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LEGAL CHARACTERISTICS OF MEDIATION

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LEGAL CHARACTERISTICS OF MEDIATION

Ruslana HAVRYLYUK¹

Abstract

The article on the methodological positions of the anthropo-sociocultural approach, especially its components such as practical philosophy and material phenomenology, which are the most effective tools for perception of such an "invisible thing as the area of intersubjectivity", by M. Anri, deals with the analytic investigation of legal characteristics of mediation as an innovative method, alternative to justice, of solving interpersonal conflicts. It is substantiated that the legal characteristics of mediation are the product of both existential properties of a person and the existential arrangement of the human world. A general list of personality traits is supplemented by a provision on the attributive affiliation of human needs in benefits. It is proved that the unconditional exchange of benefits between people inevitably transforms the excess of human autonomy, being actualized in the communicative solidarity of people, and generates intrapersonal and interpersonal contradictions and conflicts. The conditional exchange of benefits between people, for its part, makes such conflicts total and especially dangerous for the existence of individuals.

It is proved that mediation has a double legal nature as, firstly, it is the product of the basic (need) method of coexistence of individuals in society, and secondly, it is a system of interrelated legal obligations between them, through which a reconciled social environment is formed. On this basis mediation can be defined as mutual legal self-defense of individuals.

Keywords:

Mediation; legal characteristics of mediation; excess of human autonomy; human needs in the benefits; exchange of benefits between people; legal nature of mediation.

1. Problem statement

Mediation has become one of the important common achievements of many European countries in recent decades. For instance, the European Council in 1999 invited EU Member States to actively implement mediation. In 2008, the Directive 2008/52/EC of the European Parliament and of the

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Council on certain aspects of mediation in civil and commercial matters and a series of recommendations and guidelines for it were adopted. Although Directive 2008/52/EC de jure applies to international disputes, according to point 8 of its Preamble, “nothing should prevent from applying such provisions also to internal mediation processes” [1]². It immediately gave rise to a number of ideological, theoretical and methodological problems for the wide public, questions from the applicants of rights on this occasion. One of the most urgent problems was the need to identify the legal nature of mediation in order to more clearly define both the actors, that are capable to carry out mediation as effectively as possible, and its procedures [60], [61], [62], [64].

The urgency of this problem is further aggravated by the fact that the legal nature of mediation have not been specifically studied by Ukrainian scientists, although some attempts have been made [2: 56], [3: 89], [4: 373], [5:225]. Currently, foreign scientists have not paid enough attention to this problem – they mainly analyze techniques and technologies of mediation [6], [7], [8], [9], [10],[11], [12], [13].

The **purpose of the article** is to justify the most fundamental – immanent for human legal determinants of mediation. It is specified in the following *tasks*: to reconsider from this point of view the basic existential qualities of human being and their functional roles in human existence, to reveal the difference between the spontaneous (unconditional) and conditional exchange of benefits among people and to show how the latter leads to the need for mediation. The subject, purpose, and tasks of the study determined the methodology of the article, that is, the *practical philosophy* and *material phenomenology*, which are the most effective tools for the cognition of such an “invisible”, according to Michel Henry, “as an area of intersubjectivity” [14].

2. Presentation of basic material of the article

Determinants, that cause the need for mediation, are the basic properties of the human being. They also create eternal contradictions of the conditions of human existence. Even the founders of the anthroposociocultural approach to cognition, including the knowledge of the nature of the human and the human world as a whole, ancient Greek

² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Official Journal L 136, 24/05/2008 – P. 0003–0008.

philosophers-Sophists, formulated a maxim by the mouth of one of their most prominent representatives, that is Protagoras: "Man is the measure of all things" [15: 374]. This truth is still one of the most important achievements in the field of human studies.

Since then, only certain cognitive traditions have left the theme of human and its nature, moreover – these traditions [16] have not made proper contribution to the knowledge of them. In general, the achievements of academic human studies are extremely convincing and they are dynamically multiplied. However, the most important results since the time of the Sophists in the knowledge of this problem reached the representatives of practical philosophy. It constitutes the ideological and methodological core of the anthroposociocultural approach to cognition. The main purpose of practical philosophy, according to its own self-identification, is to seek answers to the fundamental question of human studies: how is the human realm possible? [17: 104].

Co-founder of the second wave of the German practical philosophy revival Thomas Rentsch on this issue stated:

"Autonomy and communicative solidarity enable the human manner of the meaning of life; they constitute the purpose of a human, since they refer to the semantic conditions of his life" [17: 226].

The first of these conditions – autonomy – according to the vision of the practical philosophy, acts as the constituent of the meaning of human life. It is filled with sense not from the outside, not extrinsic to a particular individual subject, but it is filled by itself from the existential human factuality, asserting the person himself not as someone's project, but as a product of his own spontaneous self-development [17].

In turn, the second semantic condition of the human existence, practical philosophy sees in "the rely of human on his neighbors and their help", that is, on the Other. "I call it [relying on the Other – H.R.], – summarizes Rentsch, – a practical horizon of communicative solidarity" [17: 227]. The realization of these two attributive semantic conditions of human life, in accordance with the cognitive tradition of practical philosophy, generates human undeniable rights. However, what is the relations between the both semantic conditions of human existence [23] and what significance this has for his existence? Are these conditions sufficient for human existence?

Practical philosophy gives a positive answer to the first question by the very fact of distinguishing the statuses of the aforementioned semantic conditions of human existence – it calls autonomy a *constituent of the meaning* of his being. By their silent distinction, there also follows their verbal separation by Rentsch:

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“Autonomous life does not hover as an ideal state over the human reality, but it is precisely a perspective, in which we always live in the primary world and which reality we evaluate, – he states, and then summarizes – *The horizon of autonomy is the first decisive form of life-related excess in the reality of the human world*” [17: 226].

This excess of the autonomy of the individual in the reality of the human world, according to the concept of Rentsch, is intended to provide the function of the trigger mechanism in each individual human project. However, paradoxically, the ideal theoretical construction of Rentsch concerning the semantic conditions of human life was not viable. It is like a car without an engine. In order to revitalize this construction, there is not enough, at least, another element – *perpetuum mobile* of human life. The excess of the autonomy of the individual is not capable to emerge into it, since from the beginning it exists only potentially, as indicated by Rentsch. Additional factors are needed to put into action this very excess of the autonomy.

A number of cognitive traditions devote the role of such an engine to human needs, or, in another terminology – the needs of individuals in the benefits [18: 79,81, 99, 155], [19] [20: 30], [21: 58]. By the way, the process of satisfying the needs of the individual in the benefits transforms the excess of his autonomy by the efforts of the same individual from the potential to the real. “Give me what you need, and you will get what you need – that’s the meaning of life” [22: 77], as wrote Adam Smith. Not knowing this, he stated in this formula the quintessence of the transcendental exchange of goods between people. An individual “in this case, like many others,” – Smith summed up, – by the *invisible hand* (highlighted by me – H.R.) goes to the goal, “which was not at all in his intentions” [22: 443]. In such a case, the excess of his autonomy transforms from potential into a real and communicative solidarity acquires existential filling.

A significant contribution to the further development for this concept of realization by individuals their own potential was made in the XX century by Armen Alchian [25:21], James Buchanan [26: 210], Karl Brunner [27:372], [28: 70], [29: 784], William Meckling [30: 454], Siegwart Lindenberg [31: 102], David Barrash [32: 42], Friedrich Hayek [33: 304], and others. In particular, they shown, that attempts to explain human needs beyond the interaction of individuals ultimately prove their fundamental failure, and specially emphasized on the spontaneity of their interaction and the exchange of benefits between them.

What is the phenomenon – the spontaneous exchange of benefits among people? What is it really – the conditional or unconditional interaction of people? Obviously, considering that the term “spontaneous

exchange of benefits between people” is a category of practical philosophy, it is necessary to find out its nature and purpose from its cognitive approaches. It is – a social construct [34], that is rooted in the co-habitation of people, in which the human autonomy and its communicative solidarity without external determination are melting in a new quality – in the social person [63], and internal spontaneous connection of the personal identity with the orientation for the benefit (needs), reveals the limit level of human activity goals.

Famous German philosopher of law at the mid-twentieth century Johannes Messner called this phenomenon “an existential goals of human being” [35], and the domestic philosopher of law at the beginning of the XXI century Andrii Baumeister summarized: “By focusing on certain values, choosing a certain benefit, a person chooses himself, decides to be in a certain way” [36: 377].

Immanuel Kant in his work “Foundations of Metaphysics of Morals” explained this as follows: “Human – is a creature with his own needs, and since he belongs to the sensual world, then **he can not reject those demands that his sensuality puts to the human intelligence** (highlighted by me – H.R.), that is to worry about his (sensuality) interests and create practical maxims focused on the happiness of this, as well as possible future life” [38]. In this case, as Rafael Ferber proved, human faces the inevitability of direct or indirect “consideration of the vital needs of other people” [39: 198]

From the whole set of the most diverse human needs Otfried Höffe distinguished three of their spontaneous groups: the needs of human as a physical living being; the needs of human as being, endowed with language and the ability to think; the needs of a human as a social being capable for cooperation. His observation is accompanied by two subsequent categorical reservations: firstly, “without a proper cooperative relationship, human can not become a human”; and secondly, “there is a transcendental exchange” [40: 41] of goods.

Although human, as Höffe continued to argue, is a potentially social being “from the nature”, but he nevertheless must by himself *create him in a strict sense*, to activate hidden in himself potential social qualities, because society arises only from the mutual recognition of human by other human. In this task, as he noted, it is impossible to avoid “the stratum of innate interests [the concept of “interests” Höffe uses synonymously with the notion of “needs” – H.R.]: “before taking care of the possibility of self-affirmation, – he concluded, – one should think about the basic conditions of human existence” [40:38]. “That indignation and specific passion, which marked a protest against human rights violations, is fair because of, – as

continued Höffe, – firstly, it concerns innate interests, the recognition of which, secondly, has the character of a demand” [40:38]. “On what basis can I demand from other the recognition of my undoubted interests?” – he concludes. And then answers by himself:

«The correlation between rights and obligations is evident... Those imposes on himself human *obligation*, who accepts from others certain services, performed only if the services are in response; and vice versa, he has a human right, since he provides a service that is provided only if the service is responded. This situation exists where a certain undeniable interest can only be realized through reciprocity. Consequently, a human is limited in his choice, where the transcendental moment is linked with a certain social moment, that is, where the inborn reciprocity or intrinsic sociality take place. Where interests become such, that they can not be ceded, while they are related to reciprocity, the impossibility of relinquish passes to reciprocity: the freedom of choice here ends and exchange can not be avoided» [40: 38-39].

In this case there is an unconditional exchange of benefits between them. Even if we assume, that in all cases of such an exchange of goods between all its participants a consensus is reached on the evaluation of the results of this exchange as fair, or at least acceptable to each one, then beyond its scope remains, as follows from the above classification of human needs by Höffe, a large number of human needs, which are compelled to be satisfied in a conditional way. The great historical experience of human communities convinces that, in satisfying these needs, it is manifested to the full extent the excess of human autonomy from each individuals or their groups, that has already been activated and put into effect in the process of satisfying their spontaneous needs. According to the concept of satisfying the human needs by Smith, this excess externalizes itself in human egoism, which struggle with all one's might for self-realization.

From this point it is obvious, that in the real human world the excess of egoism is present attributively and to the same extent it is connected with the first semantic condition of human existence in the world – its autonomy. Like a rifle, hanging on the wall in the first act of theatrical performance, must shoot in one of the subsequent acts, so human autonomy as the first decisive form of excess concerned with human life in the human reality is bound to manifest itself outside, in the co-being of human with the Other. This excess makes itself very noticeable for the person and the Other at every step of their co-being, it externalizes primarily in the eternal desire of the individual to self-realization, self-assertion in his dignity, including at the expense of the same assertions and life aspirations of the Other.

It creates the insurmountable within the human nature permanent conflicts between people, which often turn into open conflict and

antagonisms between them. Numerical myths, legends, and other sources of human history are full by the evidence of the existence and inevitability of such agonal relations between individuals in society, their controversial nature. Such a conflict is genetically integrated into every human personality. This is spontaneously caused by the impossibility of being the human beyond self-correlation with the Other.

Consequently, a human remains constantly in an external conflict with the Other, and in a personal conflict with himself. From the way in which the personal conflicts will be resolved, depends primarily the personal destinies of people, and from the solution of interpersonal conflicts – the fate of entire human communities, societies and even humankind. Conflicts, that were successfully resolved, the experts in conflictology call “resultative conflicts” and evaluate them as “the force that works for You” [41]. Conflicts that are not resolved in a natural way necessarily turn into violence, which, as known, have a total spread in human societies and is one of the main factors, influencing the course of history [42].

Despite the fact that both personal and interpersonal conflicts are ultimately generated by the same phenomenon – the excess of human autonomy in relation to itself or in relation to the same autonomy of the Other – all human history convinces, that the main way of successful resolution [64] of personal conflicts is human morality, and the same means of solving interpersonal conflicts has proved to be law [43], [44: 153], [45:232]. Usually, this excess, both in the first and in the second cases, is so unnoticed at first glance, that they are mostly neglected or their danger are underestimated. Therefore, from the triumph of the excess of human autonomy to its catastrophe is just one step.

Well-known Ukrainian philosopher Viktor Malakhov explicitly described this episode from the tale of priest Anatoly Zhurakovsky about Judas Iscariot: “One day, Judas had a dream: he, along with other Christ’s pupil, flies in a dizzying height. Suddenly, somewhere far below *a tiny black spot* attracted his attention: it was a small vineyard, a family legacy of parents, which he left when followed the Teacher”. Now, “for a moment, only for a moment, supposedly the pity for this vineyard, remembrance associated with it shook his in the heart; and at the same moment a “catastrophe” happened, when his terrible fall began, that determined the further course of events” [46: 289]. Judah betrayed himself, his Teacher and his majestic mission, which he volunteered to swear with infinite loyalty, because he did not cope with the instantaneous influence of a meager abundance on him - like “a tiny black spot” – that is his human autonomy, which Christ did not deprive any of the people.

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The more catastrophic consequences can and often, as convince historical experience [23], [24], has an excess of human autonomy in the existential embodiment of human communicative solidarity as the second semantic condition of his existence. Indeed, there is already not single human autonomy, but a combination of them.

Significant factual confirmations of the validity of above assumption are included in long-term studies of social anthropology by Marcel Mauss. Particularly valuable from the standpoint of our research is his work "The Gift: The Form and Reason for Exchange in Archaic Societies". In the introduction to it, the author, in particular, notes: "This type of legal and economic relations includes a variety of rules and ideas. The most important among these spiritual mechanisms, obviously, is the one, that obliges to compensate the received gift" [47: 144]. Under the gift (present) Mauss understands the benefit received by an individual or a group of individuals in exchange for the benefit already provided to another, or for receiving a benefit from him. This institution of mutual exchange of goods, which had a total distribution in most traditional societies, entered into human history under the name of potlatch. Among scientists we can find a different classification of potlatch on the basis of different criteria. However, we should agree with Mauss that, based on the nature of the potlatch as a benefit-obligation, the most adequate is its classification according to the subject composition of donors and recipients.

Analyzing the relationship of potlatch, Mauss distinguishes four of its following forms: a potlatch in which the phratries and the families of chiefs are exclusively, or almost exclusively involved (Tlingit); a potlatch in which the phratries, clans, chiefs, and families play roughly an equal part; a potlatch by clans in which chiefs confront one another (Tsimshian); a potlatch of chiefs and brotherhoods (Kwakiutl). However, from the point of view of compliance, as he writes, "the obligation to give, the obligation to receive and reciprocate" gifts "the four forms of the potlatch are comparatively identical" [47: 202]. "In all of this, – as Mauss summarizes, – contains a set of rights and obligations to consume and compensate for the corresponding rights and duties of giving and receiving" [47: 154]. The rejection to give a gift, as well as to take it, as Mauss concludes, "is identical to the declaration of war" [47: 153]. The same prohibition to refuse the receiving of gifts and their compensation in the face of pernicious losses by those, who did so, spread in traditional societies on interpersonal and group relationships [47: 145].

No less well-known Bronislaw Malinowski, the contemporary of Mauss, came to similar conclusions, investigating the relations of exchange of benefits in other traditional societies. On this basis, he formulated the

concept of law as a system of interconnecting for individuals obligations, through which a reconciled social environment is formed. In this concept, such binding obligations of the participants in the exchange of goods in society were considered on the one hand of the legal relationship, as the legal claim of the individual to the Other, and on the other hand were recognized as the attributive obligation of the Other. However, here in both cases it was considered impossible not to reciprocate the exchange of goods under the threat of harsh sanctions [48: 58], [49: 241], in other words, under the internal and external coercion [37].

Friedrich Hayek continued the tradition of studying the behavior of individuals and their groups in satisfying their needs in the benefits, provided by them beyond the transcendental exchange. He focused his attention on the completely unexplored problem of identifying and cognition the processes of the emergence of abstract (objective under the understanding of the social construct) **rules for behavior of individuals** as an indispensable condition for the appearance and existence of viable “extended” societies, that go beyond the scope of certain *emotionally interconnected* groups of people. These rules are “law” [33: 20]. He discovered, that the activity of individuals in *emotionally interconnected groups of primitive people* was usually directed by *the common goals for all of them*, while *individuals under the conditions of extended spontaneous order* were pursuing *various individual goals*, but were forced to observe strictly the **same rules of conduct (customs)** [33: 32].

Hayek investigated, that under the appearance of an *expanded spontaneous order* and the achievement of the supremacy of one tradition and customs over other, decisive role belonged to *indirect, substantially remote* in time results of the activities of distant predecessors of any of the extended order. These results were reflected in such distant from each other in time groups, that their ancestors could not imagine, but if they were somewhat hypothetically aware of their influence, then it would have turned out to be not so positive that it really became for much later generations. This is due to the fact, that the *system of needs* of each generation of individuals and the *conditions for their satisfaction are somewhat similar, but basically unique*.

Hayek proved, that many of the evolved rules, which formed and secured greater cooperation of individuals in the *extended order*, most often turned out to be quite different from anything, that could have been anticipated, and for someone, who lived on the earlier or later stages of the evolution of that *order*, they might even seem to be completely inappropriate. In the *extended order*, the circumstances determining what each must do to achieve his own purposes **include**, – “and that catches the eye” [33: 126], – as Hayek summarizes – **unknown decisions of many**

other unknown people about what means to use for their own purposes. The conclusion of Hayek in this case is unusually categorical: “It follows that in the process of evolution there were no such moments when individuals could consciously design, according to their purposes, and put into service *rules, that gradually did form the extended order*, and only later, and imperfectly and retrospectively, have we been able to begin to explain these formations in principle” [33: 127].

However, following Moss and Malinowski, Hayek also was forced to admit, that the extended order of human coexistence in society not only does eliminate or at least reduces the contradictions and conflicts between individuals in the process of satisfying their own needs: on the contrary, these conflicts and contradictions eventually become more acute and for their solution require the use of new effective tools that have the external nature in relation to individuals.

Is there a threat of violation the reciprocity in the exchange of goods between people and their groups in modern contemporary societies? This problem is constantly worried and still disturbs the minds of the most talented intellectuals, it has repeatedly become the subject of their special research [50], [51: 187-220], [52: 307-320], [53], [54], [55], [56], [57], [58]. Expressing more generally, their results confirm the validity of the conclusions of the predecessors on this issue. Particularly valuable are the results of many years of research by the prominent American professor Mancur Olson, who thoroughly analyzed the transcendental exchange of benefits between human beings applying methodological approaches to the theory of group action and the interests of “economic man”. Here are his most important conclusions: 1) “individuals in the group act in their own interests”; 2) “behavior aimed at achieving self-interest is usually a rule” 3) “unless a constraint or other special mechanism is applied, that would force individuals to act in the common interest, *rational, egoist individuals will not act to achieve common or group interests*” [59: 11-12].

One of the most accessible among such “other special mechanisms”, which effectively facilitate the solving of interpersonal and group conflicts, that has proved itself in the civilized countries of the world, is mediation. It has no alternatives as a mass method to resolve existential conflicts by their own participants involving the professional mediators. This method, according to its legal nature, is the mutual self-defense of individuals.

3. Conclusions

The fundamental properties of human include human autonomy, communicative solidarity and human needs in the benefits, that are satisfied

in the course of both unconditional (transcendental) and conditional exchange between individuals by them. The transcendental spontaneous exchange of human beings with goods inevitably transforms from the potential to the real state the excess of human autonomy, generates both intrapersonal and interpersonal contradictions, many of which transcend into collisions and conflicts. These latter constitute the foremost and attributive for a person group of determinants, which stipulate the need for mediation as one of the most effective method of resolving interpersonal conflicts by the efforts of individuals themselves. Mediation has a double legal nature, because, firstly, it is the product of the fundamental (necessity) method for co-being of individuals in society, and secondly, it is a system of interconnected legal obligations through which a reconciled social environment is formed. It can be defined as the mutual legal self-defense of individuals.

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