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Mediating High-Stakes Global and Judicial Disputes

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Abstract: What matters is the fact that mediation is a powerful possibility to cover human requirements, using a very fast, very effective but also relatively cheap solution to close the conflict. It raises the question of the existence of social justice which is closely related to the fact that mediation can bring individuals from a strong community to the same table. Mediation has the extraordinary ability to transform conflictual interaction into strengthening the relationship between the parties, including the society of which the parties are a part. However, we cannot deny the negative aspect of mediation, its harsh but also oppressive character that can increase the power of a state over individuals, respectively of the strong over the weak. The timely resolution of the conflict is the main beneficial effect of mediation as an inexpensive and fast alternative to the legal process, but it thus denies the right of the poor parties to compensation, to the legislation on the protection of human rights, although speed is guaranteed. The purpose of deepening the notion of mediation is to show its potential both from a legal point of view and in society, in the resolution of minor, traditional conflicts.

Keywords: conflict; human rights; social justice; parties; beneficial effect

Introduction

Regarding mediation, in the doctrine, a multitude of definitions are given in relation to the notion of negotiation. According to David Richbell, mediation is still a form of negotiation, but more structured. It was named as a voluntary procedure, only if the recourse to it was not included in a contract. Unlike negotiation, mediation has a

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flexible framework, in which the person with the role of mediator, in joint or separate meetings, supports the parties to resolve the most important issues and to reach an agreement (Richbell, 2014).

Body of Paper

1. Definitions

Acland defines mediation according to whether it resolves the conflict. Considering the conflict as: a problem to be solved; as an unpleasant situation from which an exit is requested; as a situation that presents risks due to stress and which is also expensive for everyone involved; mediation is presented as a discussion in the presence of a mediator, in individual or group meetings, which bring those involved in the conflict together with their lawyers, in order to: reduce or extinguish misunderstandings in establishing natural but also effective communication, the lawyers of the parties to perceive the wishes and concerns of the conflicting parties, by asking pertinent questions or reformulations that highlight the true interests of the parties, posing and clarifying the still existing problems through an inappropriate approach, helping the conflicting parties to create and communicate innovative ideas, supporting proposals in terms with which both parties are in agreement, discussing requests that seem unapproachable, testing new proposals to be taken up, discussing the initiation of draft agreements to overcome present obstacles, to save relations between conflicting parties as well as to anticipate incidents possible futures. Another definition of mediation was given by Baruch Bush and Folger, two American writers, as a process of informing the parties in conflict, with the help of a neutral third party, without the possibility of imposing his solution, but who supports the parties to reach to an agreement acceptable to both parties. The authors expressed their opinion that there are four distinct theories in relation to mediation that influence its definition and even its application in practice: the theories of satisfaction, social justice, transformation, and oppression. The first three theories are positive, but the last one is completely negative. (Folger, Baruch Bush, 2014).

2. Use of Mediation

What matters is the fact that mediation is a powerful possibility to cover human requirements, using a very fast, very effective but also relatively cheap solution to close the conflict. It raises the question of the existence of social justice which is

closely related to the fact that mediation can bring individuals from a strong community to the same table.

From a legal point of view, the people involved in the mediation, also referred to as the parties involved, can follow several steps to prepare for the mediation, as can their lawyers, if any. The preparation involves the drafting of statements in which the subject of the dispute is presented, and which will be brought in the process. In general, parties who know the mediator beforehand tend to reach a consensus much faster and are much more satisfied with the process. Another preliminary task involves identifying the people who should participate in the mediation. Apart from the parties involved, other important participants are lawyers, accountants, spouse, or translators.

3. Judicial Mediation

In Romania, article 43 para. 1 of Law no. 192/2006[1] presents the framework for conducting mediation. Articles 50-59 of Law no. 192/2006 offers a vision of how the mediation process is carried out: Mediation is based on the cooperation of the parties and the use, by the mediator, of specific methods and techniques, based on communication and negotiation. The methods and techniques used by the mediator must serve exclusively the legitimate interests and objectives pursued by the conflicting parties. The mediator cannot impose on the parties a solution regarding the conflict subject to mediation.

The parties in conflict have the right to be assisted by a lawyer or other persons, under the conditions established by mutual agreement. During the mediation, the parties may be represented by other persons, who may make acts of disposition, in accordance with the law.

[1] "The parties in conflict can appear together at the mediator. If only one of the parties appears, the mediator, at its request, will address the other party with a written invitation, in order to inform and accept the mediation, setting a deadline of no more than 15 days. The invitation is sent by any means that ensures confirmation of the receipt of the text. The requesting party will provide the mediator with the necessary data to contact the other party."

The claims made during the mediation by the parties in conflict, by the persons provided for in art. 52[1] and to art. 55 para. (1)[2], as well as by the mediator, are confidential to third parties and cannot be used as evidence in a judicial or arbitration proceeding, unless the parties agree otherwise, or the law provides otherwise. The mediator will draw the attention of the persons participating in the mediation under the conditions of art. 52 on the obligation to maintain confidentiality and will be able to ask them to sign a confidentiality agreement.

If, during the mediation, a situation arises that could affect its purpose, neutrality, or impartiality of the mediator, he is obliged to bring it to the attention of the parties, who will decide on maintaining or denouncing the mediation contract. The mediator has the right to abstain and close the mediation procedure, proceeding according to the provisions of art. 56, which applies accordingly. In this situation, the mediator is obliged to return the fee proportional to the uncompleted mediation stages or to ensure the continuation of the mediation procedure, under the conditions established by the mediation contract.

If the conflict subject to mediation presents difficult or controversial aspects of a legal nature or from any other specialized field, the mediator, with the consent of the parties, may request the point of view of a specialist in that field. When seeking the opinion of a specialist outside his office, the mediator will highlight only the issues in dispute without disclosing the identity of the parties.

The mediation procedure is closed, as the case may be:

• by concluding an agreement between the parties following the resolution of the conflict.

• by the mediator finding that the mediation has failed.

• by submitting the mediation contract by one of the parties.

If the parties concluded only a partial agreement, as well as in the cases provided for in para. (1) lit. b) and c), any party may apply to the court or arbitral tribunal. At the end of the mediation procedure, in any of the cases provided for in art. 56 para. (1),

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(2) During the mediation, the parties may be represented by other persons, who may make acts of disposition, in accordance with the law."

[2] "(1) If the conflict subject to mediation presents difficult or controversial aspects of a legal nature or from any other specialized field, the mediator, with the agreement of the parties, may request the point of view of a specialist in the respective field."

the mediator will draw up a protocol to be signed by the parties, personally or through a representative, and by the mediator. The parties receive an original copy of the minutes.

When the parties in conflict have reached an agreement, an agreement is drawn up that will include all the clauses agreed to by them and which has the value of a document under private signature. The agreement of the parties must not include provisions that affect the law and public order, the provisions of art. 2 being applicable. The parties' understanding may be affected, as permitted by law, by the terms and conditions[1].

The agreement of the parties can be submitted to the verification of the public notary to authenticate or the approval of the court, under the conditions provided for in art. 63.

Mediation involves several stages or aspects:

• controversy, dispute, or difference of opinion between two people or the need to solve a problem.

• taking the decision with both parties by mutual agreement rather than imposing the solution by a third person.

• the willingness of the involved parties to negotiate a solution to the problem and to accept discussions about the interests and objectives pursued.

• the intention to obtain a positive position with the help of a third person, independent and neutral.

Mediation has the extraordinary ability to transform conflictual interaction into strengthening the relationship between the parties, including the society of which the parties are a part. However, we cannot deny the negative aspect of mediation, its harsh but also oppressive character that can increase the power of a state over individuals, respectively of the strong over the weak.

The timely resolution of the conflict is the main beneficial effect of mediation as an inexpensive and fast alternative to the legal process, but which thus denies the right of the poor parties to compensation, to the legislation on the protection of human rights, although speed is guaranteed.

[1] https://e-justice.europa.eu/6/RO/national_legislation, accessed on 20.01.2023.

4. Communication, Conciliations, and Mediation

The greatest importance was assigned to communication, used in both negotiation and mediation, because understanding is based on exemplary communication between the parties. N.P. Meierding has the same position regarding communication, the opinion according to which communication is the essence of the soul of the mediation process, because the main function of communication is the construction of relations between the parties. References to communication do not stop at the presentation of its importance in the framework of negotiation and mediation, methods of peaceful settlement of disputes, but refer to the morphology of mediation or the mediator, the types of mediation, but also to international mediation. (Grossberg & Wartella, 1998).

Conciliation is not new in the field. Until recently, mediation was confused with conciliation, and some authors still support this fact. The two terms are differentiated by the intervention of the third party as a mediator, respectively by his attributions in resolving the conflict, as well as by the nature of the conflicts in which he intervenes, conciliation being reported, in general, in the health system, in labor disputes or in international trade. About arbitration, it is situated between extrajudicial and judicial ways of resolving conflicting disputes (Cremin, 2007).

To date, an increasing number of European countries have adopted laws on mediation between the offender and the victim. This legal framework may, in some cases, apply to conferences. Before, it should be noted that the term mediation is not always used in law. In some countries, mediation is indirectly mentioned in the laws, for example, it refers to the possibility of reparation, reconciliation or accepting responsibility for the victim. Furthermore, in cases where mediation is directly mentioned in the laws, it is described in general terms. It is also assumed that legal guarantees are not contained in a formal law, but, if they exist, in secondary regulations or precedents. Furthermore, a formal law often contains no information about the position and organization of mediation services or the status of mediators. In general, there are three types of legal regulation of mediation in Europe.

• First, mediation is enshrined in juvenile justice laws. It also exists in Catalonia (Spain), England and Wales, Finland, Germany, Ireland, and Poland. In this case, mediation is initiated by a prosecutor or a judge or, as in England and Wales, by the police or the probation service, and acts as one of the alternative forms of influence in criminal cases.

• Secondly, mediation with regard to adult offenders can be regulated by the provisions of the criminal procedure codes (Austria, Belgium, Finland, France, Germany, Poland, Slovenia) and / or by separate provisions in the criminal codes (Finland, Germany , Poland). In Austria and France, the Code of Criminal Procedure also provides for mediation for minors (reimbursement in France). The most common is the system when mediation is initiated by a prosecutor who, in accordance with his authority, can decide to transfer the case to mediation and organize the subsequent execution as soon as the mediation process is completed. This is usually a conditional release. In Switzerland, the penal code provides for the possibility of mediation at the post-sentence stage, especially during the execution of a prison sentence, and there is also a federal law to help victims of crime[1].

• Third, mediation can be regulated by an autonomous mediation law, which sets out in detail the organization and process of mediation. A similar law has existed in Norway since 1991 (Municipal Mediation Committees Act, applies to both minors and adults and covers criminal and civil offences). In 2002, a law on mediation was passed in Sweden, which must also be implemented in cooperation with municipal services. The Law on Probation and Mediation Services of the Czech Republic (2001), which establishes the basis for the operation of probation and mediation services throughout the country, also falls into this category (Mackova, 2019).

Regarding the need for legislation, the Framework Decision of the Council of the European Union of 15 March 2001 about criminals in criminal proceedings should be mentioned. This decision defines mediation in criminal matters as "the search, before or during the criminal process, for a solution through negotiations between the victim and the criminal, with the mediation of a competent person" (Article 1). Article 10 states that each Member State of the European Union: "should try to promote mediation in criminal cases concerning offenses which it considers appropriate for such measures" (and) should ensure that the agreement between the victim and the offender during mediation criminal cases"[2].

In accordance with the principle of the presumption of innocence (Article 6(2) of the European Convention on Human Rights), the decision on sentencing can only be taken by criminal judicial authorities through a process of law. How is this principle consistent with mediation, which involves admissions of fact, but which usually occurs in the pre-trial phase, before guilt is determined? In fact, mediation does not

[1] https://www.coe.int/en/web/cpt/states, accessed on 20.01.2023
[2] https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vitgbgi8vbys, accessed on 20.01.2023.

make sense if the basic facts of the case are not known. Therefore, the transfer of cases to mediation should be based on the requirement that the alleged offender accepts some degree of responsibility for the act. According to point 14 of the recommendation: "The basic facts of the case should usually be recognized by both parties as the basis of mediation. Participation in mediation should not be used as evidence or an admission of guilt in a subsequent legal process." Thus, the alleged offender does not have to admit guilt in the legal sense of the term. Furthermore, participation in mediation should not be used against the accused if the case after mediation is transferred back to the criminal justice authorities. (Groh, 2018). The above clearly demonstrates that the use of mediation and restorative justice, are generally not based on the legal concept of guilty pleas, but on a broader, moral concept. A more flexible and open definition is currently being sought, one that would not be sufficient to establish criminal liability[1].

5. Mediation and Humanism

Mediation is closely related to the idea of humanism, but inexplicably also to its decay, as recorded in the 20th century. She finds the possibility to intervene through people's abilities to solve their own problems, without using power and violence or religious ideas related to good and evil. Starting from these logical explanations, mediation appears as a last resort in stopping conflicts, which starts from the optimistic character of human nature. This conception of man reached the height of deception in the 19th century, being exposed by Locke, Comte, Nietzsche, etc.

Humanism developed in the modern era and especially in the Renaissance period, carrying forward the approach from Antiquity as well as from the Middle Ages. Since the 15th century, humanism has been associated with the learning promoted by the Renaissance period. As for Enlightenment, with its definitions of reason, respect for humanity, science, it continued to pursue its proposed objectives in the 19th century, also through the force of humanism. In the 20th century, a renunciation of the optimism of the 19th century can be observed. Freud, Marx, Darwin put man at the center of the universe, showing his dependence on laws as well as structures external to his person. The modern period was characterized by industrial capitalism, by the development of the scientific aspect of solving problems, but at the same time there were also the horrors of Nazism, Auschwitz, the permanent threat of nuclear

[1] https://eur-lex.europa.eu/EN/legal-content/glossary/european-convention-on-human-rights-echr.html accessed on 20.01.2023.

war, the existence of Stalinism, Eurocentrism but also neo-colonialism, racism, famine in third world countries but finally, global warming. If in the 19th century, religion somewhat lost its influence, the 20th century lost the fight for human existence.

Jean-Paul Sartre challenged the so-called foundations of modern humanism, considering that abstract humanity does not exist in its materiality, and that contributes to the fulfillment of its own nature. Syne-le can only be built through actions. But the greatest attack on humanism is found in the written works of the structuralists. The latter appeared in the second half of the 20th century, becoming the most popular way of approaching language, culture, and society. In legal doctrine it has become natural that the adoption of the structuralist approach either in linguistic form, or in anthropology or in other fields of activity, brings important implications of a philosophical nature. This demolishes the view of language as a translucent representation of objective reality: so, it is not the nature of the world that determines concepts, but the world that can change everything. This situation in turn undermines almost all metaphysical doctrines, regarding the possibility of knowing the absolute. H. Cremin, in his claims, shows that the implications of structuralism for mediation are clear and recognized (Cremin, 2007).

Traditional jurisdiction grew in the idea of uniting diegeses legitimized by history and but with strong roots in popular wisdom and the good estimated by each generation. Justice for all the people, was the desire of the professions in the field, at least at the declarative level. But in a world dominated by unrealistic political discourses, which cannot be controlled by groups or individually, a world divided on complex grounds, justice and truth are no longer so transparent, approaching the ignored gray. Mediation brings a new breath that gives solutions in local disputes, solutions satisfactory to the parties. B. Bush and Folger have repeatedly shown that this situation can lead to a change in the way the conflict is perceived, but not to consider that mediation is based on any new vision of man, regarding human nature. (Folger, Baruch Bush, 2014).

Habermas agreed that only the integration of the normative aspects of philosophical ideas in the conquests of the social sciences can resolve disputes even at the international level. The postmodern world has considered Habermas outdated because, although he recognizes plurality in modern society, he believes that ideal discourse situations are necessary in consensus to justify knowledge. Derrida, like Habermas, saw in the use of the third party through the theories of international law and international organizations, the key to solving global terrorism. Third-party

intervention, through mediation, small-scale responses to existing injustices, attempts to find solutions that are not objective, generally valid, or universal truths, recognized pluralism and local actions are thus inextricably linked to the theory but also to the practice of mediation. Mediation is not possible to use in all cases, but it is a good and useful answer to many conflicts that are formed in these complex and incomplete times. (Meierding, 2004).

Starting from Heidegger's writings, Derrida suggests that humanism, which is dependent on a single conception of man in its essence, is against true humanity. According to this conception, we are truly human only through mediation, through recognition primarily by ourselves through ourselves, in relation to the truth of existence, in harmony with the existence of all, in society. (Gersh, 2003).

In specialized literature, it is claimed that mediation as a theory owes a lot to the writings of J.F. Six, who exemplify its possibilities and highlight all its useful sides. From here also started a new definition given to mediation, which must start from the four known and agreed types of mediation, the first two being intended to start the existence of a relationship or its replication, and the other two, to resolve the conflict. According to the author's opinion, there is a mediation that creates links between individuals or groups of individuals, a mediation that renews such links, another preventive one that opposes the outbreak of conflicts and a mediation that resolves conflicts by helping the parties to get out of the created situation. So, there are two forms of mediation. On the one hand, mediation located outside the conflict and on the other hand, conflict mediation, which directly resolves conflicts. The last form of mediation includes two elements: mediation of differences and finally, mediation of differences. Regarding the mediation of differences, we must start from the fact that all social constructions are based on differences. The social relationship arises through mediation by a third party, which can be an object or an individual, but only through speech, language, so only through communication. About the mediation of disputes, we can say that it takes place at the beginning of the conflict to suppress it from the front, or to resolve it. When not resolving a conflict, mediation can create new ties or restore existing ones, the first form being creative, while the second is restorative. The first one it creates the social fabric, and the other removes the gaps. J. F. Six and V. Mussaud discovered two exceptional purposes of mediation, such as conflict and connections. They also established the purpose of mediation, which would be to resolve dysfunctional issues when misunderstandings arise between the parties, respectively when conflicts arise. For the ultimate purpose,

mediation does not solve problems, but establishes connections and creates friendships. (Six, Mussaud, 2002)

Thus, mediation acquires a major role and has conquered its position in all philosophy dictionaries, more so as the role is visible, concrete and resolves without violence most conflicts, especially minor ones. Mediation extends its roots in many cultures and religions around the globe, dating back a very long time. Hilary Cremin, however, believes that mediation, seen as a form of conflict resolution, would be far outmoded. Mediation has been widely used in Asia and Africa as a traditional method of conflict resolution. Its popularity reached the USA in the 70s, and from there it spread to Australia, Canada and even Europe. What sets mediation apart from other ways of conflict resolution are its voluntary, easy, natural character, as well as its informal nature. These are the elements that have the power to change a conflict into an inter-individual relationship (Cremin, 2007).

Starting from the evolution that mediation has known over time, the definitions of this concept in the legal doctrine, have remained in an unfinished form, being contested most of the time. But no one disputes the transformative, practical, and social potential of mediation. Various forms of mediation have been outlined in legal doctrine (Lowry, 2004).

The presentation of the evolution of mediation in some states of the world is to be presented, after approaching the topic in the framework of the transition from informal justice to formal justice, which in fact constitutes the development that mediation has recorded over time, in its practical development, from informal to formal, an evolution that seems to face more of a formal framework, through the monopoly that the defenders have over the settlement of disputes in practice. The passage of mediation within the complex of formal justice - informal justice, can also be observed in the presentation of the development of mediation in some of the most important countries with tradition, such as the USA - within which the American states have committed themselves, in an appropriate legislative framework, to support mediation , recognizing its status in the resolution of *lato sensu* conflicts, and ensuring a statistical system for recording the agreements reached through mediation; Great Britain - where, following the Woolf reform of 1999, the court is considered to be a last resort for resolving disputes, with mediation being the main way to resolve them; France - where mediation was launched especially in the field of businesses, and only then penetrated criminal justice, constituting a possibility of ending criminal prosecutions, and experiencing a remarkable revolution in the family field; Germany - where mediation was initially introduced through programs

financially supported by the state, precisely for the implementation of democratic forms of thinking; China - where the adoption of mediation required the knowledge of Confucian ethics, but also the history of Chinese legislation; and Israel - where mediation was a preferred and widely applied method, as being the most intelligent in conflict resolution (Sinha et comp., 2005).

The so-called culture of mediation is materialized through the forms of mediation, which, in turn, can be viewed from two angles, as mediation was expressed in legal doctrine, regarding which a distinction is made between transformative mediation - which gives the parties in conflict a new possibility of conciliation, to understand the misunderstandings that may arise in society, if individuals do not understand each other; facilitated mediation - which is based on dialogue and non-adversarial communication; and evaluative mediation - which actually resolves conflicts, in order to unblock the activity of the courts.

From another point of view, there is contractual mediation, which has strict rules; emergent mediation, in which the scope of its development is not limited in any way, moreover, there is no pre-conflict rule that imposes a specific development. Mediation strategies and tactics are essential in the mediation process, and for this they are given special attention. The legal doctrine is not uniform regarding the classification of mediation, the strategies and tactics used. Hence the need to establish the mediation techniques to be used, within this complete process, but also the factors that influence the mediator in his possibilities to choose. The choice is made between several types of model stages of mediation, resulting from judicial doctrine on this subject. According to the models presented in the specialized literature, we believe that mediation takes place in five stages: preparation, beginning, opening, actual negotiation and completion, the other stages mentioned in the doctrine, being an integral part of it.

The use of mediation does not contravene human rights, because both by the Declaration of 1789, but also by the Universal Declaration of 1948. In accordance with the provisions of art. 1 of the Universal Declaration defines human dignity as the definitive foundation of human rights. The Council of Europe established the principles underlying human rights, which form a whole within the universality of human rights, which in turn arise from the equal dignity of individuals; regarding indivisibility, human rights create a whole, even if they are political or social; when all rights are respected, man can lead his life in dignity; solidarity implies a collective and joint defense of the rights of others. Only in this way, through altruism, we become human again. This introduction was necessary because mediation

presupposes solidarity and even altruism. The existence of ethical communication between individuals constitutes the basic element of the existence of contemporary democracy. Today, mediation is a civic attitude in relation to the individual's position in society, as well as to his politics. Marcel Gauchet noted the situation created by civil society's dependence on the state, as it would not have the ability to separate from it. Mediation, however, is not dependent on the state because it has its own civic dynamism. The law regards mediation as an ordinary human activity. Like any human activity, mediation exists through respect for the law. Between them there should not be competition, but complementarity. Mediation can only intervene where justice cannot intervene, as it would violate public norms. It cannot replace justice, nor can it rely on illegal solutions, even if the conflicting parties agree. Knowing how to apply mediation to minor conflicts leads directly to the resolution of major conflicts in the same way (Gauchet, 1989).

The fundamental principles of mediation are also the principles of the institution of the mediator, such as: the responsibility of the mediator, his impartiality and neutrality towards the parties, the principle of independence, professional secrecy, confidentiality; to the mediator's role in this process; the concern of the parties involved in the conflict for their image, including what qualities a mediator must possess to be successful (Pruitt, Carnevale, 1980).

The institution of the mediator must and is in the culture of mediation because the mediator is the creator of the process itself. As it follows from the exposition so far, mediation is self-contained, not submitting to any extrajudicial conflict resolution technique. At the same time, mediation is a philosophical concept, not reduced only to conflict resolution (Stancu, 2012).

At the global level, mediation can acquire another definition, namely as a communication process based on ethics, responsibility but also on the self-determination of the participants and in which the independent, neutral and impartial third party - the mediator - who cannot decide and cannot he consults with other people outside the authority that gives him the title, resolves with the help of his ability through confidential discussions, explanatory meetings, restoring the situation before the conflict started, by restoring social ties. Thus, through its fundamental function, mediation restores communication, and the conflict is not inherent to it, but only enables its resolution. Over time, mediation had consistent results. Also, it should be noted that without the existence of a third-party mediation cannot take place (Folberg et comp., 2004).

Third-party intervention, independence, impartiality and neutrality, lack of institutional power are all criteria that form the basis of a mediation.

The intervention of the third party is the characteristic that distinguishes mediation from negotiation or conciliation. In all definitions of mediation, the third party is a person with several qualities such as independence, neutrality and of course lack of institutional authority. There have been many theories about the third party and its role when moving from the dialectical relationship described by Hegel to Simmel's own impartial third party. Not everyone is a mediator. Any interposed person, with a role of representation or subordination, is not a third party as a mediator, but could be his agent (Matthews, 1990).

The independence of the third party must be evaluated concretely in relation to partners, public or private authorities, guardianship, etc. In the mediation of necessity, the independence of the mediator must be assessed. When there are no financial, moral, or political pressures what, we can say that the third-party mediator is independent. There is also a functional independence, which the mediator must not lack, and which results from the preservation of professional secrecy, an important characteristic of independence (Stancu, 2014).

The impartiality of the third party is manifested in the relationship with the conflicting parties. The neutrality of the mediator refers to the mediation since, the third party has no interest in the case.

In turn, the absence of the institutional power of the third party consists in the lack of pressure from the state institutions, the discretionary choice of the parties leads to an active mediation, in the constructive sense that finds solutions by the parties themselves. The mediator does not possess power but can ethically guarantee the reality of the communication (Salacuse, 2003).

In fact, mediation is a typical human activity that considers a system of values. Its reports are both philosophical, political, and moral in nature. According to Hegel, mediation is essentially philosophical in nature. From this point of view, mediation is an act of negotiation that makes the transition to the connection between object and subject, between time and indefinite, between finite and infinite. In his work The Reason of History, Hegel posits mediation in human nature itself. He points out that man has always turned to himself, not immediately. The mediation movement thus conceived as an essential moment of the idea, of the spirit. The activity is perceived as an exit from the immediate through its negation and therefore, the return to itself. Hegel sees mediation as an ideal relationship, confusing it with the identity between

logic and history. Lavelle, the life of an individual cannot be realized by himself, but only through - the mediation - of other people, and Le Senne identifies mediation with the engine of conceptual thinking. Mediation ethics includes, first, self-knowledge. In terms of communication, this means recognizing other individuals. By sending the message, the sender wants to recognize the symmetric value for the receiver of this message. In this context, mediation means mutual recognition plus the autonomy of those mediated. The only guarantor of the quality of communication is the mediator. The philosopher Habermas refers to the ethics of discourse without treating it in relation to authority, because discourse strengthens authority, making it more efficient. Through discord, the value of the other is recognized, leaving his flaws visible. (Tiberio, Cericolla, 1999)

Adam Gersh considers mediation as an optional, confidential, and voluntary process of conflict resolution, using an independent third party to assist the conflicting parties in reaching an agreement. The mediation process consists of the mediator acting as a facilitator, in which context everything that is discussed becomes confidential and is not binding until the agreement is signed. The indisputable advantage of mediation consists in the fact that the parties can incorporate into the agreement everything they consider important for them, of course within the limits of law, morality, and public order. In addition to this advantage, the philosopher showed in the chapter dedicated to the culture of mediation and other advantages of this procedure. For mediation to be beneficial to individuals who use this process, all the considerations outlined in this paper up to this point must be considered (Gersh, 2003).

To be able to perceive the deep originality of mediation and the consolidation of the concept itself, the creation of the necessary means to put it into practice. Today's mediation is based on the intervention of the third party, without which it remains only a conciliation. In legal doctrine, it is considered that the mere use of the term mediation is sufficient to show the actuality of the subject in society. In Europe, but especially in France, the definitions given to mediation show that it is used in various fields of contemporary society. Regarding this aspect, the drafting conditions give them an added value when adopted unanimously. The definitions were created in a single mandate and were thought out based on the concept in its fundamental unit, so that it can be used immediately in any field where it appears necessary. Thus, for example, they are social mediation, the definition of which was formulated during the European Union seminar that took place in September 2000; family mediation that was defined in France by the National Consultative Council between 2001-2004, regarding this type of mediation. This way of presenting mediation in each field

separately, should not destroy the overall image that mediation has as a concept, and which gives meaning to the use of this process that intervenes in a multitude of fields (Renson, 2010).

Starting from the concept - formal-informal justice -, three types of mediation were identified: voluntary mediation, i.e. the type of mediation to which the parties reach a mutual agreement, without any outside intervention to guide the parties; judicial mediation, carried out at court order and with legal consent and free, independent mediation that has nothing in common with voluntary mediation and does not benefit from any legal provision to regulate it as in judicial mediation, not being subject to approval regarding the concluded agreement. Related to the goals of mediation, namely, to repair relationships or to build them or to resolve a conflict, four types of mediation are considered: the one that creates, the one that renews, the preventive one and the curative one. However, as I have pointed out, along with the general features on which any mediation is based, there are also the characteristic features of the field in which mediation intervenes, but which do not destroy the universal image of mediation (Stimec, 2001).

The individual exists through the manifestations that characterize him, value him, and every individual belongs to a cultural context. Culture is the one that sets the tone in the organization of the individual, who is subject to observation by his peers, and which influences the way in which he expresses himself politically, they decide, they set their functional priorities, they create their lives, and they think. Ignorance of both local and national cultural norms, of complex political, economic, and even institutional situations, can destroy even the most professional communication relationships (Connon & Connon, 2008).

In order to be able to penetrate the understanding of cultural mediation, of course it was necessary to define it, but as a process through which individuals of diverse origins regarding cultural and linguistic contexts exchange through communication with their own cultural world, for the respect and acceptance of the history of the cultural world from which they come from, which favors the recognition and socialization with individuals from the ethnic background of origin, as well as subjecting to the knowledge of the Italian model of cultural mediation, which was created specifically to adapt to the migratory flow that has invaded Italy recently. The new mediation model formed in this way focuses on the role of the mediator who emphasizes the strengthening of the cultural identity of immigrant foreigners, to return them to their roots, to the peoples of origin, of their belonging to a culture other than the industrialized one, and which does not have the same values, ideals or

criteria as reference parameters, of the particular importance of knowing the language for perfect communication, but, at the same time, of the knowledge of the three forms of intercultural mediation used by Italians in their territory: cultural mediation for immigrants, which it gained momentum due to the need to communicate and adapt to the newly created situation; cultural mediation for resident immigrants, which involves the incorporation of new cultures into Italian culture and the mediation necessary for the social integration of new generations, i.e. the children of immigrants in the European educational system on the territory of Italy (Tiberio & Cericola, 1999).

Social mediation, which is also called community mediation, represents a process of repair but also of creating links between individuals in society, resolving conflicts that may arise in everyday life, when an independent and impartial third party intervenes creatively in exchanges of ideas between individuals or groups of individuals, to be compatible in the development of society or to resolve conflicts that may arise. The idea of community tries to define the place of the existence of the conflict in relation to interpersonal relations and the complexity of society, showing that in its content we will find numerous subjects such as: informal groups, the family, institutions, organizations, social services that take care of the whole community, respectively to reach the common good, according to the principle of subsidiarity. In these conditions, the community is, in fact, the territory on which the mediation, at the macro or micro level, between the third party and the social complexity that it addresses, carries out its activity (Caune, 2000).

The final aim of this analysis was to reveal the importance of mediation in a society with several categories of communities, such as social, territorial, work, symbolic, ethnic, etc., in which a set of implicit values appeared for mediation in local agglomerations, regarding listening to them, both in terms of facts and feelings; cooperation as well as appropriating the contributions of others, finding common points and not differences, affirming the other's starting point in resolving conflicts; discussions must be self-directed and not directed at others; separating the conflict situation from the individuals; taking other different points of view into analysis; using creative approaches to conflict resolution; orientation towards the problems of individuals and not those who are guilty for what happened; the search for solutions that bring gains for both parties, and not highlighting the losses, starting from the idea that the specialized works take into account the fact that the basis of mediation lies the philosophy of non-violence (Stacey & Robinson, 1997).

Starting from those specified, it is necessary to present the specific features of this type of mediation used in countries with a rich tradition in the field such as the USA and England. From this point of view, both the literature in the field and the British practice have brought to light seven moments of the mediation process. Although there was a tendency to simplify things, from a more careful analysis of community mediation it is found that, depending on its object, it cannot be forced into the model of the five stages of this complex process (Elkiss, 1997).

Special attention was given to Foucault's way of approaching the subject about power and centralized manifestations, in direct relation to the power that community mediation has in the state, under the conditions that power should not be reduced to these centralized manifestations. So, powers do not spring only from the state, which is a binder of power relations in society. In close connection with the principle of sovereignty, power must be seen in direct connection with the techniques and tactics of domination. But the dominance of the law and the primordial model is passed in the field of political innovation. Mediation in society helps individuals make appropriate choices, thereby strengthening society. This fact exceeds the expansion of power and shows a pro-active involvement in changing the image of liberal configurations to be supported.

Thus, community mediation can be considered as a governmental power that does not operate in plain sight, but on the unseen side of the model of sovereignty and law. Foucault thus shows that in today's times the state domination of society is no longer so important, but a government of the state with many degrees of freedom. Mediation would be part of this state process, thus perfecting the art of governance in society. Regarding power, Foucault shows that it is an emanation from nature, from individuals and from the person concerned. Power acts through individuals and they are not the points of application of power. In post-modernism, individuals and their selves are means of society's mediation. The latter aims to reconstruct the behavior of individuals, the self-identity of the conflicting parties, using the mediation solutions (Kruse, 1995).

In the works written at that time about mediation, two ideas related to divine mediation were found. The first starts from the idea that God has always been with his creation through his Son Jesus Christ. The second conception refers to the realization of divine mediation through prayer, and only with the help of representatives and ministers of the Christian Church. W. O. E. Oesterley believed that mediation is actually a principle that applies at all levels, but especially at the universal level; this principle is in the nature of things; whether it refers to the natural

or the spiritual world, and there is always a way in which cause and effect can stand in the same place; the unity of nature, the obvious solidarity of the human race, the permanent-spiritual growth of man are all dependent on this principle. Importance was also given to the Christian tradition in resolving conflicts, highlighting both biblical examples and examples from the involvement of the Catholic Church in this sense (Folberg, 2004). Mediation in the entire political life implies the knowledge of political mediation, as one of the most developed types of mediation. Political mediation has appeared since antiquity. For the first time it appears in the writings of Aristotle, who, analyzing friendship, distinguished three forms of friendship, related to their purposes: virtue, interest, pleasure. What these forms have in common is the equality between the individuals who practice them. Mediation is based on friendship as an ethical relationship, which in turn is based on virtue. Friends stand within this relationship as equal individuals seeking the common good. For Aristotle, friendship is the soul of social life and social ties. This is the philosophy of the relationship, and it is still found in the West today (Licata, Heine, 2012).

There are an impressive number of relational philosophers, including: Martin Buber, Paul Ricoeur, Husserl, Gabriel Marcel, Gilles Deleuze. According to Emmanuel Levinas, the subject in his relationship begins with the obligation towards the other individual. In this context, the ultimate good is the recognition of the neighbor as an individual, and the responsibility that the individual has towards the neighbor must exist within the city, in a political form. The philosopher Alain Finkielkraut, a disciple of Levinas, showed that doing politics for an individual who is not a politician by profession means dialoguing, associating through language. The latter can be transformed by the discussion of another. According to him, democracy is based on this idea of politics and language. Alain Finkielkraut recognizes political friendship, in the sense given by Hannah Arendt, namely that friendship should not be reduced to trust, but should be the means of reflection on the world. Apart from intimacy, friendship is considered a typically political quality, it is the world that leaves itself open and that we must understand together. According to these claims, political life is organized and diversified through dialogue, through confrontation, through associative, political, or union mediation (Boncu, 2006).

Conclusions

Unlike Eurocentric philosophers, we also have philosophers who believe that there must be communication and collaboration between different traditions and cultures, especially in the era of globalization, since interactions between cultures are

inevitable. The goal is to expand the individual's way of thinking to include other cultures, so that we no longer talk about a single tradition, but about as many as possible, such as Asian, Latin American, Islamic or African. It is no longer important to ask questions on our own, this approach being considered regional. Intercultural philosophy should not be an object of academic research in addition to the other existing ones, but an attitude that must be adopted by those who are in the field. The thinking of other cultures must be considered, regardless of the chosen philosophical orientation. From a legal point of view, mediation helps to decongest the courts, taking a middle position where the law allows. Court mediation also has negative aspects, especially related to solving pecuniary problems. New legislative approaches are needed, also in this direction.

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References

Baruch, Robert, A.; Pope, Bush & Ganong, Sally (2004). *Transformative Mediation. Changing the Quality Jay* in Folberg, Ann L. Milne, Peter Salem (ed.), *Divorce and Family Mediation. Models, Techniques, and Applications, Family Conflict Interaction the Guilford Press*. New York, London: 2004, pp. 59-60.

Bickmore, K. (2001). Student Conflict Resolution, Power 'Sharing' in Schools, and Citizenship Education. *Curriculum Inquiry*, no. 32/2, pp. 137-162.

Boncu, Ştefan (2006). *Negotiation and Mediation, Psychological Perspectives*. Iasi: European Institute, p. 182.

Calogero, Guido (1962). *Filosofia del dialogo/The philosophy of the dialogue*. Milan: Edizioni di comunita, p. 442.

Cameron, J.; Dupuis, A. (1991). The Introduction of School Mediation to New Zealand. *Journal of Research and Development in Education*, no. 24/3, pp. 1–13.

Caune, Jean (2000). *Culture and communication. Theoretical convergences and places of mediation*. Mădălina Bălăşescu (trans.), Romanian Book Ed., pp. 103-104.

Cremin, Hilary (2007). *Peer Mediation.* Berkshire: Open University Press, pp. 13-14.

Elkiss, H. (1997). Alternatives to arbitration: Are unions ready for change? *Labor Law Journal*, p. 686.

Folger, J. & Baruch Bush, R. (2014). *Transformative Mediation*. Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/441.

Freund, Julien (1983). *Sociologie du conflit/ Sociology of conflict*. Paris: PUF, p. 17.

Gauchet, Marcel (1989). *La Révolution des droits de l'homme/The Human Rights Revolution*. Gallimard, p. 23.

Gersch, Adam (2003). Introduction, in Irvine S. Gersch, Adam Gersch (ed.). *Resolving Disagreement in Special Educational Needs. A practical guide to conciliation and mediation*. London, New York: Routledge Falmer, pp. 5-6.

Gersch, Adam (2003). *Introduction*, in Irvine S. Gersch, Adam Gersch (ed.). *Resolving Disagreement in Special Educational Needs. A practical guide to conciliation and mediation*. London, New York: Routledge Falmer, p. 6.

Groh, A. (2018). *Research Methods in Indigenous Contexts*. New York: Springer (ISBN 978-3-319-72774-5).

Grossberg, Lawrence; Wartella, Ellen & Whitney, D. Charles (1998). *Media Making: Mass Media in a Popular Culture.* SAGE Publications, May 20, Language Arts & Disciplines, pp. 340-344.

James, Paula (1997). *The Divorce Mediation Handbook: Everything You Need to Know*. San Francisco: John Wiley & Sons, Inc., Jossey-Bass Publishers, p. 32.

Kruse, A. (1995). Third-party roles in conflict management. *Training and Development*, pp. 74-77.

Lande, J. (2000). Toward more sophisticated mediation theory. *Journal of Dispute Resolution*, no. 2, 2000, pp. 322–323.

Licata Laurent & Heine Audrey (pref. John Berry, postscript Pierre Dasen). (2012). Introduction to Intercultural Psychology, Brussels, De Boeck, coll. *Psychological Openings/LMD*, p. 330.

Liebmann, M. (2000). *Mediation in context.* London: Jessica Kingsley Publishers, p. 45.

Mackova, Alena (2019). *Civil Procedure in the Czech Republic*. 2nd edition, Wolters Kluwer International, pp. 60-65.

Matthews, E. (1996). *Twentieth century French philosophy*. Oxford: Oxford University Press.

Mayer, Bernard (2004). Facilitative Mediation, in Jay Folberg, Ann L. Milne, Peter Salem (ed.), *Divorce and Family Mediation. Models, Techniques, and Applications*. New York, London: The Guilford Press, 2004, pp. 30-33.

McConnon, Shay; McConnon, Margaret (2008). *Conflict management in the workplace. How to manage disagreements and develop trust and understanding*. The 3rd edition revised and updated, howtobooks, Oxford, pp. 130-131.

McMahon, C. (1997). Conflict Resolution Network Schools Australia. *European Journal of Intercultural Studies*, no. 8/2, pp. 169–184.

Meierding, Nina R. (2004). *Managing the Communication Process in Mediation*, in Folberg, Jay; Milne, Ann L. & Salem Peter (ed.). *Divorce and Family Mediation. Models, Techniques, and Applications.* New York, London: The Guilford Press, p. 225.

Negruț, Gina & Stancu, Adriana Iuliana (2012). Negotiated Justice from the perspective of the Criminal Procedure Code. *Agora International Journal of Juridical Sciences*, 2012, no 2, ISSN: 1843 570X; E-ISSN: 2067-7677, https://univagora.ro/jour/index.php/aijjs/issue/download/78/96.

Pruitt, D.G. & Carnevale, P.J. (1993). *Negotiation in social conflict*. Buckingham: Open University Press.

Randolph Lowry, L. (2004). Evaluative Mediation, in Jay Folberg, Ann L. Milne, Peter Salem (ed.), *Divorce and Family Mediation. Models, Techniques, and Applications.* New York, London: The Guilford Press, pp. 73-74, 80-84.

Renson, Pierre-Paul (2010). *La Médiation civile et commerciale. Comme éviter les aléas, le coût et la durée d'un procès/ Civil and commercial mediation. How avoid the hazards, the cost and the duration of a trial*. Belgique: Anthemis, pp. 14-18.

Richbell, David (2014). *How to master Commercial Mediation*. Bloomsbury: Ed. Bloomsbury, pp. 34-39.

Riskin, L. (1994). Mediator orientations, strategies, techniques. *Alternatives*, no. 12, 1994, p. 111.

Riskin, L. L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harvard Negotiation Law Review*, no. 1, pp. 7–51.

Rubin, J. Z. (1980). Experimental research on third-party intervention in conflict: Toward some generalization. *Psychological Bulletin*, 87, 2, p. 379.

Salacuse, Jeswald W. (2003). *The global negotiator. Making, Managing and Mending Dealsaround the World in the Twenty-First Century*. New York: Palgrave MacMillan, p. 262.

Sinha, Dipankar (2005). *Information Society as if Communication mattered: The Indian state revisited*, in Bernard Bel, Jan Brouwer, Biswajit Das, Vibodh Parthasarathi, Guy Poitevin (ed.) (2005). *Communication Processes*, Vol. 1 – Media and Mediation, Sage, New Delhi: Thousand Oaks, London, p. 138.

Six, Jean-François & Mussaud, Véronique (2002). *Médiation/Mediation.* Paris: Seuil, p. 35.

Six, Jean-François (1990). *Le temps des médiateurs/The time of the mediators*. Paris: Seuil, p. 164.

Stacey, H.; Robinson, P. (1997). *Let's Mediate: A teacher's guide to peer support and conflict resolution skills for all ages*. London: Sage Publications.

Stancu, A. (2014). *Protection of the Right to Life of the Person by Internal and International Legal Instruments.* The 8th edition of the International Conference Education and Creativity for a Knowledge Based Society, Bucharest 20-22 nov. 2014, ISBN 978-3-9503145, ISSN 2248-0064.

Stimec, Arnaud (2001). La Méditation en entreprise. It facilitates dialogue. Gérer les conflits. Favoriser la cooperation/Meditation in business. It facilitates dialogue. Manage conflicts. Promote cooperation. *Doctorate thesis*, Université Paris I, Sorbonne, p. 30.

Tiberio, Antonio; Cericola, Alberto (1999). *I Declare You Separated. Separazione, divorzio e mediazione/I Declare You Separated. Separation, divorce and mediation*. Milan: FrancoAngeli, p. 91.

Tyrrell, J.; Farrell, S. (1995). *Peer Mediation in Primary Schools*. Belfast: University of Ulster.

Zăpârţan, Liviu-Petru (2005). *Mechanisms and policies of European integration, course notes*. Cluj: Univ. Babeş-Bolyai, Faculty of Law.