Let Mediation Be Mediation: Conciliation Versus Mediation in Brazil

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In 1999, I had just returned to Brazil from the United States with a Ph.D. thesis on ADR when a mediator colleague invited me to attend and appraise a mediation session. I was eager to do that and observed, minute by minute, the rich communication interaction between him and the parties. At the end my colleague asked me for comments on the session, which I promptly critiqued. It was fast, beautifully done and effective – except for the fact that it was not a mediation but a conciliation (at least as those terms are understood in Brazil) because the session was focused on a discussion of rights and law between the parties and the intervenor.
And this is what still happens in Brazil. Since mediation began primarily with lawyers, they brought their baggage of rights and laws to mediation sessions, putting aside the principles of the process, such as party control, autonomy, mediator neutrality, etc. This is especially so in what was later institutionalized as "judicial mediation" following the enactment of the Brazilian Mediation Law in 2015.

Mediation and conciliation have different meanings in different countries. In Brazil, as indicated below, conciliation is always a law-based procedure with a legal evaluation at the core of the process – who is right, who is wrong, and who has the law on their side, whereas mediation is a more flexible process, centred on party control of the process, their interests, tailored to individual circumstances and conducted by a third party intervenor with a different role. This role is focused on uncovering and working with the parties' real interests (personal, commercial, etc.) underlying their stated positions, rather than evaluating purely legal arguments. Conciliation is an objective process dealing with rights and laws. Mediation is a subjective process dealing with parties' dispositions, recognition and acceptance.

There is nothing wrong with conciliation per se, but it must not be confused or interchanged with mediation, nor put into the same definitional category as mediation. This has been done elsewhere, causing a certain amount of confusion. UNCITRAL used the terms interchangeably in its 2002 Model Law on International Commercial Conciliation[fn] See https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf [/fn], which it finally changed in a 2018 revision of that Model Law.[fn]See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html[/fn] This may have been because diplomats have been using the term "conciliation" in a very broad sense, whereas lawyers use it in a more technical sense. Substituting or confusing conciliation with mediation will damage the institution of mediation and seriously impede its development in Brazil.

We observe, especially in family mediation where unique particular personal situations arise which are not specifically covered by statutory laws and rights, that there is a strong necessity for more accurate research into the arsenal of resources available to the parties to satisfy their needs and interests. These resources may come from the fields of psychology or family therapy which lie outside of law, for example.

Here a real situation described by a mediator colleague in Brazil provides a good picture of the issue, even when such situations do fall within the scope of codified laws and rights. A couple came to consult this mediator-lawyer about the support and guardianship of their child. There was a heavy imbalance of power between the spouses. The man stepped into the office, yelling "Which law is going to support my case?" to which the mediator responded: "You can choose whichever law that suits what you think your child deserves. As you can see, we have on the shelves lots of codes with lots of laws, including King Solomon's law to cut the child in half for each interested person. Or… you can create your own law – that's your choice".

I confess I used that answer in many opportunities to lead parties along the real track of mediation. Conciliation, in Brazil at least, means finding the law on the books to justify what you want, while mediation involves going beyond that to create your own resolution – in effect, a private law to govern the parties' particular situation. More than anything, the conciliator has to recognize the applicable precedents which impact the case being conciliated.

Without formal training, I had used conciliation in my law office starting in 1973. But only after my research on mediation in the United States in 1995 – 97 did I realize that it was up to me, as manager of my clients' conflicts, to determine which process was suitable for each specific scenario, especially taking psychological factors into account. I have always found situations where, although legal resources were plentiful, we still found issues where one more key resource was required that was not provided or stated in any code. This resource might have a very short shelf life and be useful for just one moment, one case among only two parties, but still necessary and required by them. It is often the analysis by the parties themselves to see if they are ready to at least recognize and accept the other parties' point of view and feelings, even if they don't agree with them. If not, they can still choose facilitation, conciliation, arbitration or other mode of dispute resolution.

In the Brazilian mediation community very few people defend the unique quality of mediation and the necessity of real and consistent education about it. Legal education, which in Brazil takes at least five years, is perfect for the performance of a conciliator or a lawyer in the conciliation process to appraise or suggest law-based proposals and solutions, but not to conduct a negotiation process without interference in the legal merits of the dispute. The problems arising from this crucial lack of qualification are exacerbated because the Brazilian Bar Association (OAB) overreacted and decided to produce a draft law (PL) 5511/2016 requiring the presence of lawyers in ***all*** mediations and changing the role of lawyers in the process to help mediate their own clients' cases, especially in so-called "judicial mediations" although this draft law does not itself contain any limitations on the types of mediation requiring lawyers' participation.[fn]See http://mediationblog.kluwerarbitration.com/2018/07/08/brazil-edge-making-lawyers-mandatory-mediation/[/fn]

We understand that the case in a conciliation process is sub judice, i.e. there is an evaluation at the core of the process – who is right, who is wrong, and who has the law on their side. So it is acceptable to call conciliation in the judiciary "judicial conciliation". The same does not apply to mediation which does not include any kind of judgment of right or wrong. Mediation and judgment definitely do not fit together. They are opposites, use different techniques, and perform different functions – mediation is centered on interests while conciliation is based on law and legal rights. Of course, mediation may also take legal rights into account but is not based or focused only on them.

To further blur the distinctions, the Brazilian Mediation Law of 2015 created a creature known as "judicial mediation". This is an attempt by the judiciary using very limited resources to administer mediations for the multitude of cases filed in the courts, as opposed to private mediations conducted via ADR institutions or independently. Judicial mediation is not mediation in the true sense because there is very little party autonomy or control. Parties have no control over the choice of the mediator which is done by lot, over the time allotted for mediations which is normally set to a very short limit – sometimes 20 minutes (this is not a typo), or over the remuneration of the judicial mediator which has also been very limited[fn]As we go to press, a brand new Resolution of the National Council of Justice (CNJ) which controls administration of the courts, is calling for remuneration of judicial mediators according to a scale: I – voluntary; II – basic; III – intermediate; IV – advanced; or V – extraordinary. See CNJ Resolution 271 of 11 December 2018.[/fn], hence failing to attract the most experienced mediators.

In Brazil, the understanding of the difference between mediation and conciliation is important because each process of dispute resolution entails very different techniques and performance from the mediator or conciliator and the parties. It is possible to think of a judicial conciliation which would mirror a subsequent judgment, but mediation would not ordinarily do so.

Conflicts are differences between people which are not manifested. When they are manifested, they become disputes[fn]See *Mediação – Uma Solução Judiciosa Para Conflitos (Mediation: A Judicious Solution for Conflicts),* book in Portuguese by Maria de Nazareth Serpa, DelRey Publishers, Belo Horizonte – MG, Brazil, 2017, capítulo (chapter) IV, "Tipología dos Conflitos" ("Typology of Conflicts"), at pp. 22 *et seq*.[/fn]. Solving means coming to a final decision, whereas resolving means taking care of the shorter-range situation at hand. In this sense, conciliation is designed to solve disputes while mediation is tailored to take care of eventual disputes by discovering and resolving underlying conflicts, which most of the time are camouflaged issues that the law does not cover. This the conciliator can ignore, but the mediator cannot.

Let's protect the institution of mediation and keep it as it is intended to be, not confused with or diluted by concepts and practices of conciliation.