stated (in the statement of claim and in the answer). According to the newly introduced legislation, the court is expected in most cases to oblige the parties to take part in a first session in a mediation procedure before the first oral hearing of the case. In this way, if an agreement is reached, further costs and time for the hearing of the case will be saved. Family cases are not included in the list of cases which shall be referred to mediation on an obligatory basis, but are included in a different, stand-alone category, for which the judge reserves full discretion to oblige parties to attend the first information mediation sessions. After the court receives the plaintiff’s claim concerning a family dispute⁶ and the defendant’s counterclaim, the parties will be referred to court-annexed mediation centres, where mediators with a legal education who have passed special training by the Supreme Judicial Council are in charge of the process. At the same time, Article 140a(4) of the Bulgarian Civil Procedure Code explicitly provides that if there is convincing evidence of violence against one of the parties or there is a risk to the life or health of a child or its best interests, the judge shall not refer parties to mediation. The quoted provision does not specify what is understood by ‘convincing evidence’ and the type of violence thereby depicted, hence leaving this question entirely open to the interpretation of the judiciary. At the same time, the newly introduced legislative provisions do not provide for any requirements for the specialization of the court mediators who would handle family matters, nor is there any need for them to follow a particular protocol for screening cases for domestic violence. This is coupled with the lack of guidance or protocols for the behaviour expected by mediators in cases where domestic violence concerns are raised in the course of the mediation procedure. Considering that the problem of domestic violence in Bulgaria is reaching alarming levels, with 1,400 official cases of domestic violence in 2023 alone, and 20 women having been killed as a result of domestic violence (Radio Bulgaria, 2024), the lack of coherent and unified policy measures in this field is alarming and may need to be reconsidered. This is especially valid when acknowledging that the ratification of the Istanbul Convention has been declared unconstitutional, and that the number of family cases expected to be coerced into attending a first mandatory mediation information session is high.

Even if it may be concluded that the existing legal regulation of mediation in Bulgaria is in line with Article 48 of the Istanbul Convention – despite the fact that the Constitutional Court declared the Convention

⁶ Family disputes that may be subjected to mandatory first information sessions under Article 140a(2) of the Bulgarian Civil Procedure Code include divorce proceedings, custody disputes, visitation rights, place of residence of a child, child maintenance, measures concerning the personal relations between a child and their grandparents, along with the procedures for all interim measures that may be adopted as part of this process.

unconstitutional – the problem of how to effectively treat cases of domestic violence during mediation remains.

2.4. The advantages and disadvantages of the approaches to domestic violence in mediation deployed in Lithuania, Ukraine and Bulgaria

2.4.1. The advantages of the approaches undertaken in Lithuania, Ukraine and Bulgaria with respect to domestic violence in the context of mediation proceedings

It may be concluded that domestic violence concerns are deemed to be an exception for waiving the requirement for parties to attend a first mandatory mediation session or initiate the mediation process. This is based on the analysis of both the Lithuanian and Bulgarian mandatory mediation models, which provide victims of violence with the chance to avoid the need to take part in the mediation process alongside the perpetrator of the act of violence. This can occur either at the victim's own initiative, as in the Lithuanian model, or at the discretion of the judge, as is the case in Bulgaria, where the judge may refrain from ordering the disputants into mediation in case of evidence of domestic violence. Through effecting such exceptions, victims are afforded a higher level of protection by not being coerced into a process that may endanger their physical or emotional well-being. While such an approach may be deemed positive, it also shares some downsides, as the existing legal framework in both countries does not foresee a time limit for using domestic violence records as a waiver for this obligation. This may lead to a situation where domestic violence appeared much earlier and does not have any relevance to the current divorce or other family dispute for which mandatory mediation would otherwise apply. Thus, even though the fact of domestic violence does not lead to a power imbalance between the parties, the person who previously experienced it still acquires an advantage and is exempted from the mandatory use of mediation. Nevertheless, the existence of such an exemption does not deprive the parties of the possibility to enter mediation voluntarily. In Lithuania, for example, a victim of domestic violence is not subject to mandatory mediation, but if a victim chooses to do so voluntarily, they are able to access state-funded mediation. A similar approach has been adopted in Bulgaria, where a judge would withhold from referring parties to mandatory family mediation if the victim has submitted sufficient evidence to substantiate pre-existing violence hindering the conduct of mediation. Thus, in all three countries, the existing legal framework, among other things, empowers victims of violence to decide and select the nature of dispute resolution between them and the perpetrator, according to their needs and best interests.

The mediation practices of Lithuania, Ukraine and Bulgaria also enable the continuation of mediation even if the fact or concern of previous or ongoing domestic violence between the parties becomes apparent during the process. This is achieved by focusing the attention of the disputants on solutions to the other problems that they face in their relationship, while ensuring that the procedure does not aim to decide whether or not an act of violence occurred and what sanctions should be imposed in this respect. The analysis of the existing mediation practices established that none of these countries have introduced an explicit requirement to discontinue the mediation process if an act of domestic violence is revealed during the process. Through such approaches, i.e., by not explicitly providing a requirement to cease the mediation procedure, the countries are *de facto* tacitly supporting the notion that mediation may still be an effective way to resolve other topics of discussions beyond the act of violence that remain outstanding between the participants. This leads to the ultimate conclusion that mediation may still offer participants viable solutions to the consequences of the termination of their relationship, even if there are concerns of violence which do not endanger parties' self-determination.

2.4.2. The disadvantages of the approaches undertaken in Lithuania, Ukraine and Bulgaria with respect to domestic violence in the context of mediation proceedings

While all three of the countries under analysis strongly support family mediation, none of the three have stipulated additional requirements towards practicing family mediators who may encounter a history of violence between partners, especially in the course of mandatory mediation. The lack of such further requirements regarding the expertise and additional qualifications that family mediators should hold, particularly with respect to screening for and recognizing underlying acts of violence, could endanger

parties and fails to ensure that the mediation process is designed in a manner that ensures both parties' equal treatment and self-determination.

Moreover, this raises concerns regarding the preparation of the individual mediator to mediate in cases with elements of domestic violence. The principle of voluntariness in mediation implies, among other aspects, the right of the mediator to decide which cases to mediate. Thus, considering that cases involving domestic violence may fall within the scope of mandatory mediation, in the absence of clear guidelines on how to identify them, an ethical dilemma arises as to whether the mediator, upon becoming aware of such a fact during the process of mediation, has the right to refuse to mediate such a case. Article 1 of the European Code of Conduct for Mediators (2004) obliges mediators to evaluate their competence and knowledge before engaging in a particular mediation process. Thus, in the absence of specific training, practicing mediators may not all be willing and able to mediate cases involving domestic violence. Moreover, their withdrawal from mediation when this fact becomes evident during the mediation process only leaves the parties confused, and certainly discredits the mediation process and reduces trust in it. This is particularly relevant in the context of domestic violence. If a victim of domestic violence has decided to engage in mediation voluntarily, they will naturally expect that the mediator to whom they refer, or who is appointed by an authorised body, will have the relevant competences and will be able to properly organise and conduct the mediation process, considering the potential risks and ensuring the safety of it.

Another issue to be overcome is the lack of a single methodology regulating the approach that should be taken in cases where domestic violence is revealed as part of the mediation process. Neither Lithuania, Ukraine nor Bulgaria hold a single methodology or provide at least a minimal amount of guidance on how the mediator should proceed or how the dynamics of mediation should change after the fact of domestic violence has become apparent during mediation. This effectively leads to a lack of clarity and standards on the expected conduct of mediators, and ultimately results in the development of individual practices that are scattered in their nature and may not be inclusive of the best practices available in the field. Mediators, like other professionals, are often convinced that domestic violence is not a significant issue in the cases they mediate. However, the experience of health professions and psychologists has revealed that up to 39% of such cases are identified when beginning to use screening tools designed to identify domestic violence (Holtzworth-Munroe *et al.*, 2010). Mediators, even those reluctant or unwilling to mediate cases featuring elements of domestic violence, should screen for signs of domestic violence between the parties in order to be able to make informed decisions and adjust the mediation process accordingly (Rossi *et al.*, 2024). Several screening protocols for identifying domestic violence are applied in practice. Some of these protocols, such as the Mediator's Assessment of Safety Issues and Concerns (MASIC), are designed to be conducted as an interview, are based on years of practice in working with family disputants who have experienced domestic violence, are freely available, and do not require special training for mediators (Rossi *et al.*, 2024). Another example is the Domestic Violence Evaluation (DOVE) method, a 19-item instrument designed to assess and manage the risk of domestic violence during and following participation in divorce mediation (Ellis & Stuckless, 2006). It is considered that increasing the safety of the victim must be the primary purpose and outcome of any screening, especially if the parties are not represented by lawyers. It is therefore essential to follow the practice of other countries in using screening tools tailored for family mediators to enable mediators facing such cases to be capable of making timely and proper decisions on how to adjust the mediation process to the needs of the parties involved.

The severity of this problem is further highlighted by the lack of domestic violence screening mechanisms in family mediation in Europe. This is especially relevant for mandatory mediation, where the victim may not have revealed themselves. Unlike in Europe, the practice of screening for domestic violence in divorce mediation processes has been widely known and implemented in the United States of America (US) and Australia since the 1990s (Thoennes *et al.*, 1995; Clerck, 2017). In 1993, a survey of 200 mediation programs was conducted in the US, which concluded that as many as 80% of programs were reported to have screened for domestic violence (Thoennes *et al.*, 1995). These results were confirmed in 2007 by a survey on 94 mediation programs in community centres in the US and Canada, which established that 69% of these centres utilized some sort of domestic violence screening (Clemants & Gross, 2007). In Australia, screening is a common practice in most states, but detection rates vary (Clerck, 2017). Conversely to the US, Canada and Australia, the mediation frameworks in Lithuania, Ukraine and Bulgaria lack unanimity in their approaches to initial and ongoing screening tools and mechanisms that should be deployed by family

mediators. This leads to differences in the treatment that victims of violence receive during mediation, and effectively contributes to the limited possibility of identifying victims during mediation. This problem is particularly important in the context of mandatory mediation models, where couples with a hidden history of domestic violence may be coerced into participating in a procedure without the mediator being able to identify the signals that a potential victim is transmitting, thus preventing the mediator from being able to truly afford victims adequate measures of support and self-determination. Consequently, without clear guidelines on how to interact with victims of domestic violence, the mediation process may become a process of secondary victimization.

One significant challenge in the context of the mediation of domestic violence cases is the potential misuse of the exemption clause for mandatory family mediation by individuals seeking to manipulate the legal process. This misuse can undermine the fairness of divorce proceedings and the integrity of the legal system, as it is often used as a strategy to undermine the reputation of the opponent. In an *ex post* evaluation report on the impact of the current legal framework for mandatory mediation in family disputes in Lithuania, a quarter of the lawyers interviewed noted that the introduction of the domestic violence exception created an environment for the manipulation of the mandatory mediation process. If a disputing party is seeking to settle a dispute as soon as possible, the current legislation allows the parties to formally invoke the exception. Later on, when it becomes apparent that the allegation of violence has not been proven, the parties are left with no recourse to mandatory mediation, and lose the opportunity to attempt to resolve the dispute amicably (STRATA, 2022). The legal framework on domestic violence is aimed at protecting and defending victims of violence, but in some cases it can also enable individuals to manipulate the situation and seek to initiate a pre-trial investigation, the findings of which may only later reveal that the allegations were not substantiated. Thus, besides undermining the presumption of the innocence of the person accused of committing domestic violence, even if the charges are later dismissed, the latter is deprived of the right to use the pre-court dispute resolution procedure, contributing to additional costs and depriving them of the opportunity to reach an amicable settlement. However, if the allegations of violence are not proven in court, the presiding judge may offer the parties the possibility to use court mediation, which is also free of charge for the parties, or may refer the parties to court mediation on a mandatory basis. The judge may also apply procedural sanctions, such as by derogating from the standard rule on the allocation of costs.

Family judges who took part in the aforementioned study highlighted that domestic violence is particularly common in divorce cases. Most of the respondents noted that violence, as part of a future dispute resolution strategy, tends to be recorded as a starting point during the planning of the divorce or during the proceedings, and is used as a strategic instrument to undermine the other person's reputation in order to better serve one's own interests. If allegations of violence are not proven, then the parties are deprived of the opportunity to settle the dispute amicably and save time and money (STRATA, 2022). The existing legal framework should protect victims of domestic violence while allowing them to decide whether and when to engage in mediation voluntarily, but the problem needs to be tackled in a holistic way that minimizes the possibility of manipulation by dishonest parties seeking to escape the mediation process, thereby depriving the other party of all of the advantages of mediation and the possibility of evading litigation.

It is important to note that the exception to mandatory mediation in cases of domestic violence does not automatically ensure its applicability in all situations. This is primarily because statistical records of such cases do not fully capture the reality of all instances of domestic violence. Victims often avoid, are afraid of, or are unable to approach the legal authorities or other institutions providing assistance to victims of violence, and as a consequence they do not possess evidence and thus lose the possibility of utilizing the exemption. This issue highlights concerns of discrepancies in legal status and the awareness of the existence of the exemption. Firstly, the legal status of an individual possessing evidence of domestic violence differs from that of a person without such evidence, despite the fact that the impact and consequences of violence are often the same for both individuals. Secondly, victims of domestic violence are not always aware of the existence of this exception. If a victim has legal representation, their lawyer will likely inform them of the exception, and together they will decide whether it is useful to apply it or whether they would rather attempt mediation and try to resolve the dispute amicably. However, in the absence of legal counsel, the prior screening for violence by the mediator or mediation service administrator becomes crucial in determining to what extent eligible individuals can benefit from the exemption.

These issues underscore the need for better clarity and communication regarding what constitutes a case of domestic violence and the existence of exemptions, in order to ensure that all victims can access the protection they need. Overall, however, the introduction of the exception to mediation in case of domestic violence is seen as a timely and positive measure by judges, lawyers, mediators and those involved in mandatory mediation (STRATA, 2022). The experience of domestic violence leads to the higher than usual escalation of the conflict between parties, greater confrontation between them, and more significant power imbalance. Thus, the rejection of any coercive element means that a survivor of domestic violence is not forced to interact with the perpetrator, thereby preventing re-victimisation and secondary victimisation, and preserving their psychological well-being. Moreover, such a legal framework creates the stigmatisation of the victims of domestic violence, as they are assumed to be weaker, unable to express or defend their interests properly, and *de facto* require protection, while the perpetrator remains aggressive, manipulative, and dangerous to the victim.

Conclusions

The explicit obligation of the Istanbul Convention signatories to take immediate action to prohibit mandatory mediation in cases where concerns related to domestic violence are raised put to an end the debate as to whether mandatory out-of-court approaches should be permitted in cases with a history of domestic violence. However, in the context of the growing trend towards adopting various mandatory mediation models, particularly in the field of family conflicts, the question of how to balance such public policy goals as the protection of domestic violence victims and the pursuit of peaceful dispute resolution with the possibility of maximising the benefits of mediation remains open. This article has sought to analyze the national legislative framework of different countries which have taken a diverse stance with respect to the Istanbul Convention – i.e., have either ratified it or not – while at the same time applying various forms of mandatory mediation. The analysis showed that the problem of domestic violence and its impact on mandatory mediation lacks uniform treatment, leading to differences in the perception of domestic violence victims who may be coerced into participating in mediation alongside the perpetrator. One way to tackle the above issue is the adoption of an exception in the mandatory mediation procedure if evidence of previous violence is identified. To date, the approaches adopted at the national level in the three countries under study lack synchronicity, and should be reconsidered in light of the fact that the EU has ratified the Istanbul Convention, which prohibits mandatory mediation.

This research allowed the advantages of the current situation to be identified, as well as the challenges posed by Article 48 of the Istanbul Convention. Based on the research, the benefits of the models that were studied include providing for the element of domestic violence as a factor that allows for an exception to otherwise mandatory family mediation. This creates an opportunity for victims of domestic violence to engage in mediation voluntarily only if they trust in a process that ensures sufficient safety measures and the self-determination of parties. Such an approach offers genuine victims of violence protection by not forcing them into a potentially harmful mediation process with their abuser, while also allowing them to choose mediation if they feel sufficiently empowered to be on equal footing with the abusive partner.

The disadvantages that were identified include the absence of screening mechanisms and a unified methodology for addressing cases of domestic violence within mediation, which can result in victims being coerced into mediation without appropriate support and safety measures. This is further coupled with the notable lack of additional qualifications and multidisciplinary expertise which is required for mediators tasked with mandatory family mediation. Separately, the mandatory mediation exemption clause can be misused as a strategy in divorce proceedings to manipulate the legal process and undermine the opponent's reputation, which can lead to additional costs and missed opportunities for an amicable settlement. The criteria for a case of domestic violence to qualify as an exception are not always clear, and may vary according to the individual case. Moreover, not all instances are statistically recorded, and victims may avoid reporting domestic violence or lack evidence thereof, thereby losing the possibility to apply for exemption. This discrepancy creates inequality between the legal statuses of those with and without evidence, despite the similar impacts of violence on victims. At the same time, domestic violence victims may not always be aware of the exemption from mandatory mediation. Legal representatives can inform victims, but in the absence of a lawyer, prior screening by mediators or service administrators is crucial in order to ensure that eligible individuals can benefit from the exemption.

This analysis led to the conclusion that there is a substantial gap between the different treatments of domestic violence cases in mediation across the European countries under study. This necessitates additional regulation, particularly in the context of mandatory mediation models in the presence of indicators of domestic violence. The compliance of the existing legal framework with Article 48 of the Istanbul Convention can be considered as an appropriate example and a significant first step towards ensuring the protection of victims of domestic violence in the context of mediation. However, beyond the advantages identified in this paper, this legislative setting is not sufficient to address the challenges that have emerged. In light of the pros and cons discussed above, it is advisable for the EU to follow the best practices of other countries in the application of screening tools developed specifically for mediation. It would also be pertinent to consider the adoption of additional guidance, standards or protocols that govern the peculiarities of cases of this nature, which would enable mediators to identify domestic violence and adjust the mediation process in the context of different forms of domestic violence, particularly in relation to mandatory mediation.

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