

# Predictable Irrationality in Mediation: Observations on Behavioural Economics

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*ABSTRACT* In my paper I attempt to provide a common intersection of mediation and behavioural economics. In doing so, I seek to identify the answers that can be used to assign the domain of mediation methodology where theorems of man's decisions of behavioural economics are validated. I seek to identify the answers that can be used to the domain of mediation methodology where behavioural economics can be applied to the theorems of man's choices. I do so in order to take account the phenomena behind human decisions, influencing them and determining their characteristics. Through this, I seek to prove the proposition that human behaviour is neither logical nor rational, a claim which plays an important role in mediation. Beyond this, the study discusses the statements of behavioural economics which also prove the above theorem. However, the aim of the paper is also to collide the results of behavioural economics with the practical experience of mediation, thereby answering the question whether theoretical results of behavioural economics on human decisions are validated in practice. The essence of mediation is to reach a favourable agreement, the in-process tool of which will influence human behaviour and decision-making towards this goal. In my study, accordingly, I intend to achieve the goal of naming the mediation techniques and tools that can be used to achieve the outcome of mediation that is a good agreement.

*KEYWORDS* mediation, human behaviour, decision theory, behavioural economics, irrationality

*„It is not the things that disturb us,  
but our interpretation of their significance.”  
/Epictetus/*

## 1. Identifying cognitive processes and cognitive biases in mediation

In many aspects of our lives, we like to believe that we are rational beings. We are logical people who see, weigh up the options and then make the right decision by calculating and proceeding along the path of reasoning. Since those

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who are rational say, they are able to put their emotions and passions on the back burner. But what about those who claim that thinking is fundamentally irrational and far from being logical? Neumann and game theory<sup>1</sup> have shown that the path to perfect rationality, however incredible it may sound, is through a die. Game theory also holds a number of solution keys in the field of conflicts and decision dilemmas, which clearly shows that conflict resolution is more emotional than logical<sup>2</sup>. In contrast to the rational approach, research has given us a glimpse into a world where it is clear how predictably irrational we really are. We are irrational in the sense that we make illogical decisions due to our cognitive biases<sup>3</sup>. Behavioural economics has incorporated these research findings into its own field and then applied them to economic models of decision making.<sup>4</sup>

## 1. 1 The human mind

Cognitive psychology seeks to explore human cognition and its processes by following a path of ideas. Its premise is that our thoughts determine our feelings, which influence our decisions and actions.

Our inner world, formed by our thoughts, is our own reality, which takes on individual meaning through social interactions. How we use the knowledge we acquire, the experience we have, is up to us. The meaning we attach to each situation greatly influences the way we feel. We have all experienced that when a dark thought knocks at the door of our mind, in a moment the darkness manifests itself in emotion and we despair. In the same way, when the image of a loved one flashes into our minds, our lips twitch into a smile and we are enveloped in happiness<sup>5</sup>.

The thought-feeling-action balance is largely determined by our ability to think adaptively<sup>6</sup> about a situation, or whether we are dominated by a maladaptive

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<sup>1</sup> An abstract discipline dealing with rational choice. This theory has paradoxically been able to prove that in some cases the only rational choice is irrationality.

<sup>2</sup> Piroska Komlósi, and Orsolya Antal. “Válni? Miért? Hogyan?,” *Glossa Iuridica* 3, no. 3-4 (2016): 96.

<sup>3</sup> Cognitive bias: Systematic deviations from norms or rationality in the way we think, which are present in each of our minds through external influences, our own experiences and our individual perceptions. These lead us to see certain things in a way that is different from the rational, according to our own subjective reality (“Schema therapy”) <https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban>.

<sup>4</sup> Radha Pull ter Gunne, “Manipulation or Assistance? An outline of skills and techniques from behavioural economics for mediation and the ethical considerations for a neutral mediator,” *UNSWLawJIStuS* 14; University of New South Wales Law Journal Student Series, no. 20–14. (2020).  
<http://classic.austlii.edu.au/au/journals/UNSWLawJIStuS/2020/14.html>.

<sup>5</sup> Valéria Csépe, Miklós Győri and Anett Ragó, *Általános pszichológia 1–3 – 3. Nyelv, tudat, gondolkodás* (Budapest: Osiris Kiadó, 2007–2008), 488–496.

<sup>6</sup> Thinking adaptively; the term adaptive basically describes the way people adapt and respond to their environment. In a broader sense, it refers to the activities people and

spiral<sup>7</sup> where automatic negative thoughts take over. Between these cognitive biases<sup>8</sup>, disharmony can easily take over, which can then manifest in psychosomatic symptoms<sup>9</sup>.

## 1. 2 The role of schemas<sup>10</sup> in human thinking

Our schemas, born out of our past experiences, emerge as obstacles that distort our perceptions as basic cognitive beliefs, thus limiting our coping. Schemas are born from unmet emotional needs rooted in childhood. Schema Therapy identifies 5 basic emotional needs: secure attachment; autonomy, competence, sense of self-identity; freedom to express legitimate needs; spontaneity and play; realistic boundaries and self-control. A healthy personality will be one who can adaptively fill these gaps. A schema can go in one of two directions: consolidation or healing<sup>11</sup>.

Maladaptive coping style, which can take three forms - similarly to the way organisms respond to danger - works in the direction of consolidation. Fighting is manifested as overcompensation, flight as avoidance, and freeze as subordination. Change can be achieved by altering cognitive re-framing and

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groups invest in, the opportunities and pathways they seek that help them grow and nurture themselves while trying to avoid stress, injury and risk (“Schema therapy” <https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban>).

<sup>7</sup> Maladaptive Spiral: Maladaptive thinking in psychotherapy describes a situation where a person's emotional problems are caused and maintained by erroneous and irrational beliefs, where a person's response to their environment does not lead to beneficial outcomes. These patterns of adaptation often become rigid and are deeply rooted in a person's actions, feelings, thinking and attitudes towards others (“Schema therapy” <https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban>).

<sup>8</sup> Cognitive bias: Also known as thinking or reasoning errors. They result in spontaneous, automatic negative thoughts that occur in current life situations, resulting in misinterpretation and negative emotional states (“Cognitive biases in thinking” <https://onlinepszichologus.net/blog/kognitiv-torzitasok-a-gondolkodasban/>).

<sup>9</sup> Aeon Beck, John Rush, Brian Shaw, and Gary Emery, *A depresszió kognitív terápiája* (Budapest: Animula, 2001), 121–128.

<sup>10</sup> Schema: the data structure stored in memory that determines our conceptual knowledge. The concept was introduced into psychology by Bartlett, following Kant and Head, who theorised that all information processing processes use schemas to interpret sensory data and retrieve information for goal-directed behavior (“Schema” [http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich\\_kog/sema.htm](http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich_kog/sema.htm)).

<sup>11</sup> Jeffrey E. Young, Janet S. Klosko, and Marjorie E. Weishaar, *Sématerápia* (Budapest: VIKOTE, 2017), 25–29., 47–49.

schema-driven behaviour<sup>12</sup> so that the maladaptive schema becomes less and less activated<sup>13</sup>.

In cognitive re-framing, it can be helpful to think about what other explanations for a situation might exist beyond cognitive biases. Cognitive rehearsal of certain actions can also be helpful. There are a number of NLP techniques<sup>14</sup> that can help us to imagine how to adapt to the situation at hand in a good and active way, in an adaptive way. Role-playing can also be helpful, just as imagination<sup>15</sup>. Importantly, a myriad of alternative ways of dealing with the problem at hand can be listed. It is also possible to think through a worst-case scenario<sup>16</sup>, and in the process experience that the world will not collapse even if you make a particular choice.

When the mediation process is stalled, the BATNA / WATNA question type is used. These questions are asked by the mediator to encourage the parties to consider the consequences of the mediation breakdown and thus to motivate them to participate in the mediation process and to make further efforts to resolve the situation. The BATNA/WATNA question type addresses the weakest points of the parties' positions. BATNA is an acronym formed from the term "Best Alternatives to Negotiated Agreement" and roughly refers to the questions that are asked in order to achieve the best outcome from the negotiation. WATNA is the opposite and is an acronym formed from the phrase "Worst Alternatives To Negotiated Agreement". WATNA, as a way of asking questions, refers to what the parties may lose by failing to reach an agreement or by breaking off the negotiation.<sup>17</sup>

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<sup>12</sup> Schema-driven behaviour: adaptation is essentially a way of adapting and responding to the environment. Adaptive patterns are the adaptation of an individual to a situation in a way that produces valuable outcomes, while inappropriate patterns tend to produce short-term benefits but cause problems in the long term ("Schema therapy" <https://mandulapszicho.hu/blog/55-maladaptiv-jelentes-a-sematerapiaban>).

<sup>13</sup> Young, Klosko, Marjorie and Weishaar, *Sématerápia*, 49–52.

<sup>14</sup> NLP Technique: neuro-linguistic programming (NLP) is an experiential system of specific psychological, psychotherapeutic and communication techniques that study language use and behaviour. It is considered a pseudoscience, since its effectiveness cannot be proven by scientific methods ("NLP Technique" <http://integrativterapiaster.hu/nlp-modszer-a-neurolingvisztikai-programozas-lenyege-es-hatasai/>).

<sup>15</sup> Imagination. The term imagination is derived from the Latin word *imago*, meaning image, likeness, semblance. Imagination is an imagery exercise introduced through relaxation, in which our imagination creates our reality ("Imagination" <https://takacsviktoriam.hu/mi-a-kulonbseg-a-relaxacio-az-imaginacio-es-a-meditacio-kozott/>).

<sup>16</sup> The scripts contain the names or themes of the types of events (e.g. eating in a restaurant) and typical event scenes, which can be used to understand incomplete descriptions of events. According to cognitive psychological theories, our autobiographical memories, which are an important part of the self-schemas that form the basis of our identity, are modelled on general event scenarios ("Schema" [http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich\\_kog/sema.htm](http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich_kog/sema.htm)).

<sup>17</sup> Tibor Kertész, *Mediáció a gyakorlatban* (Miskolc: Bíbor, 2010), 85–86., 149.

The types of questions used in mediation relate to the dynamics of the process, the process of empowerment. At the beginning of mediation, we are busy trying to understand what has happened, so we typically ask informational questions. Then, when we want the parties to understand who did what or why, or who thinks what, the proportion of motivational questions increases, and when we deal with the impact of the conflict on the other, reflective questions follow. Circular questions already help the parties to draw conclusions from the discussion together and if this process gets stuck, BATNA/WATNA is used.<sup>18</sup>

### 1.3 Characteristics of communication

Speech is one of the most basic means of expressing our thoughts. "... we are ourselves in what we say: the way we say it, the words and expressions we use, all tell us something important about ourselves, they can refer to our gender, our social status, our current state of mind, our personality, our attitudes."<sup>19</sup> "Our life is full of conversations."<sup>20</sup> "... it is always through the verbal communication, changing roles, that we achieve what we want, move closer to the other or move away from them. In a certain sense, all human relationships are conversations, and conversation can be seen as the direct reality of language."<sup>21</sup>

We call the hidden logic of conversation a system, after P. Grice, in which the rules of conversation form a general system of conventions. The cooperative principle is the guiding principle by which we assume that the other person plans his actions on the basis of his desire to cooperate with us. Grice breaks it down into 4 further principles: quantity (be informative), quality (aim for the truth), relevance (relate what you say to what has already been said), mode (be clear)<sup>22</sup>. When we converse, we have to coordinate several things: we have to pay attention to order (temporality and causality), but also according to a certain concept, to what the other person might know or think. In the process, the roles of speaker and listener can be distinguished. It is also worth distinguishing several levels regarding the number of people involved in the communication: intra-psychoic, interpersonal, group communication and mass communication.<sup>23</sup> A basic tenet of the Palo Alto school of communication studies is that every communicative act is a two-step process. The communication of information

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<sup>18</sup> Tibor Kertész, *Mediáció a gyakorlatban*, 84–86.

<sup>19</sup> Eszter Tisljár-Szabó, "Érzelmek és beszéd," in *Pszicholingvisztika 2*, edited by Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014), 962.

<sup>20</sup> "Text is the immediate reality of language, discourse is in fact the equivalent of speech in its broadest sense. I use the term conversation to refer to this living, interpersonal reality." (Csaba Pléh, "A társalgás pszicholingvisztikája," in *Pszicholingvisztika 2*, edited by Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014), 988.

<sup>21</sup> Pléh, "A társalgás pszicholingvisztikája," 987.

<sup>22</sup> Csaba Pléh, "A lélek és a nyelv" (Budapest: Akadémia Kiadó, 2013), 79–98.

<sup>23</sup> Pléh, "A társalgás pszicholingvisztikája," 987–1030.

itself takes place at the subject level, where the reality of the content of the communication depends on whether the message is true or false, and even the subjective importance of the content itself is relevant. On the relational level, on the other hand, the communication process takes place between the emotions and qualities associated with the relationship, which depends on the content of the communication, the situation in which it is made, as well as its nature and cultural qualification.<sup>24</sup>

Habermas defines the criteria of an ideal speech situation as follows: formal, cognitive and universal. From the formal point of view, he emphasises normativity, in which we should be able to abstract from our own everyday environment, thus achieving a spatio-temporal transcendence. The cognitive measure is that rationality is expected of those involved in communication, which can thus be weighed as arguments in a given debate. According to the criterion of universality, the norm, the conditionality, the arguments and the procedure itself must mean the same to all concerned.<sup>25</sup>

According to Wiemann and Giles<sup>26</sup>, communication is a multi-functional social sequence of events, capable of conveying emotions and performing instrumental actions; however, most of the processes involve a very low degree of awareness and intentionality. Csepeli, using Machiavelli's approach, observes that "there are three kinds of human cognition: one can recognise things by itself, another will do what others recognise, and a third cannot recognise either by itself or by others"<sup>27</sup>, and he points out that cognitive inequality must be taken into account, because the majority of people in society are those who do what others recognise.

Hobbes refers to speech as the most useful human invention, but he counts it only at the level of the subject, since he interprets uncooperative communication that promotes understanding as a failure. In his view, there are four ways of misusing speech.<sup>28</sup> "First, by using the direct meaning of words to record our thoughts incorrectly, because then we record as perception something we never perceived, and in this way, we mislead ourselves. Second, if we use words in a figurative sense - that is, not in the sense in which they are intended - we have deceived others. Thirdly, when we use words to express a will that does not exist in reality. Fourth, when we use them to hurt each

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<sup>24</sup> György Csepeli, *Szociálpszichológia* (Budapest: Osiris Kiadó, 2001); György Csepeli, *A hatalom anatómiája* (Budapest: Kossuth Kiadó, 2013), chap 14.

<sup>25</sup> Jürgen Habermas, *A kommunikatív cselekvés elmélete* (Budapest: Gondolat Kiadó, 2011). Cited in Gabriella Szabó, "Politikai kommunikáció és közösség," *Politikatudományi Szemle XXV*, no. 1 (2016): 29–47.

<sup>26</sup> John M. Wiemann and Howard Giles, „Az interperszonális kommunikáció,” in *Szociálpszichológia* eds. Hewstone, Stroebe, Codol, and Stevenson (Budapest: Osiris Kiadó, 1995). Cited in Csepeli, *Szociálpszichológia*, 2001.

<sup>27</sup> Niccolò Machiavelli, *A fejedelem* (Budapest: Európa Kiadó, 1978), 76. cited by Csepeli, *A hatalom anatómiája*.

<sup>28</sup> Csepeli, *A hatalom anatómiája*, chap 14.

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other.”<sup>29</sup> In the mediation process we experience this abusive communication countless times.

This approach can be paralleled with Grice's system of maxims that describe the conditions for successful communication: (1) focus on the subject, (2) do not use more or fewer words than necessary, (3) avoid words that are ambiguous or have vague meanings, (4) do not say anything you are not sure is true. In contrast, the reverse application of the maxims can often be seen in communication between people in conflict with each other.<sup>30</sup>

	<b>Grice maxims</b>	<b>inverse Grice maxims</b>
<b>quantity</b> be informative	do not use more or fewer words than necessary	use many more words than necessary or significantly fewer words than necessary
<b>quality</b> strive for the truth	do not say something you are not convinced is true	do not say something you sincerely believe
<b>relevance</b> your communication should be relevant	focus on the subject	never talk about the subject itself
<b>manners</b> be clear	avoid ambiguous words with obscure meanings	feel free to use words with obscure meanings, ambiguous expressions and clichés

Own table based on Csepeli (2013) and Pléh (2013)

In the mediation process, the key to successful communication is not at the object level, but at the relational level, where information affects emotions, with the aim of creating an emotional relationship between the speaker and the addressee that lies between love and hate.

<sup>29</sup> Thomas Hobbes, *Leviatán I* (Budapest: Kossuth Kiadó, 1999), 90. cited by Csepeli, *A hatalom anatómiája*.

<sup>30</sup> Ildikó Bencze M., “Kísérleti pragmatika,” in *Pszicholingvisztika 2*, eds. Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014). 813–854.

## 2. Characteristics of social behaviour

One of the basic motivations of human beings is that they want to save face. They want to believe that as objective beings they can resist influence, but at the same time they desire to be able to influence others. To understand people's social behaviour, social psychology provides a starting point to see that, despite our best efforts, we are still influenced by certain phenomena. Due to the effects of social and cognitive processes on individuals, we can see that we are significantly influenced by physical presence, by a perceived and mediated opinion, by feelings about ourselves or our group, and by our perceptions, memories and motivations.<sup>31</sup>

According to social psychology, the diversity of social behaviour can be understood through two basic axioms, three motivational principles and three processing principles. The two most important principles are that we construct our own reality and that social influence affects everything. By construction of reality, we mean that for each individual, the idea of reality is “merely” a construction, shaped by both cognitive and social processes, the effects of which cannot be separated. In contrast, the pervasiveness of social influence implies that even if we are not physically present, our thoughts, feelings and behaviour are almost always influenced by other people.<sup>32</sup> “Our perceptions of others' reactions and our identification with social groups shape our most intimate perceptions, thoughts, feelings, motivations, and even our perceptions of the self (...) social influence is strongest when it is least obvious: when it shapes our most basic assumptions and beliefs about the world in ways that we do not even notice.”<sup>33</sup> This also has a powerful impact on the way we construct our own reality, through which we clearly influence our thoughts, feelings and behaviour.

In relation to the two basic axioms detailed in the previous paragraph, people are driven by three motivations: the desire to control situations, the search for connection, and the valuation of ourselves and those we belong to. Striving for mastery motivational force implies the need to understand the world around us and to be able to control it in order to gain rewards for ourselves. Seeking connectedness implies the need to be able to show reciprocity in the individuals and groups we value, which manifests itself in supporting, liking and accepting each other. The motivational principle of valuing “me and mine” satisfies our need to see ourselves in a positive light, as well as those connected to us.<sup>34</sup>

The three processing principles are: 1) The conservatism principle is the processing concept that existing beliefs, both for individuals and groups, change slowly, but that this established knowledge tends to maintain itself. 2) According to the accessibility principle, the most accessible information has the

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<sup>31</sup> Eliot R. Smith, Diane M. Mackie and Heather M. Claypool, *Szociálpszichológia* (Budapest: Eötvös Kiadó, 2016), 65.

<sup>32</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 55-58.

<sup>33</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 57.

<sup>34</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 58-59.

greatest impact on our thoughts, feelings and behaviour. 3) The superficiality versus depth principle distinguishes the extent to which information is processed. People typically live their lives on autopilot, where they put little effort into processing information and make decisions based on this superficial picture. Sometimes, however, they become motivated to look more closely at the circumstances of the case and thus make a more considered decision.<sup>35</sup>

Different combinations explain all social situations, whether they are valuable or destructive. “Even when information has been considered as thoroughly as possible, it is not always guaranteed that the right decision will be reached. Sometimes even thinking about things can distort our interpretation and lead us to make mistakes without being aware of the problem.”<sup>36</sup>

## 2. 1 Competition or cooperation

The question of taking responsibility for personal behaviour, for the way situations develop and for our decisions will determine to a large extent whether we choose to cooperate or compete. The freedom of choice carries with it a burden of responsibility from which many would like to escape. A sense of responsibility includes individual morality, norms of social coexistence and respect for the rights of others. It embodies on the one hand a willingness to accept the consequences of one's actions, and on the other hand a willingness to assess the outcome of one's future actions. Alongside freedom, a sense of control is a distinctive element of responsibility. According to Schlenker (1994), the assumption of responsibility requires that the person involved in it knows the content of the event in question - which is relevant to him or her, and in the meantime they also possess a sense of control. We therefore judge responsible people those who make decisions of their own free will, in the knowledge of the consequences.<sup>37</sup>

Following Bandura (1977), the belief in one's own competence is presented in psychology as general self-efficacy. This perceived ability influences people's thinking, feelings, behaviour and motivations. These efficacy beliefs guide and regulate human behaviour through motivational, cognitive, emotional and decision-making processes.<sup>38</sup> According to Bandura, the defining element of adaptive functioning<sup>39</sup> is

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<sup>35</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 60–61.

<sup>36</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 62.

<sup>37</sup> Éva Szabó, and Márk Kékesi, “A felelősségérzet koncentrikus szerkezetének vizsgálata középiskolások körében,” *Alkalmazott Pszichológia* 16, no. 2 (2016): 53–68.

<sup>38</sup> Anita Nagyné Hegedűs, *Énhatékonyság – iskola – teljesítmény* (2014) [https://gradus.kefo.hu/archive/2014-1/2014\\_1\\_ART\\_001\\_Hegedus.pdf](https://gradus.kefo.hu/archive/2014-1/2014_1_ART_001_Hegedus.pdf).

<sup>39</sup> Adaptive behaviour is defined as the ability to perform effectively in terms of social and community expectations appropriate to one's age and cultural group, personal

self-efficacy, which implies an increased sense of responsibility. Research has identified a strong correlation between dimensions of self-efficacy and responsibility. They suggest that the more self-efficacy one feels in a particular area, the more likely one will take responsibility in that area than in areas where one lacks this feeling.<sup>40</sup>

It is easy to see that in a conflictual situation, which involves taking a case to court and hardening it into a lawsuit, one is often unable to see the possibilities of an alternative route. In contrast to the zero-sum outcome of litigation, cooperation in conciliation, which is the highest gain, requires a very different attitude from the parties. The formalisation of the procedure - along the axes of negotiation, mediation, arbitration, adjudication - will gradually increase, as the settlement of the dispute becomes more and more norm-oriented. All this means that the chances for resolving the dispute are increasingly out of the hands of the parties, while the scope for discretion in the negotiating position is also diminishing.<sup>41</sup>

### 3. The impact of behavioural economics on mediation

Knowing ourselves is a key task for our whole lives. Knowledge is formed through different mirrors. Observing ourselves, observing the signs of others, and comparing ourselves with others can all serve as a starting point for getting to know and understand ourselves better. The initial observation and interpretation of thoughts, feelings and behaviours can also help us later to be able to bring about change in these areas. The components of the 'self' are therefore the sum of our knowledge about ourselves (self-concept) and our feelings about ourselves (self-esteem).<sup>42</sup> We are people first and litigants second.

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independence, physical needs and interpersonal relationships. (Behaviour that interferes with daily activities is called maladaptive behaviour, or more commonly problem behaviour. Maladaptive behaviours are undesirable, socially unacceptable, or interfere with the acquisition of desired skills or knowledge). Problems with the acquisition of adaptive skills can occur at any age - in young children, in the development and acquisition of basic maturational skills (e.g. walking or performing self-help skills), the acquisition of academic skills and concepts (e.g. basic reading, writing and maths skills) in school-age children, or in social and occupational adaptation (e.g. working with others, developing basic workplace skills) in older children. <https://us.humankinetics.com/blogs/excerpt/adaptive-and-maladaptive-behavior>.

<sup>40</sup> Szabó, and Kékesi, "A felelősségérzet koncentrikus szerkezetének vizsgálata középiskolások körében".

<sup>41</sup> Béla Pokol, "A jog elkerülésének útjai. Mediáció, egyezségkötés" *Jogelméleti Szemle*, no. 1 (2002), <https://jesz.ajk.elte.hu/pokol9.html>.

<sup>42</sup> Smith, Mackie, and Claypool, *Szociálpszichológia*, 155–161., 170.

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A number of studies on the impact of behavioural economics on mediation have been carried out, which bring us closer to understanding irrational behaviour in negotiations and offer useful tools for dealing with it. The research on behavioural economics and mediation provides a comprehensive picture of the possible biases and heuristics that can arise in negotiations, but also identifies a number of techniques for the mediator to overcome these obstacles in his or her work. The question is 'merely' to what extent a mediator who uses these techniques to deal with the biases and heuristics encountered in a negotiation process can be considered neutral and ethical.<sup>43</sup>

Mediation is a form of dispute resolution in which a neutral third party facilitates the resolution of a dispute. The mediator may take on a facilitative, evaluative or transformative role in the negotiation. Regardless of the model used in the process, mediation focuses on the parties and on reaching a favourable agreement through negotiated decision-making. The central element of mediation is the decision-making power of the parties. Decision-making in mediation is linked to the dominant social paradigm, derived from microeconomic theory, that individuals make decisions based on rationality and self-interest. Such individuals have been termed *Homo Economicus*, namely who make their decisions with a focus on maximising profit by considering relevant costs and benefits. Research in the field of behavioural economics suggests that *Homo Economicus* does not exist, given that people are irrational and make countless cognitive errors in their decisions.<sup>44</sup>

Irrationality is in contrast to rational thinking based on the objective functioning of logic, reasoning and the brain's operations of linear thinking. Thus, if one is irrational, one's decisions will be determined by one's emotional responses to external stimuli triggered by visceral reactions and internal biases. In this case, attention to his direction must also be based on a different foundation, since it is the emotions and perception that influence negotiations. Cognitive biases, prejudices and heuristics are systematic errors in thinking that need to be corrected in the decision-making process.

Pull ter Gunne's paper outlines nine different tools drawn from the behavioural economics literature on how the mediator can mitigate certain types of biases and heuristics of the parties in negotiations: (1) Accounting for concessions made by the parties during negotiations, which can serve as a tool to eliminate emerging biases where appropriate.<sup>45</sup> (2) Re-framing,<sup>46</sup> which can help with

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<sup>43</sup> Pull ter Gunne, "Manipulation or Assistance? An outline of skills and techniques from behavioural economics for mediation and the ethical considerations for a neutral mediator".

<sup>44</sup> Ibid.

<sup>45</sup> According to the theory, the parties' decisions are not driven solely by self-interest and profit-seeking, but rather by the relationship of their own gains and losses to the gains or losses of others. If it appears that the other party is in a better position, the proposal may be rejected by the other party even if it is economically advantageous. (Pull ter Gunne, "Behavioural economics," part A)

<sup>46</sup> Re-framing: The placing of arguments and proposals in a new perspective by the mediator. It is well known that parties make their decisions based on whether a given

loss, endowment effect<sup>47</sup> and reactive devaluation,<sup>48</sup> (3) Making the choice relative by outlining several alternatives, which can make certain choices appear better;<sup>49</sup> (4) Reality testing, which can help change the parties' perspective by outlining the worst and best outcomes, so that they are able to interpret reality from more than just their own perspective.<sup>50</sup> This can help to address confirmation bias,<sup>51</sup> optimism bias,<sup>52</sup> inverse fallacy,<sup>53</sup> and effect bias.<sup>54</sup> (5) Understanding the causes of conflict and the parties' histories is important to eliminate attribution bias,<sup>55</sup> availability heuristics,<sup>56</sup> and self-serving bias.<sup>57</sup> (6)

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choice is framed as a loss or a gain. Studies show that a proposal framed as a loss is more likely to be rejected by the parties than something framed as an equivalent gain. (Pull ter Gunne, "Behavioural economics," part B).

<sup>47</sup> Endowment effect: parties will place a higher value on something if they perceive it as their own. Over-valuation of an object in their possession, manifested by emotional and subjective appreciation, can also be helped by reframing, which can bring objective and subjective value closer together (Pull ter Gunne, "Behavioural economics," part B).

<sup>48</sup> Reactive devaluation: the recipient irrationally devalues a proposal from the other party because it is perceived as less advantageous. The proposal from the intermediary reduces bias (Pull ter Gunne, "Behavioural economics," part B).

<sup>49</sup> When multiple options are provided, even those that may be considered extreme, proposals may appear more attractive. For example, in deferred payment arrangements, a party is more likely to accept an arrangement with a longer payment option if the final amount is larger (Pull ter Gunne, "Behavioural economics," part C).

<sup>50</sup> Parties usually find it difficult to separate themselves from their role in the dispute, which means that the parties' perspective determines how they experience the dispute. However, by reframing the parties' positions, the mediator can change the parties' perspectives, which can be either negative or positive illusions (e.g. perspective bias), and help overcome different biases (Pull ter Gunne, "Behavioural economics," part D).

<sup>51</sup> Confirmation bias: another type of positive illusion, which refers to people accepting only evidence that supports their current position and ignoring evidence to the contrary (Pull ter Gunne, "Behavioural economics," part D).

<sup>52</sup> Optimism bias: A type of positive illusion that refers to people's tendency to overestimate their abilities and to make overly optimistic predictions about future events. Positive outcomes for themselves are also seen as preferable to statistical predictions (Pull ter Gunne, "Behavioural economics," part D).

<sup>53</sup> Inverse fallacy: also known as affect heuristics, which induce parties to base their decisions on their feelings and emotions rather than on logic and firmness. With its "help" people tend to ignore the importance of statistics. By eliminating these mental short-circuits and decision-making errors, parties will be able to make decisions that appear more rational (Pull ter Gunne, "Behavioural economics," part D).

<sup>54</sup> Impact bias: This bias refers to the overestimation by parties of the impact of a future uncertainty and therefore, for example, they continue litigation because the future uncertainty is overestimated relative to a fixed amount offer (Pull ter Gunne, "Behavioural economics," part D).

<sup>55</sup> Attribution bias: People tend to attribute their bad experiences to inappropriate causes and may interpret situations differently in terms of whether they are controllable or uncontrollable. When they judge it to be controllable, they attribute the negative outcome to the other person; when they judge it to be uncontrollable, they attribute it to circumstances (Pull ter Gunne, "Behavioural economics," part E).

## Predictable Irrationality in Mediation

Irrational devaluations can be reduced through expressing opinions about the reasonableness of the proposal. (7) By questioning certain assumptions, anchoring bias<sup>58</sup> can be unleashed. (8) Educating the parties about their biases and heuristics<sup>59</sup> in a constructive way can help to put the negotiation in a different light. (9) Through changes in the structure of the mediation, the mediator can act as a buffer in the mediation of information and settlement proposals. Since the offer does not come directly from the other party, the chances that the receiving party will irrationally devalue it can be reduced.

The main question is: can a mediator who uses the practical skills and techniques described above to deal with the biases and heuristics that arise in the negotiation process be considered neutral and ethical?

In the traditional framework of mediation, the mediator is considered a neutral third party where the parties are solely responsible for reaching an agreement in the process. In practice, however, a closer look at the role of the mediator, particularly in the use of this type of instrument, suggests that the theory of a neutral mediator does not correspond to the actual role of a mediator. In practice, a mediator actively seeks to eliminate the parties' bias, which means that a mediator must use his or her opinion of the parties and apply biases that he or she believes will ensure equality and impartiality, but this does not correspond to the theoretical expectations of the role of a neutral and ethical mediator however it is often necessary to reach an agreement. Therefore, the answer to the question of whether a mediator can be considered neutral and ethical when using the tools identified by behavioural economics is not a clear yes or no. However, it creates further complications that not only the parties but also the intermediary itself have cognitive biases and prejudices. A mediator using these tools may therefore be unethical in certain circumstances without

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<sup>56</sup> Availability heuristics: when a situation is judged by the parties on the basis of direct experience or recent information and is given too much weight in decision-making. In these cases, as a mediator, you can draw attention to these disproportionalities and help the parties to consider the history (Pull ter Gunne, "Behavioural economics," part E).

<sup>57</sup> Self-serving bias: Refers to the tendency of humans to remember and consider the side of certain events that is more favourable to our own point of view than the opposing party's point of view. As a mediator, it is therefore also very important to understand both sides' positions and to present them equally to the parties.

<sup>58</sup> Anchoring bias: It refers to the possibility that a completely unrelated element on which a person's mind is focused can influence the outcome of a situation. This acts as a mental shortcut. By questioning this assumption, the party may find that he or she is fixated on something that is not necessarily related to the situation (Pull ter Gunne, "Behavioural economics," part E).

<sup>59</sup> Heuristic: According to Aronson (2008), heuristics are how we make sense of the information that surrounds us. "Judgmental heuristics are nothing more than mental short-circuiting: simple, often merely approximate rules or strategies for solving some problem". The use of heuristics reduces the need for thinking, for more detailed cognition. Heuristics are opposed to systematic thinking (Gábor Hollósy-Vadász, "Heurisztikák" <https://pszichologuskereso.hu/pszichologia-blog/pszichologia-blog/heurisztikák>).

being aware of it and may try to influence the outcome on the basis of his or her personal beliefs. This is why self-awareness is particularly important in mediator training, because just as the mediator is aware of the biases and heuristics of the parties, he must also be aware of those of his own.

#### **4. Summary**

As we have seen, our reality, constructed by our thoughts and our perceptions as real, is endowed - also due to social influence - with an individual meaning, which is interpreted and shaped through the grip of numerous cognitive distortions, despite our best efforts. This is an unavoidable process, but it is also a process that can be made conscious and cognised. It is important because, in our experience, it is present in all intra-psychic and interpersonal interactions.

Conflicts are a natural part of human relations, and in many cases they are legal in nature. Whether the parties concerned choose to resolve their dispute through the ordinary judicial route or through an alternative dispute resolution procedure depends to a large extent on the nature of the dispute, the individual's responsibility and sense of control. We see that the legislator also keeps pushing citizens towards personal responsibility and encourages, and in some cases requires, personal conciliation between the parties to a conflict as a condition for initiating proceedings which should lead to an appreciation of mediation.