MEDIATION ON TRIAL: INCONGRUENCIES WITHIN A TRADITIONAL LEGAL PARADIGM

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ABSTRACT

This paper seeks to demonstrate that the insertion of mediation into a traditional system of justice produces incongruencies that could be resolved by modifying the framework of the justice system itself. Over the last thirty years, the legal literature has tried to assimilate mediation into the justice system by transforming the *alternative* method of mediation into an *adequate* method, in line with mainstream judicial values. However, there is evidence to suggest that mediation is a conflict resolution practice that presents itself as an anomaly (as argued in Kuhn's theory of paradigm shift) in the legal model of modernity. The underlying principle of participation and the features of the mediation process are at odds with the principle of authoritative decision-making and the formal process on which the traditional judicial system is based. An efficient strategy of legal harmonization requires a change in the general theory of justice as a process that makes rights effective and recognizes the citizens' interests.

The Italian experience demonstrates that mediation is not simply a new tool within the justice toolbox, but rather a constructive process that builds a different social meaning of justice. In 2010, Italian legislators introduced mediation as an alternative form of dispute resolution in civil and commercial matters in order to reduce the burden on the Courts. This reform has not been successful so far because Italian lawmakers have introduced mediation into the civil justice system without reforming the existing judicial framework.

As argued by Kuhn, a new theory is seldom, or never, a mere addition to a known one; its assimilation requires a reconstruction of the existing theory. In this case, the integration of mediation into the justice system requires a revision of the principles upon which the latter is founded.

1. Introduction

Over the last thirty years, mediation has been interpreted in different ways depending on its degree of integration into the legal systems in various countries. In Italy, it was initially labeled a new phenomenon and described as "revolutionary" compared with the judicial process because of its underpinning values.[1] It was later viewed as a valuable tool for the resolution of family and social conflicts, which could develop parallel to the judicial system without interacting with it.[2] In 2010, civil and commercial mediation was regulated by law, fully integrated within the legal system and made wholly compatible with the values and principles it stands for.[3] My brief analysis intends to take into consideration some inconsistencies that result from the adjustment of the legal system to mediation. My theory is that, in spite of the process of assimilation facilitated by Italian jurisprudence and lawmakers, mediation encompasses principles that are not consistent with those of the traditional system where judgment holds prime importance. This inconsistency is the main reason why the insertion of mediation into the Italian civil justice system has, so far, produced such poor results, given that it has neither reduced the burden on the Courts, nor has it met the citizens' expectations of justice.

2. Mediation: an anomaly in the legal paradigm

Mediation can be defined as "a process in which the parties and their lawyers meet with a neutral mediator whose role it is to assist them in finding a solution to the dispute. A mediator improves communication between the parties, helps each manifest its interests more clearly and

1. S. Castelli, *La Mediazione. Teorie e tecniche* (Milano: Raffaello Cortina, 1996) at 32.
2. See observations by D. Scatolero, "Prefazione" in L. Luison, ed., *La mediazione come strumento di intervento sociale* (Milano: FrancoAngeli, 2006).
3. See P. Luiso, "La conciliazione nel quadro della tutela dei diritti" (2005) 58:4 *Rivista Trimestrale di Diritto e Procedura civile* 1201-1220; A. Buonfrate and A. Leogrande, "La giustizia alternativa in Italia tra ADR e conciliazione" (1999) *Rivista dell'arbitrato* 375-388; L.P. Comoglio, "Mezzi alternativi di tutela e garanzie costituzionali" (2000) 4 *Rivista di diritto processuale* 318-371; S. Chiarloni, "La conciliazione stragiudiziale come mezzo alternativo per la risoluzione delle dispute" (1996) 4 *Rivista di diritto processuale* 694-702.

understand the other's; assesses the weak and strong points of both legal positions; identifies possible meeting points and helps formulate a hypothetical solution both parties can agree on".[4]

Mediation is a conflict resolution tool that falls under the umbrella of alternative dispute resolution methods. The expression was coined by Frank Sander, a Harvard law professor, who discussed his theory during the famous 1976 "Pound Conference" on "The Causes of Popular Dissatisfaction with the Administration of Justice".[5] Considering that each dispute is different and that, therefore, resolution methods must be adaptable, Sander suggested that alternatives to traditional trials, such as mediation and arbitration, could be used to lift part of the burden from the Courts' shoulders.[6] The expression "alternative dispute resolutions" (and its acronym, ADR) was universally accepted and even officially adopted by the European Union in its *Green Book* in 2002.[7]

For over thirty years, practically since Frank Sander first used the term, legal scholars have been working on the "alternative" concept so that it will not be seen as an alternative to the judicial system that rejects its principles, but rather as an "appropriate"[8] method equipped to handle

4. O. Chase, *Gestire I conflitti* (Roma-Bari: Laterza, 2005) at 116. (*Law, Culture and Ritual. Disputing Systems in Cross-cultural Context*, New York-London: New York University Press, 2005.)
5. See A.L. Levin and R. Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future*, *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (St. Paul, Minnesota: West Publishing Co., 1979).
6. "A second way of reducing the judicial caseload is to explore alternative ways of resolving disputes outside the Courts, and it is to this topic that I wish to devote my primary attention": F.E. Sander, "Varieties of Dispute Processing" in A.L. Levin and R.R. Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future*, *supra* note 5, 65-87 (p. 66). For adequacy of resolution methods for disputes, see L. Fuller, "Mediation: Its Forms and Functions" (1971) 44 *Southern California Law Review* 305-339; L. Fuller and Kenneth I. Winston, "The Forms and Limits of Adjudication" (Dec., 1978) 92:2 *Harvard Law Review* 353-409.
7. In the "Green paper on alternative dispute resolution in civil and commercial law" presented by Commission of European Community, published on April 19, 2002, the Commission states: "Alternative dispute resolution methods, in accordance with this green book, will include non-judicial conflict resolution procedures mediated by a neutral third party. Alternative conflict resolution methods shall hereafter be referred to with the universally recognized acronym ADR, "Alternative Dispute Resolution"; COM (2002) Def., in <http://europa.eu.int/eur-lex/it/com/gpr/2002/com2002_0196it01>.
8. C. Menkel-Meadow, "Mediation, Arbitration, and Alternative Dispute Resolution (ADR)" in N.J. Smelser and P.B. Baltes, eds., *International Encyclopedia of the Social § Behavioral Sciences* (Oxford: Elsevier Science Ltd., 2001) at 9507-9512. "The term 'appropriate' dispute resolution is used to express the idea that different kinds of disputes may require different kinds of processes" (p. 9507). Also see P. Adler: "In the narrowest

certain types of dispute which can be integrated with other legal tools, thus forming a complex and harmonious[9] conflict management system. Italian lawmakers have aligned their actions with this integration idea by including mediation in procedural law.[10] The same can be said for France, traditionally very similar to Italy as regards its legal order, which introduced civil mediation in 1995, two years after having regulated mediation in the criminal sphere.[11]

Mediation in Italy continuously met with considerable resistance from jurists and lawmakers, at least until the 2008/52/CE European Directive, which introduced the use of mediation in cross-border disputes and encouraged its application to internal ones as well.[12] This criticism has often been discounted and interpreted as an attempt by

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sense, ADR can be viewed as a toolbox of dispute-resolution methods that complements rather than acts as any real alternative to America's litigation and adjudication systems.": "The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement" in S. Engle Merry and N. Milner, eds., *The Possibility of Popular Justice. A Case Study of Community Mediation in the United States* (USA: The University of Michigan Press, 1993) at 68.

9. See L. Nader, according to whom there is a specific set of beliefs termed "ideology of harmony" which has a cultural control function and limits the debate on the judicial system and its limitations, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1993) 9:1 *Ohio St. J. on Disp. Resol.* 1.
10. Legislative Decree 3/4/2010 n. 28. For commentary, see F. Cuomo Ulloa, *La mediazione nel processo civile riformato* (Bologna: Zanichelli, 2011).
11. *Loi nº 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative*, *Décret nº 96-652 du 22 juillet 1996 "relatif à la conciliation et à la médiation judiciaires* which included mediation in the *Code de procèdure civile*, from sec. 131-1 to 131-15. See L. Cadiet, "La Francia tra tradizione e modernità" in V. Varano (a cura di), *L'altra giustizia: i metodi alternativi di soluzione delle controversie nel diritto comparato* (Milano: Giuffré, 2007); C. Jarrosson, "Les modes alternatifs de règlement des conflits : présentation générale" (1997) 49:2 *Revue Internationale de Droit Comparé* 325-345. "Le mot *Alternatif* n'est utilisé en français que par suite d'une traduction littérale, mais son emploi en l'occurrence n'est pas vraiment correct" (328). See also with regard to penal mediation in France, J. Faget, *La médiation* (Ramonville Saint Ange: Éditions Erès, 1997).
12. *Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*. See C. Vaccà, "La Direttiva sulla conciliazione: tanto rumore per nulla" (2008) 3 *Consumatori, Diritti e mercato* 117-128; P. Biavati, "Conciliazione strutturata e politiche della giustizia" (2005) 2 *Rivista trimestrale di diritto e procedura civile* 785-800; M.F. Ghirga, "Conciliazione mediazione alla luce della proposta di Direttiva europea" (2006) 2 *Rivista di diritto processuale* 463-498; P. Cecchi Dimeglio, "La Directive 2008/52/CE : Pourquoi ? Comment améliorer son champ d'application ? Le droit collaboratif, une des solutions possibles ? (2011) 1:2 *Journal of Arbitration and Mediation* 53-75.

lawyers to maintain a professional monopoly.[13] However, a deeper analysis of jurists' resistance to mediation reveals that dispute resolution models are often rejected on the grounds that they cannot be fully or seamlessly adapted to the legal system. What is being rejected is precisely the alternative nature of mediation as an expression of profound changes that are taking place in the justice administration system and within judicial roles themselves.

In fact, the term "alternative", used by Sander to describe mediation,[14] was deeply ambiguous considering the various political and cultural contexts within which the phenomenon of informal justice[15] evolved in the United States. At least two major forces behind the birth of extra-judicial conflict resolution practices can be identified.[16] First, there was a radically novel cultural push outside of the legal and political order towards experimentation with new forms of justice and reliance upon non-authoritative, consensual forms of conflict resolution and recognition of individual demands.[17] The second force, stemming from within major institutions such as Courts and legislative and academic bodies, was concerned with the judicial system's efficiency and its degree of adequacy with respect to new social and economic demands, as well as the need to streamline and reform the judicial system. While the first force aimed to modify the management of conflict at the social level, by rejecting its traditional values and mechanisms, the second wished to amend the system but preserve and re-affirm its core structure and dominant legal values.[18]

Similarly, to this day, an observation of the analyses and comments that accompanied the introduction of mediation into the Italian legal

13. See F. Sitzia, "Alcune riflessioni problematiche sul d.lgs 4 marzo 2010 n. 28 e ordini professionali" (2010) 1 *Quaderni di conciliazione* 111-127; G. Scarselli, "La nuova mediazione e conciliazione: le cose che non vanno" (2010) V *Foro italiano* 146- 151.
14. The "Multidoor Courthouse" system presented by Sander entailed use of various extra-judicial tools for conflict resolution. "Varieties of Dispute Processing", *supra* note 6 at 83ff.
15. R. Abel, ed., *The Politics of Informal Justice*, vol. I, *The American Experience* (New York: Academic Press, 1982).
16. C. Menkel-Meadow, "Roots and Inspiration. A Brief History of the Foundations of Dispute Resolution" in M.L. Moffitt and R. Bordone, eds., *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005) at 17.
17. P.S. Adler, "The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement", *supra* note 8 at 67; J.S. Auerbach, *Justice Without Law* (New York-Oxford: Oxford University Press, 1983).
18. S. Roberts and M. Palmer, *Dispute Processes, ADR and the Primary Forms of Decision Making* (Cambridge: Cambridge University Press, 2005) at 66-67.

system[19] highlights its different interpretations: on one hand, it has been viewed as a flexible tool in line with the principles of autonomous negotiation; on the other, it has been painted as a conflict resolution model based on direct participation of the parties involved that clashes with the punitive, formal and bureaucratized legal system. One can see that, alongside technical, strategic and outcome-driven uses of mediation, there exists an ethical one as well, geared towards the search for new social and political equilibriums. The first is concerned with limiting the financial and temporal expenditure of the justice system by supplementing traditional tools with a range of methods that allow citizens to resolve their disputes by reaching satisfactory agreements without going to trial. This sphere is concerned with a quantitative measurement of justice as more or less accessible, more or less expensive, more or less time-consuming, and more or less satisfactory.

The second area is concerned with the very idea of justice that the practice endeavors to uphold: in this case, it is not just about bettering the judicial system by simplifying it, but actually considering new modalities of dispute resolution. In this case, the spotlight is on qualitative aspects with regard to consensual conflict resolution, allowing parties to find a solution autonomously without subjecting themselves to a judge's decision.[20]

As stated by Taruffo, "[...] it seems clear that the alternative between ADR vs. the judicial process has profound and complex cultural implications that go well beyond the merely practical problem of choosing the quickest and least expensive conflict resolution tool."[21] While the relationship between conflict resolution methods and the cultural system within which they develop, mentioned by Taruffo, is not a recent anthropological discovery, it is nevertheless a rich substrate for discussion of the theory of mediation. Any conflict resolution mode is an expression of social meanings and equilibriums and, in turn, it also informs and shapes them into new ones. Chase describes the implicitly constitutive nature of conflict resolution systems: just as a trial reflects a particular value system, at the same time it shapes it, often preserving and changing the

19. G. Canale, "Luci ed ombre ad una prima lettura dello schema di decreto legislativo di attuazione della delega in materia di mediazione" in F. Auletta, G. Califano, G. Della Pietra and N. Rascio, eds., *Sull'arbitrato. Studi offerti a Giovanni Verde* (Napoli: Jovene, 2010) at 109-121; T.V. Russo "Alcuni aspetti controversi nella disciplina della mediazione per la conciliazione delle controversie civili" (2010) 15/16 *Mediares* 281-291.
20. See M. Cappelletti, ed., *Access to Justice. A World Survey* (Milano – Alphen aan der Ijn: Giuffré– Sijthoff, 1978).
21. M. Taruffo, *Sui confini* (Bologna: Il Mulino, 2002) at 31.

political order through social conflict management.[22] The presence of a jury in the American trial or its absence in the Italian one, or the questioning of an oracle among the Azande people, share the same significance: they are expressions of a cultural system that constantly re-defines its parameters through its practice. We can state that "The ways in which conflict is handled tell us something about how a given group thinks about the universe and its social order".[23]

Beneath the surperficial reason of needing to lift part of the burden on the Courts, the advent of mediation in our system heralds signs of considerable change: the State's weakening role, a re-definition of the judicial system's role through the rise of state-sanctioned private bodies dedicated to conflict resolution management, the search for a negotiated social order that operates alongside, with, and not in opposition to, an institutionally imposed one. In order to explain the complex dynamics of this shift in the legal panorama, Ost turns to Kuhn's famous theory of paradigms.[24] The paradigm acts as a framework of theories and principles, around which the scientific community forms a consensus, since it represents a valid explanatory model of reality, and allows the generation of puzzle-solutions. When the paradigm is no longer able to explain certain phenomena, called anomalies, it enters a crisis, until it is replaced by a new and more suitable model.[25] According to Ost, we are in a phase of transition from the dominant legal paradigm, represented as a hierarchical positivist model, to a new polyarchic one that co-exists with the previous model. The former, depicted as a pyramid, is centered on the State as the sole guarantor of political order and the sole source of law. The new paradigm, depicted as a network, is characterized by the emergence of a plurality of centers of power and sources of law.[26] In Friedman's words, these are characteristics of a horizontal model that signals new (and not necessarily improved) social equilibriums.[27]

3. Moving toward a new idea of law: from an imposed order to a negotiated order

The concept of mediation seems to imply that plural ideas of what is "just" are both possible and legitimate. This goes against one of the prin-

22. O. Chase, *Gestire I conflitti*, *supra* note 4 at p. 5.
23. Ivi, p. 18.
24. F. Ost and M. van de Kerchove, *De la pyramide au réseau* (Bruxelles: Publications des Facultés Universitaires Saint-Louis, 2002) at 13-15.
25. T. Kuhn, *La struttura delle rivoluzioni scientifiche* (Torino: Einaudi, 1978) at 30, 43. (*The Structure of Scientific Revolutions*, Chicago: University of Chicago Press, 1962.)
26. F. Ost and M. van de Kerchove, *De la pyramide au réseau*, *supra* note 24 at 14.
27. L.M. Friedman, *The Horizontal Society* (New Haven and London: Yale University Press, 1999).

ciples the modern legal paradigm hinges upon: universality of justice administered by a State that has unified and formalized its pre-modern forms and funneled them into a single model.[28] The idea of attributing multiple meanings – as many as can be reasonably argued for – to the term "just" falls outside of the modern political vision because it is a divisive force that conceives of many different possible orders, in contrast with the singular sovereign state's order. This acceptance of plural concepts of what is just also contrasts with the modern philosophical vision which is based on the idea that human reason can provide an objective and universal concept of justice. Universality and foundation are the two conditions modern lawmakers and philosophers refer to, when establishing moral or legal rules and norms to guarantee orderly and conflict-free co-existence. In fact, the theoretical removal of conflict is the premise of modern political theories that distinguish between a state of nature, governed by a potentially destructive conflict (as argued by Hobbes[29]) and a civil society in which order is guaranteed by the law and the sovereign.

In the contemporary era, the relationship between law and conflict appears to have been reversed: instead of resolving disputes and contributing to building social order, the law seems to be divisive and conflict-causing. As stated by Catania: "it seems clear that in the late modern era a situation of polyarchy is increasingly common". Consequently, there are conflicting and overlapping intentions and plans, a condition that goes against the order's original purpose: instead of aligning and controlling behaviors, there is the risk of increasingly unresolvable conflicts, and divisive and centrifugal conduct supported and justified by the very use of the law by individual citizens or groups.[30]

How is it possible that the law, which in principle ought to resolve conflict, has become a factor that sometimes accentuates and fuels the phenomenon of conflict?[31] An emphasis on the chosen uses of the law, which can have ambivalent effects, at times even opposite to those it was created to engender, speaks of a concept of law reduced to the merely technical level that is increasingly removed from the dimension of values. The conception of law in the postmodern era has demonstrated the illusory premises that were associated with its birth in the modern era, particularly the idea that it is possible to create a universal legal order

28. See D.Garland, *Pena e società moderna*, Milano: Il Saggiatore, 1999 at 235ff. (*Punishment and Modern Society*, Oxford: Clarendon Press, 1990.)
29. T. Hobbes, *De Cive* (Roma: Ed. Riuniti, 1988), cap. V.
30. A. Catania, "Purezza del diritto e politicità delle decisioni" in *Nuove frontiere del diritto. Dialoghi su giustizia e verità* (Bari: Dedalo, 2001) at 27. See also, in the same volume, the essay by R. Bodei, "Illimitatezza dei desideri ed erosione delle norme" at 59ff.
31. On conflict and law, see E. Resta, *Il diritto fraterno* (Roma-Bari: Laterza, 2005).

capable of governing social complexity without being subjugated by it. As argued by Bauman in his attempt to redefine the fluid conception of postmodernity, "the illusions we speak of come down to the belief that the "chaos" which characterizes the human world is but a temporary and changeable condition that will sooner or later be replaced by the orderly and systematic rule of reason. The "truth" is that "chaos" is here to stay in spite of anything we can do or know, that the modest orders and "systems" we forge in the world are fragile, ephemeral and as arbitrary and ultimately random as their alternatives."[32] Accepting disorder as a natural element of human co-existence, and reshaping the role of the law by reducing its invasiveness, for example into the family, involves redefining the concept of social order by basing it upon negotiation and consent and on real social and individual needs rather than on abstract political plans.[33] The now famous idea of "mild law", evoked by Zagrebelsky, refers to the need for various social values and models to co-exist: "The political vision it implies is not based upon relationships of exclusion and domination (as intended in Hobbes' and Schmitt's friend-enemy distinction) but rather on an inclusive logic of integration through the weaving together of values and communication procedures, which is ultimately the only possible non-catastrophic vision of politics in our time".[34]

4. The changing relationship between law and rights

We are faced with a change in the legal landscape as the solid underpinning concepts it inherited from the Enlightenment are replaced by the shifting sands of postmodernity. While some, like Ferrajoli, believe that such change is part of the natural evolution of legal positivism,[35] others argue that it connotes an overturning or break in continuity with regard to the principles modern state sovereignty is based upon. In fact, Ferrarese argues that the crisis of law, taken to mean the national legislation and jurisdiction system corresponds with a powerful affirmation of rights, specifically "people's rights, pre-political or apolitical resources that can resist majority-driven mechanisms".[36]

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32. Z. Bauman, *Le sfide dell'etica* (Milano: Feltrinelli, 1996) at 38-39. (*Postmodern Ethics*, Oxford Uk and Cambridge USA: Blackwell Publishers, 1993.)
33. See F. Vianello, *Diritto e mediazione* (Milano: FrancoAngeli, 2004) at 20ff.
34. G. Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992) at 11-12.
35. L. Ferrajoli claims that a second change in the law paradigm is taking place, fueled by a crisis in external and internal sovereignty, but "this is a paradigm shift that occurs within the legal positivism paradigm, not to weaken but to complete it": "La crisi della sovranità e il ruolo della filosofia politica" in *Nuove frontiere del diritto*, *supra* note 30 at 153; see also *ibid.*, *La sovranità nel mondo moderno: nascita e crisi dello stato nazionale* (Roma-Bari: Laterza, 1997).
36. M.R. Ferrarese, "Il linguaggio transnazionale dei diritti" (2000) *Riv. di Diritto Costituzionale* 74.

The renewed vitality of rights, which signals significant change in the legal sphere, is heralded by several conceptual phenomena. The first is concerned with the context in which the affirmation and recognition of rights is born: we have moved from a national to a transnational setting of relevance. Rights are no longer the domain of a nation-state, but rather they cross borders and create a space for global communication and debate that is sustained by the widening market.[37] We are moving away from a static, territory-bound notion, and toward one based upon the mobility of rights. The latter are seen as personal tools that can be used by the nomadic, postmodern individual anywhere he/she goes.[38]

The second shift in perspective, highlighted by Bobbio,[39] consists in emphasizing the promotional and active aspect of rights, as opposed to the more normative and punitive understanding that has thus far been prevalent. The crisis in state sovereignty has weakened the concept of authority and now drives us to re-interpret the meaning of terms like "duty", "obligation", "responsibility", and "punishment", situating them in a more consensual paradigm of political-institutional relationships.

Once they are removed from a strictly state-centered and legal positivist perspective, "rights" develop an ambiguous relationship with "law". While they require protection and recognition, their existence is not dependent on these.[40] This separation between law, as the lawmaker's rule, and rights, as individual demands independent of the former, highlights a degree of tension between two poles of the legal experience that used to exist in absolute unison until recent decades.[41] The crisis of state

37. As specified by Ferrarese "transnational is not the same as international; the latter evokes territorial thinking and borders and is in line with state-centered mentalities. The reference here is not to certainties and borders, but to reaching across borders and uncertainties. A transnational is mobile, in constant flux, designed and re-designed continuously by the individuals who inhabit it and engage in communication (social, legal, political, economic, etc.) within it.", Ivi, p. 93.
38. According to Bauman the vagrant and the tourist are valid metaphors for people living in the postmodern reality, *Le sfide dell'etica*, *supra* note 32 at 244.
39. N. Bobbio, *Dalla struttura alla funzione* (Milano: Ed. Comunità, 1977).
40. See observations by A. Pintore who criticizes "the tendency to turn rights into an *insatiable* tool that devours democracy and politics and, in the end, the very moral autonomy at their foundation", *Democrazia e diritti. Sette studi analitici* (Pisa: Edizioni ETS, 2010) at 83.
41. See F. Laporta, "La reinvención de la ley" in S. Pozzolo, ed., *La legge e i diritti* (Torino: Giappichelli, 2002), which examines two different meanings of the law: "the first, the formal "*mas cotidiano*" one seen in the formal sense as the product of lawmakers' efforts; the second, seen in the practical sense as a normative tool equipped to handle our ethical needs. Though we can point to a crisis in the legal system as understood in its first sense, if we consider the second meaning [...] no podemos aceptar que la ley, como vehículo normativo idóneo para la satisfacción de nuestras exigencias etica

sovereignty and its attributions has, in a sense, broken down the monolithic image of state law, now seen as separate from individual rights.[42] For this reason, it can be said that these latter exist "suspended between the legal and ethical dimensions".[43]

The third phenomenon that signals a change in the legal paradigm is the markedly subjective vein in which rights are increasingly understood, as they become less the domain of state legislation and more part of the individual's sphere. In fact, while the concept of "rights" is an invention of natural law theory, intended to protect the individual's freedom, these rights are also justified by the founding elements of the state, which is an instrument of political legitimization and ultimately the horizon for individual prerogatives. As the national dimension becomes less constitutive of rights, their degree of subjectivity also shifts towards greater individualization; thus, the line between rights and individual interests becomes increasingly blurred.

As rights multiply, arise from multiple sources and create a hierarchy that is still being defined,[44] their clarity and enforceability are not necessarily augmented.[45] The mobile landscape of modern rights is therefore not a clear and defined list, but rather a force of constant change and adjustment which gives rise to questions and conflicts engendered by the affirmation of plural cultures and identities.[46] The legal system, duly revised in a global perspective, is a natural outlet for this *extra-ordinem* struggle.

In fact, while the judicial system has always been a privileged meeting place for "rights" and "law", in contemporary times the inconsistent proliferation of rights has corresponded to an equally chaotic multiplication of private, public, national, super-national, judicial and extra-judicial institutions that shoulder the burden of a growing conflict.[47]

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sea incorporada a esa llamada crisis de la ley y sea ignorada y degradada como la otra" (p. 26).

42. Cfr. G. Zagrebelsky, *Il diritto mite*, *supra* note 34 at 57ff.
43. "Il linguaggio transnazionale dei diritti", *supra* note 36 at 79. On this topic, also see F. Viola, *Dalla natura ai diritti* (Roma: Laterza, 1997).
44. See Antonio Ruggeri, *'Itinerari' di una ricerca sul sistema delle fonti* (Torino: Giappichelli, 2012).
45. See C. Wellman, *The Proliferation of Rights* (Boulder, Colorado: Westview Press, 1999); also see 2008, n. 31 the *Ragion Pratica* file titled: *Il futuro dei diritti: proliferazione o minimalismo?*; ivi see G. Preterossi, *I diritti alla prova del politico* at pp. 279-289.
46. See A. Schiavello, "Diritti umani e pluralismo tra argomentazione e negoziazione" (2010) 34 *Ragion Pratica* 129-149.
47. See M.R. Ferrarese, *Le istituzioni della globalizzazione* (Bologna: Il Mulino, 2000).

Basing his argument on the premise of globalization and unification of trading markets, Taruffo comes to similar conclusions with regard to the role of the judicial system. Alongside the powerful tendency towards homogenization of culture and markets, which even affects the legal culture, there is also an unfolding process of fragmentation and territorialization that induces changes in various aspects of law.[48] The idea of a legal order that is "consolidated, consistent and hierarchically organized"[49] is replaced by one that is light and flexible, like a network of "legal connections with no official or formal center or apex".[50] Within this "de-structured" order characterized by a weakened position of legal institutions such as national parliaments, the judicial system takes on a key role fueled by the transnational nature of disputes and by the new function of the rights affirmation process.

5. The tradition trap

This is the context in which mediation was born and found its meaning. In this sense, we can view it as an invention of contemporary society, even though its informal and triadic logic is reminiscent of other alternative conflict management practices that can be found in numerous cultures.[51] It is largely agreed upon that mediation is a tool rooted in ancient traditions. Anthropologists have highlighted that a certain informal logic, which can be found amongst diverse cultures, eclipses the idea that the judicial system is the only effective tool for social conflict management. As Umbreit points out in his discussion of the principles behind humanistic mediation, there are beliefs and values shared by a broad range of cultures in which the peace-making process is viewed as a spiritual journey, wherein relationships and dialogue are more important than a quick and efficient resolution of conflict.[52] While it is possible to note substantial similarities between mediation and traditional conflict resolution systems across the world, it would be a mistake to view mediation as an expression of ancient lore or the heir of practices dating back thousands

48. See E. Pariotti, "La società civile oltre lo stato: fra globale e transnazionale" (2004, 1 June) *Ragion Pratica* 23-48.
49. M. Taruffo, *Sui confini* (Bologna: Il Mulino, 2002) at 29.
50. *Ibid*.
51. "Conciliation and mediation have a long history in many cultures; many societies across the world have developed peaceful methods to resolve disputes between individuals, families or tribal groups, making use of neutral third party entrusted with negotiating a solution that is satisfactory to all involved", as in L. Parkinson, *Separation, divorce and family mediation* (Trento: Erickson, 1995) at 94.
52. "These beliefs and values are not subject to empirical testing. They derive from a variety of sources and are shared across a range of cultures", as in M. Umbreit, *The Handbook of Victim Offender Mediation*, Jossey-Bass: San Francisco, 2001 at 4.

of years. As discussed by Faget, "A naturalistic nostalgia imbues discourse on mediation, which tends to be associated with non-institutional modes of social peace production".[53] Beyond a "vague idea of peacemaking",[54] we cannot argue that a clearly defined practice of mediation has always existed. Conflict resolution tools have the function of ensuring cohesion and survival of organized social groups and follow their evolution. For these reasons, there is nothing incidental, according to Faget, about the appearance of the alternative dispute resolutions methods in the American and European landscapes in the 1970s and 1980s. This was not a reworking of ancient forms of conciliation, but rather a novelty that took shape alongside the needs, demands and social trends marking Western history in those years.[55] We can therefore define mediation as a ripened fruit of crisis in the modern age; it is the expression of the need for changing paradigms and the search for new principles and ideas capable of effectively handling the rapidly changing contemporary society.[56] It is true that mediation is an informal tool that eschews the rigid framework of law and that this aligns it with certain pre-modern cultural environments; however, as stated by de Sousa Santos, "after nearly two centuries of formalization and state-centered trends, the new informality and spirit of citizenship must necessarily differ from the informality and spirit of citizenship of the pre-modern world".[57] In other words, the ideas upon which informal justice was based until the late 1970s are a direct consequence of the modern cultural paradigm and state-sanctioned justice. In this sense, formality and informality are born of the same concepts and framework of values which govern the modern world. For this reason, de Sousa Santos argues that, just like the oscillation of a pendulum, informality swings towards formalization and legal justice systems occasionally give rise to informal practices.[58]

53. J. Faget, "Mediazione e azione pubblica: la dinamica del fluido" (2006) 2 *Sociologia e politiche sociali* 10.
54. *Ibid*.
55. See M.A. Foddai, "Conciliazione e mediazione: modelli differenti di risoluzione dei conflitti?" (2011) 2 *Persone, famiglia successioni* 43-50.
56. See M.A. Foddai, "Mediazione e postmodernità" in M.A. Foddai and G. Cosi, eds., *Il tempo della mediazione* (Milano: Giuffré, 2003) at 91-92.
57. B. de Sousa Santos, "Stato e diritto nella transizione post-moderna. Per un nuovo senso comune giuridico" (1990) 3 *Sociologia del diritto* 5-34 (17).
58. "Informal mechanisms tend towards formalization; the legal common sense that supports them becomes professionalism through mediator training and other means; the parties, which are responsible for representing themselves, gradually turn this responsibility over to other individuals with greater experience and knowledge of the system. Through this process, among others, informal justice mimics the logic of formal justice, if not its form. In short, it is not dichotomization, but duplication", ivi, p. 21. By the same Author, also see "Law and Community: the Changing Nature of State Power in Late Capitalism" in R. Abel, ed., *The Politics of Informal Justice*, *supra* note 15.

6. Mediation and postmodernity

It is not by examining the formal or informal logic of conflict- or at least not by doing this alone- that one can identify the principles transmitted by mediation or the characteristics that make it a tool that is fully in line with the needs and demands of contemporary society. One must consider new ideas and principles in the worlds of law, ethics, politics and economics in order to understand that mediation is but an efficient and active instrument of change already underway. It has characteristics that distinguish it from both ancient and modern philosophy, placing it in a timeless dimension that can be seen as postmodern- *post* not in the temporal sense, but insofar it transcends the view of the world that was constructed in the modern age.[59] In fact, postmodernity cannot be defined in terms of time; it coexists with modernity because it is representative of a critical outlook on the modern age and its push for a universal human order mediated by the law and based upon epistemology combined with science.[60]

Mediation is not a throwback to "ancient" philosophy[61] because it does not share an essential element with the past: a monolithic ethical horizon, such as the basis for a sense of belonging to a *polis* ensured by *logos*- a rational script that governed the universe. Ancient philosophies would not have conceptualized order as existing outside a principle of authority represented by community norms, nor would they have conceived of free individual choice.[62] We can go so far as to say that they

59. See J.F. Lyotard, *La condizione postmoderna: rapporto sul sapere* (Milano: Feltrinelli, 1979).
60. The relationship between the linear understanding of time and human progress that characterized the modern age is unhinged by the concept of postmodernity. This is understood as going beyond a set of modern beliefs which have run their course. This is not about the announcement of a new beginning but an acknowledgement of the inadequacy of the founding ideas of another season of humanity, thus proclaiming their end. As Bauman specifies: "not *post* in the chronological sense, or in terms of removing or relocating modernity, nor of a beginning that must necessarily coincide with the breakdown of modernity. Rather, the term implies that the zealous efforts associated with modernity have been sidetracked, carried forth on unfounded premises, and ultimately destined to run their course sooner or later", *Challenges in ethics sfide dell'etica*, *supra* note 32 at 16.
61. The term "ancient" is not meant in a chronological sense, but rather it represents those ideas and principles that are alternative or opposite of those found in the modernity paradigm. See L. Lombardi Vallauri, *Corso di filosofia del diritto* (Padova: Cedam, 1981) at 242ff.
62. On the distinction between the concept of self in the modern age and the self in heroic society, See A. Macintyre, *Dopo la virtù* (Milano: Feltrinelli, 1988) at 148ff. (*After The Virtue*, Notre Dame – Indiana: Notre Dame University Press, 1981.)

would also not have conceived of the individual as an autonomous force that can exist outside of his/her social roles and be granted free will in choice-making. Many of the practices seen as precursors of mediation must be understood within the context of a community characterized by a shared set of beliefs, values and behaviours. Beyond this, they are also the fruit of the evolution of conditions dictated by specific historical and geographical conditions- they are born with an identity, history and context. Placing conflict in the hands of a wise person or other appointed mediating authority is not divisive with respect to the tapestry of a given community- rather than pitting factions against each other with an adversarial logic, there is a push for cooperation within a wider network of relationships whose powers go well beyond the law or alternative peace-keeping methods.

This is not the case with mediation. Its sphere is society, not a community; its operative base is pluralism of values and the presence of diverse life systems; its aim is to re-open blocked channels of communication, rebuild broken or compromised social ties. Its real challenge lies in the acceptance of diversity, difference, and the dissent and disorder they generate. Its loftiest goal, then, is not positing new values, but rather fostering communication between the diverse sets of values each one of us harbors. The idea that the values which inform our choices may be critiqued or discussed and that their hierarchies can be critically re-examined goes against the grain with respect to the concept of a universal code of ethics and a legal system that many see as authoritarian and overbearing. As noted by Castelli "the practice of mediation, along with its inalienable premise of freedom and autonomous taking on of responsibility by involved parties, as well as its total independence from current regulated practices, is quite novel for "traditional" cultures and entirely "revolutionary".[63] One might add that it is also true with respect to the founding principles of our legal system. Freedom, autonomy and responsibility are terms that take on new shades of meaning in mediation as it relates to the crisis in state sovereignty and the principle of authority which our society is experiencing. These concepts can no longer be applied (at least not exclusively) to the individual as a beneficiary of rights and safety; instead, the individual must be an active participant in the process of building a system for safeguarding and protecting those rights.[64]

63. S. Castelli, *supra* note 1 at 2.
64. As noted by P. Barcellona, in the contemporary age "Freedom itself [...] is increasingly reminiscent of the idea of power intended as the opportunity to manage one's world with the concretely powerful act of participation and self-affirmation.", *Il declino dello stato* (Bari: Ed. Dedalo, 1998) at 214.

7. The Italian way of mediation

In light of these reflections, it is fitting to give a brief account of the Italian experience of mediation.

Italian legislators, with the implementation of Law 69/2009, began a process of reform of civil justice in order to address the "perennial" crisis of the Italian system,[65] and the citizens' protestations about what they perceive as a slow, costly and unfair, wholly inadequate to social expectations. The aims of this reform involve, on the one hand, an 'internal' simplification by streamlining and reducing the duration of procedures (sec. 54), and on the other, an 'external' simplification by moving a considerable number of disputes toward the mediation process (sec. 60).[66] Its guidelines reflect a policy aimed at conserving the traditional judicial model of dispute-resolution, simplifying and improving it by the introduction of some corrective measures. Indeed, the legislator explicitly attributed to mediation the function of relieving the burden from the Courts.[67]

Consequently, in 2010, much later than other European States, mediation officially entered the Italian legal panorama; this also in response to Directive 2008/52/EU which obliged Member States to adopt mediation in cross-border disputes and encouraged them to apply it also in internal disputes. Legislative Decree 28/2010, modified in 2013, applies to disputes in civil and commercial matters and foresees four types of mediation: the first is optional and freely chosen by the parties; the second derives from a contractual clause that obliges parties to turn to mediation to settle disputes in contract implementation; the third is delegated by a judge who can request that the parties have recourse to a mediation center; the last is compulsory, and imposes mediation as a condition precedent to filing suit in disputes regarding certain matters (e.g. medical liability, inheritance). This latter has been subject to harsh criticism both from the legal community, and from mediators themselves. More in particular, while mediators have criticized the violation of the principle of voluntariness that represents the keystone of mediation, lawyers have denounced the violation of the constitutional right to legal action, caused by the increase in costs arising from this additional, compulsory phase that, in their opinion, makes access to justice more diffi-

65. V. Ferrari, "La giustizia come servizio. Centralità della giurisdizione e forme alternative di tutela" in *Studi di diritto processuale in onore di Giuseppe Tarzia*, vol. I (Milano: Giuffrè, 2005) at 47.
66. F. Cuomo Ulloa, *La mediazione nel processo civile riformato* (Bologna: Zanichelli, 2011).
67. Cfr. G. Scarselli, "Sugli errori degli ultimi venti anni nel porre rimedio alla crisi della giustizia civile" (2010) I *Il foro italiano* 50-54.

cult. Such a critical attitude, coupled with a poor knowledge of this practice, translated into a scarce confidence in the institution of mediation, as is borne out by the statistics published by the Department of Justice that clearly show, if not the failure of, at the very least, the problematic start to mediation in Italy.[68]

8. Conclusions

In Italy, lawmakers have seen mediation as a tool to lift some of the burden from the civil justice system, while failing to recognize its underlying principles and significance. An analysis of the newly introduced sphere of mediation has indeed highlighted the points of incongruence between the punitive, formal and bureaucratized characteristics of the traditional judicial process and a conflict-management model based on the autonomy of all parties, voluntariness and confidentiality.[69]

Mediation was hastily introduced into the traditional judicial system without appropriate consideration of its founding principles, and/or of the social and political implications of its integration; as such, the reform has proved to be ineffective and has failed to fulfill social expectations.

Placing mediation within a system based upon the predominance of judgment and authoritative decision-making almost inevitably led to the legal community's attempt to assimilate mediation into the traditional process by harnessing it and herding it into the familiar territory of formal process and professional representation. It is, however, important to distinguish between "centrality of jurisdiction" and "priority of jurisdiction": the former makes reference to a constitutionally necessary activity of judicial protection of rights, as indicated by articles 24 and 111 of the Italian Constitution, while the latter has to do with a "psychological" attitude that sees formal jurisdiction as the primary, if not sole, remedy for disputes.

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68. Department of Justice, *Relazione sulla performance 2011*, in <http://www.giustizia.it/giustizia/it/contentview.wp?previsiousPage=mg_14_7&contentId=ART779048>. See G. Floridia, "La giustizia come servizio pubblico essenziale" (2010) 15:1 *Riv. Crit. Dir. Priv.* 136-140.
69. G. Armone and P. Porreca, "La mediazione tra processo e conflitto" (2010) 2 Il foro Italiano 95-100; E. Fabiani and M. Leo, "Prime riflessioni sulla "mediazione finalizzata alla conciliazione delle controversie civili e commerciali" di cui al d.lgs 28/2010" in *www.judicium.it*; T.V. Russo, "Alcuni aspetti controversi nella disciplina della mediazione per la conciliazione delle controversie civili" (2010) 15/16 *Mediares* 281-291.

Luiso argues that giving jurisdiction priority is the consequence of an "old legacy" which seems to be at odds with the new legal reality based upon the principle of subsidiarity, which sees the formal process as a last resort in dispute management, to be used only when other avenues of conflict resolution have been exhausted.[70] In Italy, we have seen a political failure, due to a reluctance, to open up to new models and principles of justice designed to satisfy the needs of its citizens rather than the *status quo* of its institutions. That is the reason this attempt to respond to a crisis situation through the application of a new tool in the judicial arsenal has proven to be weak and ineffective, and has failed to lighten the burden on the Courts: without an adequate reflection on the inadequacy of the traditional judicial model and a now unavoidable paradigm shift, effective integration will continue to be elusive.

70. Cfr. F.P. Luiso, "La conciliazione nel quadro della tutela dei diritti", *supra* note 3 at 1206ff.