

International Association of Women Judges

9th Biennial Conference

Equal Justice for All:

Access, Discrimination, Violence and Corruption

Panel H

Mediation and the Courts:

Increasing the Tools for Settlement of Disputes

Mediation as a Policy Tool of Supreme Courts in Latin America

By Gladys Stella Álvarez

Argentina

Panama City, Panama

March 25-28, 2008

Gladys Stella Álvarez

Uribelarrea 481 6° C – Olivos –Argentina
alvagla@fibertel.com.ar
Telefax (5411 4790 4763)

Fundación Libra

Lavalle 1125 7° 15 – Buenos Aires - Argentina
libra@fundacionlibra.org.ar
Telefax 5411 4382 3708/4382 3967
www.fundacionlibra.org.ar

Gladys Stella Alvarez was Judge of the National Court of Appeals of the city of Buenos Aires from 1984 to 2005. Currently, she is Academic Director and President of the Honour Council of Fundación Libra, a non-governmental organization founded in 1991 to support the ADR movement and the modernization of the Argentine Judicial System. She runs the posgraduate course in Negotiation and Resolution of Conflicts in the Law Faculty of the University of Buenos Aires. Due to her pioneering work on the use of mediation in Latin America and her judicial initiatives on ADR, she received national and international awards together with Dr. Elena Highton. The Association of Conflict Resolution awarded her with the first prize of the International Sector for her international leadership in ADR. at the annual meeting held in Philadelphia, USA, in 2006. Windsor University in Ontario, Canada, granted her an *Honoris Causa Doctorate in Civil Law* as a recognition for her work on *Access to Justice and Mediation*. Her doctoral thesis on *Mediation and Access to Justice –summa cum laudae–* was published in 2003. She is author and co-author of several mediation books.

Buenos Aires, March 13, 2008

Mediation as a Policy Tool of Supreme Courts in Latin America

By Hon. Gladys Stella Alvarez

Argentina

1. INTRODUCTION

Mediation is a non-adverse procedure of dispute resolution in which a neutral third party assists disputants in reaching a mutually satisfying settlement of their differences that fulfills their interests and needs.

The institutionalization of mediation as one more service provided by the justice administration is directly related with the protection of a fundamental human right: the effective access to justice.

Access to Justice and Non Access to Justice so that it not only involves the entrance to the judicial system but also comprises dejudicialized ways to settle conflicts.¹

This comprehensive outlook is related to an ample concept of the *administration of justice* interpreted as the offer of tutorial services through the jurisdiction and of mechanisms of Alternative Resolution of Disputes, especially mediation. The traditional system of justice has proved insufficient to meet the demands of modern societies. Therefore, citizens must be guaranteed access to diverse mechanisms that are denominated as Alternative Resolution of Disputes (ARD).

2. POLICIES OF STATE FOR THE JUDICIAL POWER

We have claimed that both *access to justice* and *the institutionalization of Mediation*, and the decentralization and dejudicialization of judicial services through Conflict Resolutions Centers and Justice Houses form part of the Public Policies that the Superior Justice Courts of Latin American countries have acknowledged since the last decade with the aim to:

1. Ensure the access of the least favoured to effective methods for the resolution of disputes
2. Diminish the litigiousity and improve the justice service
3. Preserve the leading role of the courts as regards assisting citizens to settle their disputes.

¹ Álvarez, Gladys Stella, *Mediation and Access to Justice*, Santa Fe, Rubinzal-Culzoni, 2003, Chap.II.

Among them we can mention Resolution No. 402-2006 dated March 9, 2006 dictated by the Plenary of the Supreme Court of Justice of the Republic of Santo Domingo in which it is "*declared of Public Policy of the Judicial Power to implement and promote the alternative mechanisms to settle conflicts in every court within the national territory*". Similarly, due to Agreement No. 252 of May 31, 2006 by the Plenary of the Supreme Court of Justice of Panama, within the frame of the Pact of State for Justice, the National Direction of Alternative Methods for the Resolution of Conflicts of the Judicial Organ which, among other functions, sets the policies in this matter.

The IInd National Conference of Judges held in Salta, Argentina, on September 13 and 14, 2007, summoned by the Supreme Court of Justice, included the topic access to justice, the alternative methods for dispute resolution and the creation of Justice Houses as Government Policy for the Judicial Power. In addition, it recommended the following:

"Bear in mind that mediation means democratization of power; that you expect to find the solution to a conflict in it, even in penal matters and in cases in which it is possible to eradicate violence from the punishment with a minimum repressive intervention of the State".

3. A NEW PARADIGM

We consider that a very important step has been taken towards a new model of administration of justice in which multiple justiciables are guaranteed different ways to resolve their conflicts.

Mediation is part of this change in the treatment of social conflicts² and in the judicial culture. Coincidentally, Lord Woolf, former Chief Justice of England and Wales and author of the Reform of Civil Justice in the 1990s said:

"(...) I am convinced that our attitude toward civil litigation in the past was the wrong attitude" (...) "We had the wrong culture. It was too adversarial. It was too aggressive. And in consequence of that, it served no one. It didn't serve the courts, it didn't serve the public, and it didn't serve the litigants who came before it." (...) "judges must take control of litigation. But there's another thing that is more important" which is "assist the parties in resolving the dispute" (...) "The cost system is high. Very few people can afford to litigate and they need to have other mechanisms to resolve their conflicts in such manner that only those which cannot be settled should go the way of formal justice"³.

2 Regarding the scientific evolution, Thomas Kuhn states that there are successive paradigms, term which is used in social sciences to refer to a model that fails and is replaced by another one.

3 Alternatives Magazine, New York, C.P.R., April 2005

4. MEDIATION PROGRAMMES IN AND THROUGH THE COURTS

The ways in which a mediation programme can be implemented in and through the courts are varied. The choice depends on multiple political, socio-economic and opportunity factors.

We define *annexed mediation* as a programme managed by the Judicial Power, which is therefore responsible for the training, the Record and the quality of the mediation service. By *connected mediation* we mean the system in which the Judicial Power participates but does not manage, or train or keep the Record, and therefore has less responsibility in providing a service. Finally, *related mediation* refers to the one managed by the parties and whose effects are judicially recognized. There are programmes that consider these possibilities within the same normative body integrated in a mixed system.

In a multiple-door system, the offer of both the judicial mediation and in the extrajudicial mediation can be included, such is the case of the ones designed in the Houses of Justice of Fundación Libra and implemented by the Judicial Powers of the following Argentine provinces: Río Negro and de Tierra del Fuego.

5. ADR DEVELOPMENTS IN LATIN AMERICA

At the beginning of the 1990's, the birth of the ADR movement could be detected in Colombia, with laws such as the No. 23 on the *Decongestion of judicial spaces* passed in 1991. In Argentina, the No. 1420 decree dating from 1992 stated that the development of mediation was of institutional interest and ordered the National Mediation Plan and the realization of a mediation Pilot Experience related to the Courts.

As from the second half of the decade, a number of norms started to be incorporated to mediations and conciliations in the following countries: Bolivia, Colombia –new law–, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay. Ecuador as well as Venezuela and the Mexican States incorporated the ADR into their new constitutions. Other countries such as the Republic of Santo Domingo, whom we have assisted over the last few years, have developed mediation programmes in the judicial sector and Houses of Justice. Uruguay has diverse programmes and procedure rules in which some conciliation and mediation aspects are regulated.

Through Fundación Libra, we have provided technical assistance and training to most of the countries mentioned and it has been proved that once mediation was established in the Justice Sector, the movement started expanding to multiple scenarios that form the social network generating capacities in individuals, and setting the values of a peaceful and participative resolution of conflicts.

6. ARGENTINA

In Argentina, the National Mediation Plan was launched by the Ministry of Justice and Human Rights

in 1992. The pilot experience of mediation with patrimonial and family courts of the Civil Jurisdiction were the antecedents of law 24537, which dates from October 2005 and establishes the Obligatory Prejudicial Mediation, and the Obligatory Prejudicial Labour Conciliation.

Statistics results collected over a decade show that the Civil Jurisdiction derived 180,000 lawsuits to mediation. Only 34.8% went back to the formal system, over 60,000 were left out and 31% would never have been admitted due to the low economic value at stake. However, the parties had access to justice thanks to mediation.

The Argentine provinces, except for a small minority, have Mediation rules that regulate Judicial Mediation in the following jurisdictions: Civil, Family, Commercial, Penal, and they also have extrajudicial, community and even school mediation.

The Houses of Justice with the Multiple Door design developed by members of Fundación Libra are a decentralization model of judicial services and of the dejudicialization of solutions to conflicts. The community in which these are established –far from the courts– participates in the Administration of Justice, either as neutral third parties (mediators, conciliators, facilitators), or as members of Social Networks such as Amigos de la Casa. They constitute community centres that see to the needs of the neighbours, orienting them and offering them services for the adequate resolution of their conflicts.

FINAL CONCLUSIONS

- Mediation allows the effective access to justice, fundamental human right that cannot be enforced within the narrow access to the formal system of the jurisdiction.
- The institutionalization of the ADR has to be assumed by the Justice Sector as an aim of public policy.
- It is worth remembering that access to justice for the weakest groups is the expression of a fair society and the power of the parties to settle their own conflicts is the expression of a democratic society.

Buenos Aires, March 13, 2008