

European Mediation and Indigenous Mediation

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The article investigates the European and Indigenous mediation and its different circumstances. Mediation is one of a variety of procedures to solve a conflict; it is based on the voluntary participation of the parties and it is a procedure, in which an intermediary without adjudicatory powers (the mediator) systematically facilitates communication between the parties with the aim of enabling the parties themselves to take responsibility for resolving their dispute.

Keywords: alternative dispute resolution, mediation, mediator.

Europos ir čiabuvių mediacijos procedūros

Straipsnyje tiriamos įvairios Europos ir čiabuvių mediacijos procedūrų aplinkybės. Mediacija yra viena iš daugybės procedūrų, skirtų konfliktui spręsti, ji grindžiama savanorišku šalių dalyvavimu, ir tai yra procedūra, kurios metu tarpininkas, neturintis teisminių galių (mediatorius), sistemingai palengvina bendravimą tarp šalių, turėdamas tikslą sudaryti sąlygas šalims pačioms priimti atsakomybę už ginčo sprendimą.

Pagrindiniai žodžiai: alternatyvus ginčų sprendimas, mediacija, mediatorius.

Introduction

Alternative Dispute Resolution (ADR) has been endorsed as one of the greatest developments of the modern legal system. Instead of engaging in extended and fraught-laden litigation, former litigants can simply take the more expedient, cheaper, creative, less complicated, less awkward, more participative and more effective route of dispute resolution – the “alternative” form. These alternatives are more commonly known as mediation, conciliation, negotiation, and arbitration; among others, Litigants can pursue, in case of court-annexed ADR mechanisms, these popular procedures in the hope of settling the case while it is being tried. The presiding judge often stays the trial and judgment until such time that the parties have emerged from an unsuccessful ADR. Parties freely negotiate with each other, but upon failure to reach a settlement, the litigants have the right to assert for a trial de novo – a trial as if no court-annexed arbitration ever took place. Private tribunals or rent-a-judge is also allowed, the decision of which can be entered as an appealable judgment. Other less common forms of ADR

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include early neutral evaluation, Mediation-Recommendation, Mediation-Arbitration, Mini-Trial before expert neutral facilitators and Summary Jury Trial before advisory juries (Consortium for Appropriate Dispute Resolution, undated).

The problem with this alternative approach is that there are numerous cultures and communities in other parts of world where litigation is not the norm and is actually the alternative. The norms for these people are their own community dispute resolution procedures. Hence, the word “alternative” in ADR seems to be a misnaming as applied to some cultures, be they situated in the developed or still developing world.

The older forms of dispute resolution, particularly those practiced by the Indigenous or Indigenous peoples around the world, challenge the novelty of present-day ADR. Under the umbrella of “Indigenous Dispute Resolution processes,” are intuitive, time-tested and pre-colonial forms and systems of dealing with community problems by coming up with a consensual, communal solution. From the continent of Africa to the shores of North America to the islands in South Asia, Indigenous or Aboriginal communities have practiced their localized way of problem-solving long before the first European settlers attempted to make contact with them.

Indigenous or Aboriginal communities (Kam, 2006)¹ in the present day practice three forms of dispute resolution: their own Indigenous processes, Western forms of ADR, and the Indigenized Western ADR systems. They very seldom resort to court litigation, whether because it is expensive, time-consuming, highly complicated, and judge and counsel-dependent, or simply because it is not innate for them to do so. Of course, certain exceptions have to be made for few communities, which have arranged themselves into corporate entities and engaged in the profitable world of casino operations. Some groups can certainly pursue litigation, but the rest of the Indigenous peoples of the world may not have the capacity, temerity and boldness to sue in court, and would rather continue to resolve disputes the way their ancestors have in the past.

1. Mediation (Díz, 2010)

1.1. Definition and Characteristics (Spencer, Brogan, 2006)

Mediation is one of a variety of procedures to solve a conflict, it is based on the voluntary participation of the parties, and it is a procedure in which an intermediary without adjudicatory powers (the mediator) systematically facilitates communication between the parties with the aim of enabling the parties themselves to take responsibility for resolving their dispute.

Additional characteristics are the confidentiality of the procedure and the neutrality of the mediator; mediation offers a flexible, self-determined approach in which all aspects of the conflict, independent of their legal relevance, may be considered. Against this background, mediation, in contrast to court proceedings, is described as *alternative dispute resolution* (ADR) (Hodges, Benöhr, Creutzfeldt, 2012), or external dispute resolution (EDR) – and it typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party. However, ADR is also increasingly being adopted as a tool to help settle disputes alongside the court system itself (Pirie, 2000, p. 5; Tiliouine, Estes, 2013).

¹ Noting, “descendants of the original inhabitants of many countries and their cultures, religions and a distinct mode of socio-economic organizations” who “are generally thought to share a ‘holistic view of nature and society where the well-being of both go hand in hand’”.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties cases to be tried (indeed the European Mediation Directive 2008 (Directive 2008/52/EC of the European Parliament and of the Council, 2008) expressly contemplates so-called “compulsory” mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). Additionally, parties to merger and acquisition transactions are increasingly turning to ADR to resolve post-acquisition disputes (Litvak, Miller, 2015).

Also interesting are the contributions of information technologies to extra-judicial channels – *Online Dispute Resolution* (ODR) (De Bueno Mata, 2018) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR), however, ODR (Monty Ahalt, 2009) can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.

A large percentage of the world’s population has a smartphone, a computer, constituting privileged tools for the development of individuals. The new paradigm for the jurisdictional process finds its basis in the technology, which we use daily: if we apply it to the process, do we send court documents using the internet, if the hearings held as teleconferences, if notifications are digitally sent to all those involved in the process, what will happen? Videoconferencing is a great tool for the smooth operation of a process and prevents displacements. However, the access right to the computer cannot replace the person of the judge.

1.2. Types

When parties involved in a serious conflict want to avoid a court battle, there are types of mediation that can be an effective alternative. In mediation, a trained mediator tries to help the parties find common ground using principles of collaborative, mutual-gains negotiation. We tend to think mediation processes are all alike, but in fact, mediators follow different approaches depending on the type of conflict they are dealing with. Before choosing a mediator, consider the various styles and types of mediation that are available to help resolve conflict.

Considering the relationship between court proceedings and mediation, three types are to be distinguished:

- Private mediation is completely independent from judicial proceedings. Indeed, it often takes place without any subsequent court proceeding.
- Court annexed mediation is initiated by the court, but then takes place without any further involvement of the court.
- Judicial mediation is more intensely connected with the court as an institution in terms of venue and personnel. However, even judicial mediation is not performed by a judge with adjudicatory competence in the specific case.

1.3. The purpose of mediation

The purpose of mediation is to allow the parties to find a resolution to their conflict in a sustainable and self-determined way.

- The procedure is constructive and involves the chance for personal development and social growth for the parties of the conflict.

- The principle of voluntariness and the development of the solution by the parties themselves carry with them the expectation of substantive justice.
- It is expected that the results agreed with benefit both parties or, at least, avoid that anyone is worse off after the mediation.

1.4. Cost-efficiency

Cost-efficient mediation holds the promise of cost – efficient and faster dispute resolution compared with other methods of dispute resolution. It should be noted, however, that each conflict needs to be evaluated on an individual basis for which dispute resolution mechanism it is best suited:

- The parties might opt for mediation because they expect mediation to be quicker and cheaper than court proceedings.
- Additional reasons to prefer mediation over court proceedings may be confidentiality and the wish to preserve a good relationship with the other party, for example in cases of commercial long-term relationships or in family disputes.

1.5. In the European Union (Shahla, 2018; Mcfadden, 2015)

The “Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters” (hereinafter: the Mediation Directive or just Directive) provides a framework for cross-border mediation, dates from 21 May 2008, has been in force since 13 June 2008 and requires the European Member States (except Denmark) to implement the necessary laws, regulations and administrative provisions by 20 May 2011 at the latest.

The Mediation Directive covers the following topics – the extent and the precise nature of the Articles of the Mediation Directive reflect the different regulatory approaches of the Member States and the fact that mediation as a dispute resolution mechanism is still in the process of development:

- Scope of application (Art. 1 – 3);
- Quality of mediation (Art. 4)²;
- Courts and mediation (Art. 5);
- Enforceability of agreements resulting from mediation (Art. 6)³;
- Confidentiality (Art. 7);
- Effect of mediation on limitation and prescription periods (Art. 8);
- Information on Mediation (Art. 9 – 10).

Finally, some issues are not directly dealt with by the regulatory part of the Directive at all, for example the liability of mediators or the regulation of professional mediator associations.

1.6. Scope of Application

The application of the Mediation Directive is restricted in three general ways.

- First, only mediation as defined in Art. 3 is covered. The definition in Art. 3(a) reads: “Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”.

² Other Articles are formulated rather softly and express rather a desire than clear rules to implement, such as Art. 4 on ensuring the quality of mediation and Art. 5 on the relationship between court proceedings and mediation.

³ Some Articles contain concrete and hard rules for the Member States to transpose into their national laws, such as Art. 6 on the enforceability of settlement agreements developed in mediation or Art. 7 on confidentiality.

In line with the functional definition offered above and according to Art. 3(b): “It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question”.

- Second, the Directive only applies to civil and commercial matters and excludes rights and obligations which are not at the parties’ disposal under the relevant applicable law (Art. 1(2)). If, for example, the applicable Member State law requires a court decision for the divorce as such but allows for private autonomy in other fields of family law, such as the pecuniary effects of a divorce, only the latter is dealt with in the Directive.
- Third, the Directive only applies to cross-border disputes as defined in Art. 2. This is a dispute in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation by a court to use mediation or attend an information session is made to the parties. While the Directive only applies to cross-border disputes, it does not restrict the Member States to enact laws that cover cross-border as well as purely national mediations. Generally, one set of rules for national and international mediations is desirable, as this fosters the understanding and practice of mediation and avoids arbitrarily different regulation.

The “Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters”, dates from 21 May 2008, has been in force since 13 June 2008 and requires the European Member States (except Denmark) to implement the necessary laws, regulations and administrative provisions by 20 May 2011, and provides a framework for cross-border mediation⁴.

At the moment, mediation does not achieve its potential in Europe since the relevant groups – especially judges, lawyers, in-house counsel and, of course, the parties themselves – often take their decisions under a lack of information about its characteristics, potential, requirements and practical implementation. In order to solve this information deficit, the Directive requires the Member states to give information regarding mediation services, and in addition asks the Commission to make publicly available the information on the courts and authorities competent to make mediation agreements enforceable across borders.

Mediation techniques have been used in Europe for many centuries. Hence, mediation as a method of dispute resolution is still developing and legislatures are in the middle of the process of establishing

⁴ Encouraging the use of mediation facilitates the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation, thus enabling citizens to secure their legal rights in an efficient way. The Mediation Directive applies to cross-border disputes in civil and commercial matters. It covers disputes in which at least one of the parties is domiciled in a Member State other than that of any other party on the date on which they agree to use mediation or on the date mediation is ordered by a court. The principal objective of this legal instrument is to encourage the recourse to mediation in the Member States. For this the directive contains five substantive rules: It obliges each Member State to encourage the training of mediators and to ensure high quality of mediation. It gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case. It provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary. It ensures that mediation takes place in an atmosphere of confidentiality. It provides that the mediator cannot be obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation. It guarantees that the parties will not lose their possibility to go to court as a result of the time spent in mediation: the time limits for bringing an action before the court are suspended during mediation.

adequate rules. United Kingdom and the Netherlands have embraced mediation longer or quicker than others.

1.7. Success Factors

1.7.1. Costs and Time

In sum, mediation offers potential cost and time advantages compared with other dispute solution mechanisms.

1.7.2. Institutional Integration of Mediation

Traditionally most, if not all, European conflict resolution laws are focused on conflict resolution by the courts. For some conflicts, that is the court, for others mediation, and again for others the arbitration or ombudsman⁵ procedures:

- Ombudsman (Costa, 2006) is an expression of Swedish origin meaning “representative of the citizen”. The word is formed by the Union of “ombuds” (representative) and “man” (Men). The term arose in 1809 in the Scandinavian countries to designate an Ombudsman of the Parliament, responsible for mediating and trying to resolve the complaints of the population to the government: Emily O’Reilly is the European Ombudsman and investigates complaints against EU institutions, bodies, offices & agencies; the office was established in 1995 and is located Strasbourg (France).
- The Ombudsman’s function is to see the problems and negative points of a particular company or institution, from the perspective of the consumer/citizen, and try to solve the crises in an impartial way.

1.7.3. Information of Stakeholder Groups

Stakeholders are not only the parties of a conflict, but all those who professionally or institutionally are part of dispute resolution services, namely lawyers, judges and in-house legal counsel. Information does not mean twisting someone’s arm.

- Having concluded this, we can only urge legal professionals involved in the practice of law, as well as business activists concerned with the delays and costs of conventional litigation, to drop their prejudices and familiarize themselves with mediation as a form of ADR through self-education and a pursuit of its implementation in a day-to-day practice.

1.8. Portugal and Mediation

In recent years, the Portuguese legal order has seen several legislative advances towards acknowledging and regulating mediation as an ADR, particularly through the insertion of a provision for mediation as

⁵ The Ombudsman investigates different types of poor administration, for example: unfair conduct discrimination; abuse of power lack of information or refusal to provide it; unnecessary delays; incorrect procedures.

How is the Ombudsman chosen? The European Parliament elects the Ombudsman for a renewable 5-year term. This is one of its first tasks when newly elected. How does the Ombudsman work? The Ombudsman’s office launches investigations either in response to complaints or on its own initiative. An impartial body, it takes no orders from any government or other organisation. It produces an annual activity report for the European Parliament. The Ombudsman may be able to solve your problem simply by informing the institution concerned. If more is needed, every effort is made to reach an amicable solution that will put matters right. Should this fail, the Ombudsman can make recommendations to the institution. If these are not accepted, the Ombudsman can draw up a special report to the European Parliament, which must then take appropriate action.

a cause for a stay of proceedings in the Civil Procedure Code² and, in addition, through the enactment of Law No. 29/2013, of 19 April (<https://dre.pt/pesquisa/-/search/260394/details/maximized>), which establishes the general principles applicable to mediation conducted in Portugal and the legal provisions governing civil and commercial mediation, mediators and public mediation (“Mediation Act”).

Portugal has a centralized government body responsible for the regulation of mediation activities – the Directorate-General (DG’s) for Justice Policy (*Direção-Geral da Política de Justiça*), is a department in the Ministry of Justice. The DG’s website contains most of the information available on public mediation services as well as other methods of alternative dispute resolution.

The website has lists of mediators, and once mediation has been decided in accordance with the rules governing public mediation services, a mediator is automatically selected.

There are no non-governmental organizations (ONGs) working in the area of mediation in Portugal. However, there are private associations that provide mediation services and training programs for mediators. The use of mediation is admissible in various areas.

Portugal has adopted measures to promote the use of mediation in specific areas of law, namely family, employment, criminal, civil and commercial matters. Family, employment and criminal mediation have their own structures, with specialist mediators in these areas. Civil and commercial mediation takes place as part of a judicial process in small claims courts (*Julgados de Paz* – Justices of the Peace). Each area of mediation – family, employment, criminal, civil and commercial – has its own legal framework with guidelines for conducting mediation. At the moment, the public mediation systems, including the civil and commercial mediation that takes place before *Julgados de Paz*, seek only to resolve disputes in Portugal, using the procedures and applications provided by Portuguese legislation.

Mediation can also take place outside the jurisdiction of the above courts, which is commonly known as extra-jurisdictional mediation. However, this type of mediation does not follow the same procedures as the matters within the competence of *Julgados de Paz* since, if agreement is not reached during extra-jurisdictional mediation, the process cannot be referred to the court for judgment, as is the case with civil and commercial mediation, over which the *Julgados de Paz* have jurisdiction, and it is necessary to refer that Mediation is entirely voluntary.

There is no national code of conduct for mediators; they conduct their activities in accordance with the European Code of Conduct for Mediators (https://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf), with some legal and administrative structures defining their activities and the requirements for practicing their profession. There are guidelines on conducting mediation sessions, the methods that may be used to achieve constructive communication or rapport with the parties, and the way in which mediators can propose settlements. The criteria applied during the training given to mediators aim to instill the ethics and principles set out in the European Code.

The conduct of mediators is monitored by a public mediation system. The type used depends on the area in which they work, and the public system has a supervisory committee that monitors mediation activity.

2. Mediation in indigenous Latin American groups (González, 2019)

The study of Indigenous or Aboriginal law (Akanmu, Jesse, Brandon, 2014) includes: the laws of indigenous peoples, treaties between indigenous groups and the government, the government laws that create rights and obligations specifically and only affecting indigenous people.

- Potential benefits – Effective dispute resolution and conflict management services assist Indigenous people to achieve a range of justice, social, cultural and economic goals. The

services have the potential to reduce levels of violence in Indigenous communities, reduce levels of adverse contact of Indigenous people with the criminal justice system, promote healing of damaged relationships between Indigenous and enhance governance and decision-making by their communities. However, these potential benefits have not been realized.

- Western and Traditional models of dispute resolution – in contemporary society, Indigenous people live in two overlapping worlds, the western and traditional, and neither is fully capable of dealing with disputes involving Indigenous people. Purely western models of dispute resolution are often incongruent with the culture of Indigenous people and fail to meet many of their needs. At the same time, European colonization has weakened many traditional ways of resolving disputes between Indigenous people. Moreover, in disputes between Indigenous and non-Indigenous people, the application of western models may work against Indigenous needs and perpetuate disadvantage. It is important that ADR programs recognize these problems and, in doing so, promote the substantive equality of Indigenous people participating in ADR.
- Traditional Practices – Traditional practices of the Indigenous may need to be supported, new approaches fostered and mainstream dispute resolution practices modified. A focus on conflict management, rather than the resolution of a particular dispute, may also be more helpful.
- International organizations – promotion by international organizations of different models of community-based conflict resolution should be understood within the overall context of transnational trends in “rule of law construction” and current donor preferences for decentralization of the state. In effect, the partial incorporation of indigenous authorities and practices into state legal structures and the promotion of different forms of ADR represents a process of legal decentralization. While to some extent this strengthens local indigenous autonomies (with positive and negative effects in practice), this “de-centering” of state law also reduces the direct responsibilities of the state for legal redress in certain spheres, in effect “privatizing” law by devolving responsibility for dispute resolution to local communities. What are the implications for human rights of the ways in which the state is being legally reconstituted within the broader context of legal globalization?

There are some characteristics that manifest other principles of the system of violations and sanctions of Indigenous Peoples; for example, we take into consideration the principle of guilt. Archaic or primitive social systems are structured under an intense cohesion of the group, so that maintaining peace or balance among the various families is presented as the guiding function of the whole life of the community. In indigenous systems, principles such as social peace and the maintenance of competing community forces are of great importance, and thus explain the principles of mediation and strong special prevention in the field of choice and sentencing of the offender found guilty.

At the most basic level of understanding, justice is understood differently by indigenous people. The dominant society tries to control actions it considers potentially or actually harmful to society as a whole, to individuals or to the wrongdoers themselves by interdiction, enforcement or apprehension, in order to prevent or punish detrimental or deviant behavior. The emphasis is on the punishment of the deviant as a means of making that person conform, or as a means of protecting other members of society.

The purpose of a justice system (Dumont, 1993, p. 32) in an indigenous society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged. This is a primary difference that significantly challenges the appropriateness of the present legal and justice system for indigenous people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order.

1. Mediation in indigenous criminal law – Mediation in Indigenous Criminal Law is one of the foundations of its legal system thanks to the kind of social structure that prevails within it.

It is considered that Indigenous Criminal Law is a right of mediation, and the crime, in Latin American societies, reflects the danger that the decomposition of the group and the social division may pass. As a legal consequence of the crime, there is a penalty that is not intended to express a punishment of social disapproval, but, above all, to restore the balance of the group's social life and to achieve peace destroyed by the perpetrator's behavior (there are many sentences regarding mediation)

2. Sanctions (Sezgin, 2011) *versus* Community – in this way, the imposition of a sanction affects the entire community in its entirety, and for this reason, in many legal systems, punitive, indigenous to the decision of the penalty to impose is a genuine process of negotiation that opens in different directions:

- The Assembly gathers the whole community to determine the guilt or innocence of the subject, and to impose the penalty in his case, the different types of Clans and families try to reach an agreement on the type of sanction, its duration and form of compliance in order to avoid the ancestral wars and maintain order in the community.
- The second way is between the same community (represented by the various authorities) and the convicted person – the attempt is always made to maintain the peace, even to ensure that the offender himself complies with the resolution of the assembly so as to be able to achieve order and balance respect for all the members of the same, including the offender.

Rupert Ross: “Until we realize that indigenous people are not simply ‘primitive versions of us’ but a people with a highly developed, formal, complex and wholly foreign set of cultural imperatives, we will continue to misinterpret their acts, misperceive their problems, and then impose mistaken and potentially harmful ‘remedies’” (Ross, 1992, p. 6).

It is exactly this misunderstanding that leads to systemic discrimination. The system assumes all persons will use the same reasoning when protecting their interests, when choosing their pleas, when conducting their defenses, when confronting their accusers, when responding to detailed questions, and when showing respect and remorse to the court. It also assumes that punishment will affect all persons in the same manner.

When the justice system of the dominant society is applied to indigenous individuals and communities, many of its principles are at odds with the life philosophies which govern the behavior of indigenous people. The value systems of most Aboriginal societies hold in high esteem the interrelated principles of individual autonomy and freedom, consistent with the preservation of relationships and community harmony, respect for other human (and non-human) beings, reluctance to criticize or interfere with others, and avoidance of confrontation and adversarial positions.

The methods and processes for solving disputes in indigenous societies have developed, out of the basic value systems of the people. Indigenous methods of dispute resolution, therefore, allow for any interested party to volunteer an opinion or make a comment.

The “truth” of an incident is arrived at through hearing many descriptions of the event and of related, perhaps extenuating, circumstances. Impossible though it is to arrive at “the whole truth” in any circumstance, as Aboriginal people are aware, they believe that more of the truth can be determined when everyone is free to contribute information, as opposed to a system where only a chosen number are called to testify on subjects carefully chosen by adversarial counsel, where certain topics or information are inadmissible, and where questions can be asked in ways that dictate the answers.

Because the purpose of law in indigenous society (Gray, 2002) is to restore harmony within the community, not only the accused has to be considered, but all the others who have been or might be affected by the offence, particularly the victim, have to be considered in the matter of “sentencing” and disposition.

The person wronged, dispossessed or destitute, is entitled to some form of restitution. In the eyes of the community, sentencing the offender to incarceration or, worse still, placing him or her on probation,

is equivalent to relieving the offender completely of any responsibility for a just restitution of the wrong. It is viewed by indigenous people as a total vindication of the wrongdoer and an abdication of duty by the justice system.

The accused also may have dependents who are involved in some way, indigenous people believe care has to be taken so that actions to control the offender do not bring hardship to others. The administration of justice in indigenous societies is relationship-centred and attempts to take into account the consequences of dispositions on individuals and the community, as well as on the offender.

In indigenous societies, it may be ethically wrong to say hostile, critical, implicitly angry things about someone in his or her presence, precisely what our adversarial trial rules require, and indigenous individuals who, in fact, have committed the achievements with which they are charged are often reluctant or unable to plead not guilty because that plea is, to them, a denial of the truth and contrary to a basic tenet of their culture.

A final example is the implicit expectation on the part of lawyers, judges and juries that people standing accused before them should show remorse and a desire for rehabilitation. However, indigenous cultural imperatives demand that they accept, without emotion, what comes to them, they might react contrary to the expectations of people involved in the justice system. He or she simply may wait passively, with head respectfully bowed, to receive the judgment of the court. This attitude has been carried over into Aboriginal behavior within the justice system.

Judges and juries can hardly be impartial when they misinterpret the words, demeanor and body language of individuals. Witnesses who refuse to testify, and people accused of crimes who refuse to plead and who show no emotion, are judged differently from those who react in ways expected by the system. Their culturally induced responses are misunderstood, sometimes as contempt, and may result in an unfair or inappropriate hearing and in inappropriate sentencing. To require people to act in ways contrary to their most basic beliefs and their ingrained rules of behavior not only is a misdemeanor of their rights – it is a deeply discriminatory act.

3. Crimes (Thalia, 2013) – there are 3 crimes that are often unknown in western laws, such as the crime of adultery, idleness (inactivity) and witchcraft. Today, adultery remains a behavior punished in most of the Muslim countries and in other area of Latin America, such as Mexico, for example:

- In cases of domestic violence, the aggressive attitude of a husband towards his wife affects the physical and psychological integrity of the victim, as well as the peace of the community, etc., which may prompt the authority to warn the subject on several occasions to respect their wife and the community itself and not cause such a scandal.
- If a *comunero* – member of the community – does not agree to the fines of the authority, they may have to stay in the longhouse with their spouse to discuss the circumstances and may reach an agreement, and in the case that this measure does not solve the problem, the authority can punish the offender, and within the list of sanctions available to communities, usually choose the one that best corresponds to the nature of the fact perpetrated and the personality of the offender.
- The defendant must agree to the penalty, and sometimes they may request that the penalty be complied with, under certain conditions, which are generally accepted by the community when reasonable.

This mediation is not unknown in Western criminal law, as the Anglo-Saxon institution of diversion empowers the judge to impose a sentence on the accused when he acknowledges the facts and after a negotiation between the prosecution and the defense. It continues to be said that the offender will be at peace with themselves and their native society, and for this reason the penalties that involve the

separation of the offender from their natural environment are rejected. As for the principle of humanity of sorrows, and the concept of humanity, we would find different valuations in one and another culture.

Effective dispute resolution and conflict management services assist Indigenous people to achieve a range of economic, cultural, social goals and improved access to justice. Nevertheless, traditional Indigenous practices have been weakened over time and mainstream services are undervalued by, and often ineffective with, Indigenous people.

Indigenous people at the local level need to be involved in the design and delivery of dispute resolution and conflict management services directed to them, and services need to take into account Indigenous perspectives on disputes and their resolution.

Customary and western practices overlap and, although customary processes can be supported in some instances, new Indigenous-specific services and practices may be required to address contemporary problems. Mainstream agencies also need to address the barriers faced by Indigenous people in using their services.

One of the questions that have pondered my mind during this research concerns the ability or inability of the facilitation process to enforce their agreements without the use of law. If two parties agree to facilitate their dispute instead of using the process of adjudication, and if they come to an agreed upon settlement, who will enforce it if there is no legal document? Unfortunately, the days are gone where “men of honor” would settle their disputes with a handshake or in front of a witness. So if the ground on which the concept of law has grown up is accountability, who will hold these two parties accountable?

The second question is related to the legal system: will it make more room for alternative styles of conflict resolution? Will lawyers and judges embrace the validity of alternative dispute resolution with the same lukewarm attitude that nurses and doctors had for alternative medicine years ago? Is it inevitable that facilitation and its varied approaches to managing conflict have impacted the legal system so much that there is no turning back? What about the development of public laws and issues of morality? Can facilitation handle the complexity of law making? These questions are still unanswered in my mind. However, having been through several seminars, studies, and *in loco* cases, like in Colombia with the Wayuu indigenous people, I am looking for something better than just the legal system. Regarding the differences between European and indigenous system of law, I would like to share this doubt: would we be able to understand the world of some civilizations, from their cultural conception, and accept Sanctions that seem inhuman, but which are actually less severe than the custodial penalties?

The concept of law is bigger than the source it derives from or the processes used to administrate it – adjudication and facilitation, that are two equally valid expression of law that attempt to provide processes for dealing with the management of conflict. Understanding that the “law” has deep roots in the pursuit of justice, peace and truth, and given that the varied approaches to conflict management contain the same values and principles, it is hereby offered that law is the makeshift material out of which alternative dispute resolution is the product. If this is true, then the law functions as the banks on the river of conflict management.

Conclusion

Law has a special meaning to indigenous people; it means rules that they must live by and it reflects their traditional culture and values, which includes relationships among human beings as well as the correct relationship with other orders: plants, animals and the physical world; laws are taught through “legends” and other oral traditions.

Broadly speaking, indigenous people share many values with other peoples around the world. Indigenous cultures and the values they represent have not disappeared; instead, they have adapted to new times and new situations, they remain vibrant and dynamic today.

The rules of behavior and the cultural imperatives of indigenous society continue to determine how an indigenous person views the surrounding world, and they influence that person's actions and reactions with other individuals and with society as a whole.

These laws respect the cultural imperatives that restrict interference and encourage restraint. Their primary purpose is to discourage disruption and to restore harmony when it occurs. They developed in other times and for other circumstances, but they remain powerful and relevant in Aboriginal society today.

We cannot continue to ignore the cultures of indigenous people and the laws, customs and values they generate and keep denying their very existence.

If the justice system is to earn the respect of indigenous people, it must first recognize and respect their cultures, their values and their laws.

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European mediation and indigenous mediation

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S u m m a r y

When parties involved in a serious conflict want to avoid a court battle, there are types of mediation can be an effective alternative. In mediation, a trained mediator tries to help the parties find common ground using principles of collaborative, mutual-gains negotiation. We tend to think mediation processes are all alike, but in fact, mediators follow different approaches depending on the type of conflict they are dealing with.

The problem with this alternative approach is that there are numerous cultures and communities in other parts of world where litigation is not the norm and is actually the alternative. The norms for these people are their own community dispute resolution procedures. Hence, the word “alternative” in Alternative Dispute Resolution seems to be a misnaming as applied to some cultures, be they situated in the developed or still developing world.

The older forms of dispute resolution, particularly those practiced by the Indigenous or Indigenous peoples around the world, challenge the novelty of present-day Alternative Dispute Resolution. Under the umbrella of “Indigenous Dispute Resolution processes” are intuitive, time-tested and pre-colonial forms and systems of dealing with community problems by coming up with a consensual, communal solution.

Europos ir čiabuvių mediacijos procedūros

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S a n t r a u k a

Kai rimtame konflikte dalyvaujančios šalys nori išvengti teismo kovos, tarpininkavimas gali būti veiksminga alternatyva. Tarpininkaujant apmokytas tarpininkas bando padėti šalims rasti bendrą pagrindą, naudodamasis bendradarbiavimo, abipusio pelno derybų principais. Mes linkę manyti, kad visi tarpininkavimo procesai yra vienodi, tačiau iš tikrųjų tarpininkai vadovaujasi skirtingais požiūriais, atsižvelgdami į konflikto tipą.

Šio alternatyvaus požiūrio problema yra ta, kad kitose pasaulio vietose yra daugybė kultūrų ir bendruomenių, kur bylinėjimasis nėra norma, o iš tikrųjų yra alternatyva. Šiems žmonėms normos yra jų pačių bendruomenės ginčų sprendimo tvarka. Taigi žodis „alternatyvus“ alternatyviame ginčų sprendime atrodo klaidingai apibūdinamas kai kuriose kultūrose, nesvarbu, ar jos yra išsivysčiusiame, ar vis dar besivystančiame pasaulyje.

Senesnės ginčų sprendimo formos, ypač tos, kurias praktikuoja vietiniai ar čiabuvių tautos visame pasaulyje, užginčija šių dienų alternatyvaus ginčų sprendimo naujoves. „Vietos ginčų sprendimo procesai“ yra intuityvios, laiko patikrintos ir ikikolonijinės formos ir sistemos, kaip spręsti bendruomenių problemas, pateikiant bendrą sutarimą.

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