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CYBERJUSTICE: THE MEDIATOR'S CONCILIATORY ACTIVITY BETWEEN TECHNIQUE AND TECHNOLOGY[1187] [1188]

CYBERJUSTICIA: LA ACTIVIDAD CONCILIADORA DEL MEDIADOR ENTRE TÉCNICA Y TECNOLOGÍA

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What can be controlled is never quite real; what is real can never be strictly controlled [V. Nabokov]

ABSTRACT: The objective of this research is to highlight that the subjective role of the legal practitioner, both mediator and judge - within the pre-litigation phase, as well as the litigation phase - appears indispensable in its technical and technological training to arrive at the use of Cyberjustice, understood as a conscious innovation of method.

KEYWORDS: predictivity, technique and technology, mediation, cyberjustice method.

RESUMÉN: El objetivo de esta investigación es destacar que el papel subjetivo del jurista, tanto mediador como juez - dentro de la fase precontenciosa, así como de la fase contenciosa - parece indispensable en su formación técnica y tecnológica para llegar al uso de la Ciberjusticia, entendida como una innovación consciente del método.

PALABRAS CLAVE: predictividad, técnica y tecnología, mediación, método de ciberjusticia.

INTRODUCTION

The object is the restoration of a just balance within a sensitive and complex area such as the applied legal area appears to be. Known are the ills of justice. The main one, to summarize, is inefficiency. What meaning should be attributed to the term inefficiency? The classic dictionary of the Italian language, Devoto Oli, by inefficiency means an absolute lack of performance. This

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content definition seems to bring the issue back to the criticalities of a system relative to a technically subjective profile, while the usual approach induces a kind of objectification of the problem made up of delays, lack of resources, and the need for reforms.

If nothing has been done to date, or rather nothing appears to have been at least sufficient, then it is clear that the problem must be approached from another and different angle.

Upon close analysis what seems to have escaped the attention of scholars is precisely the procedural stalemate dependent, substantially and for the most part, on the "typical" operator. And in this approach the discourse of inefficiency comes back perfectly fitting, especially when one considers that today the judge, in Italy, is paid regardless of his results in terms of productivity and productive quality and his career proceeds automatically, regardless of performance; no external control of the self-managed category accompanied by the absence of a configuration of direct civil liability. Incontrovertible, however, is the evidence about inefficiency which, it bears repeating, appears to be a subjective and not a systemic concept.

The institution of mediation itself is proof of this; the public insufficiency is being met with a private sufficiency; in other words, studies, beyond the expedients, albeit agreeable, regarding the need for streamlined paradigms of a procedural or para-trial type, are evolving toward concentrations about the need for a breakthrough in a new conception of the figure of the operator: the mediator.

2. A REVIEW OF MEDIATION

Mediation entered as a conflict resolution system in Italy in 2010[1189] .

A type of sensibility that is certainly not new: from the cult of the deity Viriplaca -to calm the violence of the man who was blamed for the conflict- to the first extrajudicial system in Rome through the so-called ius respondendi that provided for the introduction of the case only after demonstrating compliance with the dictates of Mos maiorum whose principles were guarded by Pontiff Maximus[1190] .

A balance sheet to date?

Procedures initiated in 2021 were almost 13% more than those in the last pre-emergency year, 2019 (and 32% more than those in 2020). A trend that seems to be confirmed in the first quarter of this year as well: procedures started from January 1 to March 31 were 11 percent more than those in 2019 (a 5 percent drop from 2021). This is the snapshot of mediation that emerges from the monitoring curated by the Ministry of Justice. It must be said that the increase in mediations in 2021 (which came to 166,511, compared to 125,754 in 2020) is largely due to the resumption of judicial activity after the halt and subsequent slowdown suffered

[1189] LEGISLATIVE DECREE No. 28 of March 4, 2010.

[1190] Dalla, Lambertini, Institutions of Roman Law, Turin, Giappichelli Editore, 2006, passim

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during the pandemic. The numbers are, in fact, driven by proceedings initiated in matters for which the law prescribes mediation attempt as mandatory before going to court.

In 2021, according to the Ministry's survey, agreement was found in 27.3 percent of cases in which the adherent appeared. The chance of understanding increases if the parties agree to sit down at the first meeting[1191] .

And with the Cartabia Reform (L. 206/2021), in Italy, there is still growing expectation on the realization of litigation settlement goals grace to conciliatory tools[1192] .

The civil reform, in fact, tends to enhance mediation by acting on several fronts: from entering more litigation matters in which the mediation attempt is mandatory (including partnership, consortium, franchise, work, subcontracting, subcontracting network and partnership contracts) to encouraging the personal participation of the parties.

3. CYBERJUSTICE: NEW TOOLS FOR THE MEDIATOR AS WELL? BETWEEN JUST DECISION AND REASONABLY ORIENTED DECISION

Mediation should also be placed in the proper perspective of cyberjustice.

But what do we mean by cyberjustice? (Magistrate console; algorithms; GTP chat; software; databases external-internal to offices; electronic file; telematic hearing; electronic notification; digital writing; hyperlink [1193] ; lawyers console technology and information technology legal)[1194].

Cyberjustice is a non-modern locution. It, in fact, goes back a long way, specifically to Plato; cybernetics from the Greek κυβερνήτης (art of the pilot [1195]) is the art of holding the rudder; for Devoto Oli [1196] it is the branch of science that aims at the study and realization of devices and machines capable of simulating the functions of the human brain, a locution, in truth, not foreign to the legal area where so many times we have heard talk of the machine of justice, in a sort of relationship, actualizing the concept and the well-known expression, between pilot and machine; between legal operator, whether he be judge or mediator (not excluding the role of the

[1191] The 24-hour Sun of June 15, 2022
[1192] Rivello, The new mediation after the Cartabia reform, in Collana Processo e Procedimenti, Ospedaletto-Pisa, Pacini Giuridica, 2023, p. 51.
[1193] D.M. 110/2023, Italy
[1194] Cyberjustice Laboratory. (2019). A tale of cyberjustice: A modern approach to technology in the canadian justice system. Montreal: Quadriscan. Disponible en: https://www.cyberjustice. ca/publications/a-tale-of-cyberjustice-a-modern-approach-totechnology-in-the-canadian-justice-system/; P. Langlos, R. Titah, Utilisation et impact des outils d'intelligence artificielle dans des contextes de cyberjustice, in HEC MONTRÉAL (École affiliée à l'Université de Montréal, 2020, p. 65 e ss.
[1195] Wiener, La cibernetica. Controllo e comunicazione nell'animale e nella macchina [1948], trad. di G. Barosso, Il Saggiatore, Milano 1968, passim; .Duso, The political significance of the Helmsman image and the modern Trennung in Geschichtstheorie am Werk, 06/06/2023.
[1196] Devoto Oli Dictionary of the Italian Language, year 2023.

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lawyer) and the complex, as much as delicate, organization of justice.

In this brief consideration, cyberjustice is fundamentally method; in fact, understanding the substance and proper function of extensive technical instrumentation -also exposed as artificial intelligence- within no longer physical classrooms in rather repulsive buildings, but within virtual classrooms on visible or non-visible platforms, or in an ideal space where synthetic defensive writings are received to be examined in the dark by the operator, means above all to create and enjoy a new method.

And then the technological method fits into the litigation sphere as well as into the (perhaps) improperly called pre-litigation sphere especially when mediation takes place after the judgment has been set in motion, not disregarding the issue of the value of predictability even within the mediation meeting, perhaps with the help of databases that we make the parties prospect what might be the future decision-perhaps right-but not always reasonable.

Within the mediation meeting what is relevant is not the wrong or the right of one of the parties-the protagonists of the chess game they intend to bring (perhaps) to the venues of the judicial offices-rather than the search for a reasonable solution that can satisfy the mutual reasons and interests and then also the mediator can or should make use of technological tools (e.g., mediation databases) to better argue and to better persuade the parties to define the conflict before it becomes toxic, not without considering that, above all, mediation is a sartorial response to the case and standardizations are exceptions and not the rule.

In order to arrive at the best solution, the mediator can and must make use of the conscious technological innovations, on the one hand, but must be accompanied, on the other, by a concrete technical preparation to proceed in the mediation process; yes, a technique in order to the modus of approaching the parties present, the type of narrative to be decided, the type of decisive approach by reason of the parties in front of him, the way in which to formulate the proposal in the perspective of an effective and substantial balancing of interests and individual rooted convictions. All this is not without a decision-making rationale that is not technical-legal, but technical-concrete in order to induce the parties to an inevitable acceptance about the out-of-court settlement of the pathology.

4. THE VALUE OF PREDICTABILITY AS SUPPORT TOWARD THE SOLVING FINDING

The mediator's approach to the conciliation technique does not appear to be dissimilar to that which the judge must hold within the case of Article 185 bis of the Italian Code of Civil Procedure.

Within this technical operation, one cannot disregard the consideration, obviously ostensible to the parties, of the value of predictability that serves to prevent the advancement of the toxicity of the dispute, if not even to stop it; so

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much so that it appears to be absolutely useful-in any proceeding for the restructuring of injured relationships-the very prospect of the probable solution even if it might not always be the best one, which, instead, it is up to the mediator to suggest in his central and decisive role.

The issue, therefore, shifts to training oriented toward a timely definition of the conflict through the exercise of conciliatory activity "technical and technological," that is, with methods and supports related to digital innovation of systems, which must always be combined with awareness and transparency[1197].

In this new methodological context, the use of databases is also grafted in order to be able to sift through the different solutions or the uniqueness of the solution, but what matters most is the ability derived from the mediator's training (third party) not to be super partes, but inter partes and to contribute to the resolution through the technique of language, argumentation, explanation, but above all through the technique of listening: being able to grasp the contemporary needs of the disputants means putting a brake on the pathology and linking the moods.

For all this, the projection of similar cases could also be very incisive, and, in this perspective, the use of digital media would serve to provide sensible utility as is the case with solution predictivity databases.

In any case, essential moments should not be underestimated: in primis, technique of listening to the parties, in all the ways deemed indispensable by the judge; in secundis, technique of communication, broad and concrete and prospect of possible alternatives for the solution of the case; in tertis the proposal of the argued solution with the method of evidence of mutual benefits for the parties. Within the phases -as articulated- other dynamic elements will be developed, from time to time, due to the specific case, as a kind of expertise of coadjutancy to induce the parties to a transparent and reasoned assessment in focusing on their respective positions and their real needs; the mediator can (and must) accompany the parties toward a greater understanding of the conciliatory dynamics; can (and must) adduce arguments that can be "felt" by the parties as being closer to them, expressing themselves in terms of saving time, money, and even economic resources. The same emotional capital, brought by the parties when they appear in person at the hearing before the judge, represents a surprising conciliatory "pick".

CONCLUSION

The path to conciliation should consist of a cost-benefit analysis of the process, from which positive and immediate effects can be disclosed. In this direction is expressed the function of the mediator, who, before proposing to

[1197] Brambilla, The awareness of technique and informality in mediation, Florence, 2023, passim.

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the parties the conciliatory experiment from the point of view of content, will have to be technically prepared towards a prior analysis of the quaestio because of the nature of the case, the availability of the rights involved and the depth of the preliminary findings acquired: a sort of ; "evaluative mediator," and not mere "facilitator of infecund meetings."

Fundamental is the use of the language used for proper communication: the technique of clear, concise, essential, but kind, welcoming and polite vocabulary fosters all kinds of dialogue.

Fundamental is the technique of listening; fundamental is the conciliatory argument; fundamental is finding a meeting point that is worthwhile to balance the needs and, therefore, the satisfaction of the parties.

The concept of satisfaction must penetrate the world of law toward a more effective attitude of problem solving.

To all this we open ourselves toward cyberjustice in the sense that as with the judge (public authority), a change in method must be welcomed for the mediator (private authority) as well, involving the intelligent and humane use of artificial intelligence aids that can help to make people understand the accuracy of the conciliatory proposal through a predictabiliy mechanism as well.

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