LEGAL CULTURES AND MEDIATION. INTERACTIONS AND EVOLUTIONS

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Abstract

Mediation, as an alternative dispute resolution method, is closely connected with the system of legal cultures. Mediation is an important link between legal culture and the judicial system. Mediation also acts as an interface between internal legal culture and external legal culture. This paper addresses the issues regarding the links and interactions between mediation and legal cultures, as well as the effects that arise from these interactions.

Keywords: *Legal cultures, mediation, legal systems*

1. Introduction

This study addresses the interactions between legal cultures and mediation as an alternate dispute resolution method. In a diverse and multicultural world, the most convenient way to settle disputes is by using alternative dispute resolution methods like conciliation, negotiation, mediation etc. In a culturally challenged environment, mediation is the best alternative to solve such conflicts, both in terms of time efficiency and costs. In doctrine, many papers were written that addressed the mediation process, while other papers tackled the issues concerning legal cultures. However, the resources regarding the interactions between legal cultures and mediations are scarce and should be developed further.

Etymologically speaking, the word "culture" has its origins in Latin vocabulary, where "*cultura*" represented a synonym of the verb *to grow*. In the eastern thinking, sometimes culture is similar with the concept of civilization, although not all European countries share this opinion. Germany, for instance, when talking about the content of this concept, it rather reconsiders its initial attributes, a growing factor. Furthermore, a French philosopher considered that the notion of culture (with the meaning that the Germans give), enriches the French idea of civilization (*La notion allemande, de Kultur enrichit et complète la notion française de civilisation)*[1]. Anyway, the notion of *civilization* has a different source, from an etymologically point of view as well as from a conceptual point of view. The notion emanates also form the Latin language, where the word *cives* meant the roman citizen. Furthermore, between civilization and culture concepts other parallels can be drawn. As an example, civilization can be considered as culture *in actu.*

Some similar aspects between the two notions were, apparently, even from XVIth to XVIIth centuries. For instance, it was considered that *„to civilize a nation means to make it*

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[1] Febvre L., (Editor), 1930, *Civilisation : Le mot et l'Idée*. (Centre International de Synthese. Premiere Semaine Internationale de Synthese. Deuxieme Fascicule. Paris, apud A. L. Kroeber, Clyde (*trad. Noţiunea germană de Kultur îmbogăţeşte şi completează noţiunea franceză de civilizaţie*) Kluckhohn, Wayne Untereiner, and Alfred G. Meyer, *Culture: A Critical Review of Concepts and Definitions*, New York: Vintage Books, 1952), 12.

progress from a primitive, natural country, to an evolved country, with a moral, intellectual and social culture".[2]

Mediation represents an alternative way to solve conflicts. Even though emerged later than other alternative methods, mediation's voice is getting stronger and stronger in amiably solving conflicts.

Mediation is underlined on the attentive study of conflict causality, as well as on identifying the divergent interests that lead to the emergence of conflicts. The connection between mediation and legal culture is more than obviously.

Many times, conflicts emerge as a result of cultural differences. Even between external legal culture operators (the public) and the internal legal culture operators (law specialists) there are significant differences. This is why mediation, more than arbitration or negotiation, sets as a possible interface between external legal culture and internal legal culture.

Of course, the characteristics of mediation weren't, fundamentally, so different then, than these from today, so mediation could intervene only in private law actions and implied a third person intervention, although this one didn't have by far the same power the arbitrator had.

2. Content

There is no doubt that the civilizing role of culture has a considerable age. To this end, it is interesting to remind only about the existence of ancient cultures, primitively speaking, as those indicated by the discoveries from Ciu-Ku-Tien[3]. After all, historically speaking, the only ancient plausible testimonies are the tombs, the ossuaries etc. The existence of this sort of digs logically implies the existence of some funeral observances, which presumes the existence of some common ideas and perceptions – therefore the existence of a culture. Besides, historically speaking, the relationship between culture and civilization it is interesting. Culture usually means an entire historical phase (namely Eneolithic cultures: Cucuteni, Gumelnița), during which more civilizations occurred, on the other hand, the idea of civilization it is commonly attributed to the notion of cultural identification of a people, country etc. From those above one may come to the conclusion that between culture and civilization may be a relationship as between part and whole. More than that, since we reminded of Neolithic and Eneolithic cultures, it is necessary to mention the wealth of symbols attached to different mythologies. In this period we can already discuss about notions like *"world axis" (axis mundi)* or *"the star of the sky".* Subsequently, the civilizing role is assumed by a number of heroes. The most back literary piece of work presents us the king of Uruk, Ghilgamesh, as a civilizing hero, emerged after the flood.

Returning to the aspects discussed in some XVIIIth French piece of work, it is interesting to see that, in the study *Encyclopédie Française,* published between 1780 – 1782, a legal meaning it is attributed to the verb *Civiliser,* that of conversion of a criminal action into a civil action. In this situation, we have to deal with a special terminology, of a legal nature, which presents the possibility to transform the criminal action, into a civil one.

The Merriam-Webster Dictionary[4] presents no less than six different explanations for the concept „culture", one of them refers to the agricultural aspect (to make something grow, to till), another is related to biology (the act or process of cultivating living material as bacteria or viruses), while a third one refers to specialized caring forms (*expert care*).

Finally, the other meanings the dictionary gives us are:

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[2] Kroeber A. L., Kluckhohn Clyde, Untereiner Wayne, and Meyer Alfred G., *Culture: A Critical Review of Concepts and Definitions*, (New York: Vintage Books, 1952), 16-17.

[3] Eliade, Mircea, *Istoria credinţelor şi ideilor religioase*, (Ed. Univers Enciclopedic, Bucureşti, 2000), 18 – 25.

[4] http://www.merriam-webster.com/dictionary/culture.

a) The act of developing the moral and intellectual faculties especially by education;

b) Excellence of taste acquired by intellectual and aesthetic training;

c) Acquaintance in fine arts, humanities, and broad aspects of science as distinguished from vocational and technical skills;

d) The integrated pattern of human knowledge, belief and behavior that depends upon the capacity for learning and transmitting knowledge to succeeding generations;

e) The customary beliefs, social forms and material traits of a racial, religious, or social group;

f) The characteristic features of everyday existence shared by people in the same place or time;

g) The set of shared attitudes, values, goals, and practices that characterizes an institution or organization;

h) The set of values, conventions, or social practices associated with a particular field, activity, or societal characteristic.

Congruous with some authors, culture became a central item to the human rights assembly[5], especially looked at through the spectrum of notions as: multiculturalism, cultural diversity or cultural development[6]. In what may concern the concepts of culture and civilization, the law has the binding role. According to professor Sofia Popescu[7], the law is one of the instruments hereby the social functions of the culture are carried out. In the same way, cultural models and values have, in their historical evolution, a high influence over the social life, between the lines tied by laws. Cultural values are subject of an interesting transformation process, by integrating them into human and social praxis. The finished product accomplished after this transformation process is represented by every-day life components in all its displays.

The study of comparative law and legal cultures have the potential to improve our perception regarding relevant aspects of the precise nature of culture, diversity and relevance, allowing different approaches than *self-sufficiency* and *ethnocentrism* attitudes[8].

Not all legal culture outlooks have an affirmative character. Some authors consider that it is possible to discuss about a legal anti-culture, underlined by dissension and anarchic thinking[9].

To the legal culture could be attributed a wide meaning, in connection with the perception of the rights that are considered important, not because of their possibility to solve every-day problems but for their function/ ability to allow a strong normative speech[10]. At the same time, some authors are discriminating between mass legal culture and elite legal culture. Other authors have tried to contour a theme regarding legal cultures development, distinguished by rural or urban surroundings[11].

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[5] Ciongaru Emilian, *Human rights and multiculturalism*, (Volume of International Conference „BIBLIO 2012", Central Library of Transylvania University of Brasov. Brasov, Editura Transylvania University of Brasov, 2012), 190-191.

[6] McGoldrick Dominic, Culture, Cultures and Cultural Rights, in Economic, Social and Cultural Rights in Action, (Oxford University Press, 2007), 447 – 473.

[7] Popescu Sofia, *Quelques réflexions sur le rapport entre la vie juridique et la vie culturelle de la société*, in (Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social), vol. III, Mexico, 1982, 293 – 311.

[8] Tych – Puchalska Bogumila, Salter Michael, *Comparing legal cultures of Eastern Europe : the need for a dialectical analysis*, (Legal Studies, Vol. 16, No. 2, July 1996), 158.

[9] Kevelson Roberta, Dissent and the Anarchic in Legal Counter – Culture : A Peircean View, (Ratio Juris, Vol. 15, No. 1, March 2002), 16.

[10] Milner Neal, *The Denigration of Rights and the Persistence of Rights Talk : A Cultural Portrait*, (Law & Social Inquiry, Volume 14, Issue 4, October 1989), 643-649.

[11] Shingles Richard D., Shoemaker Donald J., *A Developmental Thesis of Legal Cultures*, (Law and Policy Quarterly, Vol. 1, No. 4, October 1979), 385 – 387.

The concept of legal culture is also well connected with the law schools evolution[12]. Hereby, the way that the law is perceived and acknowledged was differently approached subsequently the direction the idea of law had[13].

Besides the definitions and concepts indicated above, other reputed legal sociology specialists tried in time to find explanations regarding the concept of legal culture, starting with the ideas enunciated by Lawrence Friedman, who connected to the notion of „legal culture" ideational attributes and continuing with Roger Cotterrell's theory regarding *„legal ideology",* as well as other specialists ideas - Penissi, Blankenburg etc.

In most specialized literature, the legal culture was appointed as a key concept[14] with great legal implications or an entirety of knowledge referring to law[15].

Also, it has been theoretically proven there are two subcomponents of the legal culture – the internal legal culture and the external legal culture[16]. The internal culture represents the joint opinions of the law specialists regarding law, while the external legal culture integrates the opinions of the great public, of the outsiders regarding the legal aspect.

The same L. Friedman shows that through legal culture the ideas, the values, the attitudes and opinions, associated with law and the legal system, which the members of a community possess, must be understood. Every person has its own legal culture, as well as literacy or social knowledge. Every person has specific features, although it is in the same time part of a collective, group or social entity, sharing the ideas and habits of that group[17].

The legal culture is a system which is always developing and modifying and it builds the fundament on which a good deal of the human society's requests are founded, which are also defining the modifications of the law system.

The way in which people are communicating with each other has always been a reason of fierce and intense debates. Beginning with the myth of being a unique language to the diversity of languages there are nowadays, most thinkers and philosophers, both in Antiquity and in Modernity, they have tried to determine, using more or less scientific methods, the role of communication and language in general, in humankind evolution. But culture must always encompass the essence of law, as a German legist[18] stated.

Mediation represents a procedure that arose early in history. Apparently in Phoenician society were practiced the first causes (cases). The Greeks also knew the mediator institution and at the same time, in the Romanic world, the institution was fully developed, the mediator being called *„intercessor", „interlocutor"* etc.

After the early days (antiquity), started in Phoenician and Babylonian societies, carried on in the Greek and Romanic phases, mediation had a differentiate influence during Middle Ages, that was because in some countries was forbidden while in others favored. In the United States of America we can place the first mediation situations around 1680s. Other countries regarded mediation as an important state institution, such as China.

For conflicts that arise within culturally distinct systems, mediation should be considered the best alternative there is. Mediation is a procedure that focuses on the real

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[12] Ciongaru Emilian, *Theory of justice from the perspective of law schools, (*Volume of Annual Scientific Aession „Justice, rule of law and legal culture" of the Institute of Legal Research „Acad Andrei Radulescu" of the Romanian Academy, Bucharest, Universul Juridic, 2011), 129-134.

[13] Chiassoni Pierluigi, On the Wrong Track : Andrei Marmor on Legal Positivism. Interpretation, and Easy Cases, (Ratio Juris, Vol. 21, No. 2, June 2008), 248 – 267.

[14] Popescu Sofia, Cultura Juridică, concept-cheie în cercetarea căilor integrării europene în domeniul dreptului, (Revista de Studii de Drept Românesc, Anul 14, nr. 3-4), 251-267.

[15] Arnaud André – Jean, Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit, 1993.

[16] Friedman Lawrence M., Perdomo Rogelio Perez, *Legal Culture in the Age of Globalisation. Latin America and Latin Europe*, (Stanford University Press), 2003.

[17] Friedman Lawrence M., *Is there a Modern Legal Culture?*, (Ratio Juris, Vol. 7, No. 2, July 1994), 118.

[18] Hocking Ernest William, *Present Status of the Philosophy of Law and of Rights*, p. 44, apud. Geer Le Boutillier,Cornelia *American Democracy and Natural Law*, (New York: Columbia University Press, 1950), 90.

reasons of the parties, instead of their pretended allegations. In most legal systems, the person that mediates conflicts is not a legal professional. Nevertheless, its techniques and abilities place him as an expert with specific competences. This also constitutes a distinct advantage, because as a technical expert, he is not bound by the legal professional rules. All he applies are his own methods and techniques to ease or resolve conflicts. Therefore, he applies concepts of conflict theory, conflict management, conflict solving. This configuration of his competences gives him a greater mobility than a legal professional.

Mediation is governed at this time mainly by Law No. 192 of 16 May 2006, which contains in 75 articles both cross-border provisions and specific provisions regarding the mediators and the mediation procedures.

Also, the Regulation of organization and functioning of the Mediation Council, the Code of Ethics and Professional Deontology of Mediators, as well as the Occupational Standard of the Mediator, must be taken into consideration.

As regards the international mediation regulations, it must be shown, that in private relations, including the commercial ones, there are no unitary regulations, because, unlike arbitration, where the entire activity ends with an arbitrary meeting, susceptible of execution, in mediation, the mediator does not act as a judge, so there is no question in accepting the mediation's positive effects. In fact, a good command of the culturally known paradigms would certainly add to the possibility of a favorable solution obtained through mediation.

Mediation is also in the international public law, at an interstate level, being there for the offices and the negotiation, and acting as one of the optional means of solving international differences. To such an end, the provisions of The Hague Conventions in 1899 and 1907 are incident in this area. At an international level, the mediation will always get optimal effects if the traits of the legal cultural system are known to the mediator. As noted in this paper, the mediator stands as a technical actor, that helps the parties to reach an agreement and solve a conflict.

According to article 1 of Law No 192/2006, mediation represents an amicably settlement modality of conflicts, with the support of a third person specialized as a mediator, under neutrality, impartiality and confidentiality.

The mediation characters encompass the following elements:

a) Consensualism, because the willingness of the parts is determined in choosing this mean of solving litigations. This is an important feature of mediation, as it demonstrates an important link between this procedure and legal cultures. There is no authority rule that is incident on the decision of the parties, only their common goal, which they exposed during mediation. Nevertheless, that goal is clearly dependent on the peculiarities of the legal cultures in which the actors of the mediation live.
b) Impartiality, because the mediator must not be partial. Instead, he must always act without favoring any of the parts. In certain legal systems, the mediator acts more like a conciliator or negotiator. Still, as a third party, imbued with confidence by the first two parties, the mediator cannot lose the neutrality or impartiality which is conferred upon him.
c) Positivism, because on one hand the mediator seeks to help the parties in looking for solutions, not culprits, and on the other hand, the solutions must last the future, and no sanctions for the future or the past are enacted in the mediation process;
d) Confidentiality, because all of the mediation acts are known only by the parties involved. This promotes mediation as a culturally desirable dispute resolution method, as many legal cultures are known to be closed systems. If the mediator acknowledges the specific systemic conditions of the cultural system in which he mediates, he will manage to increase the chances of success in mediation.

e) Neutrality, which completes the impartial role of the mediator. Although the mediator must know the specific cultural traits of the system from which the parties emerge, he also must remain neutral. Mediation allows the mediator to become acquainted with the cultural and legal problems of the conflict that is brought before him, but also compels him to remain neutral to all the features and traits of the mediation process.

As every process does, the mediation has a beginning, a course and an ending. Every one of these is bound to relate themselves to culturally appropriate backgrounds. In the beginning, the mediator must assess the situation and decide if it possible to mediate the conflict or not. To this end, the cultural analysis plays an important role. In certain cases, the cultural systems are closed, by standards of General Theory of Systems and therefore, mediation is not possible. However, the mediator may always find gaps in the fabric of inflexible systems to bring the conflict to an end.

The mediation process ends by: a) registering an agreement as a result of the solved conflict; b) by the mediator ascertaining the failed mediation. There are also other cases when the mediation ends, like forfeiture of the parties etc. The influence of legal culture is also important in this stage, as in many systems, the mediator must be aware to avoid any unnecessary risings of conflicts.

Supposing the agreement has a partial character or that the mediation has failed, any of the mediation parts can address to the jurisdictional or arbitrary competent court.

As proven before, in all cases, at the end of the mediation process, the mediator will close a protocol which is signed by each part, in person or through a representative, as well as the mediator.

If the parts get to an agreement, then the closing of a convention, which encompasses all the clauses that the parts agreed with, is necessary. The convention has the value of a deed in private signature, although, the convention may be attested by an attorney.

Cancelling the mediation contract can be made anytime, by any of the parts, they having the duty to notify the other parts, as well as the mediator. In this case, the mediator closes a protocol of closing the mediation. If one party is not present at the mediation, but does not cancel the mediation contract, in many cases, the mediator must take steps to confirm if this is an accidental setback or an intentional refusal to solve the conflict through mediation.

Legal cultures and mediation are irrevocably intertwined in their evolution and interactions, as mediation relies on the correct analysis of legal cultures to justly allow mediation attain its purpose, and legal cultures have their own part, being both actors and determined parties in the whole normative social system of law, acting as the means through which mediation can allow litigants to better and faster solve their disputes.

3. Conclusions

Legal culture is a social normative system that interacts with the other normative systems. Among these, the system of law is specifically connected to the system of legal culture. However, the formalism of law is better addressed through alternative dispute resolution methods, of which mediation is clearly a serious choice, when tackling issues regarding the amiable resolution of conflicts. The purpose of this paper is to find if there are any connections and interactions between legal cultures and mediation. Knowing the intricacies of legal culture certainly offers an advantage to any expert in mediation. Moreover, as mediation tends to become more and more internationalized, a correct understanding of the impact of legal cultures is extremely important. This paper intends only to scratch the surface of the complex of interactions between legal cultures and mediation. As a method of alternate dispute resolution, based on interests, mediation is ideally suited to solve conflicts in culturally challenged environments.

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