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KEYNOTE
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Law and the Pacification of Conflicts
(Translated by Thelma Butts Griggs)

It is commonplace to assert that Law is a product of civilization, an instrument of social pacification that is greater than the mechanisms of self-regulation, self defense, the rule of brute force, or taking justice in one's own hands. Judicial instruments are the way conflict is formalized, externalized, and resolved, yet, at the same time, Law is a source of conflict which has increased the growing complexity of Law and the goals of justice.

Even though the dominating tendencies have been to conceive Law as a normative system, today it is characterized by its procedural elements and described as a mechanism for communication and conflict resolution.

From this perspective, the guarantees of independent judges, due process, and the fundamental right of every individual's access to justice guaranteed by international human rights treaties and national constitutions have acquired a special importance. This individual right of access to justice, along with a notable increase in demand has generated an overflow and crisis in the justice system of nearly all countries, which has brought to the forefront, even in countries with long judicial traditions, methods of alternative conflict resolution that are different from judicial methods. These extra- or para-judicial systems of private ordering are not new, what is new is the attention and interest that they awaken universally, and that they reflect a profound change in the legal culture regarding the handling of conflicts.

In the European Union, this change begins in 1989, when the European Council of Tempere called the states to create alternative extrajudicial processes to improve the access to justice in Europe. To this end, the European Commission presented a Green Book (Libro Verde) in 2002 that examined the situation of these processes in Europe, and that began a system of inquiry regarding possible measures related to the issue. The result of these initiatives has been, at the end of 2004, the European Parliament and Council's Directive Proposal regarding aspects of mediation in civil and commercial matters (COD 2004/0251), currently being reviewed by Parliament and which could be approved before the end of the year.

This important instrument confirms the new state of current affairs. From this starting point I will reflect on the new role of these [conflict resolution] methods in developed democratic societies and how they can contribute to assure the effectiveness of justice and guarantee our system of liberties.

The preparatory community documents of the Directive Proposal and its explanation of motives have insisted that the promotion of alternatives systems is not solely a practical response for the moment. They are not a transient, arbitrary solution in response to the increase in disputes to avoid procedural delays and excess load on the court dockets. They also address substantial structural reasons. The social demand for justice cannot be satisfied through judicial solutions alone. Judicial solutions are not always adequate for the citizen to present and resolve his legally transcendent personal or economic problems and conflicts. Additionally, there is the increasing complexity of

legal procedures and the difficulty of understanding them. Conflict is inevitable, but the process is avoidable.

The economic analysis of law has demonstrated that legal protection and processes are not the only, or always the most economic and effective, mechanism for the satisfaction of rights and the resolution of conflicts. Beyond economic analysis and system design to reduce the economic and financial costs of conflicts; such as transaction costs, you, in your studies, publications and debates, have demonstrated that there are other non-economic costs of conflict, and that clearing up misunderstandings, reconciliation, keeping in mind party satisfaction with outcomes, and considering subsequent party relations and the possibility of new disputes are elements to take into account when valuing the role of conflict resolution systems.

The new role of conflict resolution systems is likewise also a consequence of the known advantages of this method of private justice, especially in certain areas where it accomplishes a peacemaking function in interpersonal relations, promoting cooperation between the parties, the search for integrative solutions, and peaceful relations between opponents. It is adaptable to the peculiarities of a given conflict and permits resolution through consensus, something not available when recurring to a judge, who does not hear a dialogue but a debate, a *litis*, or argument, which presupposes confrontation, without which there is no process. However, the ruling does not resolve the conflict and may even aggravate it, because a judicial solution is a decision made by the authority vested in a judge and is based in law, it cannot be imaginative or creative, it does not try to understand the person, their social actions or their environment. Additionally, the ruling is unpredictable because it is out of the control of either party. Suits frequently destroy relationships and the litigants leave the process with worse relations than when they began, leading to dissatisfaction. A dramatic example of this is the growing issue of gender violence. Many of the alleged offenders are involved in judicial processes, and the initiation of these processes exacerbates the violence.

The systematic use of alternative dispute resolution processes in small claims in consumer disputes fostered by various European Directives has generated the risk of considering these processes as a mechanism of a lesser justice, suitable for issues of low economic or social value, following the old saying *de minimis no curat praetor*. However, reality is demonstrating that alternative dispute resolution is not being used only in small claims, but also in other socially important areas such as family disputes, community peace, and socio economic issues, such as labor relations. It is also being used in disputes concerning the insurance and financial sectors, and by the electronic communications networks. Therefore it is not about a lower quality, lesser justice, but a different kind of justice, that although it may have its limits, encompasses a great variety of matters, including those that are very complex and of considerable economic importance.

The adjective “alternative” is mistaken if it is understood in the sense of lesser importance or substitute of jurisdictional processes, or even as an instrument to avoid or deceive the judicial system. Of course, the “alternative” nature of alternative dispute resolution implies that the resolution of conflicts in the public courts is not excluded, for it is an indispensable right guaranteed by the State and the rule of law. The fundamental right of access to justice is respected, as it should be respected, but alternative dispute resolution accomplishes its own role, different from that of the judicial system.

These [ADR] systems are generally products of civil society; they have a voluntary judicial basis, and are based in self-determination and private autonomy. This is the foundation of its democratic legitimacy, and is a useful indicator of the depth of the social and democratic state of law. It is also, along with the acknowledgement of ample spaces for private justice, a characteristic element of democratic societies and the values these represent. They promote the “rule of law” in society, citizen participation, and the development of self-responsibility, creating at once an environment favorable to respecting the rights of others.

The Directive Proposal’s statement of motives affirms that the concept of access to justice should include fostering access to adequate processes for resolving conflicts for individuals and corporations, and not only access to the judicial system. Important consequences follow this fundamental affirmation that affects the treatment of these [ADR] systems.

In the first place, it requires the advancement, encouragement, and facilitation of these [ADR] systems, and the establishment of a frame of reference and a judicial environment that permits the development of these systems. It requires eliminating obstacles to free use and access, and assuring a dynamic and appropriate relationship and coordination with the judicial processes; for example, avoiding interferences by a judge while the [ADR] system is operating, or permitting the suspension of prescribed time limits or statutes of limitations during the course of the process. Above all, it is important to provide certainty and confidence, vesting agreements with judicial value so as to avoid that using the [ADR] system generate court actions to enforce or void agreements.

Preserving the possibility that the parties resolve the conflict in a judicial process, the Proposal concerns the establishment of a coherent, stable, trustworthy judicial frame of reference that contributes to mediation being seen on par with the judicial process, in which parties can choose their preferred method of conflict resolution without undue legal barriers.

The Community Directive Proposal is about these issues, it refers to the execution of agreements, suspension of judicial time limits and prescriptions, exclusion of mediator testimony, and to the possibility of judicial entities promoting mediation.

Assuring access to appropriate conflict resolution processes to individuals and corporations requires not only the suppression of legal barriers and the establishment of a trustworthy judicial frame of reference, but also ensuring certain conditions,

requirements, and guarantees in the functioning of the system; quality not only in the technical sense, but also in a judicial sense. From the perspective of the right of access to justice, the alternative systems require the guarantee of their quality, effectiveness, procedural norms, and the qualification and regulation of third party neutrals that intervene in the process.

The Directive Proposal does not include rules regarding the process of mediation, or the designation or accreditation of mediators. It has been understood that it is preferable that the regulation of these issues be undertaken by auto-regulatory [self-regulatory] initiatives led by the parties responsible for the leadership and professional work in these systems. Article 4 establishes that “the Commission and Member States will promote and foster the development and adhesion to voluntary codes of conduct by the mediators and the organizations that provide mediation services, at Community level as well as national.”

The call to auto-regulation [self-regulation] intends to ensure the flexibility of these procedures, their margin of freedom, voluntary nature, and the choice of private autonomy. The establishment of these basic minimal rights include, generally and in specific areas, basic principles of process and ethics, to ensure in these systems security, due process, and protection from the hardships of the judicial system. Additionally, they seek to strengthen the quality of third party neutrals that work in these systems through their standards of conduct, their accreditation and their effectiveness.

When these alternative systems operate inside the judicial process, the principles of process and ethics can be ensured by the control of the judge, but the judge cannot always control the quality of the third party neutral as “expert” in the techniques of conflict resolution. In traditional systems, the principles of process, ethics, and quality are usually ensured by professional associations, by codes developed through auto-regulation [self-regulation], which are more flexible, create trust, and avoid public regulation that is not always adaptable to the situation of the conflict.

From the perspective of access to justice, the alternative systems require, then, that their quality and effectiveness be guaranteed, and this depends on third party neutrals whose abilities and relative competencies can be labeled (“trustmarks”), are recognizable, and certifiable.

The Directive Proposal refers to promoting and fomenting effective quality control mechanisms regarding the provision of these services, and it sets out the need for adequate training of sufficient depth to permit the third party neutrals to accomplish their jobs in a useful and effective way; training which should be supplemented by mandatory continuing education. To this effect, Article 4 entrusts the States “to promote and foment the training of mediators to allow parties in conflict to choose a mediator that can conduct an effective mediation the way expected by the parties.”

When the Directive Proposal defines the mediator (Art. 2, a), it refers in a generic way to “independent of his profession,” that is, whether or not the mediator belongs to a regulated profession. This does not exclude the possibility of associations of these professionals or of entities related to these systems realizing or promoting, training, certification, accreditation, or periodic evaluation of its members. Likewise, they can develop a code of ethics and procedural norms guaranteeing a control of the quality of the neutrals and the quality of the system.

I will not discuss the difficult subject of the professional code of neutrals, to whom will be applied the freedom to lend their services in the entire territory of the European Union. However, the need for a certain amount of harmonization and the establishment of minimal guarantees of competency should be acknowledged. These should be ensured by public authorities that uphold the effort of professionals establishing systems for accreditation of neutrals without diminishing the flexibility and simplicity of these systems, and without reaching the academic rigidity of a regulated profession, which would create special problems of professional frontiers. This would avoid the introduction of professional monopolies and barriers in a subject area that is by nature interdisciplinary.

The European Commission has understood that the qualification of third party neutrals should be linked to the existence of associations or groups that can be accredited in the European arena and that would function with the economic support of the European Commission. The European Parliament has asked the Commission to foment the development of a Pan European network of specialists, professional organizations, and other interested parties, as well as gatherings and exchanges of best practices. In this respect, there was a conference organized in Brussels, the 2nd of July, 2004, to discuss auto-regulatory initiatives for mediation in general, and the presentation of the European Code of Conduct in Mediation. The Code is a private, voluntary document, meant to improve the quality and trust in mediation and to ensure the use of principles such as independence and impartiality, transparency, efficacy, respect of law, and confidentiality.

The content of the European Code of Conduct in Mediation coincides substantially with other codes of ethics and codes of conduct developed within and outside of Europe, and the current renewed importance of these codes is evident in the March 2004 revision of the code of ethics of the important American Arbitration Association, which was prepared in conjunction with the American Bar Association.

Therefore, it is a worthwhile question to ask ourselves in a meeting such as this where we exchange experiences, learn new things, and facilitate a high level of preparation of those that work in these systems or educate others who work in them, if the development of a common regional code of conduct and those points in codes where there is already agreement could be a first step to elaborate by consensus a common code of conduct on a global scale that would include certain procedural guarantees and ethical norms. It would be an indispensable contribution to specialists to guarantee the quality of these alternative systems. From the perspective of access to justice, it is not solely about ensuring the good doing of a third party neutral, in the techniques of mediation as well as

how to work honestly, but also establishing for the parties guarantees similar to those offered by the judicial system; the very ones of due process, whose integrity should be ensured in these processes as well.

There is therefore a close relationship between the minimum procedural guarantees and the ethical norms required of the parties and especially the third party neutral. The definition of ethical norms also implies the establishment of common general principles to guarantee the quality of the systems, the impartiality of the neutrals, and to define their roles and establish a frame of reference to reach agreements.

It is worthwhile to briefly emphasize the common elements of these ethical codes, with a view to making them universally applicable.

The first guarantee mirrors the norm *nemo iudex in causa sua*, which implicates the neutrality of the third party who participates in the case. This rule is included in similar fashion in all codes of conduct which require that the third party neutral be “impartial,” and independent with regard to the parties. Independent means without any clash or conflict of interest with either party, thereby allowing for equal treatment of the parties and guarantees balance in the neutral’s activities during the entire process.

Secondly, the code of conduct should try to ensure that the parties turn to the process in a truly voluntary manner, and that they accept the final agreement voluntarily, which implies renouncing their expectations, which is necessary to solve the conflict and achieve social peace. The potential for power imbalances should be kept in mind, guaranteeing information about the development of the process, and the right to withdraw and access the judicial system or other extra-judicial recourse. To this end, there is the principle of transparency which implies that the parties shall have the necessary information at each stage of the process regarding the nature of the process, the calendar, developments, costs, and about the effect of a potential agreement.

Thirdly, the rules of due process and respect for equality should be maintained in these processes. The principle of *audi alterum partem* is basic to the judicial system and should also be applied to these alternative systems. Both parties should be heard and given equal opportunity to present their positions. The process should be based on the principle of debate, where each party can freely express their opinion, be informed of and discuss any task or judicial procedure, and present any document or proof without it being used against him outside the process.

This affects a fourth rule, that of confidentiality in the sense that the arguments and proofs set out by the parties in the process should be held confidential, an indispensable condition to ensure openness and the free flow of communication. The confidentiality affects the parties, but especially the third party neutral, who should not divulge information learned in caucus, and should not be used as a witness on behalf of either party. Article 6 of the Directive Proposal covering admissibility of proof reflects an ethical norm linked to the confidentiality of the neutral, establishing that the neutral will not give testimony or present proof in civil judicial processes in a case relating to the

mediation process and that such testimony is inadmissible as proof, except as to the application or execution of the agreement.

The principle of efficacy is also mentioned, and is a somewhat equivocal term since the third party neutral promises to undertake an activity but not to reach a positive result which in the end depends on the parties. From an ethical perspective, “efficacy” implies acting with the diligence of a good professional, taking the task seriously, acting in an impartial and transparent manner, without nuances or dirty play. The matter has also been related to respect for law in the sense that the mediator can oppose an agreement when he believes that it is illicit or contrary to law.

There is no doubt that the tasks you will work on these days and the resulting exchange of experiences will contribute to the improvement of this world phenomenon, at once related to the globalization of alternative dispute resolution of conflicts that contribute to peace in family life, in the business world, in labor relations, and in social relations, as well as to the deepening of the rule of law in our society, to the restoration of justice and the defense of liberties. In this way, you strengthen the credibility and efficacy of these systems, indispensable today in an advanced democratic society in which the process is an indispensable element but not necessarily the way to resolve the inevitable conflicts generated by personal and social life.

For this reason, you should be conscious of the important responsibility you assume before society, for which to accomplish you must continue to pursue the task of ensuring satisfactory codes of conduct, and an appropriate level of preparation and education as you have been doing all along, and for which I congratulate you.