Mediation as a New Ombudsman Tool

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Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions
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Mediation – an evolution of the ombudsman concept – has been a constant factor in the history of human societies. Today, there has been a veritable explosion of mediation almost in every field, for a few key reasons: Our citizens often feel incapable of confronting our legal and bureaucratic jungles alone. People everywhere are looking for mediation to help re-establish the power of law, so that force does not triumph over law – dialogue rather than violence. This paper reviews the effective work of the Médiateur of France and defines the mediator's role: Mediators, as moral authorities, have the obligation to remind us of the fundamental values of our society, to propose to each person who comes to them a lasting solution that restores our ability to live together. It is up to us – Mediators, Ombudsmen, Defenders, Protectors – to be concrete doers, effective and exemplary in the service of the citizens.

I wish first of all to express my gratitude for being invited to take part in this great revisiting of our history, on this occasion of the Bicentennial of the Swedish Parliamentary Ombudsman, in which we are invited to examine together the nuances, the different facets of our institutions and our traditions, to draw from them the means to better respond today to the modern challenges of our society.

In France, 36 years ago, the Law of January 3, 1973 created the first "Mediator of the Republic." As elsewhere, the creation of the *Médiateur* responded to the need to better connect the citizen with the administration, to improve the quality of service. But from the outset, the relationship between the Mediator and the political, judicial and administrative powers was strained. Parliamentarians had difficulty understanding this new administrative recourse and, not appreciating the desire of the public for this mediation, they passed the Law of 1973 by only a single vote.

However, three years later, the same parliamentarians voted unanimously to adopt a law strengthening the powers of the Mediator and conferring, among others, the power to propose general reforms, which has been much utilized ever since.

The law gives the Mediator of the Republic three principal mandates:

- handling of individual complaints by informal resolution;
- the ability to propose reforms to the government and to Parliament (30% of reform proposals come from field experience); and
- The defense of human rights.

Mediation has been a constant factor in the history of human societies. The majority of communities have striven, in order to resolve disagreements, to organize the intervention of an arbiter, of a neutral and independent third party capable of bringing the parties in conflict into discussion, to allow the boundaries of their conflicts to emerge, and to develop a solution.

But today we witness a veritable explosion of requests for mediation: Family mediation – the generalization of which I am fighting for in France, under the control of a judge; judicial mediation; public and private mediation; business mediation; mediation in schools, in hospitals, and so on.

Why? First, this evolution is directly linked to the growing complexity of the world around us. The current tendency is that of legal regulation, through justice, through order, to counteract transgressions of law in the areas of business, the penal system, health, etc. Regulation carries with it an inflation of applicable rules, an instability in legal norms and a multiplication of procedures.

Our citizens often feel incapable of confronting alone the jungle that our laws constitute today. With so much regulation, one can perceive a complementary need for mediation outside of the judicial system. People everywhere are looking for mediation to help re-establish the power of law, so that force does not triumph over law – dialogue rather than violence.

On the level of the State and Society:

- Mediation between government employees, legal professionals and citizens in a powerless position – the heart of the Mediator's mission;
- Mediation between government bodies that function mostly in a "vertical" manner, that struggle to communicate among themselves – here, the transverse character of mediation allows an escape from impasses;
- Mediation between different worlds that speak different languages, e.g., government employees, politicians, universities, associations, etc.;
- Mediation between political parties: Every month, I organize a program on public television where I bring together a parliamentarian from the majority party, and a parliamentarian from the opposition, to discuss reform propositions;
- Mediation, finally, in the context of the integration of national norms with international norms, or with international case law.

As well, in the field of economics, the multiplication of commercial transactions, and thus of potential conflicts, requires from us to invent new methods of conflict resolution – faster, cheaper and more sound I offer as proof the adoption by the European Union on April 23, 2008, of the directive framing civil and commercial mediation.

On the international level as well, we clearly see that the 21st century will be the century of personal mobility, revealing an interest in mediation in situations of divorce between foreign couples; the century of migration, both legal and illegal; and the century of tensions between communities, cultures and religions, creating a new balance of power between those who enforce the law, and those who transgress and reject it.

In addition to the complexity that has erupted in our daily life, the need for mediation also bears witness to the tensions and ruptures that are weakening the society. For as much as worldwide growth enriches societies globally, inequalities inside countries are growing: economic inequalities, social inequalities, or inequalities in access to rights. The challenge of the 21st century is not so much the power of nations, but the vulnerability of individuals, immigrants, poor workers and minorities, and the challenge of the increase in violence that will sharpen tensions between the collectivity and the individual.

In the face of all this, the predictable tendency will be an increase of anxiety and of the need for security, for benchmarks and for listening posts. And astonishingly, in our Western societies based on the written word, we are witnessing the return of the need for direct, human, physical mediation.

At an initial stage, the mission of the Mediator of the Republic is therefore to be this "safety valve," this unconditional support space, that penetrates isolation, that eases human relations through listening and dialogue. The physical mediations that I have developed have allowed us to end numerous disputes, including those between administrations themselves! Actually, 50% of the requests I receive are requests for information and guidance. Why would the remaining 50% be an appeal to a Mediator rather than to a judge?

In a society traumatized by the precariousness of life and anxiety about tomorrow, citizens turn to the judges rather to get vengeance for suffering caused by another party than to see the law enforced. The feeling that one is right and the other is wrong is initially satisfying, because law and order are restored.

However, as the diplomat Aristide Briand liked to say, "To make peace, there needs to be two: yourself and the person opposite you". This is where the interest in mediation resides: while judgment divides, mediation joins. To win a legal case, one needs an attack or a defence strategy; to win in mediation, one needs the will to understand and to communicate. Legal judgment brings with it an exacerbation of differences; mediation, on the contrary, is geared to finding convergent interests, and "win-win" solutions. This is why I have the opinion that mediation is not compatible with the power of sanction.

But the power of mediation is also related to the capacity of recourse to an effective jurisdictional remedy, when mediation fails. For if mediation is the result of deadlocked dialogue, the recourse to a judge is the result of deadlocked mediation. And even if it fails, mediation often serves to restore confidence in the judge, because it helps the parties become well aware of, and accept, the parameters of their conflict. Thus mediation positions the judge no longer as an instrument of revenge, but as the final recourse in the resolution of the struggle, the decision-making stage.

I see the virtue of mediation at three levels, which I will illustrate with three examples:

1) Appeasement by handling complaints, and restarting dialogue, in a world of violence;
2) Being present with someone in a word of solitude; and

3) Seeking, together with citizens, a lasting solution in a world of instability.

Intake and appeasement

Appeasement relies on the proximity and humanity proper to mediation. These requirements have guided the creation of the local network of the Mediator of the Republic. Since 1986, 13 years after the creation of the Mediator of the Republic, delegates have been put in place to be the direct interlocutors of the public, and to intervene in the name of the Mediator at the local level. Today these 275 delegates are all volunteers, often ex-public servants or retired magistrates, "experts" in the local network and in regional realities. They are on duty two half-days a week in one of the 386 contact points throughout France, more than half of which are in sensitive urban areas.

Since the more technical matters, or those that concern the national government, are handled through central services in Paris, the delegates now handle 90% of the 65,000 mediation requests addressed each year.

If every citizen is to have access to justice, this also implies the presence of representatives in each regional institution for the handicapped, and in each penitentiary institution; I am in fact convinced that the limitation of freedom should not lead to the limitation of access to other rights.

The presence of a delegate in prisons on a weekly basis provides direct access to justice for 50,000 prisoners, who can speak to the delegate in confidence in order to receive full information about their rights and the possibility of making a claim in cases of conflict with the administration. Some prison wardens have observed a reduction of 30-40% in acts of violence since the arrival of a delegate. Mediation conducted by the delegates essentially allows for the resolution of complaints that could not be handled in any other way. Nonetheless, only 30% of prisoner complaints concern the prison administration; the remaining 70% concern various government bodies outside the penal system, and sometimes have to deal with the circumstances of the prisoner's family or the prisoner's return to social life.

Whereas the sophisticated legal and administrative systems of modern societies create complexity, the Mediator creates simplicity and accessibility, freely and quickly. The need to make the Mediator accessible to all types of populations convinced me to create, for the first time in French administration, the *e-mediator*, a "chat" tool that allows 24-hour access to information about the Mediator, or to set up an appointment with a delegate via MSN Messenger or Google Talk. Our presence on the Internet, notably our website, allows us to observe the thematic tensions that are emerging in our society.

Being present with someone in the search for a solution

I will take the example of health care. In France, 70% of hospital visitors are over 60 years old. Arranging rapid access to expertise and compensation is important to them, rather than enduring long procedures that wear them out, and which, unfortunately, may not yield results in their lifetime.

France is one of the few countries that passed, in 2002, a law for the protection of the rights of patients and victims of medical accidents. A hospital user committee and mediator were put in place in every hospital. However, the need was soon felt for a body independent from the medical profession and the hospital administration, in which the patients could place all their confidence.

It was in response to such needs that in January 2009 I established a healthcare unit, an information and mediation service mandated to encourage dialogue between health care users and health care professionals.

After five months of experience and 1,000 phone calls per month received by the healthcare unit, I have observed that the main problem with the health care system is that it lacks transparency (for example, access to medical records) and lack of capacity for dialogue. Actually, 15% of inquiries that I handle come from health care professionals themselves, looking for a way to re-establish lost communication with users.

In 85% of cases, mediation allows to find a solution that avoids litigation and allows learning a lesson from the already committed errors, in order to correct procedures. In France, we are undertaking a study with insurance companies which prefer to compensate on the basis of legal decisions rather than the results of mediation.

Seeking a sound and lasting solution

The extremely rapid development of technology creates new challenges for government action. The legislator will always be late with respect to technological advances, for example, in bioethics.

As an observer of societal evolution in treating individual cases, the Mediator can propose solutions to individuals that bridge this time gap by using his power of recommendation in equity. One returns to Aristotle's classic definition that when one puts fairness into practice, one ends up correcting the law when, by virtue of its general character, it reveals itself as inadequate.

The fundamental question is: can the Mediator limit himself to guaranteeing fair administration in conformity with the law, to the deliverance of "good provision of administrative service"? What to do in a situation where the administration has applied the law strictly, thereby creating an unjust situation?

The French legislative system has conferred on the Mediator the trust not to "speak the law" but to "speak justly". The Law of 1973 states that:

> when it appears to the Mediator, during a case in which he is involved, that the application of legal or administrative measures would lead to an injustice, he may recommend any solution that leads to a fair resolution for the claimant[1].

Fairness, an abstract notion defined more or less intuitively, has to be applied in the context of the complaints received by the Mediator, who must con-

[1] Article 9 of the Law No 73-6 of January 3, 1973, instituting a mediator.

stantly remember that he represents neither the citizens nor the administration.

It is worth emphasizing that the notion of fairness is infused with the subjectivity of whoever puts it into practice. Moreover, so that it does not fall into arbitrariness, a certain number of conditions should be fulfilled:

- The need to respect the law of the state leads one not to oppose the will of the rule-making authority;
- Respect for the law of the state leads one also to avoid adopting a solution, in the name of fairness, that detracts from the rights of third parties, which is to say where the act contested by the claimant has created rights favoring other persons;
- The Mediator ought not to intervene except advisedly, where the unfairness created by the administrative decision is clearly established; and
- When the Mediator recommends a solution out of fairness, this may not in any case become jurisprudence, or create a precedent. The administrator who accepts this recommendation ought also to be protected by his structural hierarchy or his governing authority.

As we see, the idea of the French Mediator's role is here based on an approach open to the everyday life of citizens, to particular circumstances; an approach open to the feeling of the opacity of law held by a great part of the citizens; an approach open to realities, and quite simply, to life.

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The fact remains that institutional mediation, which calms, listens, accompanies, and proposes lasting solutions, should be based on requisite conditions.

Of course a precise definition of the attributes and powers of the Mediator, equipped with qualities as much legal as human, as well as sufficient means of action, is essential. I should like at this point to pay homage to the combat that many among us are waging daily under difficult moral and material conditions, out of respect for the mandate they were given. In France as elsewhere, the Mediator's mission is marked by struggles with power; these struggles are more intense in certain states where the Mediator is perceived by parliamentarians, politicians and judges as a competitor – even though the Mediator is never a political decision-maker; his role is to question politicians in order to convince them to make decisions, without becoming a substitute for them.

We can, however, accomplish our mission only on the condition that we are demanding from ourselves, first and foremost.

Mediators are independent institutions for which freedom of speech, action and inquiry ought to be formally guaranteed. But let's not delude ourselves; it is not a question of gaining independence by opposing, but rather by trusting; not independence for combat, but a combat for independence; not to destroy but to construct. Independence is rooted in a relationship of trust with the administration and political power, so mediation plays the role of a stinger that sometimes pricks or upsets, while revealing dysfunctions that one would prefer to ignore.

Independence is not a reward but a responsibility. We must recall what every Mediator knows: That the conquest of independence begins with oneself, with one's own opinions, religious or philosophical convictions, friendships and political views.

I spoke earlier about a multiplication in requests for mediation. In reality, the need to improve the intake and internal treatment of claims has led in France to the establishment of numerous Mediators or conciliators in the public service – postal mediators, energy, taxation, transportation mediators, etc. I see them not as competition to the Mediator but as a complement, as a gateway into administrative labyrinths, an intermediary to administrators, a lever to reduce the pressure on the Mediator's office. I therefore supported the creation of a Public Service Mediators' Club, and the adoption of a Mediators' Charter in the public service to coordinate our actions.

Conclusion

Dear colleagues, we can clearly see that our societies are torn between increasingly fierce repressive strains, and an increasingly rigorous demand for the respect of human rights. The Mediator is at the heart of this tension, which is the reason for our cooperation with international organizations for the protection of human rights, such as the Council of Europe.

I am convinced that the way a society treats the weakest, the most marginalized, or even the most dangerous of its members is a good indicator of the level of that society's democratic development. A strong democratic society, sure of itself and its values, favors the rule of law over the right of power, justice over vengeance. It creates avenues of expression for all its citizens, and respects the intangible, absolute dignity of each human being.

Mediators, as moral authorities, have the obligation to remind us of the fundamental values of our society, to propose to each person who comes to them a lasting solution that restores our ability to live together. Laws are often good – but they can nourish the appetites of politicians, and also the bitterness of the public if they are badly applied. People are no longer content with words; they want concrete action. It is up to us – Mediators, Ombudsmen, Defenders, Protectors – to be concrete doers, effective and exemplary in the service of the citizens.

Thank you.