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MEDIATION AND STATE CIVIL JUSTICE

by

Remo Caponi♦

Abstract:

The promotion of mediation is element of the access to the courts. Mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. Accordingly, mediation should not be encouraged in all cases, but only in those categories of disputes which are better suited than others to be resolved through mediation. One category is where the parties are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a conclusive breakup between the parties. Instead, mediation can broaden the perspective and help maintain future relations between the parties. Another category is that of small claims, often those of consumers. In these cases the average length of the civil procedure and the lawyer's fees are disproportionate in relation to the small value of the dispute. So the consumer often does not claim his right before the courts. Mediation is an alternative that costs less than the civil procedure. Frequently, consumers injured by an illegal act are many and fall into a class. When there are questions of law or facts at stake which are common to the class, and the claims are typical, the most efficient solution is not an individual mediation but a class action eventually followed by a collective mediation.

Keywords: Mediation; State Civil Justice.

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1. Access-to-Justice Movement – 2. Procedural Law - 3. Barriers to Access to Justice - 4. Declining Welfare State – 5. "Active State" and "Reactive State" (M. Damaska) – 6. Mediation in the U.S.A. – 7. Mediation in Germany – 8. Concluding Remarks – 9. Beautiful Monuments and Beautiful Legal Ideas.

1. - As a scholar in civil procedure teaching in the University of Florence, I would like to begin my presentation with the Mauro Cappelletti's ideas. In his opinion, the development of alternative dispute resolution methods became part of the "access-to-justice movement" and "effective access to justice can [..] be seen as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all".[1]

2. - As Cappelletti put it: "Procedural law is not just about techniques - methods to regulate the business of courts. Procedural law, in the first place, details the role of government, through public courts, in settling disputes, creating new substantive rules and policies, and implementing policies through law. Important public policies are at stake in decisions about when to encourage parties to litigate, how to shape their factual and legal claims, and wheter to promote a strictly legal resolution as opposed to a negotiated settlement. How much law regulates social behavior depends in large part on how the machinery of justice is constructed"[2].

3. – Barriers to access to justice are many and often interrelated, but they are most evident for small claims and for isolated individuals, especially the needy. In order to overcome them, a complex strategy is needed. Accordingly, the movement for access to justice is characterised by three "waves".

The first wave consists of the development of mechanisms for providing legal aid. The second wave is the movement to give representation to "diffuse" collective interests and/or to protect "homogeneous" individual interests through such mechanisms as class actions and the granting of standing to sue to consumer and enviromental associations.[3] The third wave is driven precisely by the simplification of proceedings and the development of alternative methods of dispute resolution.

In my opinion, the distinctive feature of Cappelletti's approach is that only the harmonic and proportionate combination of the three waves can effectively and efficiently respond to the demand for

[1] See *M. Cappelletti, B. Garth*, Access to justice: The Worldwide Movement to make Rights Effective. A General Report, 1, 1, Milan and Alphenaandenrijn, 1978-79, p. 9.

[2] *M. Cappelletti, B. G. Garth,* Introduction – Policies, Trends and Ideas in Civil Procedure, in International Encyclopedia of Comparative Law, XVI, Tübingen, Dordrecht et a., 1987, p. 1.

[3] It is worth mentioning Marc Galanter's distinction between individuals, who tipically have isolated and infrequent contacts with the judicial system, and organizations with a long-term judicial experience, stressing the advantages of the "repeat players": *M. Galanter*, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, in Law & Society Review, 9 (1974), p. 95.

justice from society. Accordingly, mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. For this reason the promotion of mediation should always be accompanied by efforts to improve the efficiency of the state civil justice system and not by attempts at limitating the access to the state courts. This point of view explains the search for types of disputes that should be "better" resolved through informal methods than through legal actions before the courts.

4. – As U. Mattei put it "Cappelletti's work [..] witnessed a moment of general optimism in the public interest model, an idea of an activist, redistributive, democratizing, public-service-minded approach to the public sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Western Societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare and education to the needy. [..] Beginning in the early eighties, the global ideological picture had changed. Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, [..] and imported on a much weaker institutional background in Reagan's America, were based on the very basic assumption that the welfare state was simply too expensive. [..] Public shelter, health, education and justice for the poor were the natural "victims" of such budget cuts."[4]

The turn to neo-liberal policies has taken influence on the development of ADR methods, cutting off their relationship with the idea of access to justice. Facing this new political environment, mediation has increasingly been employed as a mean to cut the costs of the state civil justice as well as to reduce courts' caseloads.

5. - So where are the western legal orders now as to the interplay between mediation and state civil justice? Systematizing the results of a comparative analysis it seems to me very useful to apply the patterns developed by Mirjan Damaska in the book *The Faces of Justice and State Authority.*[5]

I mean the opposition between "active state" and "reactive state". The active state seeks to manage the society by implementing its own social policies. The reactive state seeks to resolve conflicts that arise in the private sector which, on the whole, sets its own policies. The active state employs courts to implement policy. The reactive state employs them to resolve conflict[6].

[4] *U. Mattei*, Access to Justice. A Renewed Global Issue? In Katharina Boele-Woelki, Sjef van Erp (Eds.): General reports of the XVIIth congress of the international academy of comparative law, Bruxelles, Utrecht, 2007, pp. 383–408; *H. Micklitz* (ed.), The Many Concepts of Social Justice in European Private Law, Elgar, 2011, Introduction, p. 34 ff.

[5] *M. Damaska*, The Faces of Justice and State Authority, New Haven, Yale University Press, 1986.

[6] *M. Shapiro*, *Book Review*, in America Journal of Comparative Law, 1987, p. 835.

6. - We can easily imagine that ADR methods meet with a propitous enviroment in a reactive State. As example we may consider the United States of America. The ADR movement has had some success over the past thirty-five years in changing business and legal decision-makers' views of how best to resolve legal disputes. Courts' civil caseloads have declined significantly over the past decade in many jurisdictions. Federal courts are now required by law to offer some form of ADR and many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date.[7]

So far, so good. But: we also to take into account the long-term consequences of the birth of the ADR industry, and the development of a professional class of mediators, not necessarily trained in the law and serving the interests of harmony and non-adversary social control[8].

As D. Hensler put it: "To encourage people to consider alternatives to litigation, in federal and state courts nationwide, judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change"[9].

7. – Let's consider now the developments in tipical active state like Germany. Modern Germany has developed a highly sophisticated and relatively successful system of civil justice. It is a good example of an efficient and respected system by which the rule of law can be maintained in the everyday world of civil litigation.[10]

This context helps to explain the German approach to mediation. As R. Stürner put it: "During the last decades, the German judicial branch and the German legislature established an efficiently working machinery of amicable case settlement through activities of judges and lawyers. This may be the reason why American style out-of-court-mediation or mediation by neutrals without legal education has not been as successful in Germany as it has been in the U.S. or in other countries of the Western world".[11]

The German legislature is now obliged to implement the European Mediation Directive by national German Law. The legislature determined to enact tha sames rules for mediation in national and international cases. The draft provides three forms of mediation: mediation which is initiated independently of a court procedure, mediation which parallels an already initiated court procedure, mediation by a judge without competence to decide the already commenced court dispute.

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[7] *D. Hensler*, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System, 108 Penn St. L. Rev. 165 (2003).

[8] *U. Mattei*, Access to Justice. A Renewed Global Issue? (n. 4).

[9] *D. Hensler*, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System (n. 7).

[10] *P. L. Murray*, *R. Stuerner,* German Civil Justice, Durham, 2004, p. XXIII, p. 19-22.

[11] *R. Stuerner*, Mediation in Germany and the European Directive 2008/52/EC, in La mediazione civile alla luce della direttiva 2008/52/CE, a cura di N. Trocker e A. De Luca, Firenze, 2011, p. 46.

It should be stressed that the bill does not provide obligatory out of court mediation by private mediators unlike the italian Bill n. 28 of the 2010. The German justice system strives to guarantee that a litigant who is seeking justice as dispensed by the court will not be placed under undue economic, procedural or judicial pressure to accept a settlement. Settlement may not squeeze final judgment from the litigation process, because the community of law needs judments. The law is preserved in judgments, and only judgments can develop and propagate the law. The German constitution speaks only about justice, not mediation (GG Art. 92). The judge, who is bound to the law and justice (GG Art. 20 III), may not misuse his authority in settlements negotiations to deny a party a judgment[12].

8. – In my opinion, the German approach of mediation is to be preferred, because it harmonize well with the access-to-justice movement.

Thus I am coming to my first and fundamental conclusion: the promotion of mediation is element of the access to the courts.

My second point is: mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. Accordingly, mediation should not be encouraged in all cases, but only in those categories of disputes which are better suited than others to be resolved through mediation. Let's consider a few examples.

One category is where the parties are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a conclusive breakup between the parties. Instead, mediation can broaden the perspective and help maintain future relations between the parties. This is the perspective of situational justice, already adopted *ante litteram* in the Italian Civil Code of 1942 (Article 1965, par. 2, CC).

Another category is that of small claims, often those of consumers. In these cases the average length of the civil procedure and the lawyer's fees are disproportionate in relation to the small value of the dispute. So the consumer often does not claim his right before the courts. Mediation is an alternative that costs less than the civil procedure.

Frequently, consumers injured by an illegal act are many and fall into a class. When there are questions of law or facts at stake which are common to the class, and the claims are typical, the most efficient solution is not an individual mediation but a class action eventually followed by a collective mediation.

If there are many people injured, but the damages suffered by each individual are mild, an individual judicial lawsuit is certainly not advisable; neither is an individual mediation. Instead a

[12] So *P. L. Murray*, *R. Stuerner,* German Civil Justice, (n. 10), p. XXIII, p. 486 ss.

'collective redress action' is more convenient. The latter costs the individual consumer less time and money than the individual mediation. The class action, then, encourages consumers to claim their rights.

However, if the costs for the recovery are greater than the value of the sum to be recovered (when this is really very small), it is preferable to confiscate the profits of the company through the application of an administrative fine equal to the value of profit unlawfully obtained (so called 'skim off').

In addition, collective redress actions organise a collective response by the consumers against the company's wrongdoing. Therefore this reaction has a deterrent effect against the company which is much greater than that of a consumer's individual lawsuit.

The existence of collective redress action also serves to improve the functioning of mediation because it strengthens the position of the weaker party, the consumer. He can refuse to enter into an unfair agreement, because he knows that an effective remedy is available before the courts.

9. - Just another concluding remark. Beautiful legal ideas are not like monuments, e.g. like the cupola of Brunelleschi in Florence: everyone going by can see it! Beautiful legal ideas - just because they are beautiful - meet with obstacles, while trying to become legal realities. They often remain only in the books. In such a case, legal scholarship has the task to repeat and repeat them, until they can find access in the political agenda and become reality.

Such a beautiful idea is the idea of access to justice.