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THE DESCRIPTION AND EXPLANATION OF MEDIATION AS A PROBLEM-SOLVING INSTRUMENT IN LIGHT OF THE PARTICIPATION THEORY

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Abstract

In my thesis, I examine mediation as the legitimate alternative instrument of conflict resolution that is closest to the own world of the individual (Horányi, 2007) and reaches it the most as compared to other institutionalized forms of conflict resolution. I examine its possible advantages and disadvantages compared primarily to law as a system of problem solving, having regard to the efficiency and effective term of the solution. My goal is twofold: on one hand, I intend to interpret the different types of mediation and review the development thereof from the aspect of communication sciences, and on the other, to examine and explain the possible accessibilities of the individual's own world in the methodology of mediation.

Keywords: alternative dispute resolutions (ADR), typology of mediation, problem solving theories, neurologic approach of decision making, participation theory, history of mediation.

Background

Mediation is a form of alternative debate resolution, in the course of which a neutral third party – the mediator – facilitates agreement between the debating parties – participating in the procedure voluntarily – in the shortest time possible. The mediator does not decide, judge or give advice. The written agreement created as a result of mediation may be legally binding for the parties. I will primarily be examining the transformative type of mediation, and I will note it where I diverge from this. I apply transformative mediation also in my own praxis. In Hungary, this is the most widespread form of mediation. This is the most advanced level of mediation, which also considers and supports with its system of instruments the real-time (in the course of the mediation procedure) realization of changes in the individual (transformation). The definition and interpretation of the accessibility of the own world and the communication tools used for the modification of accessibility is what makes the presentation of mediation as a process of conflict resolution complete. One of these is empowerment, the communication technique of giving power to the parties, facilitating the progression of the mediation process.

As a mediator, I have applied all branches of this both in Hungary and abroad: I have mediated family-, school-, community restoration-, workplace- and employment related cases. The successful cases accumulated during the years have given me motivation to review the reasons behind the positive and negative attitude towards mediation in a comprehensive form, both from the side of the legal- and administrative bodies and the clients participating in the procedure. To summarize these dimensions, I looked for a descriptive and analytic system with which I can add the foregoing together and draw inferences and reach conclusions with regard to the situation of mediation in Hungary in the most efficient manner.

Mediation – as the institutionalized alternative protocol of debate resolution – has been taken over from the United States and adopted by more and more European countries in the last decade of the previous century. As it started to expand as a problem-solving protocol, mediation became more and more widely used in a growing number of areas. It was not only used to resolve debates related to employment or finances anymore. Beside family mediation, community mediation, school peer mediation, health care mediation and inter-cultural mediation, mediation also appeared in the criminal procedure under the name "restorative justice".

Different branches of mediation became increasingly significant in different countries, such as employment-related mediation in the United Kingdom, family mediation in Germany, school and peer mediation in the Scandinavian countries (especially Sweden) and inter-cultural mediation in the southern countries (France, Italy, Spain). These specializations became the centres of attention in these countries due to their actuality.

Mediation in the Hungarian and international legal system

It appeared as an approach in the former socialist countries after the regime changes, and it was codified at the turn of the century. In Hungary, the legal aspects of mediation in civil court procedures were regulated in Act LV of 2002 on Mediation Activity. Part IV of Act XXII of 1992 regulates the resolution of employment-related debates, Act CXVI of 2000 of health care-related debates, and Act XIX of 1998 and Act CXXIII of 2006 provides the rules of debate resolution in criminal proceedings. The most significant of these are the statutory regulations of 2002 and 2006, as these are the ones that provide the most specific directions and instructions both for those participating in the mediation procedure and the lawyers.

The necessity to implement mediation stemmed not only from the EU directives but also the over-encumbered condition of the courts. It took years to finish some of the legal cases taken up in civil

court, often leading to the situation that by its end, the reason on the grounds of which the procedure had been started had ceased years ago, rendering both the procedure and the judgement redundant for those concerned.

Interpretations of mediation throughout history

The term "mediation" originates from the Latin word "mediare", meaning "to be in the middle". The activity covered by the term has been interpreted in various ways in different cultures. In the western culture, it had a supplementary role alongside clerical and royal jurisdiction, the legitimate providers of justice. The Church considers Jesus Christ to be the mediator between God and men. Pius XII put it in his papal encyclical titled Mediator Dei as such: "Christ is the only eternal High Priest, the mediator between God and men" (Treacy 1948). Kings and emperors were considered to be the mediators of justice. Roman Emperors also held the title of Pontifex Maximus, the literal translation of which is "greatest bridge builder". Initially they had been chosen from among the patricians, and later the reigning emperor held this title, beginning with Augustus. Saint Gregory the Great was the first catholic pope to hold this title, which gradually became the Latin term for "Pope of Rome". In 1533, a law made by the parliament declared that the head of the English Church was – after Christ – the king of England, who was accordingly deemed to be both ruler and mediator between men and the Heavens.

Over time, mediation morphed into judgement-making, reducing the available options to the dimensions of good and bad. As such, mediation did not happen directly between people. Their debates were resolved by some higher – secular or Church – power. From the aspect of communication, this was the turning point after which the outcome of the debate was assessed based on criteria that had not been relevant for the parties at the time when the debate emerged. Because of this, the parties participating in the debate were unable to represent their interests in their full, holistic human selves as both the Church and the secular courts focused on making a judgement instead of reaching an agreement. Whether we look at secular jurisdiction or the canonized legal system of the Church, it can be clearly determined that both used the variables "yes" and "no" when applying their protocols. Most of the time, the decision is unsatisfactory to both parties, and as such, the problem is not solved, no equilibrium that would be acceptable to everyone is reached. On the contrary: the decision often leads to new tensions and problems.

By the 20th century, this arrangement was not adequate anymore to satisfy the needs of individuals and the social groups with respect to the resolution of debates. The solution was the redefinition of mediation, which happened at the middle of the 20th century.

Mediation, as an interpersonal problem solving and conflict handling protocol provides an option for the debating parties to resolve the debate jointly, according to their own criteria. While in the language of logic, the first solution was the logic gate "or – or", mediation opens up the possibility of the logic gate "both – and" before the parties. For this however, the parties also have to engage in the process of making a responsible decision themselves. This is necessary due to the circumstance that the part that could be part of the solution for one party ("and") can only be validated by the other party, and vice versa.

If we examine the history of the development of conflict resolution in Europe, we can easily determine that it was not at all consistent throughout the centuries. Though the philosophical and theological aspects have changed from time to time, the practice did not: the resolution of conflicts was the privilege of the current higher power, exercised through the different institutions of jurisdiction.

A significant change came at the middle of the 20th century, having its beginnings rooted in the development of the jurisdiction of the USA. The cold war stalemate of the post-WW2 era was threatening with global annihilation. Conflict resolution protocols formed on the basis of various logic systems were gaining a more and more significant role in the world powers' relationships with each other (Zagare, 1984).

Interdisciplinary approaches to mediation

Conflict resolution research have been cooperating with several disciplines ever since, such as law, logic, neurobiology and linguistics. The achievements of these disciplines will be presented and explained in detail in this thesis as background materials required for the effectiveness of mediation. Experiences show that this method of debate resolution has an effectiveness rate of more than 90% (Törzs, 2010), which applies also to the proportion of mediation procedures ending in agreement (92.4%) and compliance with the agreements (91%). As a practitioner mediator, besides effectiveness, the presentation and analysis of the various uses of mediation have also inspired me to examine the topic from the aspect of communication.

Mediation is becoming more and more widespread as an approach – due mainly to schools providing alternative trainings (e.g. Rogers, Waldorf). For those in possession of such skills, not just the legal procedure but even the involvement of a mediator can be avoided, as they have the knowledge and skills necessary to find a solution to the problem.

The methods used

This thesis examines mediation as an environment of interpersonal communication and problem resolution from several aspects. As a territory of conflict resolution, I analysed mediation from the aspects of history, logic, law, society, the history of communication and Participation. The first part of the essay contains descriptions and analyses from the aspects of scientific disciplines. In the second part, I analyse the different types of mediation from the aspect of Participation.

The studies used for creating this thesis extend also to the mapping of the materials of each background discipline and the collection, analysis and comparison of data and information. Each chapter approaches the topic from the aspect of a particular discipline. After these, the essential parts of each chapter are summarized. I have used the taxonomy of Horányi's Participation (Horányi, 2007) communication theory descriptive system. This terminology is exceptionally appropriate for the accurate presentation of the topic and for presenting the essential aspects thereof in a precise manner. Even Participation theory itself places the aspects of conflict- and problem resolution in the dimension of the agent, the environment and the institution. Mediation – as a means of the resolution of interpersonal problems – is examined within the Participation system in a dimension that has been created especially for the examination of the environments and participants of problem resolution and the system of rules assigned to them. The greatest advantage of the system is that it does not limit the number of disciplines and approaches that can be involved in the examination to one, but instead allows for the interpretation of several logic systems that differ from each other. Participation theory has its own taxonomy, thus any part of any discipline involved in the research can be marked and defined within the system.

After the presentations and analyses from the aspects of the disciplines, the various types of mediation are presented through my own mediation cases. The case studies are more than just the description and interpretation of the cases, and have been analysed using the concepts of Participation. As such, all types of mediation have been placed in the same system of concepts.

In addition to the application of descriptive and analytic methods, statistical data has also been researched and is presented. The Hungarian and international statistical analysis helps place the framework of Hungarian mediation and its effectiveness among the European legal systems. Currently, sixty mediators and forty-two probation officers are licensed to act as mediators in criminal cases in the country. Eighty percent of the cases are initiated by the public prosecutor, which means that the cases are referred to the mediation environment by the appropriate authority. Experiences show that this method of debate resolution has an effectiveness rate of more than 90% (Törzs, 2010), which

applies also to the proportion of mediation procedures ending in agreement (92.4%) and compliance with the agreements (91%). These rates are in proportion similarly high throughout Europe.

Of the procedures referred to mediation in Hungary, 56% are acquisitory, 28% are traffic and 16% are crimes against the person. The number of cases referred to mediation procedure is very low. The capital is proportionally overrepresented with respect to the total number of cases, and does not even reach the national average as compared to the rate of prosecutions. This latter value is 1.5%, that is, mediation procedure is initiated in the case of only 1.5% of prosecutions.

The territorial distribution of the initiation of mediation procedures in the country also shows large differences: in Baranya, there is up to a 600% higher chance that a case will be referred to mediation procedure than in Győr-Moson-Sopron (Törzs, 2010).

Achievements

A) This thesis is the first study to examine mediation as a communicative phenomenon with scientific means, comparing it to other means of problem resolution.
B) The comparison of law – being a canonized system of problem resolution – and mediation makes the border between the areas of application of the two systems – many times handled uncertainly even by the practitioners of the profession – of problem resolution clear.
C) The accurate practical description of the areas in which mediation is effective provides guidance in the various areas of the mediation procedure (both in civil cases and in restorative areas).
D) The presentation and analysis of the types of mediation used in the international practice through practical examples helps in the daily professional work of mediators.
E) One of the most important achievements of this thesis is that it calls attention to the consistently high effectiveness rate of this method worldwide, and also the exceptionally low rates of application related to this; that is, that the competent internal authorities refer cases to mediation in a proportion that is unjustifiably low. Obviously, this statement refers to the cases that fully fulfil the criteria of being referred to mediation procedure.
F) This is the first study to place mediation in the system of PTC and describe it using its taxonomy. On one hand, this means the expansion of the practical application of the Participation theory, by which we gain relevant feedback on the applicability and practical usability of the theory itself. On the other hand, the placement of mediation is much more significant in a system where practical applicability can not only be described but its operation can also be explained and analysed. In the course of this analysis, the mediator

can define the mediation process and his/her own role as a mediator much more easily. The analysis helps the mediator in gaining a view on the mediation concerned through a constant system of concepts, also developing his/her own work.

G) Placement within the system of PTC helps to understand the reasons behind the low rate of application of the communication- and legal mediation protocol, which appears to be in strict correlation with the social image of individual self-advocacy and the related social fixations, and also the lack of learning new communication patterns.

Summary of conclusions

Humanity has preserved written records of an early form or predecessor of mediation. Throughout the ages, various dynamics have been created for the process. In periods when wars were frequent, it was the higher powers – initially gods, then rulers – or their representatives who decided interpersonal debates. (Transferred the environment of decisions from the interpersonal to the intra-personal world). In more peaceful, economically prosperous times, both individuals and institutions spent more time and effort to reach mutual agreements via self-advocacy. In these periods, mutual decisions were made once again in the interpersonal environment. The decisions or series of decisions made in the interpersonal environment are reached with the consideration of several inputs both with regard to the interests of the individual or the group and the evaluation of the outcomes of the decisions. This all becomes comprehensible if we refer back to the contents of the chapter titled "*Neurobiological reactions*". When engaging in interpersonal relationships, the development of a new condition of calm is necessary, which in turn requires an activity of the frontal lobe that is only possible when the reptilian brain and the limbic system are calm. In times of war and poverty, this calm could only be achieved for short, secluded periods, which was not enough for it to become institutionalised and adopted as a habit at the level of society. With economic development, the chance of problem resolution via the neocortex becoming a mass phenomenon increased.

We are practically speaking about the concept of access as defined by PTC, the access that is required for successful participation in mediation. This can typically be described by the neocortex activity of the brain. That is, the more time the human brain spends in active state in the environment of the resolution, the more successful it will be in finding a mutual solution with another agent within the same environment. The capability to represent the own world in this environment also increases proportionally with the time spent. The reverse is also true: the more time the agent spends in this environment, the more accurately he/she will be able to interpret and decode the expressions of the other agent in the same scene. It is also important that for the neocortex to be active, the reptilian brain and the limbic system must be inactive. This is also reached through a high number of repetitions:

the more times the agent successfully reaches the world beyond instincts and emotions, the more accurately and in detail he/she will be able to perceive and interpret the other party's and his/her own emotional actions and reactions, further facilitating the manifestation of the own world in the territory of thinking.

Throughout history, many procedures similar to mediation – as a problem-solving protocol – emerged. These include concepts such as jurisdiction exercised by rulers or community rulers or the Hungarian "king's chair", where the ruler decided the debates of both nobles and commoners while travelling around the realm. The term "metiatoribus" (pleader) was already used in writing in the age of St. Stephen. This pleader was of course very far from the modern concept of the mediator. The first international event where the mediator's name was recorded in the course of the mediation was the Peace of Westfalia in 1686. Until the mid-20th century, intermediating third parties appeared in various international crises and peace treaties. These intermediations resembled modern mediation in the circumstance that the environment for mediation was provided by a third party, both in a physical sense and in the sense of being prepared as required to facilitate the progress of the intermediation. Since ancient times, the official framework for problem resolution has been provided by law in all civilizations. The Anglo-Saxon legal system was the first one to implement mediation into its framework in the mid-20th century in the United States, pursuant to the suggestion of the professors of the Harward University. This was necessary due to the fact that even the simpler court cases could last for years. The initial form of mediation closely resembled the legal procedure: the mediator leads and controls, and the most important goal is to sign an agreement as soon as possible. At that time, the needs originating from the own worlds of the participating agents – being the reaction to the problem related to the subject of the mediation – were not taken into consideration. It was not long – a few decades – before mediation had developed to a level where it was recognised that the most important issue is the reaction of the participating agents to the change that was the subject of the mediation. This reaction can be integrated and differentiated with the newest type of mediation: transformative mediation. It provides a mutual environment for the participating agents where the mediators are qualified to understand and interpret the own worlds or to create one or more new, joint own worlds.

Importance of Participatory Theory in the Reinterpretation of Mediation

Using the taxonomy of PTC, the mediation process between the participating agents can be conducted clearly and logically. Without the application of PTC, it would have been impossible or only partially possible to describe it to the communication science community. In transformative mediation, the most important part of this is when two agents are unable to redefine and rebuild

the dissolved/ceased own world state by themselves, then by providing a suitable environment and the necessary skills, a neutral third party can provide stimulation resulting in transformation, which are the conditions necessary to reach the own world state, such as the physical and mental environment. An adequately prepared mediator can maintain the state necessary for the progression of the procedure among the coordinated framework of the procedure. This is necessary for example when the emotional expression of one of the participating agents would disturb and interrupt the procedure without assistance from the mediator. The above can be exemplified more accurately in the system of PTC through a comparison with the legal system. (There is no relevant difference between the continental and the Anglo-Saxon jurisdiction from the aspect of this comparison). In the case of the legal system, at the start of the resolution of the problem, the agent is located in a physical environment where there is no place for emotional expressions. (1) There, the *agent's preparedness* (or more accurately the lack thereof) shows clearly: the agent is not in possession of the skills that would make him or her adequately prepared for communication that is free of emotions. In mediation, the participating agents are allowed and even encouraged to make emotional expressions. These emotional expressions help the limbic system reach a state of calm and open up a way for neocortex activity. This is essential, as if this does not happen, then the changes of the agent's own world and the alternatives arising in connection with the change will not be expressed in the mediation environment. In the legal system, it is the agent's legal representative who expresses the *agent's own world,* or more accurately, the legal representative's interpretation of a part of the agent's own world. This had to be phrased this way to make it clearly visible that the represented agent is getting further from his or her own world, even though this happens with small differences. The next distancing factor is the category system of law, which does not contain conceptual units that allow for the description of the agent's entire characteristic own world. Consequently, the own world of the participating agent can not be described without a significant loss of data, and even if this is achieved with respect to some parts, it will only be understood by the legal representatives who have studied the professional language for years. As such, the own worlds can not be fully represented in the legal environment. The judge – another outsider with whom the agents never formed a common own world – makes a decision based on the partial own worlds so expressed by the legal representatives. Therefore, law, as a protocol for the resolution of problems, does not possess an appropriate set of tools to represent the own worlds of the participating agents – though it is also true that its goal is not to resolve the problem but to decide about it based on the provisions of the law. (3) The difficulties of *accessing* the environments of mediation where solutions can be reached are – as presented in the chapter titled *Social Drivers* – rooted in social conventions. Whether we are talking about the individual, community or society level – as shown by the above presented comparison –, in most systems of customs, the decision of one agent was accepted. (Examples for this are the ordeal, the decision of the king, the

tribal leader or – later, in continental law – the judge, or the concordant decision of the judge and the jury in Anglo-Saxon law.) The creation of common own worlds has been accepted and made a part of everyday life only in small communities, such as alternative school systems (e.g. Rogers, Waldorf, etc.). (4) Similarly, to other forms of decision making, the creation of common own worlds is also elevated to the level habitual use and becomes a problem-solving protocol accessible to everyone through regular practice. If the solution is brought about by a third-party agent (e.g. judge, mediator) – be it in the form of judgement, suggestions, etc. –, then no common own world is created between the participating parties and the solution will not stem from that. Therefore, the solution will not be the agents' own solution. If the agreement that settles the debate does not originate from the parties themselves, then they will also deem it less important to comply with it. (5) The role of the mediator (who does not decide, judge or give advice) in the mediation procedure is twofold: for one, to conduct the procedure and ensure compliance with its phases in accordance with the protocol, and secondly to observe and support the processes taking place in the participating agents. A successful mediator instructs these two processes parallel with each other, in a synchronized manner. The preparedness of the mediator lies not only in knowing the phases of the protocol but also the ability to assess the momentary mental state of the agent. The mediator provides the additional preparedness for the mediation procedure that lies in the knowledge of the dynamics of mediation. The most important characteristic of this preparedness is to make all elements of the own world of the participating agents related to and pertaining to the mediation concerned capable of being displayed in the common environment in a way so that it can be understood by the agents participating in the mediation. This is true not only for the first phases of the process – where the participating agents present the state of their own world – but also the later phases when a solution is being sought. It is important that the preparedness of the mediator extends also to being capable of ensuring that the decisions (whether individual or mutual) and agreements originating from the own world states do in fact originate from the own worlds of the agents, and not from some other, hidden reason. Such reason can be the emotional effect a third person has on one of the parties or pressure from the work environment, which would not necessarily be found out otherwise. The mediated agreement is internalised by the parties. Such a high rate of compliance is facilitated by the following circumstances: (I) The own worlds become common in the course of a deep process, and as such, the parties consider it their own. (II) The fears related to the former problem not being resolved are eliminated. (III) A win-win situation is reached by the end of the process not just in the opinion of the outsiders but also that of the participating agents. (IV) After an agreement is reached, if any new change arises compared to the terms of the agreement, the parties will seek a solution once again through mediation as they are conscious of the fact that there is a channel through which they can cooperate successfully.

In addition to being the most advanced type of mediation in the field of interpersonal problem resolution, transformative mediation also brings the own world of the participating agents close enough so that they are able to reach real, long-term mutual agreements. It achieves this by returning problem resolution to the environment where the problem arose – its agents –, making the ones generating the problem also its solvers. The number of problem-solving methods will undoubtedly increase in the future from the aspect of protocol, possibly even through the involvement of and joint development with other interpersonal sciences and techniques. The closer the agents get to fully expressing their own world, the more accurate common own world they will be able to create with less losses – for closeness is infinite.

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