
MEDIATION AS A METHOD OF SOLVING ENVIRONMENTAL CONFLICTS UNDER THE LAW 13. 105/2015

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ABSTRACT

The present article intends to investigate in which cases and what are the conditions to be observed so that the mediation can be applied to the solution of socioenvironmental, preventive and repressive conflicts, based on the Federal Constitution and the infra-constitutional legislation pertinent to this matter. To do so, access to justice will initially be approached as one of the foundations of environmental mediation, as well as the concept and principles that conduct mediation in Brazil. Subsequently, the article discusses the purpose of mediation in order to verify if the unavailability of the environment is an obstacle to the use of this consensual method of conflict resolution. Finally, we analyze the advantages of environmental mediation in relation to the Term of Adjustment of Environmental Conduct. The method used to perform the article was deductive, in addition to the technique of bibliographic research, such as books, articles of national and foreign doctrine on the subject.

Keywords: environment; mediation; celerity; prevention.

*A MEDIAÇÃO COMO MÉTODO DE SOLUÇÃO DE CONFLITOS
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RESUMO

O presente artigo pretende investigar em que casos e quais as condições a serem observadas para que a mediação possa ser aplicada à solução de conflitos socioambientais, preventiva e repressivamente, com base na Constituição Federal e na legislação infraconstitucional pertinente a esta matéria. Para tanto, inicialmente será abordado o acesso à justiça como um dos fundamentos da mediação ambiental, além do conceito e dos princípios que regem a mediação no Brasil. Posteriormente, o artigo discorre acerca do objeto da mediação com a finalidade de verificar se o caráter indisponível do meio ambiente é ou não um entrave à utilização deste método consensual de resolução de conflitos. Por fim, analisam-se as vantagens da mediação ambiental em relação ao Termo de Ajustamento de Conduta Ambiental. O método utilizado para a realização do artigo foi o dedutivo, além da técnica de pesquisa bibliográfica, tais como, livros, artigos da doutrina nacional e estrangeira sobre o tema.

Palavras-chaves: *meio ambiente; mediação; celeridade; prevenção.*

INTRODUCTION

In accordance with the Federal Constitution, it is a task of the Judiciary Power to establish mechanisms of adequate treatment to the demands that are presented to it, either by means of the services given in the actions, either by means of consensual mechanisms of conflicts solution, the mediation, the conciliation and the arbitration.

The answer to the requirement of the procedural celerity and concretion of the constitutional laws assured the National Advice of Justice instituted the Resolution nº 125/2010, that it consolidates the permanent politics of incentive and enhancing of consensual methods of conflict solution.

Among the consensual methods of conflict resolution, it is distinguished the mediation as a useful instrument of the national judiciary politics of adequate treatment of the conflicts of interests.

However, the mediation lacks improvements in definitive areas, as in the environmental one. That's because conflicts in this area, dealing with fundamental and diffuse rights belonging to current and future generations, may not be subject to waiver by the parties involved in the conflict.

The complexity and the specificity of the conflicts that involve the natural resources, the irreversibility, the intergenerational character, and the diverse opposed interests, in such a way, demand the search of mechanisms that take fast solutions, efficient and adjusted to the necessities of the constitutional duty of protection of the environment.

Thus, this article intends to investigate the viability of adopting the mediation as a method, as a reply to the conflicts in the ambient area. The problem facing is the object of mediation, that is, only the individual and collective environmental damage, available and subject to transactions, can be submitted to mediation, or even the right to the environment, even though diffuse, can be mediated when this practice proves more efficient than the judiciary to good environmental protection.

For such, initially, it will be the beginning of the access to environmental justice as legal-constitutional bedding for application of the mediation to the solution of conflicts in the environmental area, beyond the concept of the mediation.

Finally, the paper approaches object of the mediation and the advantages of this in relation to the terms of behavior adjustment, as well

as of the need (or not) of regulation of the mediation by means of law.

1 ACCESS TO JUSTICE

It is necessary to clarify the concept of access to justice that will guide the study of the environmental mediation, either towards the meanings that had been attributed to it, either with the purpose that the access to justice is not restricted to the judicial state service (MANCUSO, 2009).

The constitutional principle predicted in the 5th article, XXXV of the Federal Constitution, cannot be parsed as a purely formal law, namely, the possibility that the holder of the right joins in court to seek the realization of the right threatened or violated¹.

Watanabe agrees with this (1998, p. 58) when saying that” the issue of access to justice cannot be studied in the bashful limits of the existing judicial agencies. It is not only about making the access to justice possible as a state institution but to make possible the access to just jurisprudence.

It is important to register, in this direction, that, beyond the possibility to complain about the violation of a right (formal direction), the access to justice must make possible that the resolution of the conflict is carried through fast, in just and in accordance with the beginning of the contradictory. This is the material direction of the access to justice, synthesized in the idea of “access to just process and decisions” as Moessa (2015, p. 43) agrees.

Mauro Cappelletti and Bryant Garth (2002) understand that the access to justice is” the system by which the people can claim their rights and/or decide their litigations under the auspices of the State. First, the system must be equally accessible to all; second, it must produce results that are individually and socially right.”

(2002) point, basically, three obstacles that make it difficult, which are: i) Obstacles of financial order, consistent in the high costs of the necessary judicial procedures to the solution of the conflicts, and the honorary fees the pertaining to legal profession; II) Obstacle of secular order, translated in the slowness of the Judiciary Power, either for the

¹ Principles” are norms that demand the accomplishment of something, of the best possible form, in accordance with the actual and legal possibilities, and the rules are norms that, being the estimatives verified, demand, forbid or allow something in definitive terms, without any exception” (CANOTILHO, 2000, P. 83).

possibility of endless resources that the procedural system allows, either for the bad administration, absence of technological modernity and/or lack of judges and servers (SAINTS, 2012); III) Obstacle of cultural order, translated in the lack of trust that the population suffers from in the Judiciary sphere and in lawyers, as well as the intimidation that the people feel due to the formalism of the Judiciary and lawyers.

It is noted, in this direction, that the obstacles of financial and cultural order hinder the formal access to the Judiciary Power, while the obstacles of secular order stop the population from obtaining the services of a jurisdictional quality (MOESSA, 2012).

In the book *Access to Justice*, Mauro Cappelletti and Bryant Garth (2002) presents possibilities of solutions to guarantee the effectiveness of the access to justice, and each movement was called by them "wave". The first wave mentions the judiciary assistance to the hyposufficient population, and, thus, it is related to the obstacle of a financial order in the access to justice. The second wave aimed at surpassing the obstacles of access to justice in relation to the representation of the diffuse and collective rights in court, such as the environmental law and the right of the consumer, once that the civil action was prepared for the guardianship only of the individual rights. E, finally, the third wave, called of "new approach of access to justice", is that one pointed in the direction to become justice accessible by means of the simplification of procedures and the creation of justice alternatives CAPPELLETTI; GARTH, 200).

Cappelletti and Garth (2002, pp. 67-68) clarify what the third wave is:

This "third wave" of reform includes judicial or extrajudicial law, either by means of private or public attorneys, but it goes beyond that. It centers its attention on the general institutions and mechanisms, the people and procedures used to process and even to prevent disputes in the modern societies. We call it "approach of the access to justice" for its broad interpretation. Its method does not consist of abandoning the techniques of the first two waves of reform, but instead of dealing with them as a series of possibilities to improve the access to justice.

In the context of the third wave of access to justice, which is the access to an effective solution for the conflict, the implementation of alternative ways of conflict resolution can contribute to the celerity of the judgment and improve the quality of the decisions.

Regarding the subject of this thesis, it is important to argue about the concept of environmental justice, understood as the access to the prevention and conflict resolution having as parameter the ideal of Justice, corresponding to the access to a just decision and the guarantee of the exercise of environmental rights to environmental citizenship” (CAVEDON, 2006).

Said differently, the access to Environmental Justice, as a basic right in the Democratic State, must necessarily contemplate the following guarantees: a) material equality; b) effective protection from the illegitimate risks and also from the potential ones; c) prevention of litigations; d) environmental education (pedagogical aspect); e) broad participation of the citizens (BENJAMIN, 1995, p. 71-72).

Being the concept of access to justice established, in the next item the mediation will be discussed, and, especially, which issues can be solved by means of this consensual method.

2 ENVIRONMENTAL MEDIATION

2. 1 The mediation concept

The Resolution No. 125 of the National Council of Justice establishes the right of access to Justice, foreseen in art. 5, XXXV of the Federal Constitution, implies access to just jurisprudence and effective solutions. To do that, it is up to the Judiciary Power to establish public politics of adequate treatment of the legal issues, either by means of the services given in legal actions or by means of other mechanisms of conflict solution.

Amongst the alternative ways of conflict resolution, negotiation, conciliation, mediation, and arbitration are distinguished. Negotiation is a conflict resolution technique whereby litigants seek self-composition, as a rule, without the intermediation of third parties. Despite its informality, it can be considered a conflict resolution technique, because it establishes the process of communication between the parties involved in the conflict with the purpose of building consensus on the dispute (TARTUCCE, 2008).

Differently from negotiation, the conciliation is a technique of conflict resolution in which a third person, called conciliator, assists the parties in the building of an agreement to cease the conflict, being allowed to the professional to reveal his opinion in a more just solution for the

conflict.

The arbitration can be considered an alternative method to the Judiciary Power, in which the parties freely choose the arbitrator who will have the power to decide upon the controversy by taking into account the rules stipulated.

As Carmona (1993, p. 19) points out, the arbitration is a technique for the solution of controversies through the intervention of one or more people who receive their powers from a private convention, deciding on the basis of this convention, without intervention of the State, being the destined decision to assume the effectiveness of judicial sentence”.

The mediation, object of inquiry of the paper, is a technique of conflict resolution by means of which the mediator, without imposing a decision or displaying their opinion, facilitates the communication and the dialogue between the involved people for the construction of the consensus. Said differently, ”it is a dialogue attended by a mediator, tending to propitiate a satisfactory agreement to the interested parties, preserving the good relationship between them” (BACELLAR, 2016, p. 128).

Also, Yarn (1999, p. 87) elucidates the mediation concept:

a composite process according to which the parts in the dispute are assisted by a third party, neutral to the conflict, or a panel of people without interest in the cause, assisting them to arrive at a composition. It is about negotiation or facilitated by one or more people, that develops a process composed of procedural acts for which the third impartial parts to negotiate between the people in the conflict, qualifying them to understand their position and to find solutions compatible to their interests and needs.

It is important to highlight that the mediation is a technique of conflict resolution, which is different from that of conciliation, because the conciliator has the possibility to intervene in a more active form for the attainment of an agreement (considering and suggesting solutions), whereas in the other the role of the mediator is to restore the dialogue between the parts so that they can construct their own consensus concerning the conflict (SOUZA, 2012).

the mediation, thus, is distinguished from the lawsuit, exactly because in this the decision is constructed by the parts, that is, the decision is not imposed on them. Beyond the celerity, in the mediation

processes there are no resources, eleven” agreement presupposes the end of the divergence, therefore the parts feel, in a certain measure, contented” (RUIZ, 2016, page 80).

On this subject, Mancuso (2009, p. 12) mentions that” the evicted solution comes impregnated with the weight of the state intervention, that, along with causing an extreme duration of the process, results in inciting the involved parts in an inflamed lawsuit”, what contributes to provoke contentions.

I) autonomy of the will of the parts, that is, the mediation is only carried through the means of the free consent of the parts, they have freedom to make their choices; II) the impartiality of the mediator, that is, they must remain equidistant in relation to the parts; III) the confidentiality, in turn, means that the mediator has the duty to keep secrecy of the information obtained in the session; IV) informality, once there are no rigid rules to be observed in the mediation process; v) the dialectic of the mediation is based on the orality of the common language, therefore the parts are the protagonists of the procedure; vi) isonomy of the parts, that is, the parts involved need to have the same capacity to negotiate and access data and information; vii) it seeks the consensus, constructed in a freeway by the parts and by means of dialogue.

In relation to the environmental mediation, it is also important to mention which is the advantages of this in relation to the solution of conflicts by the Judiciary Power, as well as who could be part of this. These, therefore, will be the subjects of the next item.

2. 2 The object of the environmental

It is also worth mentioning the object of mediation, that is, which conflicts can be mediated. What it is intended to investigate is the possibility of the use of mediation as a method of consensual solution of environmental conflicts, having as a parameter the Law of Mediation (Law nº 13,140/2015) and the Federal Constitution.

In the field of the legal-environmental rules, the forecast of the constitutional protection of the environment was the watershed for Environmental Law. First, because of the establishment of the duty not to degrade, with a binding force of public order, confiding its creation of instruments of sanctionary and reparatory means at the disposal of the

State and the victims. Second, the environmental guardianship is raised to the level of the basic right, of equal importance to other rights foreseen in the Constitution, like the right to private property.

the Federal Constitution, in the caput article 225, considers the environment a public good, of diffuse and indivisible ownership:” Everybody has the right to an ecologically balanced environment, of public use to the people and essential to a healthy quality of life, imposing to the Public Power and to the collective the duty to defend it and preserve it for the current and future generations”.

The Code of Defense of the Consumer established, in article 81, only paragraph, the definition of diffuse rights²:

Art. 29. The defense of the interests and rights of consumers and victims may be exercised individually or jointly.

Single paragraph. The collective defense will be exercised when it is about:

I - diffuse interests or rights, so understood for the purposes of this code, indivisible transindividuals held by persons undetermined and bound by actual circumstances (. . .).

Based on the above definition, it is possible to identify four important elements for the definition of diffuse rights: i) the transindividual character means that diffuse rights belong to all indistinctly, that is to say, they are” interests that depart the sphere of action of the individuals alone, to surprise them in their collective dimension” (MANCUSO, 2009, p. 67); ii) indetermination of the subjects, since they do not belong to a single person, nor to a specific group; iii) the indivisibility of the object, that is, the impossibility of breaking the law in relation to the indeterminacy of the subjects that hold it; the persons, holders of these rights, are bound by actual circumstances (MANCUSO, 2009).

According to Mazzilli (2016, p. 53), diffuse rights “are like a bundle or set of individual interests, indivisible objects, shared by indeterminable persons, who are united by related factual circumstances.”

Thus, although mediation has emerged as a method of resolving conflicts of a patrimonial and familial nature, countries such as the United States and Canada have already discussed the adequacy of this method

² Article 81, II and III of the CDC, also defines *collective interests or rights*, understood as such, for the purposes of this Code, the trans-individual ones, which are indivisible, owned by a group, category or class of linked persons or the opposite party for a basic legal relationship, and *homogeneous individual interests or rights*, thus understood as arising from common origin (emphasis of the author).

in relation to conflicts of an environmental nature, whether due to the unavailability of the environment, or by the multiplicity of the actors involved (SOUZA, 2012).

For Souza (2012, p. 100), the use of mediation in the environmental sphere in the United States arose “[...] because of the widespread perception of the bankruptcy of the jurisdictional system to account for the complexity of conflicts of this nature, technical-scientific view, or from an intersubjective point of view.”

In this sense, Almeida (2016) points out that the motives that led to negotiated solutions in the environmental area were cost reduction, facilitation of access to justice, community participation in conflict resolution, and the possibility of decongestion of the courts.

Therefore, it is necessary to investigate the conditions and limits for the use of mediation of environmental conflicts in Brazilian law, whether due to the unavailability of the right to the ecologically balanced environment or due to the Mediation Law that came into force in 2015.

Article 3 of Law no. 13140/2015 says” that the conflict regarding available or unavailable rights that allow transaction can be mediated”. That is, both the available rights and the unavailable rights can be subject to mediation, requiring for the latter the following requirements: i) admit transaction; ii) the Public Prosecutor’s Office; iii) and the approval in court of the consensus reached by the parties (Article 3 § 2 of Law 13140/2015).

The concept of unavailability should not be confused with intransigibility, since it only occurs in those situations that the law prohibits the transaction, for example, article 17, paragraph 1, of Law No. 8,429 of 1992, which deals with administrative improbity (SOUZA, 2012).

In this way, the discussion about the possibility or not of the transaction of unavailable rights is overcome by the wording of the Law mentioned above, since it makes a distinction between the group of diffuse rights that can be object of mediation, provided they admit the transaction and the group of diffuse rights that cannot be mediated by not admitting it (RUIZ, 2016).

In this sense, the discussion regarding the possibility of mediation being used as a method of solving conflicts in the environmental sphere, shifts from unavailability to the possibility or not of the diffuse rights transaction. And, as Green (2006, p. 63) says, “the prohibition of the non-availability of rights that are unavailable is a mere legislative option”.

In addition, the law does not clarify what are the unavailable

rights assumptions that admit the transaction. Thus, “even when the unavailability of the public interest is trivialized and generalized, to reach hypotheses that do not characterize it, the transaction is not forbidden, only that will depend on judicial ratification” (GLOBAL SCENARIO GROUP, 2017).

Due to the lack of a legal seal in relation to the transaction of environmental assets, it is defended the possibility of mediation,” provided that the mediation carried out serves its most efficient and expeditious protection, without giving up the right of the present and of future generations to a balanced environment” (RUIZ, 2016, p. 80).

As for the possibility of the transaction of the unavailable rights, it shares the same understanding of Lenza (2005, p. 79) when saying that:

In the absence of an express legal prohibition (see, for example, § 1 of article 17 of the Law of Administrative Improbability - Law 8. 429/92), in theory, the process is guided by the permissibility of the transaction, provided, of course, that the concession that must be made to be more efficient for the maintenance and protection of diffused goods than for the continuity of judicial demand. It is noted that the concession (material aspect inherent to the transaction) does not mean giving up material law, but in reality, it is limited to the form and term of the adjustment, in order to guarantee greater protection of the public good in litigation.

In this way, it is emphasized that, given the permission of the Law for the use of mediation as a method of resolving conflicts involving unavailable rights, as well as the express provision that mediation may relate to any conflict or part thereof (Article 3 1 of Law 13105/2015), it is necessary to verify in the concrete case if the object (s) involved in the conflict admits the transaction or not.

The difficulty of accepting the use of mediation in the environmental sphere can be overcome with the understanding that the environmental legal good admits both the legal regime of private law and the legal regime of public law. To better understand this issue, it is relevant to bring up the concept of environmental damage, which is circumscribed by the meaning attributed to the environment. In the legal sense, the environment is a unitary *macro good*, incorporeal and immaterial, with a configuration of *micro good*, since it involves the natural, artificial and cultural elements (LEITE, 2013).

On the other hand, the environmental damage is considered as”

the damage to the environmental resources, with consequent degradation - adverse change or *in pejus* - of the ecological balance and quality of life” (MILARÉ, 2003).

Environmental damage results from the unjust aggression of environmental goods made up of ecological goods as well as personal, economic, moral and material goods. This means that the environment (*macro good*) is composed of *micro goods* that can integrate the role of both available and unavailable rights (ANTUNES, 2003).

In the same sense, it is said by Milk (2013, p. 65):

Environmental damage can be understood as an intolerable injury caused by any human action (culpable or otherwise) to the environment, directly, as a macro good of interest of the collectivity, in a totalizing conception, and indirectly, to third parties, in view of their own interests and indivisible and reflecting in the macro.

In its broad sense, the injury caused to the environment due to environmental damage can fall on environmental, cultural, natural and artificial heritage. In this sense, environmental damage in relation to the objectified interests can be called individual environmental damage³ (protection of the victim’s own interests) and collective environmental damage or *lato sensu*⁴ (it is a more comprehensive category because it involves all components of the environment, such as natural, artificial and cultural environmental goods).

In view of this, the right to compensation for moral or property damage arising from an environmental tragedy can be the subject of mediation, since it is an individual or collective right, available and negotiable, that does not affect the right of everyone to live in an ecologically balanced environment.

This is the case, for example, of” damage to private property resulting from atmospheric pollution (blackened walls and windows of a dwelling), or of (ii) lack of pure water (reduced production of a company)” (ANTUNES, 2015, p 85), since these constitute facets deprived of environmental damage.

Once the possibility of using mediation as a method of dealing

³ The individual environmental damage is that” connected to the environment, which is in fact an individual harm, because the primary objective is not the protection of environmental values, but the interests of the injured person, relative to the environmental good” (LEITE, 2013, p. 343).

⁴ Carvalho says that” collective environmental damages are related to accidents caused to the environment *lato sensu*, affecting on diffuse interests, because they directly harm an indeterminate or indeterminate collectivity of owners” (CARVALHO, 2001, p. 197).

with individual and collective conflicts in the environmental sphere (other than environmental damage) has been delineated, it is necessary to raise the debate about the possibility of environmental impacts being mediated.

The impossibility of disposing and compromising about environmental goods” is based on the naive assumption that such rights are better protected if they are not available” (ANTUNES, 2015, p. 56). For Antunes, this understanding could lead to the perishing of diffuse rights, since” environmental justice that is not done quickly is injustice”.

In the same sense, Ruiz (2016, p. 81) states:

Given that the new regulatory framework does not expressly prohibit the mediation of conflicts involving environmental rights, it is argued that this may be a more efficient alternative than judicial in the face of a disaster that requires a rapid response, at the risk of significant possibly irreparable damage to the environment.

Moreover, as the Law of mediation does not seal the mediation of conflicts on the environment, it is understood that this may be a more effective tool than the court, in that offer a faster response and thus avoid environmental damage, which is mostly irreversible (RUIZ, 2006).

Likewise, the second class of the Superior Court of Justice recognized the validity of a transaction involving diffuse rights, but as an exception to the rule of intransigibility. In the words of the minister,” To say that diffuse rights are not unworkable is to say nothing, insofar as it is already known that, in matters of environmental damage, one can hardly return to the status quo ante” (STF, 2016, s/p).

In this sense, the following is a summary of the decision of the Superior Court of Justice:

CIVIL PROCESS - PUBLIC CIVIL ACTION FOR ENVIRONMENTAL DAMAGE - ADJUSTMENT OF CONDUCT - TRANSPARENCY OF PUBLIC MINISTRY - POSSIBILITY. 1. The general rule is that the fuzzy rights cannot be transacted. 2. *When dealing with diffuse rights that impose an obligation to do or not to do, different treatment must be given, making it possible to give the controversy the best solution in the composition of the damage, when it is impossible to return to the status quo ante.* 3. The admissibility of a diffuse rights transaction is an exception to the rule. Special resource (emphasis added) (BRASIL. Superior Tribunal de Justiça. Special Appeal nº 299. 400 - RJ. Second Class. Rapporteur: Minister Francisco Peçanha Martins. Rapporteur for judgment: Minister Eliana Calmon. Brasília, June 1, 2006).

From the reading of article 225 of the Constitution of the Republic, it is extracted that the right to the environment, as a rule, is available; therefore, unavailability is an exception provided for expressly in the Constitution of the Republic. In this sense, it defends the possibility of the protection of the environment being the object of an agreement of will between the parties (ANTUNES, 2015).

The author Antunes (2015) argues that, just as Article 5 determines the unavailability of "vacant or collected lands by States, by discriminatory actions necessary for the protection of natural ecosystems," other points of this constitutional article admit both the possibility of being suppressed goods of environmental value that the "environmental recovery is not done in an integral way, but by a presumption established by technical solution" (ANTUNES, 2015, p. 76).

Another argument raised by Ernardorema (2013) refers to the fact that the unavailability rests on the environment as a whole and not on each natural or cultural element that composes it in isolation. The author (2013, p. 210) argues that the limit for the use of mediation in environmental matters is "the requirement of maintaining the environment in a situation capable of triggering the natural movement of self-regeneration or of not inhibiting it, able to set the nucleus of diffuse interest in focus - and therefore unavailable - with respect to environmental conflicts."

In conflicts involving diffuse rights, Morais (2012, p. 54) understands that the renunciation or disposition of these rights is only possible when their consent gives greater protection to the public interest. This author (2012, p. 54) gives the following example regarding the possibility of a diffuse rights transaction:

We had a concrete case in which an agreement was made providing for the placement of the first filters in three months, after fixing the second group of filters in six months, and the last would only be installed nine months after the agreement was formalized. Some say that this is not a provision, but mere forecasts about deadlines, with which we do not agree. In fact, when it is accepted that for a certain time the pollution continues, in favor of the complete resolution in a certain and reasonable time previously adjusted, it is obvious that there is a transaction in which the public agent disposes of the interests of the collectivity, the environment, because the public interest shows that it is more advantageous to wait for less time (a few months) for the total solution than to continue to sue in the context of public civil action for long years.

In relation to the possibility of using mediation in the treatment of environmental conflicts, Rodrigues (2006, p. 236) shares the view that” even if it is a question settled, there is no possibility of compromising on the subject of the right, only to define deadlines, conditions, place, and form of compliance, even if the term” transaction” is used”.

According to Souza (2006, p. 176), in the case of an agreement between the author of the environmental wrongdoing and the Public Power, “the compromise has to be a means by which, at least, all that may be obtained in the event of a possible judgment in a judicial action related to that specific conduct can be reached”.

In relation to the adequacy of mediation as a method of solving social and environmental conflicts, Warat (2001, p. 87) shares the idea that “mediation can deal with any type of conflict: community, ecological, business, school, family, criminal, consumer-related, labor, political, human rights and citizenship and at-risk minors etc.”

However, in addition to the discussion previously raised as to the possibility or otherwise of the transaction of diffuse rights, another objection raised is the inequality of the parties involved in the conflict.

Freitas Junior (2009, p. 524) objected to this argument by saying that” if relations between unequally constituted subjects did not involve mediating intervention, mediation would have no place in any concrete intersubjective relationship.” The author argues that the intervention of the mediator in the balance between the parties by means of agreed empowerment techniques is what allows” [...] the least unequal treatment in the common confection of a pattern recognized by the subjects as substantially fair and balanced” (FREITAS JUNIOR, 2009, p. 524).

Although Souza (2014) recognizes that mediation is an appropriate method to deal with complex, multifaceted and multi-stakeholder conflicts⁵, she objects that mediation does not prove to be an adequate consensual method when there are significant differences in the power relations between the parties involved or when the history of the conflict makes dialogue impossible, given the impossibility of working.

Hemmati (2002, p. 22) argues that in those conflicts involving a large number of actors, there is a risk that the conflict will be staggered” to the point of rendering dialogue unfeasible, or when issues are still

⁵ The author understands mediation as an appropriate method” given its potential to deal with the underlying layers and to work with multiple interests and needs, harmonizing them and seeking compensations and creative solutions that maximize the protection of both the objective view (from the different interests at stake) and from the subjective perspective (from the different subjects affected by the conflict)” (SOUZA, 2014, p. 27).

too dispersed and intangible for the consideration of concrete results”, mediation might not be considered the most appropriate option.

However, even in the case of staged conflicts, the option to use mediation “can provide productive and transformative outputs” (BARROS; ESPÍNOLA, 2016, p. 767), because of the opening of dialogue space, which allows at least the possibility for the actors involved to understand one another’s positions and points of view.

Although mediation of conflicts involving environmental matters is an incipient practice in Brazil, three initiatives in this area should be highlighted. The first of these is the Nucleus of Resolution of Environmental Conflicts created by the Public Ministry of the State of Minas Gerais in 2012.

The project, winner of the Innovare Prize, is highlighted by the implementation of the Public Prosecutor’s model by water basin and for the protection of the natural, cultural and artificial environment, as well as the construction of legal solutions that are consensual and compatible with the need for protection” Of the ecological and socioenvironmental attributes of the various natural systems that comprise a basin” and the economic development of the state (MPMG, s/p).

The functions of NUCAM (Nucleus of Resolution of Environmental Conflicts) are thus disciplined:

I - Articulate and guide the action of the Public Prosecutor’s Office in mediation and negotiation of complex environmental conflicts, involving undertakings or activities of significant environmental impact, characterized as class 05 or 06 of the state environmental licensing; II - Conduct civil investigations or administrative procedures submitted to NUCAM; III - Analyze, through technical staff, environmental studies and technical opinions, presented in environmental licensing processes; 53 IV - Draw up, at the request of the executing agency or regional coordinators, opinions regarding potentially polluting enterprises implemented or to be implemented in the State of Minas Gerais; V - disseminate, with the support of the Center for Studies and Functional Improvement (CEAF), good practices and methodologies applied or developed in the extra-judicial resolution of environmental conflicts; VI - perform other related functions, defined by CAOMA (MPMG, s/p).

This model of organization of the Public Ministry of Minas Gerais helps to reduce the judicialization of environmental demands, as well as reinforce the role of this body as a mediator of environmental conflicts.

The second initiative concerns the determination of Minister Luiz Fux, Rapporteur of the Public Civil Action (ACO) 2536, to hold a mediation hearing, with the participation of the Public Prosecution Service, in order to establish a dialogue between the parties concerned in the supply of the Cantareira System (BARROS; ESPÍNOLA, 2016).

Incidentally, the Court of Justice of São Paulo and the Catholic University of Santos (UNISANTOS) implemented an Environmental Mediation Chamber on March 15, aimed at solving environmental conflicts before the parties entered the Judiciary. One of the major concerns of this organ is the invasions that occur in areas of environmental protection located on the coast of that municipality (JORNAL A TRIBUNA, 2017).

These three examples show that the Public Civil Action and the Term of Adjustment of Conduct can serve as a channel for access to mediation, considering that the Public Prosecutor's Office plays an important role in protecting the environment, as can be seen from the Federal Constitution (BARROS; ESPÍNOLA, 2016).

In addition, it shows that, in choosing to mediate, the Judiciary is directing its action to the consensual methods of conflicts, according to what determines paragraphs 2 and 3 of article 3 of the Code of Civil Procedure⁶.

In the next item, the advantages of environmental mediation will be addressed in relation to the Judiciary's performance in the environmental sphere.

3 THE ADVANTAGES OF ENVIRONMENTAL MEDIATION

The main advantages of choosing to mediate conflicts, whether in the environmental sphere or not, is the reduction of the average time of conflict resolution, in addition to the fact that the actors involved have greater control over the process, since, in mediation, the parties have the autonomy to build consensus on the object of the conflict.

In addition, informality, the relationship of trust established between the parties, respect for dialogue and cooperation, and the responsibility of the parties involved in relation to environmental rights and duties can also be cited as advantages of environmental mediation.

⁶ Art. 3 of the CPC - Judicial assessment shall not exclude any threat or damage to law. [...] Paragraph 2. The State shall promote, whenever possible, the consensual solution of conflicts. Paragraph 3. The conciliation, mediation and other methods of consensual solution of conflicts shall be encouraged by judges, lawyers, public defenders and members of the Public Prosecution Service, including in the course of the judicial process.

Corroborating with this position, is Soares (2010, p. 36) who establishes the following advantages of mediation:

Mediation is advantageous because it allows a greater degree of satisfaction of the participants, who maintain a certain degree of control; for having greater flexibility in analyzing more creative options than the courts and, most importantly, promoting cooperation, which is often missing in solving most environmental problems. Because it does not have an adversarial stance, mediation can deal with a larger field of technical data and does not favor the obstruction of information. Also, because it is voluntary, it manages to arrive at more lasting solutions and to a better implementation of these.

Another advantage that deserves to be highlighted is the possibility for the parties to choose a mediator with technical knowledge about the subject of the conflict, which can give greater speed to the resolution of conflicts, due to the fact that it has been submitted to an expert.

Couto and Carvalho (2003, p. 238) understand that the conflict is submitted to the appreciation of mediators who have knowledge in the environmental area (expert), due to the” elusive and often indivisible nature of environmental damage; the frequent distance between the event generating the damage and the manifestation of its effects; the technical and scientific uncertainties that these conditions suggest.”

It is worth mentioning the important role of the principle of popular participation in the protection of the environment, enshrined in Articles 1 and 225 of the Federal Constitution, in addition to the Rio Declaration on the Environment⁷.

The principle of environmental participation requires citizens to participate in environmental decisions and public policy making, either because they are the recipients of the ecologically balanced right to the environment or because of the duty of protection established by the Federal Constitution.

The importance of popular participation lies in ensuring that the citizen is a protagonist in environmental decisions.” It is the joint

⁷ The best way to deal with environmental issues is with the participation of all concerned citizens at various levels. At the national level, every person should have adequate access to environmental information available to public authorities, including information on materials and activities that threaten their communities, as well as the opportunity to participate in decision-making processes. States should facilitate and encourage public awareness and participation by making information available to all. Effective access to judicial and administrative procedures, including reimbursement of relevant data and resources, should be provided. UNITED NATIONS ORGANIZATION. United Nations Conference on Environment and Development (Agenda 21), adopted from 3 to 14 June 1992.

venture that contemplates two fundamental elements: information and education” (FIORILLO, 2003, p. 75). That is, it contemplates both the right that citizens have to obtain information about the state of the Public Power environment, and education as an instrument for the construction of environmental awareness.

Finally, reference should be made to the advantage of mediation in relation to the Term of Conduct Adjustment (TAC), an extrajudicial tool used by the environmental agency and the Public Prosecutor’s Office to prevent or repair damages to the environment.

The balance between the parties and the scope of the best agreement are hampered because the TAC is developed by the Public Prosecutor or by the environmental body. In addition to not having an impartial third party, TACs “were not standardized on their methodology” (RUIZ, 2016, p. 82).

In addition to the Term of Adjustment of Conduct, the public hearing of environmental licensing is a mechanism that citizens have at their disposal to act on environmental decisions.

Although the holding of public environmental hearings promotes the debate and participation of those involved, this does not mean that they are guided by the dialogue and consensual negotiation of opposing interests. In the opinion of Innes and Booher (2004, p. 421), public hearings are held for the purpose of complying with the legal requirement because “we are trapped in thinking that social participation involves citizens on one side and government on the other. This simplistic dualism underlies debate and encourages adversarial participation.”

For this reason, the authors argue for collaborative participation characterized by dialogue that encompasses all the interests involved, as well as ensuring the participation of the weaker groups and that they are assisted in the participation of the debates (SOUZA, 2012; INNES and BOOHER, 2004).

In the definition of Innes and Booher (2004, p. 421-422):

Participation must be collaborative and incorporate not only citizens but organized interests, for-profit and nonprofit organizations, planners and public managers [...] methods of effective participation involve, collaboration, dialogue, and interaction. They are inclusive. They are not reactive but focused on anticipating and defining future actions. They defy the current state of affairs and formulate complex questions about the themes considered peaceful.

It should be said that the option for mediation to resolve environmental conflicts is shown as an alternative to overcome disability in relation to the instruments of popular participation in environmental matters. This is because the mediator, the impartial third party, is in charge of identifying the common and divergent points between the parties and co-opting possible alternatives for the solution of the conflict, which would facilitate the formation of consensus among them (SOUZA, 2012).

Considering the advantages of the option of using mediation to resolve environmental conflicts, Acselrad and Bezerra (2010, p. 89) argue that mediation could consolidate a model of society that unequally distributes environmental risks to inequality of power of the parties involved. That is, if the inequality of power between the participants in mediation is significant, the consensus resolution of conflicts can be configured as "a social technology of central demobilization for the construction of what Francisco de Oliveira calls domination without politics."

Viégas (2009, p. 12) points to the uncertainty of success regarding the incorporation of foreign models of consensual resolution of conflicts of an environmental nature by saying that:

The initiatives of out-of-court solutions to conflicts of an environmental nature in Brazilian Comparative Law follow the example of flexibility in the diffuse and unavailable nature of environmental law, as in the case of French and North American law. The first, for example, has a judicial device called *contrat de blanche*, which establishes essential operating conditions for a branch of economic activity, combining it with the protection of the environment. This involves the concerted development of a pollution abatement program in return for financial aid to industry for pollution remediation. The second presents the *environmental dispute resolution*, which consists in the existence of several consensual measures to accommodate environmental conflicts, involving all stakeholders. In order to set up a landfill in a particular location, for example, an agreement between the employer and the local community is required. Such negotiations are mandatory and receive technical assistance and general oversight from a council bringing together representatives of government, industry and civil society. If there is no agreement, the Council determines an arbitration, dirty decision binds the entrepreneur and the host community.

The objection made by the aforementioned authors regarding the option of mediation as a method of dealing with environmental conflicts

lies in the premise that, where there is unequal power between the parties involved, the maintenance of the jurisdictional monopoly would be more adequate. This is because the economic, political and/or cultural inequality of the participants can lead to the production of agreements that do not meet the protection of the environment. However, this inequality of forces can be overcome by the public prosecutorial function (ERNADOREMA, 2013).

Finally, it should be clarified that the possibility of the citizen bringing a conflict of an environmental nature to justice remains because his removal would represent an affront to the principle of universality of jurisdiction, the basis of the Democratic Rule of Law.

Outlining the advantages of environmental mediation in relation to the Conduct Adjustment Fear, it is now important to mention who can compose a mediation, according to the legal order.

CONCLUSION

Mediation has proved to be an adequate mechanism for conflict resolution, either because it provides for the interpersonal improvement of stakeholders by enabling dialogue among actors, or because it allows the prevention of future environmental conflicts and even ecological awareness.

Even in the face of the existence of alternative mechanisms for solving environmental conflicts, such as a public hearing and the Term of Adjustment of Conduct, the controversy that arrives at the Judiciary faces slowness of judicial proceedings regarding environmental protection, difficulty in producing evidence, and technical questions. These, in environmental terms, are always more expensive, since in some situations the solution is impracticable due to the cost, complexity or irreversibility of the damage.

In this way, it is understood that mediation can be used to enable the solution of conflicts of interest related to the use and protection of environmental resources in order to prevent the exhaustion of these valuable resources to the human being.

In addition, it has a preventive character, as it avoids the emergence of new conflicts, and a pedagogical character since the parties learn to communicate and to deal with situations of conflict.

When dealing with the application of mediation to the solution

of environmental conflicts, there is no specific regulation in Brazil, which would be important to establish the minimum regulatory parameters and also safety in relation to users of environmental mediation.

The use of mediation to protect the environmental goodwill consolidate a new law position regarding the pacification of environmental conflicts in the internal legal order, either because of the possibility of this contribution to access to justice, or for speed and prevention and compensation of damages environmental impacts.

In the face of diffuse environmental risks, characterized by irreversibility and unpredictability, mediation could be used as a tool for the prevention and resolution of socio-environmental conflicts, since, by allowing an active listening of the involved parties, there would be a greater commitment on environmental sustainability.

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