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How negotiators are transformed into mediators. Labor conflict mediation in Andalusia

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ABSTRACT

In this paper we describe and analyze the Extrajudicial System for Labor Conflict Resolution in Andalusia. We begin by emphasizing the major relevance of alternative dispute resolution (ADR) in a European context and the need to benefit from different ADR experiences. Next, we comment on the situation in Spain and focus on the Andalusia's system. This system was created by an interprofessional agreement between the most representative employers' union and the two largest trade unions with the support of the national government. During the first fourteen years more than 4,500 conflicts have been submitted affecting more than 400,000 companies and 3,000,000 employees. Collective mediations are conducted by a team of four mediators, two of them appointed by the principal employers association, and the two other by the two largest trade unions.

Cómo se transforma a los negociadores en mediadores. La mediación en los conflictos laborales en Andalucía

Palabras clave:
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RESUMEN

En este trabajo analizamos el Sistema Extrajudicial de Conflictos Laborales de Andalucía. Comenzamos por enfatizar la relevancia de los mecanismos extrajudiciales de resolución de conflictos en Europa y la necesidad de beneficiarnos de las diferentes experiencias. A continuación comentamos la situación en España, focalizando en el caso del sistema andaluz. Este sistema fue creado por un acuerdo entre los sindicatos más representativos y la patronal con el apoyo del gobierno autonómico. Durante los 14 años de vigencia del sistema se han tratado más de 4.500 conflictos, que afectaban a más de 400.000 organizaciones y a tres millones de empleados. El sistema de mediación está formado por un equipo de cuatro mediadores, dos pertenecientes a las principales centrales sindicales y dos a la confederación de empresarios.

Nowadays there is a general dissatisfaction with the Administration of Justice (Verdonschot, Barendrecht, & Kamminga, 2008). In the United States, this dissatisfaction was obvious during the Pounds Conference, where prestigious jurists and lawyers expressed their worries about the increase in the costs, delays, and workload of the Administration of Justice. In Europe, the necessity for improving the access to justice encouraged the Council of Europe to create the European Commission for the Efficiency of Justice (CEPEJ) with the objective (among others) of promoting the effective implementation of the Council of Europe's instruments for the judicial organization (CEPEJ, 2010). In Spain, the III Barometer of the Observatory of the Judicial Activity exposed the discredit of the Spanish Administration of Justice because 65% of the interviewed considered that the Spanish Administration of Justice works "bad or very bad" (Fundación Wolters Kluwer, 2012).

This general dissatisfaction is caused by a "gap in the access to justice". This gap is understood as the difference between the type of protection that individuals need from the legal system and what those systems are able to offer (Barendrecht et al., 2008). Mediation has been one of the tools proposed in order to lessen this gap. In this sense, it is worth mentioning that the concept of access to justice has recently evolved. Traditionally, international instruments for the protection of human rights have codified the concept of access to justice as the "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by

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the constitution or by law"(Article 8 of the UDHR), "the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law" (Article 14 of the ICCPR), or "the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law**"** (Article 6 of the ECHR). Today, the right to access to justice goes beyond this definition and it is understood as the right to access to adequate dispute resolution mechanisms and not only the right to access to courts (EC, 2004). Following this approach, Carretero (2011) claims that we should look for different models for dispute resolution in Europe with the objective of offering more and better responses to people's legal needs, and using one or another mechanism should depend on the nature of the problem. Therefore, mediation has an important role to perform in the new concept of access to justice and the state has an important role to safeguard the right of access to justice.

Mediation is understood as one one of the most constructive methods for conflict resolution (Brett, Goldberg, & Ury, 1990). Developing an in-depth knowledge of how different mediation systems are functioning is essential to benefit from them and to suggest relevant research questions for the mediation practice. We will present a paper with the following structure: we begin by emphasizing the increasing relevance of mediation in Europe and next we describe the Extrajudicial System for Labor Conflict Resolution in Andalusia (Spain).

Mediation in Europe

Mediation is an assisted negotiation by a third neutral, the mediator, who differently from judges and arbitrators has no power to impose a solution for the parties (Goldberg et al., 1999). We follow the concept of mediation stated in the 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 (EU Directive on Mediation) which establishes that "*mediation* means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member state" (Dir. 2008/52/EC,3).

In Europe, the mediation is developing at a lower pace than in other countries such as United States, Australia or Argentina; however, the value of mediation has been recognized by the most important international organizations in Europe. For instance, the Council of Europe has elaborated different recommendations in this matter such as Recommendation (98) 1 on Family Mediation, Recommendation (2002) 10 on Civil Mediation, Recommendation (99) concerning mediation in penal matters, Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties, and Recommendation (2002) 10 on mediation in civil matters. The European Union published in 2002 the Green Book on Alternative Dispute Resolution in Civil and Commercial Law in which it highlights the potential of mediation as an alternative dispute resolution. And, in 2008 the European Directive on Mediation (European Union, 2008) was approved with the objective of establishing mediation procedures for cross-border disputes in civil and commercial matters. Despite the fact that the obligation lies only for cross-border disputes, the Directive encourages the establishment of mediation procedures for internal conflicts as well.

The promotion of mediation by the European Union has encouraged the proliferation of pilot projects on the implementation of mediation procedures and cooperation projects with the aim of spreading the culture of mediation through Europe. For instance, EIRENE (2012) is a project in which different countries of the EU cooperate in order to implement a communication strategy at the EU level for the promotion of mediation. Its main objective is to develop the culture of mediation as an identity symbol of Europe. Another example is the creation of the European Association of Judges for Mediation (GEMME), which associates professionals of the European Union, Council of Europe, and eventually also the Latin-American countries willing to use alternative dispute resolution systems and specially court-connected mediation measures (European Association of Judges for Mediation; GEMME-España, 2007).

In the directive 52/2008/EC of European Parliament, mediation is promoted as a mechanism which is a quicker, simpler and a more cost-efficient way to solve disputes. This mechanism allows for taking into account a wider range of interests of the parties, with a greater chance of reaching an agreement which will be voluntarily respected. It also allows the preservation of an amicable and sustainable relationship between them. The Commission considered that mediation holds an untapped potential as a dispute resolution method.

Alternative dispute resolution procedures are already a key component of dispute resolution in industrial relations in all the member states. These procedures have demonstrated their usefulness with regard to the resolution of individual and collective disputes related to both conflicts of interest and rights conflicts. However, procedures vary from one member state to another (European Commission, 2002). Also, new procedures, laws, and ADR methods are introduced in different ways. In the Council meeting on employment and social policy in Brussels (2001), the European Council (1999) recognized that non-judicial dispute resolution mechanisms contribute to resolve disputes and play an important role in existing systems of industrial relations. The European Council welcomed the Commission's intention to deepen the understanding of how dispute resolution mechanisms are organized and function in the area of industrial relations. The degree of implementation of this Directive has recently been assessed in order to discover the reasons for its low impact in Europe. The outcome of this research was published in a document titled "Rebooting the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU", which was presented in February 2014 in Brussels. This report develops the "Paradox of Mediation in the European Union" that highlights that despite the multiple benefits of mediation and the support of the European Union, the European Commission and most of the Governments, mediation has only been used in 1% of the civil and commercial disputes that have arisen in Europe (European Parliament, 2014). As this study suggests, we are living a new phase in the integration of mediation in the judicial systems of the European states. The regulation of mediation is not homogeneous through Europe. Some states have completely legislated the process of mediation. For instance, in United Kingdom, the Advisory, Conciliation, and Arbitration Services (ACAS) offer mediation services for any phase of the labor disputes before and after the judicial procedure is open. While some European countries have extensive legal rules on the subject (Lithuania), other countries have no specific provisions pertaining to dispute resolution (the Netherlands), and others already have a rooted tradition of mediation based primarily on self-regulation such as Spain. In Spain, the development of mediation is new, with the first formal proposal developed in 1996, and there is still limited regulation depending on the region and the jurisdiction. There are a few regional laws on mediation and one law at the national level that implements the EU Mediation Directive (Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles a través de la cual se implementa en España la Directiva Europea sobre Mediación). Recently, in December 2013, the Spanish government has published a Royal Decree developing certain aspects of this Spanish Act on mediation, such as the Public Registry of Mediators, the compulsory liability insurance, and the requirements for the establishment of on-line mediation procedures for claims below 600€.