***Regulaturity*: Regulation and Security - New Forms of Mediation**

First of all, many thanks to the Committee of the World Mediation Forum and to the Scientific Committee, as well, for having accepted my paper.

Secondly, I'd like to thank all of you who have chosen to attend this workshop, as well as my table colleagues. I hope it will be worth your while!

I have entitled my communication:

***Regulaturity*: Regulation and Security - New Forms of Mediation**

And I am bringing more questions than answers to this conference.

A few months ago, during the mediating training course I was taking, someone shared the case of a very young man who lives in a small Portuguese village. He had been bullied throughout his entire childhood at school by his so-called friends, and even his family. It had never been easy for him. However, he did fall in love with a girl who lived in the same village.

Things went well at first but, as is so often the case, not for very long. Typically, this first experience of falling in love was absolutely crushing when came to an end.

As a result, this young man, who was unable to cope with this failure very well, started to mistreat his ex-girlfriend as well as her family. It ended up with him constantly bullying her, her family and friends.

So they all decided to participate in a mediation procedure instead of going through a long penal process.

After some sessions, they arrived at an agreement: the young man proposed that he would make a public apology in the main square of the village, at a time of day that most people would be there.

When I heard that I immediately asked myself, would that be fair to my Mum?

If the parties work together with our help and agree on something, do they really agree on the basis of fairness and dignity?

If not, how can we help them reach that agreed commitment?

Should we strengthen regulation or should we increase a sense of security?

Is mediation a way to implement regulation or to safeguard security?

Probably the right answer is that the choice should not have to fall on just one of them.

The regulation concept derives from the Latin word *regula* and is a technique that ensures a system's stability, while the *security* concept*,* from the Latin word *secura,* is a set of actions and resources used to protect someone or something.

So, on one hand, there are rules and norms that help to achieve some results, while on the other, there is behaviour.

The former must be universal and addressed to everyone; the latter depends on each individual.

In my view, both should coexist in mediation procedures.

Regulation is one of the most controversial topics in the development of mediation. Its flexibility and informality are of little help in fostering the confidence needed to be accepted as a new tool in legal systems.

Governments have therefore created norms and laws that allow the mediation process to be also a legal instrument to obtain fair solutions, while keeping the spirit of mediation intact.

According to Kimberlee Kovach, regulation deals with management, behaviour and quality control.

> ***Regulation covers a wide range of issues and includes such matters as the management of mediated cases, how the mediation process is conducted, the conduct of the participants in mediation, and mediator quality control.***» (KOVACH, 2006:390)

We find this commitment, for instance, in the Uniform Mediation Act, approved in 2002 in the United States of America, where diversity and creativity as well as autonomy should be protected from all interferences from the legal systems.

> ***«It is important to avoid laws that diminish the creative and diverse use of mediation. The Act promotes the autonomy of the parties by leaving to them those matters that can be set by agreement and need not to be set inflexibly by statute»*** (UMA, 2002:7)

And also,

In the European Directive 2008/52/CE of the European Parliament on certain aspects of mediation in civil and commercial matters, which points the path of regulation to be followed by state members and mediators as well.

Nevertheless, the laws and norms that have been developed and applied in different countries have revealed the complex balance between flexibility and informality and the need to regulate the activity of mediation in a system based, above all, on normativity.

This complex balance is called ***Diversity – Consistency Dilemma*** with, as Nadja Alexander highlights, its «***standards that guarantee a level of competence and quality versus the threat of loss of flexibility and its cost effectiveness and its accessibility***.» (ALEXANDRE, 2006:29)

Taking into account the global world in which we live, cultural differences are reflected in the genesis of the conflicts themselves as well as in their own solutions, so all attempts at regulation have also to consider the cultural differences in the mediation procedure.

According to Nadja Alexander, (2008:4-10), there are in all four different approaches to the regulation of mediation:

The first, **market regulation**, is based on free market and contract law concepts and derives from values such as freedom of the individual, choice and competition. Anyone can engage in any kind of arrangement for mediation services subject to the laws of supply and demand, and of private contract.

However, there are risks in this approach: 1) participants do not have the same **level of information** to be sufficiently informed and educated about mediation in order to check its quality and they need access to feedback mechanisms to express their views; 2) **imperfections of the market,** as not all market participants use information rationally. As we know, wealth and education can make choices more illusory than real; 3) **standard contracts** deal with big corporations, which distort freedom of contract, among other risks.

Self-regulation refers to collective, community and industry-led regulatory initiatives. It extends to established practices of co-mediation, supervision, mediation intake and preparation, empirical research, including research forums and exchanges.

Some disadvantages are known, such as the application of the rules only to members of the approving entity.

The third approach establishes parameters of regulation and takes the form of an international convention, directive, legislation and model law. The European Union Directive on Mediation illustrates this approach well. It defines mediation thereby establishing its scope, and then goes on to identify the aspects of mediation that require regulation by European Union member states

Last, but not least, the **Formal Legislative** approach, which relies primarily on legislation upheld by formal institutions, such as the judiciary, to regulate mediation.

However, ***it is important to avoid laws that diminish the creative and diverse use of mediation***

Besides these different approaches to regulation, there are essential principles in mediation (such as voluntariness, neutrality, impartiality, among others) that are understood here to be techniques for the procedure to advance with stability and *regularity* in order to reach a solution that works for the participants.

However, regulation and principles are not enough.

In order to fulfil their functions well, mediators must be required to have a proper understanding and command of the fundamental principles of democracy and the rights, freedoms and guarantees granted by the Constitution that rules their own countries.

But what are fundamental rights?

What are the existing determinant characteristics that consider a guarantee to be a fundamental right and differentiate it from other types of rights, for example, common law in civil law?

Fundamental rights are legal situations of complexity at both a conceptual and a practical level.

It could be said that these are the rights and freedoms that people hold for the simple fact that they are endowed with a **human character**, possessing an **essential nature** to guarantee the existence of the individual.

Furthermore, both fundamental rights and human rights are considered to be closely linked to a vision of equality and freedom of individuals.

On the basis of their neo-contractualist theories, Rawls, Dworkin and Richards, among others, tried to identify a set of fundamental rights deduced from the principles of fairness or moral prerogatives of the personality, affirming its non-negotiable priority in the ordination of the political community.

Fundamental rights are often defined by their purpose: protecting powers and spheres of freedom of the people, applicable primarily in the person - State relationship

Fundamental rights can also be defined by using a positivist approach that defines them through their inclusion in a constitutional text. That is, fundamental rights are the result of a process of constitutionalisation.

Professor Jorge Miranda considers that fundamental rights are understood as «the rights or subjective legal position of persons as such, individually or institutionally considered, based on the Constitution.» (MIRANDA 1999:11)

Fundamental rights and human rights undoubtedly share true similarities. They have the same ethical values (of justice and equality) and characteristics that are essential to human nature as well as a common purpose, which is to protect the dignity of the human person.

And these are:

Fundamental: these rights represent essential issues for human beings as regards their existence and autonomy. They contain a nature of need, which doesn't just represent desirable aspects. They are inherent rights to the very notion of human beings, as basic rights of the people.

Universal: Everyone may own these rights. At the international level, this characteristic means that all people have human rights, irrespective of where they reside, their nationality or culture. The existence of categories of rights specifically relevant to certain groups, for example women, children and disabled people, doesn't undermine the universality of human rights and fundamental rights. These are the so-called positive differentiations necessary to respect the principle of equality,

Inalienable: one of the most prominent of fundamental rights and human rights. This feature refers to the permanence, unavailability and immutability of these guarantees, meaning that these guarantees cannot be withdrawn, except in certain circumstances and in accordance with the applicable procedures, and the holder cannot dispose of them. These rights are extinguished only at the death of the holder.

Interdependent and Interrelated: these characteristics are related to the implementation of these guarantees that provide that the enjoyment of a right may have an impact on the enjoyment of another right. These relations find application in economic, social, and cultural rights as well as in civil and political rights.

Given that these rights represent the protected goods themselves, then guarantees are the instruments to ensure the enjoyment of these goods. These guarantees are accessory to the rights, having a relation through their nexus.

We can say the rights are declared and the guarantees are established.

For example, in the Portuguese Constitution, the right to life (Article 24, n.º 1) corresponds to the guarantees of the prohibition of the death penalty (Article 24, n.º 2) and guarantees non-extradition to countries that impose the death penalty (Article 33, n.º 6);

There are four primary functions of fundamental rights (which also represent the functions of human rights):

non-discrimination

defense or freedom

social provision

thirdparty protection

The first three functions are strongly related to the dignity of the human person.

It could be argued that the history of the development of fundamental rights has a Western focus.

This is often reported to be a challenge to the universality of human rights.

However, research has shown that non-Western religions and traditions, such as the Quran of the Islamic world, Chinese Confucianism, as well as African traditions, similarly include aspects related to fundamental rights such as the dignity of the human person.

Much has been achieved in the last two centuries with regard to the guarantees of fundamental rights and human rights.

Despite this progress, violations of human rights still occur in every corner of the world and are violations of huge gravity in certain situations.

It is undeniable, however, that the standards recognized now provide an important safety net for the enjoyment of fundamental rights and human rights. The existence of a number of fundamental rights in the constitutions of States is the rule and not the exception.

Within this net created to strengthen and protect these two rights, there is a tendency to increase legal situations that are seen to be fundamental rights and human rights.

On one hand, this increase demonstrates the importance attached to human rights and fundamental rights. However, on the other hand, an increase in the standards of these rights could dilute their main character and blur the boundary between fundamental rights and rights of another nature.

One of the cornerstones of democracy is the access to justice for all as stipulated in various democratic constitutions and in Article 6 of the European Convention on Human Rights.

Mediating procedure must ensure that participants are guaranteed constitutional rights and principles (of equality, access to justice and equity), when they seek to resolve their disputes through mediation.

In conclusion, I return to the story of the Portuguese young man who wanted to make a public apology to a community had always behaved in a hostile manner to him and threatened his sense of dignity.

How can 21st century mediators conduct procedures, while keeping the principles of mediation and in compliance with the regulatory standards of each state, and yet be mindful of the fundamental rights of all participants, including their own?

Regulation is part of the solution and is based in laws and norms, as we've seen. It's been a very important tool for mediation in order to be accepted and incorporated by legal systems around the world.

Security depends on each individual, depends on each one of us and on a set of actions to protect someone.

It depends on every single person's perception of human dignity.

To develop this perception we need to read and understand ethics and philosophy.

We need to think about the daily relationships that we construct and see around us.

We need to keep asking ourselves throughout the mediation procedure: «Would it be fair to my Mum?» And if it doesn't seem fair, we must address ethical questions in order to make the participants think about the solutions they are seeking.

Not all mediators have a background in law, where fundamental rights and human rights are studied. They can also come from other fields of human knowledge where these issues are certainly not studied or in any way pondered. My area is both Law and Communication Studies and I know this for a fact.

I believe that greater awareness of the dignity of the human person and fundamental rights among mediators is the keystone for better performance in the search for an extrajudicial agreement that guarantees an effective and lasting solution, based, above all, on respect for others.

Thank you.

Belval, 10.09.2019

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