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Confidentiality of Mediation

Abstract

Mediation, in its institutionalized form, plays a dominant role in non-imperious and peaceful dispute resolution in most legal orders including common law and statutory law countries. The popularity of mediation comes from its uncomplicated legal structure and high effectiveness rate. This is a scientific study largely inspired outside the world of science, i.e. it comes from the understanding of the principle of confidentiality in mediation by the representatives of the doctrine, legal practice, mediators, parties to mediation, and the author's commitment to promote mediation.

With the advent of institutionalized mediation and its rise in importance during the last several years, mediation entered the legal language as a carrier of duties and powers. Broken down into its elements, mediation rests on at least three principles that determine its properties, i.e. voluntariness, impartiality of the mediator, and confidentiality. Despite fairly developed scientific reflection on alternative dispute resolution including numerous studies on mediation, the scope of research into constitutive principles of mediation seems insufficient. My initial analysis of the common language, legal language, and language of the law indicated shortcomings in understanding confidentiality of mediation on legal theoretical grounds. The notion of confidentiality of mediation is ambiguous, and its proposed semantic scope lack theoretical clarity. An amorphous image that is created can lead to erroneous interpretation of legal provisions and, by extension, make the principle of confidentiality more unclear and be conducive to establishing improper relations to the remaining constitutive principles of mediation. This preliminary analysis of the research material led to earmarking the research problem, setting the aim and defining relevant research tasks.

At the core lies an assumed reality of mediation as a social phenomenon. Mediation manifests itself through the conduct of its participants with due consideration for their mutual relations with the mediator. Adopting a different point of view, I indicate that mediation participants go through experience obligation and power-related feelings that determine their conduct throughout the process. The second determinant is adopted in line with the theories developed by Leon Petrażycki and his followers. Other determinants are more specific in nature. I assumed that confidentiality of mediation is an abstract term defined solely by its

features. I also assumed the notion in question to constitute the basis for determining relations to openness, especially in disputes whose effects influence public law.

An in-depth analysis of the research area was needed to select proper methods and tools of research. The subject matter is discussed in the light of J. Lande's *Legal Norm Analytical Theory* where the terms of obligation and entitlement (right) are used and which bond the conclusions drawn. Lande's concept, resulting from the use of these two terms, guarantees that confidentiality of mediation is described to legal entities in a lucid and understandable language. I assumed that the entities operating within the framework of the research area are only possible carriers of confidentiality of mediation. Three basic entities, i.e. international, supranational, and national, were earmarked for research, namely: the UNO as an entity that safeguards international legal order and the Council of Europe as a representative of the regional international order. The EU was selected as a particular representative of the supranational legal order while national legal orders were selected with due consideration for the relations between common and statutory law systems (statutory law systems of EU Member States of the Continental Europe with a clear-cut division into new and old EU Members). The legal orders under analysis included Poland, Czechia, Germany, Italy, the States of Texas and Washington in the US.

The time which the research material comes from is different depending on the matter analysed. Considering a normative model of mediation confidentiality, I reached to statutory law resources older than 25 years and to those relating to common law that were older than 40 years or, in some cases, even more. Nevertheless, despite different dates of origin from which mediation has been in existence as an institution, in 2020 a relative uniformity can be assumed on the normative level. In developing a relevant model and issues relating to liability for breaching confidentiality in mediation, the dates of the primary sources were not taken into account.

This study aims at a comprehensive theoretical analysis of the principle of confidentiality of mediation within the framework of its normative model and with due consideration for employing the same in the description and explanation of real mediation proceedings. This analysis also includes elaboration on the links with other types of legal proceedings, determination of obligations and entitlements of the mediator, parties thereto and other participants thereof resulting from the underlining principle of confidentiality of mediation.

The aim was accomplished when individual research tasks were successfully completed. The first one focused on the normative content of the principle of confidentiality

of mediation and its scope in the analysed legal orders. Confidentiality of mediation was defined as a combination of three elements, i.e. secrecy of mediation proceedings, secrecy of mediation, and performance of technical and organisational acts in the course of mediation (generation, processing, storage and archiving documentation). The functions of confidentiality of mediation were isolated and the powers of the parties to mediation to disclose information subject to mediation secrecy were highlighted. To properly understand the normative content of this principle, it is essential to place mediation within a legal system, to allow for internal (within the institution of mediation) and external comparative studies (in relation to other legitimate entitlements and obligations pertaining to secrets protected by law). Apparently, the list of norms governing obligations and entitlements of mediation participants regarding confidentiality is by no means universal, and it depends on the type of legal culture and legal order (national, supranational or international). Elaboration on the subject is included in the first two chapters of the study.

The development of a theoretical model of law execution for non-professional legal entities was supported by observations of daily life on a global scale, largely by electronic means and scientific debates of doctrine experts and practitioners. It is the flow of information, including legal information, speed of transfer and quality of the message, coupled with the competences of the addressee determines proper understanding of the legal content. The quality of interpretation of information included in normative texts is of particular relevance. The proposed model of executing law resulted from an analysis of selected concepts of the construction of the law with a view to possible adaptation and juxtaposed with cognitive capacities of non-professional legal entities. The way they interpret mediation confidentiality determines how mediation proceedings are organised and carried out. Non-professional legal entities follow two stages of the model, i.e. the stage of cognition and the stage of analysis proper at the end of which a legal norm associated with the confidentiality of mediation is thoroughly explained. When completed, task two offered a theoretical tool with which to describe and explain interpretation acts undertaken by mediation participants (notably the mediator and the parties involved) and ensure consistency in understanding the norms that govern the principle of mediation confidentiality. Chapters Three and Four are devoted to discussing this task.

The last research task, described in Chapter Five, refers to the application of the proposed mediation model in determining liability of mediation participants, including liability for breaching the principle of confidentiality. An entity participating in mediation is aware of liability as a result of understanding confidentiality through jurisprudence other than

normative. Liability for breaching such confidentiality is also shown in the light of private and public laws.

Work on research tasks highlighted a need to develop a wider interdisciplinary research programme on mediation that will allow the application of findings of other sciences to a multifaceted specification of mediation and its role in non-imperious conflict and dispute resolution. Hopefully, new goals will soon be set and pursued by interdisciplinary research teams.

In order to define confidentiality of mediation in scientific terms, an adequate approach and research procedures are required including praxeology whose tools and methods are employed in this study. The content and order of matters presented in this dissertation reflects the use of methods specific to jurisprudence such as conceptual analyses, used for legal sources where mediation and its principles are discussed, and comparative analyses used for sets of regulations pertaining to national mediation (branches of law) and international (comparing legal regulations of the UN, EU and selected countries) to bring out similarities and differences. Finally, model analyses that employs a decision making approach and a system analysis with a view to developing a law execution model that contains legal norms related to confidentiality.

The study conducted was also linked with the methods used in other social sciences (sociology and social psychology) that focus on empirical studies of social processes and phenomena, and employing introspective experience. "Canberra style" philosophy and psychology-based analysis was also used to go beyond the conceptual analysis that focuses on explaining the meaning of individual words.

While all assumptions and theses concerning confidentiality of mediation and the results obtained were subject to discussion with theory and philosophy of law scholars ADR and mediation practitioners, the dynamics of the contemporary world suggests possible events not included in this dissertation. Setting clear boundaries of research and using supplementary materials will minimise such a risk.