

## Conclusions and Recommendations

### I Introduction

The final chapter aims at presenting a general view that brings together the different parts of the White Book, points out some of the important results obtained, and allows for making a list of general recommendations from the proposals of the work groups. In order to facilitate the reader's job, the tables of Annex 1 may also be consulted. Furthermore, reading and understanding the situation of mediations or the mediation activities will be easier if the regulation pyramid is taken into account (figures 5 and 6 of Chapter 1). So we will distinguish between (i) *mediations* and (ii) *interventions* or *mediation actions*. *Mediations* are formal completed processes, whereas *interventions* or *mediation actions* may not be institutionalized and are composed of social and/or political diverse actions (interventions, translations, information, assistance, etc.).

Every action or mediation process is placed into three dimensions: a social one, a political one (governance) and a legal one. Making a distinction between them may be useful to understand the functionalities of social mediation interventions. As we go from the base of the pyramid to the vertex, the level of formalization and the degree of legal engagement resulting from the agreements of mediations grow. However, social or more informal mediations found in the base are not less important, since conflicts need to mature for the mediation process to occur.

Therefore, it is not surprising that there are few mediations in some domains in comparison with the thousands of sentences of the ordinary jurisdiction. Nevertheless, this comparison is not accurate because it does not take into account that mediations are actually a part of the *mediation*

*system*, this is to say a set of social and political actions with a *preventive* and *resolving* goal. Methods of alternative resolution are not only procedural mechanisms, even if there is a procedural part.

Mediation not only aims at reaching an agreement with executive effects, but it also aims at managing the conflict in a reasonable way in which (i) the parts do not convert their dispute into a lawsuit that gets into the ordinary jurisdiction; and (ii) the conflict does not escalate to more aggressive situations. Therefore, mediation sometimes stabilizes the conflict more than solves it. Then the parts can identify and *better understand the differences that separate themselves*, so they may decide not to go on with their dispute. We will see that this balance, even if scarce, is given by mediation and that is why the degree of fulfillment of the agreements reached is higher than the degree of fulfillment of judicial sentences. From this point of view, mediation is a *system of social, political and legal management of differences* as well as a civil or citizen system of justice.

For this reason, this kind of *relational justice* complements (and is not opposed to) the state system of the Administration of Justice. Relational justice may be presented as a fundamental part for justice performance in complex societies because it is a social, political and legal liaison (in diverse degrees) between the different public Administrations – especially the local ones which are close to citizens –, the governing bodies and the civil society to manage social problems. Therefore, it is a democratic development of the contemporary rule of law.

Most of the results obtained from the White Book research may be understood from this perspective as a reaction of the Catalan society and its institutions

towards the three structural problems set out in the Introduction of Chapter 1: (i) the demographic and social transformation of the Catalan society; (ii) the crisis of the exclusively jurisdictional model of the Administration of Justice, (iii) the commitment of the European Union as regards the mechanisms of dialogue, governance and *soft law* in order to find a model of regulation which is not exclusively built upon the traditional political and legal system of the State in the XIX and XX centuries.

After this brief conceptual introduction, our conclusions will be organized as follows: (II) Relevant Methodological Aspects, (III) Global Vision of the Results, and (IV) Recommendations.

First, we will briefly describe the methodology to continue with an explanation of the results obtained. Finally, we will propose some recommendations.

## II Relevant Methodological Aspects

One of the most important challenges of the project was organizing the research from methodological guidelines which allowed us obtaining a well-grounded knowledge of the state of mediation in Catalonia. The studies on the features of research at Catalan universities object that, in a moment in which interdisciplinarity is a common feature, research is still far too isolated as regards the domain and methodology. This is why from the very beginning of the project we wanted to gather as much theoretical and methodological approaches as possible. So multidisciplinary teams participated and took part in all the stages of the project.

In the first stage, theoretical and methodological guidelines were settled. These allowed the definition of a set of concepts, variables, indicators and research techniques that facilitate the cross-reading of the study. These minimal assumptions were defined on the basis of the specifications of each mediation domain and the need to get comparative and comprehensive information about the state of mediation in Catalonia.

From a set of basic dimensions, common and specific variables and indicators were defined as well as the most appropriate qualitative and comparative methods for the objects of study and for the research stage.

The use of qualitative and quantitative tools shows meaningful results concerning not only the amount of actors consulted but also the diversity of tools. As regards quantitative studies, a lot of institutions were consulted – a total of 1,263 – as well as individuals – 757 – through questionnaires and surveys, and 15 databases were also consulted to obtain statistical information. In the qualitative domain, 21 focus groups were organized in which more than 100 people were participating, 118 semi-structured interviews were carried out and 50 case studies.

The features of the universe of study, the dimensions to analyze and the footprints of the research teams explain the logical differences in the implementation of the analysis techniques. Nevertheless, the flexibility and methodological adaptation allowed for the different experiences and knowledge fields to be put in order harmonically with no epistemic bias that hinder the comparative and cross-analysis of mediation.

So the three methodological pillars of the White Book have been: (i) the complementarity of research methods, (ii) the standardization of information to get a general view of the results, and (iii) the aim to work with a census (and not with samples) in the collection of data. However, there is one pillar missing that has been present from the origins of the project: providing new data instead of simply rewriting the existing information, which was poor and unreliable from the numerical point of view.

Nonetheless, this effort has made a set of valuable social activities become apparent for the first time. Now, we will try to describe this phenomenon concisely.

## III Global Vision of the Results

### 1 The Extent of Mediation

When reading the conclusions of each domain, anybody may realize that mediation is still an institution which has to move forward. Mediators and domain experts consider that the institution could be better well-known and acknowledged, and the citizen could choose it as the first option before turning to the ordinary jurisdiction. This is a right and well-founded perspective.

However, if we pay attention to the numbers of the first general table of Annex 1, this perception is not that correct. The first thing to take into account is how deep and vast is the scope of mediation in such a short time. In 2008 – the year of reference of the present study - 141,602 mediations were carried out and 154,384 people were mediated. *In other words, more than 2% of the Catalan population was involved in a mediation process.* In addition to this description, there was a high number of institutions offering mediation, a total of 515.

An important clarification: we are talking about *mediations* or completed mediation processes with a certain degree of institutionalization, which means that these cases are on the top of the pyramid of the mediation regulatory system. So the number of social mediating interventions on the base must be much higher. Although we do not have comparative global data, we will give an example later on.

If we focus on the private domain of business mediation, we can see that – despite the provisions and previous opinions – companies know well mediation, and this knowledge follows a pattern. The degree of knowledge is directly proportional to the size and age of the company, so 90.8% of companies with more than 100 workers and 80% of businesses founded before 1980 know mediation. Besides, the lowest point is over 50% for recent companies and companies having less than three employees. After taking a look at these figures, we think that conflict resolution techniques – and among them mediation – take part in the knowledge and tools which are normally used by human resources departments, so mediation takes part in our country culture as regards the organization and business. This is also coherent with the high number of labor mediations: 47,699 in 2008. Managing labor tensions (including tensions between the staff and the company) is a particular field of individual and collective negotiations which are closer to conciliation techniques. However, this experience cannot be played down as it may be useful for the development of mediation.

The 30,755 consumer mediations which were carried out during the same period deserve special attention. These are neither negotiations nor conciliations, but mediations that follow a series of protocols established by the *Agència Catalana de Consum*<sup>1</sup> (hence ACC) and all the bodies offering this service – 113, distributed in the territory. These bodies work

between the public and private sector, and they manage a growing amount of claims between consumers and businesses as well as between providers and companies. Indeed, this domain comprises citizens and important economic sectors where there are a lot of different actors and service providers: consumer associations, the Administration, chambers of commerce, local bodies...

The most common claims are those of telephony/Internet, shopping, air transport services for passengers and supplies, which amount to 68% of the total of mediations. Telephony/Internet gets 40% of mediations though. Usually, companies in this sector are big – except for shopping –, offer their products to all their consumers in the same way and hold a preeminent position as regards the consumer. Therefore, we can see how the mediation processes can be conceptualized from different perspectives, since this sector normally protects the consumer. Furthermore, the ACC may impose penalties which affect its neutrality.

## 2 The Fragility of the Institution and Professionalization

Generally speaking, there is a clear dissonance between the important number of mediations carried out in 2008 and the situation of the institution. Most of the research teams pointed out that mediation is in an emergent situation, so the degree of institutionalization is very low as well as the information that citizens have and the professional acknowledgment. This is a general perception. On the other hand, another surprising contrast is the precision of mediation services in the field of healthcare as well as the relatively high number of town councils and *consells comarcals* (county councils)<sup>2</sup> having protocols and codes of good practice for mediation. 34.2% of town councils and 36.4% of county councils state that they have *all* the regulatory protocols for mediation as well as 56% of healthcare centers (CAPs<sup>3</sup> or hospitals).

On the contrary, no matter whether we look at the market (business, labor or consumer mediation) or at the public (or semi-public) domain to manage the family system, the education and healthcare systems or the local Administration, there is a feeling of fragility. However, it seems that an organizational and institutional reaction has taken place. What is the reason for this contrast? Which are the

conditions for the emergence of the profession of mediator?

On the one hand, the answer is related to an increase in the demand of these services, which is undoubtedly connected to the processes of social change, demographic movement and migration. On the other hand, the efforts and movements resulting from the institutionalization process of mediation in such a short period of time may also reply the two questions.

The institutionalization occurs due to diverse reasons. One of them is the political intervention of the legislator: since the study comprises Catalonia, the starting point was the *Centre de Mediació Familiar de Catalunya*<sup>4</sup> (hence CMFC) which was born after the enactment of the *Llei de mediació familiar 1/2001* – the first family mediation act in Spain. The creation of the CMFC was a major boost for mediation, as the foundations and management of the activity became an identified and autonomous political action within the *Departament de Justícia*<sup>5</sup>. The expectations created by the above mentioned act were reflected in the increase of the activity of mediators in 2002 and 2003. However, there was a remarkable decrease in 2004 as regards the activity of mediators and the interest in training courses. Tendencies are created by expectations. Nevertheless, most of the variables affecting institutionalization are not the result of a legislative impact but they refer to the organization and conduct of the bodies of the Public Administration. 49.1% of the units specialized in mediation in the public institutions (out of a total of 53) were born in 2006 and 2007 (but decreased in 2008).

In fact, the implementation of mediation, the creation of protocols of mediation and the increase of mediators are strongly connected with either the structure of the Administration of Justice or the public policies of participation promoted by the Administrations, especially by the local governments.

This is not surprising: the Administration is responsible for answering the social tensions caused by conflicts and territorial, demographic, labor or professional unbalances. During the 80s and 90s, research about the emergence of community and professional mechanisms of conflict resolution took place in USA, Australia and Canada. These studies stated that mediation was developing “in the shadow of the law”, specially at the courts. In the countries

with continental legal tradition, this expression may be translated as “under the protection of the Administration” (either at the state, regional<sup>6</sup> or local level).

So the Administration of Justice manages labor mediation; regional agencies take care of consumer claims; and town councils, county councils and *diputacions* (provincial councils)<sup>7</sup> deal with community and citizen mediations. Likewise, consortiums with the participation of the public sector and some Departments of the Catalan Government – namely those of justice, education, healthcare and environment – manage family, healthcare, environmental and criminal mediation (for adults and the young) as well as mediation in schools. In any case, these mechanisms are supported by public funding.

The profession of mediator emerges in this scene and follows the path of institutionalization with a weak presence in the market. For this reason, the fragility feeling exists despite the high number of mediations. This statement is easily demonstrable, since the companies created due to social services' outsourcing have public institutions as preferred customers.

If we also observe the composition of the profession, we get to the same conclusion. Counting the exact number of mediators is difficult. If we take into account real demonstrable mediation, we may agree that there are not even one thousand people working as mediators (not counting mediations in schools). The majority of these people are lawyers, afterwards psychologists – some of them also find job opportunities in the human resources departments of companies –, and finally there are also education professionals or social services and assistance workers. In short, four fifths preferably work as mediators within another more consolidated profession such as lawyer, psychologist, teacher or worker at the Administration. Very few people get their entire salary exclusively from mediation activities. Likewise, very few people work in the free market as mediators or social workers employed in service companies (220 people who are connected to mediations effectively carried out, according to table 4 in Annex 1, but these people depend as well on the Public Administration).

Therefore, the degree of professionalization right now is more a specialization of another profession.

And so the degree of sectorialization is high, as it is indeed connected with explicit or implicit public policies. The profession is growing thanks to the Administration and within other professions, and this twofold dependency is the reason for such a high degree of sectorialization and training. For instance, 83% of community mediators have studied at university. There is also a matter of gender which is not surprising: approximately three quarters of the total of mediators are women. In contrast, such a difference in the variable of gender is not found as regards mediated people, at least in family and community/citizen mediation (50% of each sex in family and community mediation, whereas there are more mediated women in the healthcare domain. In criminal mediation, more than 85% are men, either adults or young, but these are mediated because of other reasons connected to the criminal and penitentiary domain).

In conclusion, there is a dependency on the programs and projects connected to the Administration. If we observe the above mentioned table, the centers offering mediation services are supported by the Administration with the exception of the consumer and labor domain, and sometimes the family and community domain too. Interesting enough, the autonomous Administration is the most involved one in this universe. However, this description needs to be clarified with the importance of the local government as regards the number of mediations – which come to more than 10% of the total – and the number of mediators. In other words, the role of the local government is a preeminent one in this respect.

A last point to take into account is the lack of involvement of the third sector in mediation, which could be the alternative to professionalization. Associations are starting to participate only in community, healthcare and consumer mediation since the others are professional mediators. Actually, there are voluntary mediators that participate on a *pro bono* basis in the processes. However, the Catalan associative movement has traditionally been intense, that is why the participation was expected to be higher. In community/citizen mediation, 88.6% are professional mediators whereas only 11.4% are volunteers. Nonetheless, if we focus on an intermediate situation such as healthcare consortiums, which comprise both the public and private sector, we can see that 36% of mediators are

volunteers. This is a key figure which may explain how the profession of mediator is evolving right now.

### 3 The Social Organization of Mediation

We should go on instead of just remaining with this information. The institutionalization is following the guidelines of the dominant administrative culture, but at the same time it is also taking place on the fringes and inside this culture thanks to a set of innovative reactions.

From another point of view, the Administration has answered the social demands of citizens and professionals as they are facing new problems and conflicts in different sectors are increasing. The response of the Administration has had a proactive dimension which has to be evaluated. Two fields are especially sensitive: education and healthcare. Taking into account the new scene in our country – which has been summarized in Chapter 1 –, a quick response has been given in both fields when the conflicts were arising as well as *cooperation with professionals and citizens has taken place*.

Mediation broke rapidly into the education domain as a means of conflict resolution through a set of guidelines and dialogue. Actually, mediation has been an education policy carried out by the *Departament d'Educació*<sup>8</sup> – in different stages for almost 10 years – through training programs for students, teachers and parents, and formal established protocols. Mediation in the education field is not only understood as a mere technique, but as an authentic *culture of peace and non-violence* put in practice by both teachers and students. In fact, mediation is not only taught as a curricular content but as a usual practice for coexistence management. In the 2008/09 academic year, 2,140 mediations at Catalan schools were carried out (176 schools) with an average of 12.7 mediations per center. This is an important figure which points out a set of established and well-settled guidelines in the education domain. Furthermore, there is a specialized unit – the *Unitat de Suport a la Convivència Escolar*<sup>9</sup> (USCE) – which has been recently created in order to deal with the most serious conflicts in which families are involved (cases of harassment, improper use of the Internet, violence inside the classrooms, etc.).

On the contrary, very few mediations have taken place in the healthcare domain. Nevertheless, the base of the pyramid shows the surprising result

concerning the management of the problem faced by some users to access the healthcare system due to language difficulties as well as social and cultural integration.

In 2008, there were 9,438 cases of community mediation: 44% of them were citizen mediations but 53.8% were intercultural (Reus and Alt Empordà<sup>10</sup> are not counted here as they had 9,676 intercultural mediations more). The issue of interculturality is much more relevant in the healthcare domain. In 2008, 37,139 intercultural mediations took place in Catalonia in 98 healthcare centers. If the total of mediations carried out is broken down into actions, there is a total of 122,593 actions with an average of 4.2 different actions per mediation. So this is neither a simple phenomenon nor a mere task of interpretation: it is a complex phenomenon in which the mediator assists and uses linguistic, cultural and technical competences at the same time.

This set of duties, whose goal is to integrate the citizen in the social system and satisfy its basic needs, is also found in the family domain with a low number of mediations. Not only spouses but family members such as grandparents or brothers are more and more mediated as well as "uncertain families". Uncertain family is the name given by the scientific literature opposite to the traditional family, and embraces those cohabitant or reconstructed families, homosexual couples and one-parent families.

The set of tasks carried out by mediators in the education, healthcare and family domain not only concern the process and the result (agreement), but also the management of problems as well as a set of roles and assessment duties, support and attention tasks which are hardly countable. In any case, this is a first order social integration mechanism which is quite similar to that of community/citizen mediation. The objective is to avoid the escalation of the conflict, but the result is the balance between individuals and between people and the society they are living in.

#### 4 The Institutional Design of Mediation

So the mediation scene is composed of a lot of different processes with different protocols depending on the sector. There is common goal though: getting to a more reasonable option before going to litigation or before the conflict becomes socially unmanageable.

Nonetheless, when we get to collective aspects, we will see that the scene is not so clear. There is not an institutional design yet which allows the connection between all the mediation aspects in a unique project. This lack of design is indeed a problem for the development of mediation.

There are three important aspects which stop the base and the vertex of the regulatory system from working well in a homogeneous system: (i) there are a lot of different institutions with few links between themselves; (ii) the interplay among the different sectors is almost inexistent; (iii) this lack of interplay has lead to a lack of information and knowledge that does not allow for evaluating the result and monitoring the implementation process as well as the development of mediation in a rational way.

Actually, we have to distinguish between the three dimensions previously mentioned: the social one, the political one (governance) and the legal one; and the four levels of the pyramid of regulation: (a) conduct guidelines and implicit social dialogue; (b) dialogue with explicit rules; (c) soft law: codes of good practice, action protocols, technical rules... (d) legislation, norms and sentences.

The distinction between the four levels is the kind of regulation and how binding the agreements are as regards the three dimensions; in other words, the existing relationship between the agreement (if there is one) and its social, political and legal value. In fact, there is usually an inverse relationship between the legal and social value because this is an indication of how the conflict has matured and what the most suitable techniques are used to guarantee the accomplishment of the agreement. If there was more institutionalization, protocolization and executive value of the agreement (valid through injunction or legal act), there would be less conflicts. This is the reason why the figure is a pyramid: the number of interventions and cases is related to the regulation which defines them and deals with them in a process. Generally speaking, the problem becomes a social case in the base of the pyramid and a political one in the middle, and becomes a legal case in the vertex because the importance of intervention procedures, rules, protocols and norms is a sequence in a whole and is different at each level.

In the base, we find the conflicts which have been managed exclusively with social procedures having few legal effects. These cases also take part in the

mediator's knowledge. The grey part is the intermediate point which belongs to soft law: governance protocols and the relationship between citizen and public authorities that deal with the conflict once it is classified as a collective problem. For instance, conflicts regarding basic goods such as the water, conflicts about public security (the construction of a prison in a territory), religious and cultural conflicts (such as the fast growth of population in a neighborhood or the construction of a religious building) or environmental conflicts (such as the management of radioactive waste) are difficult to be managed as these confront the different actors. In addition, these conflicts take a long time and may remain after partial agreements, which usually result in turning points and evolution.

These are the kind of problems faced by the Catalan society, which has chosen a dialogued solution for them. Therefore, we may not be surprised if mediation in the community/citizen and healthcare domain scores the highest number of mediations as well as the highest number of chances of more support interventions and intercultural mediations. Before language, coexistence and communication problems, dialogue has been found as the unique way out to deal with them. Dialogue has allowed for the representation and management of the conflict getting to a scarce balance which mitigates the consequences if the conflict is not solved.

These are the sort of mediation agreements in the education domain. Individuals are minors and the documents they sign have not the same legal force as the agreements resulting from a divorce process, or labor or company agreements. However, an agreement which bonds the parties is always present for both documents and agreements, so school mediations are real mediations. These processes are more educative and pedagogic mediations than legal ones (as in the definition given by the Catalan act) though. Actually, the binds changes but not the bonds. Furthermore, these mediations are very effective from the institutional point of view and make a contribution to the improvement of coexistence and good governance at schools.

Let's talk about healthcare mediations: according to *CatSalut*<sup>11</sup>, the units of user support received 50,569 claims and complaints in 2008. Nevertheless, only 20 centers (5 hospitals and 15 CAPs) out of a total of 425 declared to have carried out mediations. In the strict sense, the number of mediations was 45.

How is it possible? There are thousands of complaints, social interventions and cultural mediations but a derisory number of mediations. Mediation is a tool which is being considered and implemented right now. Healthcare mediation has started dealing with intern conflicts, whereas the user gets personalized support, especially intercultural support. So the problem of sectorialization exists as well as the lack of interoperability between the services, and the fact that these techniques do not get to the citizen or user of the service in a standardized way. But from the point of view of the *mediation system*, the low number of mediations is not so weird. Actually, this number is not so low since these are emerging procedures which have not been classified yet from the point of view of mediation as an *institution*.

The nature and the level of development of the conflict determine whether it is more or less institutionalized. So there is no fluent communication either horizontal or vertical between the three dimensions: when the conflict goes worse and cannot be managed by the existing social services or the established system – school mediation, consumer support services, social services... –, the only possibility left is to turn to the ordinary jurisdiction or to make the conflict become a lawsuit. Therefore, the conflict maybe leaves too early the healthcare system or the school because there is no efficient coordination between the social, political and legal dimensions of the mediation process. This last statement is related to how the system is managed and how it works, but it has no connection with the relationship between professionals.

Criminal and youth mediation has been present for 20 years in Catalonia, so the experience is notorious: as a matter of fact, 6,358 cases were managed in 2008. The team of restorative justice (Chapter 10) concludes:

“There is a good coordination in the professional domain as regards the management of cases by mediators and other professionals (from schools, social services, community mediation, etc.). On the contrary, there is no coordination between institutions to make these initiatives for conflict resolution become policies”

Fair enough. Mediators are a small group of people who know each other due to courses and training

activities, so they can cooperate informally to derive the conflict or to manage particular cases. However, these activities take place without clear regulation protocols between institutions that facilitate the cooperation.

Therefore, the goal would be to establish flexible *protocols of interoperability* (horizontally) depending on the case in the different sectors, and *legal degrees* (vertically) depending on the degree of exigency and necessary protection of rights and people. All the agreements do not need strong legal validation: only those in which the parties ask for or need a legal guarantee because they want their rights to be protected. For a lot of cases – especially in these social sectors –, mediation could be a regulated process of conflict resolution with only governance protocols and social interventions with a link and binding value as strong as the legal one. Nevertheless, the dimension (a social and/or political-administrative one) would be different to deal with the problem.

From this point of view, the law both separates and unifies. If we make the conflict become a lawsuit, there are less possibilities of reaching an agreement with the less intervention possible from the authority and the less coercive capacity of the state. Here the pyramid section of *soft law* makes sense. As stated in Chapters 11, 12 and 13, the relational Administration may have governance protocols with some stages of mediation and soft administrative law to deal with collective conflicts. These stages may prevent the conflicts from getting to the courts (which is a strategy with political effects to have an influence on negotiations).

## 5 Judicial Processes, Intrajudicial Mediation and Analysis of Costs

One of the most interesting points of the study is the analysis of comparative costs, together with the procedures of judicial forwarding and the degree of effectiveness of the agreements forwarded. In short:

- i) *Judges hardly forward lawsuits to mediation.* If we look at the results of the survey made by the Consejo General del Poder Judicial<sup>12</sup> (CGPJ) or the survey made by the White Book which can be found in Annex 5, judges are not generally against mediation, but they barely carry it out. (However, as we leave the civil jurisdiction and

get into the criminal jurisdiction, the level of opposition is higher). According to the data of the *Centre de Mediació de Dret Privat de Catalunya*<sup>13</sup> (hence CMDPC), there are more applications for mediation which come directly from the parties (72.9%) than applications that come from judicial forwarding (27.1%). As regards the result, when mediation is requested by the parties, the level of agreement overcomes 70%. In contrast, only 47.5% of mediations coming from judicial forwarding or in an open judicial proceeding reach an agreement. Judicial forwarding – this is to say the de-escalation of the conflict – is very important, but it is a less efficient channel to reach an agreement in comparison with those cases in which the parties have not previously turned to the courts.

- ii) *But even if judicial forwarding is crucial to link the system and the institution of mediation to the state system of justice, it does not provide a solution to the extreme workload. Litigation and pending litigation rates – as shown in Chapter 15 – are not the only point to take into account for a change in the external legal culture of the Catalan Society.* In 2009, the number of cases turned to judicial bodies in Catalonia was around 18.86 cases per 100 inhabitants, whereas 17.81 was the figure in 2007. If this tendency was constant, there would be 20 cases per 100 inhabitants in Catalonia in 2010 – the year we hand in this study. This means that one out of five inhabitants probably has a lawsuit at the courts.

- iii) *The calculation of comparative costs between the (civil) ordinary jurisdiction and the different mediation scenarios is convincing as regards the viability and the need to have a mixed model composed of jurisdiction and mediation.* The team of econometrics concludes:

“If mediation was to be extended to 20% of cases, the equivalent to a budget of 4 million euro per year would be saved. This saving neither takes into account the drastic reduction of waiting time for the conflict resolution nor the implications for the parties. Nevertheless, it neither considers the initial costs of implementation of mediation so that it becomes more important in the present judicial system”.

Intrajudicial mediation is necessary and it is also an essential coordination tool between tech teams, centers of mediation and the state Administration of Justice. However, intrajudicial mediation can be found in the vertex of the pyramid, the highest point in which the conflict has already become a lawsuit.

It seems that the most suitable model is not exclusively jurisdictional. The appropriate model should include the mediation system (both private and public side) which would absorb the major part of litigation, at least in those sectors where possible.

In the criminal domain, restorative justice has contributed to change the traditional view of crime in order to focus the actions on the victims and the social integration of the offender after and before imprisonment. Work as well as preventive and integrative actions in the *social environment* are decisive and take part (beyond youth and adult mediation) in the set of actions that may be promoted by the Administration of Justice. Such an approach requires some legislative changes to be made as we will explain later on.

## 6 The Process and Procedures of Mediation

The diversity of processes and procedures are one of the features of how mediation has been developed in Catalonia. Generally, there is a distinction between pre-mediation, mediation and post-mediation. The average of days for the process as well as the length of the sessions is variable. According to the available data, the number of days varies from 11.5 days (school mediation) to 75 days (youth criminal mediation), and the time the mediations last for ranges from 43 minutes (school mediation) to 1 hour 58 minutes (family mediation in the private domain – the mediation sessions managed by the CMDPC last for 90 minutes at the most). The average of sessions also varies from 1.5 to 5 sessions. For different reasons, labor mediations (when they are a formality) and school mediations are shorter (one session and a half). In contrast, mediations between the victim and the offender usually take an average of five days. As predictable, the nature of the conflict defines the kind of process, techniques and methods to be used as well as how long it will take.

The degree of agreement reached depends on the difficulty and complexity of the differences and interests in the problem. School mediation shows 94.6% agreements. Family, community and criminal

mediations range from 60% to 80%. On the contrary, labor and consumer mediation only get to 42% and 50.3% agreements.

The variety of techniques used is not counted. Formal sessions may be driven in different ways, but each sector has developed specific techniques. Negotiation techniques seem more suitable for the processes of company and labor mediation, whose interests are more defined. On the other hand, community/citizen mediations – most of them take place in a more opened space which is called “street mediation” or “coffee mediation” – have their own very wide variety of methods, roles and goals (see Chapter 7). Maybe defining the object of discord, more protocolization of the mediation processes as regards particular interests, less intervention of other social or cultural variables are the reasons why the use of automated technological means look more suitable at first sight for consumer and labor mediations.

The flowchart of the process of consumer mediation is especially suitable to create a pilot program of automated negotiation. This is why consumer mediation has become the use case of the computer program that is included in the CD at the end of the White Book. The technology team has created an online mediation program (ODR, see Chapter 16) and they warn about the need of protocols and the standardization of processes before any tool is built. Experience creates standards, not the other way round.

*“The adoption of technology must be gradual and must rely on the particular needs of the users. Therefore, prudence and carefulness are required to introduce technology. Big inversions promising a definitive automation of the processes – which neither take into account these needs nor design made-to-measure solutions – run the risk of keeping below the initial expectations and compromising the satisfaction of future needs.”*

Nevertheless, procedures in other domains may not be automated. Only those having more simple and defined stages and objects are good starting points for the elaboration of automated protocols beyond the use of telephone, e-mail and websites. These are the technological tools more frequently used by mediators right now.

## IV Conclusions and Recommendations

Finally, we will give some general recommendations by way of conclusions. We will be based on the guidelines below, which allow us gathering the results of the White Book previously presented:

1. First of all, the regulation which institutionalizes mediation as a legal procedure has to be flexible enough to respect and encourage the different forms of mediation arisen in the different sectors with different professional profiles. Whatever may unload improper litigation from the Administration of Justice means that the *mediation system* is duly managed and working well not only at institutional (and/or legal) level. The regulation has to pay attention to governance (the link with the Administration) and to the social dimension presented by the different interventions and mediation actions. The Public Administration has to become relational, too. The important thing is to get to a balance as regards the political, social and legal performance of the institution. This is the only way to fit the mediation system into the jurisdiction and limit the litigation and pending litigation rates.
2. The roles and responsibilities in the mediation system of bodies such as the *Sindic de Greuges*<sup>14</sup>, local ombudsmen, social services of the town councils, provincial councils and county councils have to be made clear. Identifying and distinguishing the role of each body as well as its responsibilities is a useful task. Particularly, information has to be given about how the mediation system is funded and what the relation is with professional mediators, centers of mediation and the different companies providing services in this field. A balance should be found within the regulatory dimensions as well as between these regulatory dimensions and the market with the aim of achieving stable conditions for the development of the profession.
3. As stated by different teams in the public domain, we have to regulate relying on concrete objectives and guarantees as well as taking advantage of the mechanisms already established. One of the important points is to involve all bodies of the third sector in this task. Some of them – namely the General Council of

Chambers and the chambers of commerce, professional associations and even ACDMA<sup>15</sup> – have already started to regulate. Furthermore, the proposed regulation has to operate in the corresponding level and dimension: *soft law* mechanisms seem suitable for a strategy of minimum intervention because the results aim at being maximal.

4. Along the same lines of the previous point, the units created within the different Administrations and Departments of the Government have to be promoted: for instance, the SMAT<sup>16</sup> in the *Departament de Justícia*, USCE in the *Departament d'Educació* and mediation units within the CSI<sup>17</sup>. These units must be able to go on developing the already started tasks with more competences which are clearly identified as mediation.
5. The goal of making legislative changes is also a priority. The present legislation affecting each specific domain is not a suitable framework for the development of mediation because this legislation *does not* take into account specifically mediation processes as a usable tool. The criminal and civil domains are different because mediation has been so far an instrument of private (not public) law, so there are problems due to the lack of a regulation-framework including mediation in this domain. The team of criminal mediation has clearly expressed this idea in the conclusions of Chapter 10:

“Legislative changes have to be made, particularly in the adult criminal jurisdiction, to enable criminal mediation and other restorative practices. Even if there is regulation on how to do mediation, who can do it and which training is required, criminal mediation will not be developed if the regulatory framework does not include elements recognizing the legal criminal value (not only from the civil perspective) of restoration, from both the victim and the offender's perspective. Furthermore, the regulatory framework has to establish forwarding criteria, the stages in which the procedure can take place, the preservation of the rights and guarantees in the framework of the procedure, the legal and criminal consequences, etc. At present, a specific law on mediation would be very important, but

particular changes in the Penal Code and the *Llei d'enjudiciament criminal*<sup>18</sup> would be more valuable in the criminal field, as these modifications in both regulations would make the access to mediation easier. As one of the mediators interviewed said 'depending on the law, having no law is a better option'."

After this list of guidelines, we propose the following

## RECOMMENDATIONS

1. We recommend a social and regulatory clarification of the institution of mediation. Difference is to be made between the different levels and dimensions of the institution, which have already been proved in this book. This clarification will allow the distinction between mediation and other conflict resolution mechanisms.
2. We recommend the recognition of mediation experiences which have proliferated thanks to the public initiative. This recognition would overcome the general feeling about the fragility of mediation, despite the results proving that mediation is an efficient mechanism of conflict management. In order to consolidate mediation, public and private entities should create communication and interoperability mechanisms. Meanwhile, mediation must be promoted in other domains initially by Administrations with the collaboration and involvement of other bodies from the third sector and the civil society.
3. We recommend and consider necessary to make the highest authorities of the judiciary aware of the advantages and benefits of mediation to manage some conflicts. Forwarding conflicts to mediation helps judges to better develop their tasks, since they can focus on those conflicts that require their authority. If certain conflicts are solved through mediation, the resolution of conflicts as a whole in the jurisdictional bodies will improve.
4. We recommend boosting efforts for monitoring in detail the cost and effectiveness of the different kinds of mediation, in order to evaluate how much money is saved in ordinary justice per euro invested in the development of mediation. Likewise, indicators need to be formulated, even if it is a difficult task. These indicators may allow the evaluation of costs saved deriving from both the speed of the mediation procedure and the level of satisfaction of the parties in conflict.
5. We recommend that the rules for the development of the *Llei de mediació en l'àmbit del dret privat* are passed as soon as possible. These rules are the perfect complementary tool to set up the mediator status entitled by the CMDPC in the forthcoming years, and to design the mediation structure managed by the CMDPC. However, it should be made clear that this procedure would only be for the mediations at the CMDPC or those of the community mediation services if stated in the terms of service. The procedure would not be compulsory for mediation in other domains. The rules would be a tool linked to the tasks of the CMDPC as a guarantee for users and professionals.
6. We recommend that domain rules are drafted (rules being in force in the education or cooperative domain, or in the farm and integration contracts may be taken into account). This action may be especially suitable for some domains such as community mediation because its special features would be made visible – and particularly, the preventive function. Furthermore, this action may be very useful in other domains such as (i) mediation in the healthcare domain to guarantee the consolidation of mediation as regards healthcare entities; or (ii) environmental mediation, where specific rules may become an introductory and informing tool about mediation, even for the Administration.
7. We recommend the creation of codes of good practice or action protocols to better fulfill and understand the principles of mediation – especially that of confidentiality – and the role of the mediator. These are extremely useful instruments for both the consolidation of mediation practice and its social acceptance (recognition). The Code of Conduct for Mediators and some domain initiatives such as the *Decàleg de bones pràctiques de la mediació ciutadana i comunitària*<sup>19</sup> may be taken as references. Besides, work should be done on other *soft law* manifestations to be

- adapted to the richness of mediation manifestations. Nevertheless, we have to start from the mediation principle of flexibility which makes the methodology stronger, and so we can avoid impositions that make the procedure slower or more bureaucratic in the worst sense.
8. We recommend legislative reforms of different state laws such as the *Llei d'enjudiciament civil*<sup>P0</sup>, the Penal Code or the *Llei d'enjudiciament criminal*<sup>P1</sup> are boosted from Catalonia. These reforms would entitle judges to forward lawsuits, identifying and including new kinds of conflicts to be mediated. At the same time and in view of the *Avantprojecte de mediació en assumptes civils i mercantils*<sup>P2</sup>, a better collaboration among Administrations should be promoted. This collaboration would prevent problems as regards competences and would take into account the many consolidated experiences in mediation in the Spanish autonomies.
  9. We recommend analyzing the possibility of giving economic incentives in this stage of consolidation to the people who choose this mechanism of conflict resolution. We have to pay attention to those mechanisms that are being debated or have already been adopted in other countries around us such as Italy. Some of these measures will be effectively executive if they are included in tax rules. Therefore, this recommendation is formally linked to the previous one.
  10. We recommend the creation of permanent spaces for dialogue that allow a better communication of reciprocal experiences, especially in a moment when the existence of mediation systems in all social domains is proved. Since conflicts impact on different domains, both actions and interpretations simultaneously responding to them need to be activated.
  11. We recommend the promotion and implementation of online mediation (ODR) in the different mediation domains. In fact, we particularly suggest ODR in consumer mediation because the results may be profitable. In a second stage, a general regulation for ODR contributing to the emergence of these mechanisms in our country would be required. Therefore, the specific training needs of professionals will have to be considered.
  12. We recommend offering and demanding a rigorous training on mediation which covers the specificities of the methodology and conflicts. Giving a complete training including theory and practice is the only way to have competent professional mediators who are socially respected. We are facing an emergent profession that has to be consolidated from the promotion of the institutions and the citizens' respect. All universities have to be involved to guarantee quality training. However, other initiatives have to be promoted as well as the existing ones in order to underline the importance of offering updated training. Even if a lot of mediation actions contribute to the better development of other professional or public-spirited tasks, training actions have to be promoted so that mediators can get the optimal skills.
  13. We recommend the diffusion of mediation among citizens, underlining both the benefits for a better conflict management and the technical aspects. General strategies of communication have to be designed and dissemination actions of scientific studies in all domains have to be promoted. Professionals should be the focus of these strategies and studies, since they can use mediation and alternative conflict management and resolution techniques in the different domains.
  14. We recommend and consider necessary a periodical revision and a correlative analysis of the data obtained in this book. The mapping of mediation has to be enriched with the analysis of temporary series starting from the publication of this work. The system for gathering information also has to be improved, specific evaluation mechanisms of the impact of mediation have to be consolidated, and procedures of analysis have to be created for the experiences and the knowledge accumulated. We recommend that this updating is supervised by independent bodies that coordinate the research tasks. In order to make this updating easier in an immediate future, mechanisms of interoperability have to be activated and sectorial protocols for maintaining

and elaborating data have to be articulated. If we succeeded in practice to get some degree of automation to obtain and create data, we would contribute decisively to the consolidation of mediation in all domains.

15. Finally, we recommend as much diffusion as possible of this work, since it is founded on the legitimate aspiration for a peaceful evolution of the Catalan society. So far, we did not have enough information, but now this book promotes new mediation actions in the forthcoming years.

## Notes

<sup>1</sup> In English, "Catalan Consumer Agency".

<sup>2</sup> It is a government body created by the *Generalitat de Catalunya* (Catalan Government). There is one *consell comarcal* for each *comarca*, which is the traditional region or local administrative division of Catalonia. In English, *consell comarcal* may be translated as "County Council".

<sup>3</sup> CAP stands for *Centre d'Atenció Primària*, which in English means "primary health care center".

<sup>4</sup> In English, "Catalonia's Family Mediation Center".

<sup>5</sup> The Catalan Government is organized into Departments, units that take on responsibilities in specific areas. The *Departament de Justícia* is the one in charge of justice matters.

<sup>6</sup> In this context, "regional" refers to the 17 regions (*comunidades autónomas*) in which the Spanish State is divided. These regions or autonomies have their own directly elected authorities and competences.

<sup>7</sup> Spain is divided into 17 regions which are composed of a total of 50 provinces. Each province has *diputació* with the exception of uniprovincial *comunidades* and the Balearic Islands. The Provincial Councils (which may be the English translation for *diputació*) are local government institutions whose aim is to coordinate municipal services; offer legal, economic and technical assistance and cooperation to the towns of its territory; and promote and administrate the particular interests of the province.

<sup>8</sup> In English, "Department of Education".

<sup>9</sup> In English, "Support Unit for School Coexistence".

<sup>10</sup> Reus and Alt Empordà are two Catalan *comarcas*, the first one is in the province of Tarragona and the second one in the province of Girona.

<sup>11</sup> *CatSalut*, the Catalan Health Service, is the public body responsible for guaranteeing the provision of public cover health services for all the citizens in Catalonia.

<sup>12</sup> In English, "General Council of the Judiciary".

<sup>13</sup> In English, "Catalonia's Private Law Mediation Center". In 2009, Catalonia's Family Mediation Center became Catalonia's Private Law Mediation Center by virtue of the *Llei 15/2009 de mediació en l'àmbit del dret privat*. This act broadens the scope of mediation to manage any conflict arisen in family relationships and extends its field of action to other domains of private law.

<sup>14</sup> The *Síndic de Greuges* is the Catalan ombudsman. It handles the complaints of anyone who is unprotected before the Administrations' actions or omissions. This body seeks to ensure the proper working of the Catalan Government and local Administrations such as town councils, provincial councils or county councils.

<sup>15</sup> ACDMA stands for *Associació de Professionals de la Mediació de Conflictes de Catalunya ACDMA* ("Association of Conflict Mediation Professionals in Catalonia ACDMA"). It was born in 1993 and its goals are developing, informing and promoting alternative methods for conflict management, especially mediation.

<sup>16</sup> SMAT stands for *Servei de Mediació i Assessorament Tècnic* ("Mediation Service and Technical Assessment") whose goals are offering mediation and reparation, technical assessment and assessment on precautionary measures.

<sup>17</sup> CSI stands for *Consorci Sanitari Integral*, which is a public institution in charge of healthcare and social services. It was born in 2000 and it gathers the old hospitals of the Red Cross in the province of Barcelona.

<sup>18</sup> This act regulates the procedural rules in criminal proceedings.

<sup>19</sup> In English, "Decalogue of Good Practices for Citizen and Community Mediation".

<sup>20</sup> This act regulates the procedural rules in civil proceedings.

<sup>21</sup> Cf. Footnote 18.

<sup>22</sup> In English, "Bill of mediation in civil and commercial matters".