MEDIATION: IMPOSSIBLE?

ON MEDIATIONS BETWEEN CITIZENS AND ADMINISTRATION

SUMMARY

The development of mediation schemes between citizens and the administrations is a relatively recent occurrence in France. Long after the Swedish *justitieombudsman*, a pioneer in the amicable resolution of disputes between private individuals and the public authorities since 1809, France embarked on this path in 1973, with the creation of the national Ombudsman, the Mediator of the Republic (*Médiateur de la République*).

Subsequently, many state administrations and operators, local authorities and social security bodies have set up mediation services, more or less directly inspired by the *French Ombudsman* – which, in 2011, became the Defender of Rights (*Défenseur des droits*), with a broader remit and prerogatives.

A mediation unlike any other

While, at the same time, alternative dispute resolution methods have taken on an increasing importance, particularly in civil and family matters, mediation with public administrations has a number of very specific characteristics. Firstly, it is carried out between two radically asymmetrical persons: on the one hand, a natural person, citizen, administration user, benefits claimant or social insurance beneficiary, who seeks to understand or contest a decision notified to him or her, or to assert his or her rights. On the other hand, an administration that makes assembly line decisions, according to the cases it receives and the regulations it must comply with and enforce – and that it also helps to shape.

Therefore, in principle, all the elements are in place to make this mediation impossible: the public authority deals with mass procedures, its action is entirely guided by rules of general application, it adopts a vertical approach towards citizens and is bound by the principles of equal treatment and legality. Whereas mediation is an art of dialogue on an equal footing, of considering the specific nature of situations, of seeking original, or even unprecedented, solutions that are not intended to be systematised or to set a precedence.

And yet this citizen/administration mediation approach has developed considerably in half a century. What are the objectives of this deployment? And how can two parties so different from each other be brought around the same table in the context of mediation? These are the first questions to which France Stratégie attempts to provide answers in this report.

A plurality of objectives

The Mediator of the Republic was created at a time when the political authorities had undertaken several initiatives aimed at bringing citizens closer to administrations, strengthening citizens' ability to assert their rights and "humanising" the functioning of a bureaucracy considered overly cumbersome.

Institutions such as the Ministry of National Education, the Ministry of Finance, the public employment service and some forty local authorities have in turn set up mediators. Their goal has been to improve the service provided to users and to establish a watchdog capable of identifying, on the basis of complaints made by citizens, cases of "maladministration" which can partly be remedied during the mediation, and which, if required, can inspire more general reform proposals, presented in the mediator's annual report.

More recently, the systematic introduction of mediators in social security bodies has been in line with the goal of recognising a "right to make mistakes" for insured persons and contributors, by offering them an interlocutor who can take their situations into account and recognise their potential good faith, rather than automatically applying sanctions.

But beyond these intrinsic reasons for development, many administrations are also inclined to entrust mediators with the task of reconnecting with a public that now has fewer direct interlocutors, behind a counter or on the telephone, owing to dematerialisation policies.

At the same time, administrative courts, looking to contain the flow of cases that reach them, are increasingly using mediation as an alternative or as a mandatory prerequisite, particularly for so-called "mass" disputes in social matters – for example, challenges to decisions relating in particular to the “RSA” (a form of social welfare), the “APL” (housing benefit), or even the removal of individuals from job seekers registers, are currently being tested with "mandatory prior mediation".

As we can see, mediation is promoted in pursuit of various objectives, which do not necessarily coincide and can lead to tension in the way mediation is designed and implemented in practice.

Highly heterogeneous schemes

In France, no major "mediation act" that could serve as a broad framework for all the schemes covered by this approach has been passed – at least not in the field of administrative law. Several successive waves have given rise to different types of mediators, which have therefore taken different forms depending on the public institutions to which they correspond.

Some mediation schemes rely on volunteers – often retirees – who receive users, while others are embedded in administrative services. Some can be contacted by email, telephone, post or through physical contact with staff, while others only accept online forms. Some mediators are appointed for six years, with irrevocable and non-renewable mandates, while others are appointed within a much less defined framework and have fewer guarantees of their autonomy. Recourse to the most recent mediators (in particular those of social security funds) interrupts the time limits for appeals when those created longer ago (including the Defender of Rights) must sometimes invite complainants to appeal simultaneously to the courts...

These formal differences present the issue of both the actual extent to which these mediators are independent of "their" administration – the condition for them to be able to play a real "third party" role – and the clarity of the schemes for users – a condition for their accessibility and effectiveness.

Shared challenges faced by the various mediators

Regarding the various objectives they are set and which are causing a rapid increase in the volume of citizen/administration mediations, mediators are at a crossroads. Can they still retain their own added value, linked to listening and considering the specific characteristics of the cases brought before them, if they are asked to replace counter service or to stand in for the judge? In other words, the specific promise that mediation makes to users can only be kept if the conditions for personalised handling of requests and sustained dialogue are preserved.

The main risk identified by the authors of this report is that of the "industrialisation" of mediation. It would not be acceptable if it were to lead to a massification of derogations from the rule of law, nor would it be admissible if it were to result in the automation of case processing – thus turning mediation into an administration like any other.

If mediation is to continue on the trajectory of quantitative expansion it has begun in recent years, it is vital that certain guarantees be met to ensure that mediators can still exercise their "core business" under good conditions and to avoid an instrumentalisation of mediation that would prevent it from being faithful to its spirit and principles.

This implies first of all finding mediation's rightful place in relations between citizens and administrations, and not asking it to do what it is not in a position to do – in particular to take the place of first-level contact with the user or to replace the courts. This in turn requires that the guarantees of independence that will ensure that users know who they are actually dealing with when they refer a case to a mediator – and that they also know what they can and cannot expect from them - are strong and clear.

To achieve this, France Stratégie has put forward several recommendations, with three main objectives: aligning the conditions of mediation, coordinating mediators, and discussing lessons learned in mediation.

Aligning the conditions of mediation

The first three proposals presented in the report aim to consolidate existing schemes and establish a standard with which any new mediators set up can subsequently be aligned.

Proposal 1 – Define a set of core guarantees of independence for mediators

In order to strengthen and standardise the positioning of mediators between citizens and administrations, a "set of core guarantees" could be enshrined in the law, which, without going into detail about the operation of each institution (which must continue to be flexible in order to remain faithful to the spirit of mediation), should define a minimum standard regarding conditions of appointment and incompatibilities, operating autonomy and publication of the annual report.

Proposal 2 – Generalise the interruption of time limits for legal action

Still with a view to harmonising schemes, which would ensure clarity and accessibility, the prerogatives of the oldest institutional mediators should be aligned with those of the social security mediators with regard to interrupting time limits. Despite a slightly stricter framework, this would be a way of increasing the attractiveness of mediation without running the risk of applicants losing their right to take legal action.

Proposal 3 – Strengthen complementarity between volunteers and employees

To provide readily available services, the comprehensive handling of cases, and face to face interaction with complainants, mediators can rely on volunteers on duty as well as on employees responsible for the legal investigation of applications. In this context, volunteering for mediation could

be better recognised, for example through the Citizen Engagement Account (*compte engagement citoyen*), and mediation employees should, wherever possible, work full-time in this field.

Coordinating the various citizen/administration mediators

The multiplicity of mediation schemes is not a problem in itself, if this means that users have access to local services and a suitable solution to their administrative disputes. However, it is important to ensure coherence between the different institutions.

Proposal 4 – Make the Defender of Rights the "network head" of public mediators

In order to give concrete expression to the "set of core guarantees" that would be shared by mediators between citizens and administrations, France Stratégie recommends that mediators be grouped around the oldest institution, which is also the and largest in terms of volume and has the strongest guarantees of independence, in a network of "correspondents of the Defender of Rights".

The Defender will thus be able to act as a resource centre for mediation, a watchdog when mediators encounter difficulties with "their" administration, echo the recommendations made by these other mediators and ensure, in general – for example by means of a specific annual report – that the aforementioned set of core guarantees is respected.

Proposal 5 – Pool operations to promote access to rights

In order to overcome the difficulties linked to the lack of resources of each mediator, the dissemination of information on mediation with the administration and its promotion as a tool for accessing rights and dispute resolution could, at both local and national level, be coordinated between the Defender of Rights and the other mediators.

Proposal 6 – Promote studies and research on the quality and accessibility of mediation

Data are currently lacking on the profile of users who have (or do not have) recourse to mediation services, and on the overall impact of these schemes. The Defender of Rights has announced that an "observatory" will be set up to work on the basis of the cases handled by the institution. It would be appropriate for it to also develop its activities on the basis of data from other mediators providing a link between citizens and administrations.

Discussing lessons learned in mediation

The annual report of each mediator, which is public, allows us to see dysfunctions identified based on specific cases, and to place these in a broader context in order to propose more comprehensive reforms. We still need to ensure that these reports are widely disseminated and discussed. This is the purpose of the report's final proposal.

Proposal 7 – Foster debate on the lessons to be learned from mediation

While most mediators present in their reports a follow-up of previous years' recommendations and how they have (or have not) been taken into account, it is possible to go further and build on this exercise to develop a culture of accountability within administrations. For each mediator, the conclusions of the mediation work and the recommendations made in the report should be discussed in a collegial body – for example, at the High Council for Education (*Conseil supérieur de l'Éducation*) for the Mediator of National Education (*médiateur de l'Éducation nationale*), or in the deliberating assembly of the local authority for local mediators.

Finally, France Stratégie recommends that, in the context of major reforms affecting citizens' rights – such as those currently under preparation, which concern the simplification of minimum social benefits and the merging of pension schemes – mediation be fully utilised from the outset to ensure continuous monitoring of the implementation of the reformed schemes and their improvement, depending on the issues that users have identified.