

ANNEX I

Speech by Ana Rusu, Council of Europe Symposium on Courts and Mediation: new paths for justice Barcelona, 18 – 19 June 2009

Council of Europe and the mediation

Dear participants,

Before starting my intervention, I would like to express my grateful thanks to the institutions who made possible the organisation of this event: the General Council of the Judiciary of Spain and the Council of Justice of the Catalan Government, the Judicial School of Spain, the Ministry of Justice, the European Grouping of the magistrates for the mediation (GEMME).

It is a pleasure for me to be here, in Barcelona, and to take part in the discussion of one of the most topical subjects in today's modern societies as well as new democracies. Mediation is nowadays more than a distinct process for settling cases and tends to be an adjunct to the traditional judicial system in Europe, working with it interdependently.

My intervention today will first focus on few examples related to the role of the Council of Europe bodies as mediator on the international political scene, because as the Councillor of Justice mentioned this morning, mediation should become a way of solving conflicts at all levels of the societies. I will then introduce to you the conventional and non-conventional work in the field of judicial mediation being done within the Council of Europe and which integrates the international dimension as it does not concern only the EU Member States but the 47 European states including the once from the Balkan region, former soviet union countries and South Caucasus. Parts of my presentation will focus on the technical assistance activities carried out by the Council of Europe in the field of mediation as well as mediation training.

As an institution focused on human rights, democracy and rule of law in its member states, occasionally, the CoE has been engaged in mediation efforts, which have been justified by the need to fulfil the aim and the Statute of the Organisation which is achieving greater unity between its members and facilitating their economic and social progress.

Certain legal instruments of the Council of Europe define more specifically the role of the bodies of the Council of Europe in mediating conflicts under more specific circumstances.

In addition to Convention based mediation of the different **Steering Committees of the Committee of Ministers**, several bodies of the Council of Europe have been engaged in mediation efforts on an ad-hoc basis, either in response to specific requests for mediation, or acting within the mandate of the CoE of ensuring that human rights and fundamental freedoms are respected in its member States.

The **Human Rights Commissioner of the Council of Europe** has acted, on several occasions, as a mediator in conflict zones. The most recent successful example of mediation was the August 2008 exchange of persons detained by the Georgian authorities and the de facto South Ossetian authorities. The Commissioner often relies on the support from the national Ombudsmen as they have an official mediation function in many countries, which are members of the Council of Europe.

The **Venice Commission** has been another important tool of the CoE's mediation efforts. The member States often rely on the Commission's opinions and analysis of legal aspects in case of complex and critical situations. The mediation of the Venice Commission was vital for the peaceful break-up of Serbia and Montenegro, and ensured a broad consensus for the modalities and the stages of the separation before the independence of Montenegro was achieved.

Treaty-based mediation

Article 23 of the Convention on the Transfer of Sentenced Persons (No. 112) specifies that the *European Committee on Crime Problems (CDPC)* of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application.

In 1998, the CDPC mediated, at the request of Italy, the application of this Convention, in relation to a case concerning the refusal by the US to transfer an Italian citizen, Ms Silvia Baraldini to Italy. Several other Conventions in the penal field gave the CDPC the mandate to do whatever, I quote, "is necessary to facilitate a friendly settlement of any difficulty which may arise out of its applications". These conventions are: the European Convention on the Repatriation of Minors, the European Convention on the International Validity of Criminal Judgments, the

European Convention on the Suppression of Terrorism, the Criminal Law Convention on Corruption, etc.

In a recommendation from 1999, the Committee of Ministers outlined a mechanism designed to facilitate the friendly settlement of disputes, including conflicts of jurisdictions and difficulties arising out of the application of Council of Europe conventions in criminal matters. The appendix to the Recommendation describes the procedural guidelines for the friendly settlement of difficulties.

Even though it is generally agreed that the “alternative” means of settling disputes is an old concept, in the last few years mediation has received close attention from the various European countries. The specific advantages of this form of private justice and the crisis affecting the effectiveness of justice increased the interest in alternative dispute resolution (ADR) which are more consensual than the recourse to the courts or arbitration and can contribute to improved judicial efficiency by providing citizens alternatives to regular judicial proceedings.

Considerable efforts have been made by the Committee of Ministers of the Council of Europe to regulate mediation by the adoption of several recommendations in this field. Recommendation 98(1) concerns mediation in family matters, particularly in the area of divorce matters (and custody cases of children). The aim of this Resolution is not only to reduce the workload of the courts, but it is also meant to create a better and more acceptable solution for the parties and (in the case of children) to better protect the welfare of children. Recommendation 99(19) for mediation in criminal matters aims to enhance the active participation by the victim and the offender in criminal proceedings. The recommendation seeks, on the one hand, to recognise the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation and to communicate with the offender, and on the other hand, to encourage the offenders’ sense of responsibility by offering possibilities of reintegration and rehabilitation. Mediation in civil matters is addressed in Recommendation 2002(10), where a definition is given: “*a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators*”. Furthermore, the **European commission for the efficiency of justice** (CEPEJ) decided to draft guidelines to ensure that the Recommendations are widely publicised and disseminated in the member State on one hand, on the other hand that the member States apply more efficiently the principles set out in them. The decision to help member

states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes was taken at the Third Summit of the Heads of State and Government of the Council of Europe which took place in Warsaw, in May 2005.

Moreover, the European Commission for the efficiency of justice (CEPEJ) in its report on the evaluation of European Judicial systems dated from 2008 (data from 2006) decided to present a new chapter on judicial mediation. In this type of mediation there is always intervention by a judge or a public prosecutor to advise on, decide on or/and approve the procedure. For example in civil disputes or divorce cases, judges may refer parties to a mediator if he/she believes that more satisfactory results can be achieved for *both* parties. In criminal law cases, a public prosecutor can propose that he/she mediates a case between an offender and a victim (for example to establish a compensation agreement).

In terms of judicial *mediation*, 38 countries have replied that a specific procedure exists. In only 8 countries this is not the case. These countries are: Andorra, Armenia, Azerbaijan, Cyprus, Estonia, Georgia, Moldova and Ukraine.

As I already mentioned, mediation can be a part of judicial proceedings. For example during proceedings, a judge may recommend that the parties visit a mediator. This is, for example, the case in certain disputes in the **Netherlands**. Mediators can be specially trained professionals, certified lawyers or other private (legal) professionals hired by the parties. In other situations, courts may even offer an "*in-house*" service - the "*multi-door courthouse principle*". Judges or other court staff may be nominated as a mediator and help the parties to settle a dispute. In criminal law cases, a public prosecutor may even fill the role of mediator, for example, to arrange (financial) compensation for the victim of a crime.

Most judicially approved private mediations or court-annexed mediations occur in disputes that are related to civil and commercial cases, employment dismissal cases and family law cases (i.e. divorce cases). To a much lesser extent, a judge or a public authority may be involved in resolving disputes in this area.

Even if mediation is used in administrative law cases it is, for the most part, a private mediator or a court-annexed mediation procedure that will be applied.

A public prosecutor in the role of mediator is common in several countries in *criminal proceedings*. The mediators in these procedures can be an independent service, a specialized centre or a victim assistance organisation. Victim/offender mediation cases can also be found in **Ireland**, where any of the parties connected to a case can suggest mediation. Similar approaches are found in **Luxembourg, Sweden, Slovenia, Croatia and Turkey**. In **France**, mediation in criminal matters is used for minor offences (and/or juvenile offenders); part of the proceedings may consist in a contract with the victim or in the application of alternative sanctions (instead of fines or imprisonment, for example community welfare work).

In the **Netherlands**, there are a large number of mediation cases relating to family law (divorce) and to dismissal from employment. In **Austria, France, Hungary, Poland and Slovenia** mediation is often used in criminal law cases.

Various people can be appointed as mediators (private mediator, public authority, a judge, a prosecutor or people nominated as a part of the judicial mediation procedure).

With growing attention paid to and use made of mediation and to guaranteeing sufficient access to justice, some countries have decided to grant legal aid for this specific form of dispute resolution. Usually countries having a mediation procedure have also legal aid possibilities for this procedure.

Very often we speak about the positive sides of the mediation, forgetting that there are also negative sides in particular when an agreement is not reached. Various surveys showed that in cases where an agreement is not reached, the parties blame often the mediator or process itself without looking at the unwillingness of the parties themselves to be flexible and creative. As a possible negative consequence of the mediation there is also the risk for prolonging of the conflict and even the parties choosing mediation in the first place with the purpose to prolong the conflict. Another negative side of the mediation is the possibility of misuse of power and a risk of the mediator to manipulate.

Also the role of lawyers in mediation can be seen as problematic, as the parties are meant to be the main actors in the mediation process it can be difficult for lawyers to find a proper role for their activities. Other topical question when using mediation is the confidentiality and what does this

really means? Does it mean secrecy? Does this allow the mediator to consult other mediators? In the case of unsuccessful mediation are the parties allowed to use the information revealed when they go to court afterwards? Can the mediator be called as a witness?

Some of these threats can be resolved by ensuring proper training for the mediators. Through the various guidelines of the Council of Europe, member States are encouraged to provide adequate training programmes for mediators and, taking into account the disparities in training programmes, to set up common standards concerning the training. The training should constantly be followed by supervision, mentoring and continuing professional development. Common criteria should also be established in the European states which will allow for the accreditation of mediators and/or institutions offering mediation services or training. Because of increased mobility throughout Europe common international criteria for accreditation, such as a certificate of European mediator could be put in place. The creation, for example of a European training centre could also increase the quality of the training and exchange of good practices among European mediators.

Technical cooperation activities

Since the extension of the Council of Europe in 1989, by the access of an important number of states from central and eastern Europe, the organisation is developing specific programmes to address in general problems connected with the independence of justice and in particular to help harmonise the training of legal professions. It is within this framework that the Council of Europe is assisting the Ukrainian authorities to set up a system of alternative dispute resolution in commercial and administrative matters by establishing, inter alia, mediation pilot projects in four chosen courts of Ukraine, delivering training seminars for judges on how to refer cases to mediation, coaching for mediators, training for practicing lawyers about their role in mediation, organisation of mediation weeks in pilot courts, translation and dissemination of documentation about mediation.

In Moldova, the Council of Europe carried out an assessment visit on mediation and other alternative dispute resolution methods in civil and commercial matters and helped drafting: 1. the regulation of the mediation Council; 2. the Code of Ethics for mediators; 3. regulations concerning the disciplinary responsibility of mediators; the registration of the mediator's offices and the mode of certification of mediator activity. The Council of Europe is also providing initial training for mediators in Moldova which

include both theoretical aspects and development of practical skills in conflict resolution. Only people trained within this course can be certified by the Mediation Council and registered as mediators.

It should be mentioned that all these projects are possible due to the financial support of the European Commission.

Trends and conclusions

The figures of the evaluation report on judicial systems by CEPEJ show that every year more information is available on mediation. There is a trend by which mediation is applied in a growing number of European countries: in 38 countries mediation procedures are used. In civil law cases (commercial disputes, family law, and employment dismissal cases), it is often a private mediator (for example a lawyer) or a judge who mediates. Where administrative law is a separate area of law, it is often a private mediator who intervenes in disputes between citizens and the government. With respect to criminal law cases there can be various types of people responsible for the mediation: a judge, a prosecutor or a private mediator.

To guarantee access to justice in mediation procedures, a legal aid scheme may be introduced. In 22 countries, it is possible to receive legal aid in mediation procedures.

From the countries where quantitative information was received concerning the number of accredited mediators and the type of mediation cases, it can be concluded that in **Austria, Belgium, Croatia** and the **Netherlands**, followed by **Hungary, Luxembourg** and **Malta** there is a high number of accredited mediators (per 100.000 inhabitants). The areas where judicial mediation is used most are: criminal law cases, family law (divorce) and civil cases (in general). In the **Netherlands** large numbers of employment dismissal cases are settled with mediation.

Thank you for your attention and I wish we have fruitful discussions and opportunities to create networking during this symposium in Barcelona.