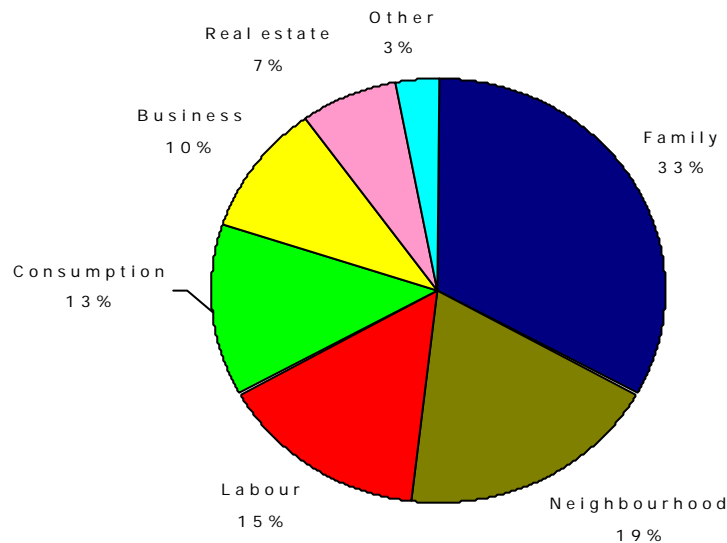


An experience in judicial mediation

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I will present an experiment, which was originally initiated by the Bar of Versailles. Since 1999, a mediation centre has been created with a non-lucrative aim, called Yvelines Mediation.

This centre is composed today of 65 mediators, representing many professions such as lawyers, notaries, bailiffs, executives in the social field, and it can therefore intervene in all the domains of civil law.



1. Family : divorce-separation, breach of the parents – children relationship, inheritance, etc.
2. Neighbourhood : co-ownership, noise, passageway rights, etc.
3. Labour : labour contract, dismissal, collective conflicts, etc.
4. Consumption : credits, guaranties, assurance, service fees, etc.
5. Business : relations between firms and their partners, their clients, their suppliers, their associates, their share holders, etc.
6. Real estate : purchase - sales, rentals, construction, renovation, etc.
7. Other : administrations, local organisations, etc.

It must be noted that on 150 cases till this day, less than 10 % have judicial origins, and this, despite agreements signed with the 2 main institutions, which have defined the modes of our intervention :

- February 11th 1999 : Agreement with the High court of legal proceedings
- December 20th 1999 : Agreement with the Court of Commerce

Let me add that we have not received any litigating cases from the Court of Commerce, while the judges from Familial Affairs and the Magistrate's Court resort more and more to our services.

We observe this reticence even though the Yvelines Mediation centre supplies all the necessary guaranties in terms of transparency, competence and ethics of the mediators, short delays in the treatment of cases, and positive results (3 in 4 cases come to a global agreement).

Why? The reasons behind the resistance of the judicial institution

As we have just seen here today with the work of Hubert Touzard, the reticence of magistrates derives not only from a certain ignorance of mediation procedures, but also from a certain traditional view of their position : using the scales to say the law (*jurisdictio*) and the sword to resolve the conflict (*imperium*).

Jacques Salzer explored 21 reasons behind resistance to the concept of mediation.

Risking to be seen as a heretic, I would add a thought that occurred to me while I was preparing for this round table, from the reading of the very interesting book of Michel Rocard on the art of peace¹.

As an anthropologist of the law I am strongly influenced by the legacy of Michel Alliot, in particular when he declares that «*To think of God is to think of the law*».

Therefore I submit to you a parallel reading of the Church Reform and the current Justice Reform that is realised with the development of mediation.

In the 16th century the Reform was born in France so that the Church of Rome no longer constitutes a screen intervening between the people and God. Michel Rocard writes that, contrary to the priest «*the pastor is no more than a believer among others, with competence and instruction such that he is able to simply accompany the thought and the approach of other people of his religion.* »

In a similar way, the mediator, contrary to the judge, is simply a citizen among others, with competence and training such that enable him or her to accompany the management and the resolution of conflicts among co-citizens.


¹ Michel Rocard, French Prime Minister between 1988 and 1991, wrote L'art de la paix, Editions Atlantica, Biarritz, 1997, for the celebration of the 400 years anniversary of the Treaty of Nantes.


In this light, mediation is an internal challenge to Justice because it implies that people no longer consider the judge as the obligatory intermediary of access to Justice. They believe that they may obtain Justice for themselves with the assistance of a third person, from the moment that the same consensual (rather than conflictual) intention motivates their opponent. The forum, the place of Justice, that is the tribunal, is no longer the sacred place of Justice because Justice may be found in any place, in the same way that God may be found outside the church.

Paradoxically, this « protestant » conception may already be found in chapter 6 of the first letter of the Apostle Paul to the Corinthians : «*Dare any of you, having a matter against another, go to law before the unjust, and not before the saints ? ... I speak to your shame. Is it so, that there is not a wise man among you ? No, not one that shall be able to judge between his brethren ? ... Now therefore there is utterly a fault among you, because ye go to law one with another. »*

In fact, mediators have not been « excommunicated », but have received very little support from judges (with the exception of a few pioneers who may be counted on the fingers of one hand²). However, I think that soon these two conceptions of Justice will coexist, in the same way that Catholics and Protestants live together within Christianity.

These two conceptions of Justice may mutually sustain each other, for the reasons that I will now briefly present and which may be summarised in the following schema :

 (Two opposing arrows) : the western conception of Justice, which is based on the **CONTRADICTORY** (argument / counter argument) and where the stakes consist in the confrontation of viewpoints to convince the judge who will decide.

 (The circle) : the autochthonous or post-modern conception based on the **EXPLICATORY** (term taken from Jacques Salzer) where the stakes consist in convincing and understanding the other. This is not about determining who is right and who is wrong, but in finding a solution to resolve the problem and restore the relationship. The objective *in fine* is to conserve the harmony of differences.

² I am referring in particular to the First President of the Court of Cassation Guy Canivet, the First President of the Appeal court Gérard Coulon, to the Senior Member of the Court of Cassation Gérard Pluyette, the President of the social chamber to the Appeal court of Grenoble Béatrice Blohorn Brenneur.

How? Toward the coexistence of two accesses to Justice

For co-existence to be established, meaning that the two systems would exist at the same time, it is necessary that citizens have the possibility to chose their way, in matters of civil law of course, because I would not contest the monopoly of violence in the hands of the State in penal matters.

For this to happen, the development of mediation will take time, but it must be conceived in my opinion according to two inseparable axes :

1. From the top down : inscribe recourse to mediation in the norms

The first French judicial mediation was ordained in a praetorian fashion in 1968 by the judge Bellet, first president of the High court of Justice of Paris, in the context of a strike with occupation of locations in the Citroën factory. However, it is only with the law of 1995³ and the decree of 1996 that judicial mediation really began to develop.

Yet, this is not sufficient for its prosperity, because in order for its application to have effects, the entire judiciary hierarchy should be involved. The first case of judicial mediation that was transmitted to us was not through the registry, but from the litigating parties directly, who were worried to not have received any news 3 months after the pronouncement of the ordinance.

In order to remedy such dysfunction the Appeal Court in Paris has just produced a document destined to its magistrates, noting the legal texts, the criteria of recourse to mediation according to a pre-established list, the working mode in the phase of establishment of the litigation or after the debate before the court, information mail-outs, propositions of motivation to ordain mediation, a way to keep statistical information, the modes of agreement approval etc.

At the same time, instruction in mediation is developed in the Ecole Nationale de la Magistrature.

This approach must be extended to all jurisdictions and with each magistrate *intuitu personae*.

³ Law n° 95-125 of February 8th 1995 (articles 21 to 26) and its application decree n°96-652 of July 22nd 1996 (articles 131-1 to 131-15, inserted after the title VI of the 1st book of the new code of civil procedures).

This strategy must be similar in the direction of all the counsels of the parties in mediation (in particular within the Bar), and the representatives of the local communities.

Finally, the upcoming reform of familial law following the report of senator Colcombet, will strongly encourage mediation before divorce and separation (with the suppression of divorce on grounds of fault).

2. From the bottom up : inscribe recourse to mediation in the rituals

Since the beginning of 2001, the Yvelines Médiation centre follows a strategy of de-concentration, by progressively establishing the presence of mediators in the entire department (town halls, houses of justice etc.). This, because, if magistrates do not prescribe mediation frequently or at all, the litigating parties may progressively come to make the demand on their own, given that mediation would be inscribed in their way of thinking and acting.

This territorial attendance aiming to create true proximity mediation is doubled with a veritable partnership with the sphere of social organisations and associations, which are frequently solicited with demands for intervention.

Our long-term development is based on the continuous distribution of information on mediation, through the recruitment of mediation and prevention agents, through attractive and dynamic communications (such as posters, flyers, films), through a constant representation in every public event in the geographic department, through the federation with other centres founded on the same model (around about sixty) in a national structure which further promotes representativeness.

The development mediation in general, and of judicial mediation in particular, is entangled in these two axes that I have described. It is through this trail that we may finally promote a veritable culture of peace by Etienne Le Roy⁴: « *respect of the other, mastery of one's self (and of one's instincts) and dialogism* ».

⁴ Etienne Le Roy, Le jeu des lois, Collection Droit et Société, Vol. 28, LGDJ, Paris, 1999, p. 336.