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Mediation: What is Necessary to Achieve its Success in Spain?

Abstract: This article presents the legal frame of mediation in Spain, especially after the enforcement of Law 5/2012 regarding Mediation in Civil and Commercial Matters. The author analyzes the main causes that might explain why, after four years of enforcement of Law 5/2012, mediation remains a peripheral conflict resolution tool in Spain, a circumstance that has been described by the European Parliament as "The Mediation Paradox". However, mediation has attracted high levels of attention from both practical and theoretical points of view, maybe because its promotion is closely related to the improvement of access to justice. Mediation is a key European Union policy and one of the main concerns of the current reform agenda in Spain. The article concludes with the presentation of several ideas that might contribute in overcoming this paradoxical scenario, with special focus on what could be done to reverse the situation from a cultural perspective.
Keywords: ADR, mediation, Spain

Introduction

Several years have elapsed since European institutions such as the Council of Europe led EU Members States to focus their attention on the true effectiveness of Justice, compelling European countries to examine their systems from an effectiveness point of view, citizen satisfaction and, in fact, the quality of the system itself.[1] Because of this new approach, a wider concept of justice has been growing, with its focus pointing to the quality of outcomes and the need to promote agile and efficient conflict resolution methods. In this paradigm shift, "we are both agents and specta-

1 H. Soleto Muñoz, Presente y futuro de la resolución de conflictos, (in:) H. Soleto Muñoz (ed.), Tecnos 2013, p. 33.

tors to what are perhaps the most significant changes in the Administration of Justice system."[2]

In this scenario, mediation is an emerging issue, maybe one of the most current discussions with clear significance from both a social and legal perspectives. Its remarkable development, maybe as the most common conflict resolution tool among the so-called Alternative Dispute Resolution methods (ADR), responds to the need to improve access to justice as a key policy and one of the main concerns of the European Union. At the same time, mediation itself can be described as an instrument of social peace that entails greater civil participation in times where society demands increasing participation shares in public affairs.

1. Mediation legal frame in Spain: experience vs. regulation

In Spain, it seems that experience and practical implementation have always been ahead of the law. In fact, before the currently applicable law came into being there were already some autonomous communities working on their own court-connected mediation programs.[3] From a legislative point of view, at state level, the first reference to mediation can be found in Law 15/2005, of 8 July 2005, which amended the Spanish Civil Code and the Civil Procedure Law in relation to separation and divorce matters.[4] The inclusion of mediation in article 770.7º of the Civil Proceedings Act,[5] as the possibility for the parties to suspend the process to initiate a mediation process, entailed the provision of legal backing to enhance these alternative solutions.

Also, the third final provision of Law 15/2005 urged the Government to submit a draft law on mediation to the Parliament, based on the principles set out in the European Union provisions, in addition to the already known voluntariness, impartiality, neutrality and confidentiality and respect for the mediation services created by the Autonomous Communities. This fact, together with the urge to transpose Directive 2008/52/EC,[6] on the basis of Article 12, brought the gestation of the draft state

2 V. Moreno Catena, La resolución jurídica de conflictos, (in:) H. Soleto Muñoz (ed.), Tecnos 2013, p. 58.

3 In Spain, an Autonomous Community (Comunidad Autónoma), also referred to as autonomous territories and regions, is described as a first-level political and administrative division. This structure, designed according to the 1978 Spanish Constitution, was created with the aim of assuring a certain level of autonomy in each one of these territories. Currently, there are a total of seventeen Autonomous Regions plus two Autonomous Cities (Ceuta and Melilla). Still, the unique frame of territorial administration receives the name of "State of Autonomies".

4 A Spanish version of Law 15/2005 can be accessed in the following link: https://www.boe.es/boe/dias/2005/07/09/pdfs/A24458-24461.pdf (3.02.2017).

5 A Spanish version of Law 1/2000, of 7 January, on Civil Procedure can be accessed in the following link: https://www.boe.es/buscar/pdf/2000/BOE-A-2000-323-consolidado.pdf (3.02.2017).

6 An English version of 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 can be accessed

law on Mediation in Civil and Commercial Matters of 29 April 2011[7], whose legislative process, nevertheless, could not be completed due to the dissolution of Parliament and subsequent general elections of 2011.

The European Union had warned all EU Members States of the risk of infringement caused by failure to transpose within the time limit set by Directive 2008/52/UE, which limit expired on 21 May 2011. Thus, in July 2011 several "letters of formal notice of default" were sent by the European Commission to nine different countries: the Czech Republic, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia, the United Kingdom and Spain. Among the countries mentioned, only Finland, Slovakia and the United Kingdom reported their respective measures to the Commission for the transposition of Directive 2008/52/UE.[8]

In this context, the incorporation of Directive 2008/52/CE took place in Spain first through the adoption of Royal Decree-Law 5/2012 of 5 March, on Mediation in Civil and Commercial Matters[9]validated by the Congress of Deputies on 29 March 2012 and subsequently processed as a draft bill, concluding with Law 5/2012, of 6 July 2012, on Mediation in Civil and Commercial Matters.[10] Although the final text contains small changes in its articles to simplify the rule it had, to a great extent, been built on the basis of the previous legislative draft.

Even before national legislation was passed, thirteen of the seventeen autonomous Spanish territories had passed legislative initiatives as well as Court-Connected Mediation Programs, particularly in the field of family mediation, which shows the strong expansion of this institution since around 2001. It might seem then that mediation is now a common conflict resolution tool in Spain. But, once again, theory and practice apparently chose different paths. The Spanish General Council of the Judiciary (Consejo General del Poder Judicial) data shows how family mediation

in the following link: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33251 (3.02.2017).

7 A Spanish version of the draft state law on Mediation in Civil and Commercial Matters of 29 April 2011, can be accesses in the following link: http://www.uaipit.com/files/documentos/1321986107__Proyecto.pdf (3.02.2017).

8 Vid. L. García Villaluenga; E. Vázquez de Castro, La mediación civil en España: luces y sombras de un marco normativo, "Política y Sociedad" 2013, vol. 50, No. 1, p. 74.

9 A Spanish version of Royal Decree-Law 5/2012, of 5 March, of Mediation in Civil and Commercial Matters can be accessed in the following link: https://boe.es/boe/dias/2012/03/06/pdfs/BOE-A-2012-3152.pdf (03.02.2017). To check an English version of the same document vid. footnote num. 10.

10 An English version of the Spanish Act on Mediation in Civil and Commercial Matters can be accessed in the following link: http://www.mjusticia.gob.es/cs/Satellite/Portal/1292426983263?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct_on_mediation_in_civil_and_commercial_matters_%28Ley_5_2012__de_mediacion_en_asuntos_civiles_y_mer.PDF (3.02.2017).

experienced positive development in the years 2014 and 2015. However, although the number of cases sent to the mediation program totaled 5,829, there is still a big gap between the number of cases referred to mediation programs and the actual number of cases that were mediated. In 2015, and just regarding family mediation, only 1,383 out of 5,829 cases referred to mediation programs were actually mediated, of which 844 cases ended without an agreement. When it comes to civil affairs mediated in 2015, of the cases mediated 46.15% resulted in an agreement, a slightly better situation compared to 2014 when, even though the total number of mediation referrals was higher, it was only possible to reach agreement in 31.09% of the cases.[11]

There is one more statistic to add to this reality. According to the information provided by the Spanish General Council, in 54.7% of cases referred to the Family Mediation Program, the parties did not attend the information session. In some of these cases it was just not possible to reach out to the parties, they showed little if any interest in the process itself or simply preferred not to participate. This data shows the need to improve the quality of the referral criteria to mediation programs and to work toward more efficient management of the resources available.[12]

Of course, these data reveal that something is not working as expected. In our attempt to identify the reasons that might explain the situation described, it might be constructive to analyze the relation between mediation, promoters of mediation (policy makers, courts as well as mediators) and the potential users of mediation. At least one thing seems to be failing: communication. The following four sections expand on these points, but the reader should realize that while treated separately they are in fact all interconnected.

2. Institutional support

In the same year that Directive 2008/52/CE was approved, the Spanish General Council had already included some points concerning mediation in its Strategic Plan for the Modernization of the Judicial System. One of the main concerns of Law 5/2012 was information. It conveys that information about mediation as an alternative to the judicial process shall be given to courts as well as to citizens. It should also be included in the free legal advice service (later detailed) introduced in October 2015, three years after Law 5/2012 came into force. But the question should go a little further: even when Spain has regulation, does mediation really have the authorities'

11 Report by the Spanish General Council of the Judiciary regarding Court-Connected Mediation Programs in 2015. It can be accessed in its Spanish version in http://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Datos-mediacion-intrajudicial/Mediacion-intrajudicial-en-Espana--datos-2015 (4.02.2017).

12 *Ibidem*.

support? Does Spanish legislation really believe in the opportunity of mediation? Or does it merely respond to the European mandate?

Determining the extent of public investment in mediation in recent years is a complicated task, especially when none of the ADR regulations included financial schedules. An example of the refusal to devote staffing and budget can be found in the recent second final disposition of Law 4/2015 which includes, for the first time in Spain, some references to the legal backup of Restorative Justice practices: "the measures included in this Law may not represent an increase in staffing levels, nor of remuneration or other staff costs."[13]

Most Autonomous Regions had transferred Administration of Justice competences and the distribution of the budget made by the regional authorities is, of course, heterogeneous in each one of them. This decentralization has, to a certain degree, also resulted in heterogeneity in the development of mediation processes within the territory of Spain. However, there are still paradigmatic cases like Catalonia or the Basque Country, with long experience of ADR and mediation. For example, the mediation services offered by the Mediation Center dependent on the Barcelona Bar Association (CEMICAB) now in operation since November 2011, should be noted. In its offices, members of the public can find *pro bono* mediators in the same way that free legal assistance lawyers can be found. It is also possible to request free of charge mediation through its very intuitive website.[14]

3. Implementation policies

From analysis of the preamble to Law 5/2012, it is easy to verify the reasoning behind the Spanish legislation to implementations policy and why it leans toward time and cost savings. The Parliament of the European Union study proves how those arguments are valid, the reduction in the number of days and in the average cost of the process is indeed significant but, nevertheless, the statistics by themselves are not sufficient to ensure the success of mediation.[15]

Magistrates, judges, lawyers and all judicial players should be familiar with mediation and its process; the number of cases sent to the mediation program will increase only when trust in mediation (and in mediators) is built among all legal workers.

13 A Spanish version of Law 4/2015, of 27 April on the standing of victims of crime, can be accessed in the following link: https://www.boe.es/boe/dias/2015/04/28/pdfs/BOE-A-2015-4606.pdf (3.02.2017).

14 The website mentioned can be accessed (Spanish version) in the following link: http://www.cemicab.es (3.02.2017).

15 Rebooting the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET%282014%29493042_EN.pdf (3.02.2017).

Mediation should be understood not as a shortcut to avoid overloaded courts. Along this line, mediation should not be seen exclusively as a way to reduce the time and costs involved in the process. Indubitably, mediation influences these two variables, but trust building might be found in changing the paradigm and adopting an educational approach while announcing mediation.

This can also be connected to the cultural change needed for mediation to be successful, according to GUTMAN, "the foundation for change in the way lawyers practice law can often be traced back to values and models of lawyering transmitted to law students in Law Schools."[16] Unquestionably, Law Schools must make greater effort to ensure that not only theory is taught, but also that the syllabus is kept up-to-date in line with the advent of new social realities and new approaches to Justice. To-date it is not easy to find a subject that covers ADR in law faculties, which means the collaborative problem-solving approach is still overshadowed by the traditional and adversarial way of practicing law.[17]

4. Information on mediation

Nowadays, mediation is not known as a real alternative or complement to traditional legal processes. This lack of information essentially means that members of the public are unable to make an informed decision about which conflict resolution tool is best suited to their interests. The judiciary statistics published in December 2014 by the General Council of the Judiciary shows how 38% of the public interviewed expressed unawareness of any alternative to trial. From this it seems clear that work on the promotion of mediation should necessarily include sufficient funding to support a public awareness program covering all available options in dispute resolution.[18]

Legally speaking, Law 5/2012 includes an amendment to article 414 of the Spanish Civil Procedure Act that requires the court to inform the parties of the possibility of resolving their conflict through negotiation, as well as mediation. Without

16 J. Gutman, The reality of non-adversarial Justice: principles and practice, "Deakin Law Review" 2009, vol. 14, No. 1, p. 31.

17 H. Soleto, has clearly reflected this phenomenon when she says: "At University, students are prepared to work in the legal area with a traditional curriculum, not always fully adapted to reality, in which it is even possible to continue taking subjects that hardly have any relevance on professional activities any more. This can be mainly explained by the stagnant university system, in which the survival of Areas and Departments might depends on the presence of these contents". H. Soleto Muñoz, Presente y futuro…, *op. cit.,* p. 31.

18 The report we are refering to regarding how citizens feel about the Judicial Sistem can be accessed in its Spanish versión at:http://estadistica.poderjudicial.es:82/infoe2/Datos%20de%20Justicia/Boletines%20Anteriores/Bolet%C3%ADn%20n%C2%BA%2038%20-%20La%20percepci%C3%B3n%20de%20los%20ciudadanos%20sobre%20la%20Administraci%C3%B3n%20de%20Justicia.pdf (4.02.2017).

a doubt, the final decision to initiate a mediation process applies only to the parties; however, there is at least this duty to inform about the ADR possibility. Article 415 of the Civil Procedure Act, as amended by Law 5/2012, provides that if the parties have decided to initiate a mediation process they may request suspension of the court hearing by agreement to proceed to mediation. If an agreement is not reached during the mediation sessions, either of the parties might request cancellation of the suspension and the resumption of court proceedings. Aside from the requirement for the court to inform the parties of alternative resolution possibilities, Law 5/2012 does not mention any obligation on the part of parties, lawyers or any other professionals involved in the case to take mediation into account as a conflict resolution tool.

The experience reflected by the European Parliament in the study aforementioned proves that in those European Member States where the duty to inform in full exists, the number of mediation cases is higher, no doubt because citizens are in a better position to make informed choices. It was only in October 2015, when the Spanish Legal Aid Act (Law 1/1996) was partially modified in Article 6 by Law 42/2015, that it became included in the pre-trial legal advice information that mediation or other extrajudicial means of conflict resolution in cases is not specifically prohibited[19] when intended to avoid the trial itself or analyze the viability of the claim. It is too soon to offer analysis on the real impact of this renewed article 6 but, at least to some extent, the fact of its introduction means a step forward in enhancing the visibility of mediation.

The Spanish Lawyers' General Statute approved by the national bar association (Consejo General de la Abogacía Española) does not include reference to mediation nor any other ADR method, except the duty to inform the dean of any dispute related to the professional conduct of a lawyer to enable the dean to mediate such dispute. From a comparative law perspective, measures like the sanctions imposed on lawyers who have not properly informed their clients about self-composition methods (United Kingdom) or making the informative session compulsory during a predetermined period of time (Italy), might be a worthwhile consideration in order to achieve an improvement.

5. Requirements for being a mediator and mediation training

According to Law 5/2012 the mediator must be a natural person satisfying the following requirements: being in full possession of a citizen's civil rights; to be able to act as a mediator without any constraints imposed by the requirements of any professional endeavors; to have completed specific training provided by a duly accredited

19 Spanish legislation specifically prohibits mediation or any other Restorative Justice tool in gender-based violence cases.

institution; to contract a civil liability insurance policy to cover any liability arising from the services provided.

In this section, the focus is on the third of these points regarding educational requirements. Law 5/2012 accepts any person having any university degree or, alternatively, any technical or professional studies as well as having specific training to act as a professional mediator. In respect the latter, such training should be acquired by following one or more specific courses taught by any accredited institution, normally offered by universities or professional associations, such as lawyers', psychologists' or social workers' associations. Once this training has been accomplished, mediation can be practiced anywhere in the country.

Even where Law 5/2012 requires this specific training, it does not provide any standards or any guidance on the content or the length of these courses. Neither does it define what the character of the accredited institutions offering these training courses should be. Moreover, other than in the legal mandate to the Government, in Final Disposition Eight of Law 5/2012, there is nothing to determine the details of the training in further legislation.

The mandate referred to became effective through Royal Decree 980/2013.[20] It states that specific mediation training shall provide future mediators with sufficient knowledge and skill to practice as a professional mediator comprising, at least in relation to the field of specialization, the legal framework of mediation, its psychological aspects, mediation ethics, processes and techniques of communication, negotiation and conflict resolution. It goes on to say that the specific training will be developed at two levels, theoretical and practical, with the latter corresponding to at least 35% of the minimum duration period provided for mediation training by Royal Decree 980/2013 and that such practical training shall include exercises and simulation of cases and, preferentially, assisted participation in actual mediations. Article 5 of the Decree, specifies that the minimum duration for the specific training shall be 100 teaching hours.

The clear inadequacy of this regulation due to its brevity might explain the noteworthy increase in the number of training courses on offer, most of which are online courses, that in their advertising make a point of stressing the possibility to access the Registry of Mediators and Mediation Institutes[21] upon passing the course - in just a few weeks. Naturally these courses respect the legal requirements involved but what is not so clear is how deeply and appropriately they manage to offer a full under-

20 A Spanish version of Royal Decree 980/2013 can be accessed in https://www.boe.es/boe/dias/2013/12/27/pdfs/BOE-A-2013-13647.pdf (3.02.2017).

21 Along with other regulations, Royal Decree 980/2013 creates a Registry of Mediators and Mediation Institutes depending on the Ministry of Justice. This registry means the possibility to freely access to a public registry through the Ministry of Justice web site, facilitating the access to mediation as a conflict resolution tool and contributing to improve the promotion of mediation.

standing of the grounds of mediation and its practical aspects. It seems that this can hardly be achieved in just one-hundred hours of online tuition. From a personal perspective, these very light requirements have had a huge impact on the quality of mediation, a key point during these first years of mediation development.

Countries like Belgium and Austria, have approved organizational models based on the creation of a general council responsible for managing the Mediators Registry and assisting the Ministry of Justice on mediation legal regulation. Therefore, the creation of an expert committee working on the quality control of academic programs and mediation vocational training courses offered by training institutions is worthy of consideration.[22]

Conclusions

It seems that discussion on self-composition methods is urgently needed in Spain. More than four years have elapsed since Law 5/2012 came into being and now is a good time to pause and analyze the data that has been collected and the experiences that have been gained during those years of mediation practice. Only with careful study can it be hoped for mediation to be applied in the (near) future as a truly acceptable method of resolving disputes. But before that can happen, there has to be an absolute political willingness, translatable into funding, to (1) give professional status to mediators and mediation, (2) promote mediation through seminars or conferences among the judiciary, and (3) apply the financial resources needed to make mediation a real option in the eyes of the general public. Here, the work of the Spanish General Council of the Judiciary should be distinguished, especially its guides regarding Court-Connected Mediation Programs in each one of the areas where mediation can be practiced. Information is the first step to drive the cultural change not only within the courts but also among the people, with the ultimate objective of promoting a peace-building conflict resolution culture.

In this line of argument, mediation should be presented as a reliable alternative or complement to traditional forms of dispute resolution. More importantly, it should be seen as an effective tool that can positively resolve conflicts; only by seeing it in this light will the belief that mediation is a symptom of weakness or is incompatible with the interests of the parties be dispelled. Furthermore, as mediators it is our responsibility to transmit to conflicting parties that they are not only the principal characters of the conflict, but they also take the leading role in its solution.

22 E. Carretero Morales, Calidad de la mediación?, (in:) M.E. Lauroba Lacasa, P. Ortuño Muñoz (eds.), Mediación es Justicia: el impacto de la Ley 5/2012, de mediación civil y mercantil, Huygens Editorial 2014.

BIBLIOGRAPHY

Carretero Morales E., Calidad de la mediación?, (in:) M.E. Lauroba Lacasa, P. Ortuño Muñoz (eds.), Mediación es Justicia: el impacto de la Ley 5/2012, de mediación civil y mercantil, Huygens Editorial 2014.

García Villaluenga L., Vázquez de Castro E., La mediación civil en España: luces y sombras de un marco normativo, "Política y Sociedad" 2013, vol. 50, No. 1.

Gutman J., The reality of non-adversarial Justice: principles and practice, "Deakin Law Review" 2009, vol. 14, No. 1.

Moreno Catena V., La resolución jurídica de conflictos, (in:) H. Soleto Muñoz (ed.), Tecnos 2013.

Soleto Muñoz H., Presente y futuro de la resolución de conflictos, (in:) H. Soleto Muñoz (ed.), Tecnos 2013.