

WHOSE RESPONSIBILITY IS IT TO PROVIDE ACCESS TO JUSTICE?

The Dutch Perspective, Lessons Learned

Mr Chairman,

Ladies and gentlemen,

I am grateful for the honour of speaking to you about the Dutch perspective on mediation and about the way it is linked to the legal aid system. I consider my presentation here today as an opportunity to exchange with you our learning's and pitfalls. But let me first make myself clear. It is not my intention to recommend the Dutch way as the best possible system. And I don't intend to recommend you to copy our system into the Turkish legal system. On the contrary. That would possibly lead to ineffectiveness and misunderstandings. To all countries who want to work on their access to justice I recommend to look good at their own legal culture! So did the Dutch. Our system has grown over the last decade adopting itself to the circumstances and culture that exist in the Netherlands. However, even if the Dutch legal culture is different from the Turkish legal culture, I think that the lessons that we learned, can be of use for you. At the same time I am sure to get much inspiration and new ideas from what I will hear from you , here today.

Definition of mediation

Let me start by formulating how I define mediation: Mediation is a form of conflict resolution whereby an independent neutral third party, the mediator, assists the parties in arriving at a solution that is supported by both and that provides each party with an optimal solution to their mutual conflict, based on their true interests. In trying to achieve this situation the mediator works in a methodical manner on the basis of an agreement entered into with the parties. The strength lies in the fact that the parties retain control over the resolution of their conflict. In this aspect mediation differs from other forms of dispute settlement, including not only the Courts, but also the extra-judicial tools of arbitration and binding advice, in which a third party ultimately takes a decision how to deal with the conflict.

An additional advantage is the fact that the level of acceptance of a solution chosen by the parties themselves is generally much greater. More often, agreements are actually adhered to, which means that disputes regarding the execution and follow-up procedures can be avoided.

In the case of successful mediation the parties can generally obtain a quicker, more durable and certainly cheaper solution for their conflict than they would if they had to go through and finance full Court proceedings including the cost of legal assistance.

Even in the case of failed mediation this route may still be effective because a lot of extraneous matters relating to the conflict have

already been removed, leaving a crystallised dispute or legal question, which can result in a more decisive Court decision.

The distinguishing features of the Dutch Approach: 1. minimum legal framework

Two main points are characteristic for the Dutch government's perspective on mediation: minimize the legal framework and maximize the efforts to facilitate and stimulate it. Where some governments have chosen to stimulate mediation by legislation (for example France, Belgium, Austria and – as I have understood well - currently Turkey) we were not convinced of the fact that regulation is necessary in order to promote mediation successfully.

As I said, our system has grown over the last decade, adopting itself to the specific circumstances in the Netherlands. In the Netherlands judges are often inclined to settle a dispute between parties instead of giving a verdict. Lawyers settle disputes in half the cases brought to them without involving the court. Legal Services Counters in most cases are advising clients without referring them to a lawyer. In this climate the introduction and promotion of mediation in the Netherlands has been very successful without regulation and, perhaps, even because of the absence of regulation. The power of mediation lies in its informal character and its ability to adapt to the needs and circumstances. We believed that we should give ourselves the opportunity to develop the instrument on a larger scale first, before introducing regulation. When it comes to prescribing the use of

mediation we do not advocate it, because we think that when people are forced into mediation, the possibility of reaching a common solution diminishes. A necessary prerequisite for a successful mediation is that both parties should choose for it voluntarily.

It is important to express that we only have this possibility to apply mediation without regulation as long as it's use or the referral to it by the court or legal services counter is totally voluntary. As long as the outcome of the mediation progress remains fully without obligation, adjustment of the current regulations is not required. This situation changes if the judge makes his willingness to further handle the dispute depends on the reaction of the parties to the advice to go to mediation. Would that be the case, a specific statutory foundation would be required.

I shall try to explain why we think that the introduction of mediation in the Netherlands has been so successful without regulation and perhaps even because of the absence of regulation. As we look at the suitability of mediation, insights has little by little changed. In the beginning we have worked with certain criteria in order to determine beforehand whether a case is suitable for mediation or not. In the past a referrer only checked a list with criteria, such as: a long-term relationship; a lack of communication is at stake; parties seek a quick and cheap solution. Factors disfavoured the use for mediation were

the use of violence or power imbalance or the fact that parties might have a principle need for a judicial statement.

Results of one of the first researches have indicated that there is no best criterion for selecting cases or referral. The most important condition for reaching an agreement is the willingness of both parties to negotiate. By now we further experience the importance of assessing a conflict: a good conflict diagnosis and investigation of the type of conflict resolution by asking the right questions to both parties. What drives them into this conflict? What is the escalation level? What about their willingness to seek a peaceful solution and what is their room to negotiate?

Another effect of the introduction of mediation we did not have foreseen as such is that its promotion has led to another 'mind set' with regard to conflict resolution. As mediation in an individual conflict teaches us to look at the problem from another perspective the introduction of the instrument itself has had a similar effect on those working in conflict resolution on a daily basis. For example, lawyers and judges. The focus is on offering a different approach to disputes, a different tone in the way the government reacts to citizen letters, a different method applying mediation skills and using insights in the underlying dispute theory. I believe that this development could not have taken such a flight had we stuck from the beginning to mediation with formal regulations and definitions.

We should not underestimate this ‘catalyst effect’. Mediation has taught us that rather than persisting in our statements, we should, above all, focus on our real interests and goals.

It should be noted that it is not as simple as I put it now. On the one hand, we want to avoid regulation on mediation and, on the other hand, we seek in some way guarantees for the process we are referring cases to and are paying for. And as I already mentioned before, we realize that cultural aspects should be taken into account in order to make a comparison between the choices of the different countries for regulation or not. Countries with no tradition of out-of court settlement might feel a greater need for regulation to get mediation started. The Dutch judicial culture can be characterized as such. It has also a tradition of self-regulation.

In the Netherlands we find ourselves in the lucky position with the existence of the Netherlands Mediation Institute. Since the profession of mediator and the process of mediation are not regulated by law, the NMI fulfils an unmistakable function for the self-regulation of mediation. This institute has set several protocols and quality requirements.

But now we have the European Mediation Directive and self-regulation alone will not be sufficient anymore. The directive compels the Netherlands to regulate some judicial mediation aspects. Although the Directive does only require regulation for the use of mediation in cross-border conflicts, it is quite possible that it also will have an

effect on our approach with regard to national disputes. There is a growing tendency, also in the Netherlands, to warrant some aspects of mediation (for instance confidentiality, minimum quality standards for mediators, the enforcement of results from mediation or the limitation of actions).

2. Maximum support for mediation

Before I tell you something more about the way the Dutch promote mediation in the absence of legislation, let me first turn to the question why governments should actually support the use of mediation in general in addition to regular court proceedings. I would like to express a short view on this issue as a starting point for the presentation of what the Dutch government actually does. Although people in the Netherlands have an idea what *mediation* is, they are however far less aware of the possibilities of mediation and the relevance of mediation to their own situation.

And then, it takes not only two to tango, but also two to start mediation. Even if one of the parties might be convinced of the benefits of mediation, it has been proven most difficult for parties who have a conflict to agree on opting for mediation.

People fear that if they propose mediation this will be interpreted as a sign of weakness. At the mean time they distrust the other party should they come with this suggestion. People generally tend to find it difficult to change position in these matters. We often see that either conflicting party will maintain the status quo as long as possible. Also,

parties are usually too optimistic about succeeding in legal negotiations and/or legal proceedings. Moreover, parties generally lack sufficient understanding of what actually drives them in the conflict, or find it difficult to voice this, particularly in a situation of inequality of power.

Let me now tell you something about the way the Dutch promote and facilitate mediation in the absence of legislation. You'll notice that we do this in connecting mediation with our legal aid system. I will focus first on referral to mediation by the legal services counters and the courts, then to the incentive subsidy for mediation after referral by the courts and I conclude with an observation about subsidised mediation for people with limited means.

A. Referral by the Legal Services Counter

The Legal Services Counter not only guides clients in law, but also informs them on other ways to solve disputes. At the first contact, the staff member will sit down with the client to try and reveal what lies at the heart of the issue. Should mediation be an option that has a good chance of success, the staff member will help the client by approaching the other party with a mediation proposal. Incidentally, not all proposals accepted lead to mediations. In some cases no mediation proposal can be signed or parties waive the option of mediation for other reasons, for example because – while discussing

what method to use to solve the dispute - they have found a solution of the conflict.

A recent report shows that the number of mediation proposals accepted since the time mediation was first introduced grew from about a hundred in 2005 to more than 3000 in 2007. Full or partial agreement was reached in 79% of all referred mediations. The reason that this percentage is so high has to do with the fact that disputes that end up with a mediator following referral by the Legal Services Counter are still in a relatively early stage of the conflict. Contrary to cases already being tried, these disputes have not yet escalated or have not yet been juridified. The first two years of experience reveal that the mediation skills learned by staff help to clarify the issue. The majority of staff used to work at legal advice centres and was therefore used to take a legal approach to the issues put to them.

B. Referral by courts

Courts first started to refer parties to mediation on 1 April 2005. Since then all courts in civil and administrative law cases have offered the parties a choice to have their dispute settled through mediation.

Judges and secretaries are specially trained to assess suitability for mediation of particular cases. They make their proposal in different manners and at different times during the proceedings: by means of a letter, by the court following an interim decision/order or by the court at the trial. The courts aim to place the choice for mediation with the parties wherever possible. Increasingly, parties are taking the initiative

to seek mediation during the legal proceedings, recommended by their lawyers or otherwise. In practice, all methods appear to work well. If parties accept the proposal and sign a mediation agreement, the referral is a fact. In total, nearly 6.000 mediations were started from April 2005 up to and including December 2007.

C. Incentive contribution

Parties who opt for mediation within legal proceedings and who do not qualify for a mediation legal aid permit, qualify for 200 Euro support in mediation costs. The amount equals two and a half hours of mediation. The contribution aims to encourage parties to accept the court's advice. It forms the bridge between parties' expectation that the court will settle the case and the – rather unexpected for most parties - encouragement by that same court to establish first if there is scope to find a solution themselves. The free initial phase of the two-and-a-half hour's process is sufficient for parties to establish an idea of what mediation can offer them, to overcome resistance and to get confidence in each other's willingness to take a serious approach to find a solution.

D. Mediation subsidy

In order to prevent parties who are not well off waiving their choice for mediation for financial reasons, the option of subsidised mediation was introduced. The Legal Aid Board may allow legal aid for mediation in the same way as allowing ordinary legal aid. The

schemes differ as to the individual contribution. Individuals taking part in mediation pay half the contribution compared to what people pay who choose to settle their dispute through court proceedings.

Mediation and legal aid – a new Dutch perspective

Mr. Chairman, ladies and gentlemen,

The theme of this session has got the title: Whose responsibility is it to provide access to justice? And Manon Schonewille, who has spoken this morning, asked me to focus on the Dutch perspective. Up till now I have told you about our experiences up to this date. But our perspective is broadening. I would like to conclude with some words about the way we, in the Netherlands, are connecting mediation and legal aid in order to achieve access to justice.

As stated earlier this morning access to justice is not the same as access to a lawyer, or access to a judge. What should be central in our efforts to address the issue of access to justice is to find ways to help people solving their disputes by giving them access to solving the problem. Last year, the Dutch State Secretary of Justice, Nebahat Albayrak, set out a policy document to Parliament in which she gave an outline of a legal aid system in which access to justice means more than just access to a lawyer or access to a judge. It focuses on problem solving. I mention some examples:

- if a citizen complains about a decision of a government institution or administrative body, he will be contacted by an official who is trained in mediation skills and who will try to solve the problem in order to avoid lengthy and costly procedures.
- in family law, divorces lead to numerous procedures, often more than three in each divorce case. This can be avoided if parties work from scratch together to achieve a divorce agreement, including a parental plan. Mediation forms an important part to this process. Besides, the courts will provide a judge as a case-manager to assess those cases in which parties failed to settle in advance.
- the Legal Services Counter will intensify their efforts – by first diagnosing the case thoroughly - to refer their clients to mediators or solutions other than a court-proceeding.

With these remarks, I only scratch the surface of the new policy document, but if you are interested we can continue the subject in the workshop this afternoon.

Concluding remarks,

Mr. Chairman, ladies and gentlemen,

In the past twenty minutes I have tried to give you an outline of the Dutch perspective on access to justice with special attention to mediation. As I said earlier it is not my intention to recommend the Dutch way as the only one possible. But I hope it will contribute to the

debate in Turkey on the subject how to integrate mediation into your system and by doing so improving access to justice in Turkey.

Thank you.

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M.J.J. van den Honert

Director Judicial System Department

Ministry of Justice

The Netherlands