

# SOCIO-ENVIRONMENTAL MEDIATION AS AN INTEGRATING INSTRUMENT

## *A MEDIAÇÃO SOCIOAMBIENTAL COMO INSTRUMENTO INTEGRADOR*

Article received on: 08/18/2021

Article accepted on: 06/06/2023

### **Flávia de Almeida Montingelli Zanferdini**

Universidade de Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil

Lattes: <http://lattes.cnpq.br/0757523800788561>

Orcid: <https://orcid.org/0000-0002-0444-5416>

[fzanferdini@hotmail.com](mailto:fzanferdini@hotmail.com)

### **Giovana Carla Atarasi Jurca**

Universidade de Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil

Lattes: <http://lattes.cnpq.br/2006258917792329>

Orcid: <https://orcid.org/0000-0002-0873-5197>

[giatarasi@hotmail.com](mailto:giatarasi@hotmail.com)

### **Luiz Felipe Machado Muraca**

Universidade de Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil

Lattes: <http://lattes.cnpq.br/2419806817430416>

Orcid: <https://orcid.org/0000-0001-8782-1159>

[lfmuraca@gmail.com](mailto:lfmuraca@gmail.com)

The authors declare no conflict of interest.

### **Abstract**

This article aims to analyze the possibility of using mediation as a possible end in resolving socio-environmental conflicts. The discussions involving the protection of the right to an ecologically balanced environment are growing in the country, especially after major environmental disasters, since they generate complex, lengthy, and time-consuming proceedings. Countless people have had their lives changed and, rightfully so, these people expect a swift solution from the Judiciary. The Judiciary, in turn, faces difficulties in settling the above-mentioned disputes, either due to

### **Resumo**

*Este artigo tem a finalidade de analisar a possibilidade da utilização da mediação como um fim possível na resolução de conflitos socioambientais. As discussões envolvendo a proteção do direito ao meio ambiente ecologicamente equilibrado tornam-se crescentes no país, especialmente após grandes desastres ambientais, uma vez que eles geram processos complexos, extensos e morosos. São inúmeros os atingidos que tiveram suas vidas modificadas e, de modo legítimo, essas pessoas esperam uma solução célere por parte do Poder Judiciário. Este, por sua vez, enfrenta dificuldades para compor os*



the absence of specialized technical staff in environmental issues, or due to the lack of resources for the solution of these conflicts, or even due to the well-known work overload. Thus, the objective of this paper is to analyze socio-environmental mediation, an extrajudicial remedy to promote access to justice in environmental disputes. To this end, the deductive method was used, based on a bibliographic review of legislative documents. In the end, it will be concluded that the complexity of the facts underlying socio-environmental conflicts requires the use of dialogical means for their composition since the simple acceptance or rejection of a certain claim is often not enough to settle disputes of this nature.

**Keywords:** dispute resolution; environment; mediation.

*supramencionados litígios, seja pela ausência de corpo técnico especializado na temática ambiental, seja pela falta de recursos próprios para a solução desses conflitos ou até mesmo pela conhecida sobrecarga de trabalho. Assim, o objetivo deste texto é realizar uma análise da mediação socioambiental, tutela extrajudicial de promoção do acesso à justiça em lides ambientais. Para tanto, o método dedutivo foi utilizado, baseado na revisão bibliográfica de documentos legislativos. Ao final, concluir-se-á que a complexidade fática que embasa os conflitos socioambientais requer a utilização de meios dialógicos para sua composição, visto que o simples deferimento ou não de determinada pretensão no mais das vezes não é apto a compor litígios dessa natureza.*

**Palavras-chave:** solução de litígios; meio ambiente; mediação.

## Introduction

The discussions related to environmental protection have become increasingly common. The numerous environmental disasters of significant impact have unfortunately positioned Brazil as a protagonist in the international environmental scenario. This is due to the oil spills in the Northeast, the collapse of mining dams in the state of Minas Gerais, the deforestation of the Amazon, and many other recent events.

Economic development, population growth, urbanization, and the technological revolution generate changes in the lifestyle and methods of production and consumption of the population, as well as environmental degradation. These factors contribute to the escalation of social conflicts, including environmental disputes.

In light of this, the United Nations (UN) promoted the Stockholm Conference in 1972, which was the first major conference dedicated to environmental issues. In 1992, the United Nations Conference on Environment and Development (Rio 92) took place in Rio de Janeiro. Ten years later, in 2002, the Rio+10 conference was held in Johannesburg, South Africa. Additionally, in 2012, the United Nations Conference on Sustainable Development, also known as Rio+20, took

place in Rio de Janeiro. Finally, in September 2015, the Sustainable Development Summit was held at the United Nations headquarters in New York. During this meeting, all member countries of the organization established the new Sustainable Development Goals (SDGs) as part of a comprehensive sustainable development agenda called the “2030 Agenda for Sustainable Development”. This agenda includes an action plan for people, planet, and prosperity, with the aim of fostering universal peace and greater freedom.

This brief overview of the efforts made by international organizations, particularly the United Nations, demonstrates that attention has been focused on environmental preservation for almost half a century. This is partly a result of the advancement in scientific analysis of the subject. However, it is evident that international efforts have not been sufficient to effectively promote the conservation of natural resources. This is evident from the ongoing series of conferences on climate issues. Additionally, there are numerous interests, primarily economic interests, that contribute to the unsustainable exploitation of environmental resources. Nevertheless, a balance must be sought between ensuring a healthy life for the present and future generations and fostering economic and social development.

In the context of promoting peace, a significant contribution arises from the analysis of the concept of mediation, particularly the potential for the participation of those involved in seeking a collective construction of consensus. Mediation provides a reflective and democratic space where conflicts can be resolved in a manner that is more suitable to the various interests at stake. In a context of fruitful and respectful dialogue among the parties involved, the chances of achieving social pacification increase exponentially compared to a unilateral solution imposed by the Judiciary. This is because mediation allows for the presentation of numerous perspectives and proposed solutions, creating an environment conducive to satisfying originally conflicting interests. Unlike judicial litigation, mediation does not operate based on a framework of legality or the determination of well-founded or unfounded claims. Instead, it aims to arrive at a resolution that considers the specific concerns of the disputing parties.

Therefore, the objective of this article is to deductively explore the possibilities of using mediation as an appropriate instrument for resolving socio-environmental disputes. This endeavor is justified for two main reasons: firstly, socio-environmental conflicts are gaining increasing attention in the study of legal theory; secondly, consensual methods for conflict resolution are proving to be increasingly effective in achieving the ultimate goal of justice, which is social pacification.

To achieve the aforementioned objective, we initially aimed to establish

reflections on the concept of ecologically balanced environment, drawing from an examination of the Brazilian constitutional text and the National Environmental Policy. Subsequently, we will delve into the discussion of consensual methods of dispute resolution. The third section of the text focuses on socio-environmental mediation, while the fourth and final topic establishes its relationship with the concept of structural process.

Particularly in the socio-environmental realm, mediation emerges as an intriguing option, as it endeavors to facilitate the resolution of conflicts arising from environmental disasters, which are frequently intricate and challenging to address unilaterally. In conclusion, our aim was to ascertain whether mediation, in fact, aligns with the objective of establishing a State governed by the Rule of Law in the socio-environmental context, as advocated in the heading of Article 225 of the Brazilian Federal Constitution of 1988. This objective entails an integrative perspective of the environment and is founded on the principles of human dignity, ultimately seeking to foster the development of an ecologically balanced environment.

## 1 Reflections on the concept of ecologically balanced environment

The recognition of the right to an ecologically balanced environment, as previously mentioned in the introduction, is enshrined in the heading of Article 225 of the Constitution of the Federative Republic of Brazil<sup>1</sup>, outlined in Chapter VI:

Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations (BRASIL, 2016)<sup>2</sup>.

The first paragraph of this provision, aimed at ensuring the effectiveness of the constitutionally guaranteed right, establishes the following subsections: (i) the preservation and restoration of essential ecological processes; (ii) the promotion of ecological management of species and ecosystems; (iii) the preservation of the

1 According to José Afonso da Silva (2009, p. 46) “The Brazilian Constitutions prior to 1988 brought nothing specifically about the protection of the natural environment. The most recent ones, since 1946, were only extracted protectionist orientation of the precept on the protection of health and the Union’s competence to legislate on water, forests, hunting and fishing, which enabled the preparation of protective laws such as the Forest Code and the Codes of Public Health, Water and Fisheries”.

2 Original text in Portuguese: “Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações”.

country's genetic heritage, including its diversity and integrity, with oversight of entities dedicated to genetic material research and manipulation; (iv) the designation, in all units of the Federation, of territorial spaces and their components to be specially protected. Any alteration or removal of such protections is permitted only by law, with a prohibition on any use that compromises the integrity of the attributes that justify their protection; (v) the requirement, as stipulated by law, for the installation of any work or activity with the potential to cause significant environmental degradation, of a prior environmental impact study, to which publicity will be given; (vi) the control of production, commercialization, and the use of techniques, methods, and substances that involve risk to life, to the quality of life, and to the environment; (vii) the promotion of environmental education at all school levels and public awareness for the preservation of the environment, and the protection of fauna and flora, prohibiting, in the manner prescribed by law, practices that endanger their ecological function, cause the extinction of species, or subject animals to cruelty, in the construction of a Socio-environmental Rule of Law State. According to Ingo Wolfgang Sarlet and Tiago Fensterseifer:

The Federal Constitution of 88 (art. 225, caption, *c/c* art. 5, § 2º) attributed environmental protection and – at least in tune with the widely prevailing position within doctrine and jurisprudence – the *status* of a fundamental right of the individual and the collectivity, besides consecrating environmental protection as one of the *objectives or fundamental tasks* of the Brazilian State – Socio-environmental – of Law, without prejudice to the fundamental duties in socio-environmental matters. There is, therefore, the recognition, by the constitutional order, of the double functionality of environmental protection in the Brazilian legal system, which simultaneously takes the form of a state objective and task and of a fundamental right (and duty) of the individual and of the collectivity, implying a whole complex of fundamental rights and duties of ecological nature, even though the controversy surrounding the existence of an authentic subjective right to a balanced and healthy environment and, if so, the nature of such subjective right (or rights), an aspect that, however, will not be developed here (2010, p. 250)<sup>3</sup>.

3 Original text in Portuguese: “A CF 88 (art. 225, caput, *c/c* o art. 5º, § 2º) atribuiu à proteção ambiental e – pelo menos em sintonia com a posição amplamente prevalecente no seio da doutrina e da jurisprudência – o status de direito fundamental do indivíduo e da coletividade, além de consagrar a proteção ambiental como um dos objetivos ou tarefas fundamentais do Estado – Socioambiental – de Direito brasileiro, sem prejuízo dos deveres fundamentais em matéria socioambiental. Há, portanto, o reconhecimento, pela ordem constitucional, da dupla funcionalidade da proteção ambiental no ordenamento jurídico brasileiro, a qual toma a forma simultaneamente de um objetivo e tarefa estatal e de um direito (e dever) fundamental do indivíduo e da coletividade, implicando todo um complexo de direitos e deveres fundamentais de cunho ecológico, muito embora a controvérsia em torno da existência de um autêntico direito subjetivo ao meio ambiente equilibrado e saudável e, em sendo o caso, da natureza de tal direito (ou direitos) subjetivo, aspecto que aqui, todavia, não será desenvolvido”.

In accordance with the constitutional provision, but preceding it, Law no. 6.938/81 addresses the National Environmental Policy<sup>4</sup>. Its purpose is to preserve, improve, and restore environmental quality that is conducive to life, with the aim of ensuring conditions for socioeconomic development, national security interests, and the protection of human life's dignity. This law aligns with the guarantee of living in an ecologically balanced environment. Article 3, subsection I, of the law that institutes the National Environmental Policy, defines the environment as "the set of conditions, laws, influences, and interactions of physical, chemical, and biological order, which allows, shelters, and governs life in all its forms"<sup>5</sup>.

Therefore, based on the examined legal norms, we can infer that the right to an ecologically balanced environment must be guaranteed to all individuals. This is essential for promoting of quality of life, equality, and human dignity. It is the collective responsibility and duty of the Public Power to preserve and protect the environment in order to foster a harmonious way of life:

The balanced environment brings, therefore, a new dimension to the fundamental right to life and the principle of human dignity, since human life develops in the environment. Thus, the human being is inserted in the environment, and is also part of it, which is why, in order for the fundamental right to life and the principle of human dignity to be effective, it is necessary to recognize its connection and interaction with the environment, and for it to be ecologically balanced, in order to provide the necessary well-being (GAVIÃO FILHO, 2005, p. 25-28)<sup>6</sup>.

These brief considerations on the protection of the ecologically balanced environment within the Brazilian legal system hold fundamental importance for the

<sup>4</sup> Law no. 6.938/81, in its article 2, establishes the following principles:

I – governmental action in the maintenance of ecological balance, considering the environment as a public asset to be necessarily ensured and protected, with a view to collective use;

II – rationalization of the use of soil, subsoil, water and air;

III – planning and supervision of the use of environmental resources;

IV – protection of ecosystems, with the preservation of representative areas;

V – control and zoning of potentially or effectively polluting activities;

VI – incentives for the study and research of technologies oriented to the rational use and protection of environmental resources; VII –(vii) monitoring the state of environmental quality;

VIII – recovery of degraded areas;

IX – protection of areas threatened with degradation;

X – environmental education at all school levels, including community education, aiming to enable it to actively participate in the defense of the environment" (BRASIL, 1981).

<sup>5</sup> Original text in Portuguese: "O conjunto de condições, leis, influências e interações de ordem física, química e biológica, que permite, abriga e rege a vida em todas as suas formas".

<sup>6</sup> Original text in Portuguese: "O meio ambiente equilibrado traz, portanto, uma nova dimensão ao direito fundamental à vida e ao princípio da dignidade da pessoa humana, visto que, no meio ambiente se desenvolve a vida humana. Assim, o ser humano está inserido no meio ambiente, dele também fazendo parte, motivo pelo qual, para que haja efetividade ao direito fundamental à vida e ao princípio da dignidade humana, há que reconhecer a sua ligação e a interação com o meio ambiente e que ele seja ecologicamente equilibrado, a fim de propiciar o bem-estar necessário".

study at hand. Firstly, because the environmental issue possesses constitutional and legislative frameworks that cannot be disregarded when resolving disputes arising from non-compliance with environmental protection regulations. Naturally, the substance of the law and the specificities of the dispute influence the analysis of a particular conflict resolution method. Finally, given the importance accorded to environmental protection by Brazilian law, disputes of this nature should be resolved through the pursuit of effective, expeditious, and peaceful solutions. In this context, mediation plays a crucial role in achieving this objective.

## 2 The use of consensual means in the pursuit of social peace

In Brazil, the effective and consistent use of consensual methods for conflict resolution is still lacking in the resolution of procedural disputes. The prevailing culture is still one of litigation within Brazilian society. According to the “Justice in Numbers” report<sup>7</sup>, conducted by the National Council of Justice (2020), based on data from 2019, a total of 77.1 million cases awaiting a definitive resolution were concluded. Among these, 14.2 million cases, or 18.5%, were suspended, placed on hold, or temporarily archived, awaiting future legal developments. Therefore, excluding these cases, there were 62.9 million ongoing lawsuits by the end of 2019.

Moreover, in 2019, only 12.5% of cases were resolved through conciliation. Compared to 2018, there was only a 6.3% increase in the number of judgments confirming settlements, despite the provision of the Code of Civil Procedure, which has been in effect since 2016 and mandates the holding of prior conciliation and mediation hearings. As stated in the report, only 31.5% of all cases within the Judiciary were resolved.

Faced with these statistics, access to judicial responses becomes excessively slow, compromising even the guarantee of a timely judicial response. Therefore, “it is necessary to seek peacemaking means, overcoming the individualistic mentality, turning our efforts to achieve the general welfare of society” (ZANFERDINI, 2012b, p. 108)<sup>8</sup>.

A change in paradigms and attitudes is necessary for the construction of a more equitable, democratic, and accessible society for all. In this sense, the resolution of conflicts through consensual means, such as conciliation and mediation, is a valuable path that should be gradually embraced in social reality.

Therefore, this does not advocate for the reduction of access to justice,

<sup>7</sup> Original text in Portuguese: “Justiça em Números”

<sup>8</sup> Original text in Portuguese: “É preciso buscar meios pacificadores, superando a mentalidade individualista, voltando nossos esforços para alcançar o bem-estar geral da sociedade”.

which is a constitutionally guaranteed right, but rather the pursuit of effective solutions. “It is necessary, therefore, that a more participative, democratic justice is implemented, with the offer of diversified methods of dispute resolution” (ZANFERDINI, 2012a, p. 239)<sup>9</sup>. The criticism that these methods may restrict access to justice cannot succeed, as it would be based on an outdated and narrow conception of access to justice. When individuals approach the Judiciary, they seek to assert their rights that have been violated in a specific factual context. It is of little importance, then, whether the decision is reached unilaterally by the Judiciary or through a consensual process between the parties. In fact, everything indicates that the collaborative development of solutions enhances the likelihood of reaching a correct decision, thereby avoiding further proceedings dealing with the consequences of an inadequately resolved matter.

In the same sense, Humberto Theodoro Júnior (2005, p. 33):

Ever since the legal conscience proclaimed the need to change the directions of procedural science in order to address the problem of access to justice, there have always been those who warned about the risk of an exaggerated simplification of the judicial process producing an excessive stimulus to litigation, which does not correspond to the desire for peaceful coexistence in society. The proliferation of lawsuits over minor issues represents, without a doubt, an undesirable complicating factor. When recourse to official justice represents some burden for the litigant, conciliatory solutions if the voluntary accommodation of opposing interests happens in a great number of situations, for the sake of social peace. If, however, the party has within reach a court that is easily accessible and practically inexpensive, many chances for self-composition will be exchanged for litigation in court. It is necessary, for this very reason, to ensure access to justice, but not to vulgarize it to the point of encouraging the warlike spirits to practice capricious and unnecessary ‘demandism’<sup>10</sup>.

<sup>9</sup> Original text in Portuguese: “É preciso, destarte, que se implemente uma justiça mais participativa, democrática, com oferta de métodos diversificados de solução de controvérsias”.

<sup>10</sup> Original text in Portuguese: “Desde que a consciência jurídica proclamou a necessidade de mudar os rumos da ciência processual para endereçá-los à problemática do acesso à justiça houve sempre quem advertisse sobre o risco de uma simplificação exagerada do processo judicial produzir o estímulo excessivo à litigiosidade, o que não corresponde ao anseio de convivência pacífica em sociedade. A proliferação de demandas por questões de somenos representa, sem dúvida, um complicador indesejável. Quando o recurso à justiça oficial representa algum ônus para o litigante, as soluções conciliatórias se as acomodações voluntárias de interesses opostos acontecem em grande número de situações, a bem da paz social. Se porém, a parte tem a seu alcance um tribunal de fácil acesso e de custo praticamente nulo, muitas hipóteses de autocomposição serão trocadas por litigiosidade em juízo. É preciso, por isso mesmo, assegurar acesso à Justiça, mas não vulgarizá-lo, a ponto de incentivar os espíritos belicosos à prática do ‘demandismo’ caprichoso e desnecessário”.



Hence, we can observe that mediation is a significant mechanism available to parties in their pursuit of social peace, aiming to open new doors for prompt and effective resolutions. From an external perspective, there are two main advantages. The first one pertains to the actual opportunity for parties to influence the content of the solution, as it is jointly crafted. Additionally, mediation facilitates a swifter pursuit of claims by avoiding lengthy proceedings and delaying appeals. From the Judiciary's standpoint, there is also a substantial benefit to mediation. This is because the judicial workload is significantly reduced when parties reach an agreement on the key aspects of the dispute. Furthermore, there is a greater potential for social satisfaction with judicial performance, as it is not uncommon for both parties to be dissatisfied with a particular judicial decision. Lastly, the members of the Judiciary can analyze disputes that cannot be subject to self-composition in a more composed manner.

### 3 Socio-environmental mediation: an integrative approach

Resolution No. 125 of the National Council of Justice, issued in 2010, was established as the “National Judiciary Policy for appropriate handling of conflicts of interest within the scope of the Judiciary”<sup>11</sup>. Its purpose is to establish a public policy for the proper handling of legal issues and conflicts of interest that occur on a large and increasing scale in society. This policy aims to organize, at a national level, not only the services provided in judicial proceedings but also those that can be provided through alternative mechanisms of conflict resolution, especially consensual methods such as mediation and conciliation. In essence, there this resolution recognizes the need to consolidate a permanent public policy that promotes and enhances consensual mechanisms for resolving disputes (BRASIL, 2010).

Importantly, the Code of Civil Procedure and Law 13,140/2015 were significant legal instruments that recognized the crucial role of mediation. In this context:

From the enactment of Law 13.140/2015, known as “Legal Framework of Mediation”, on June 29, 2015, the regulation of conciliatory activities has materialized in Brazil, because the main rules inherent to the mediation of conflicts were compiled in the respective text. The Civil Landmark of Mediation was responsible for expressly establishing the basic guidelines for the performance of conciliatory activities and other procedures alternative to the jurisdiction, throughout the national territory. With the advent of Law No. 13.105/2015 (New Code of Civil Procedure) and Law

<sup>11</sup> Original text in Portuguese: “Política Judiciária Nacional de tratamento adequado dos conflitos de interesses no âmbito do Poder Judiciário”

13.140/2015 (Mediation Law), finally, the procedural institute of mediation and other practices of consensual resolution of conflicts (virtual or not) was recognized, and such practices were even admitted within the Judiciary (ZANFERDINI; NASCIMENTO JUNIOR, 2018, p. 181-182)<sup>12</sup>.

It is worth explaining that mediation refers to a conflict resolution technique in which the parties themselves are encouraged to seek a solution to the dispute. A third party, an impartial mediator, is responsible for facilitating the dialogue between the parties in order to find the best way to resolve the issue. For that reason, it is a self-determined measure.

Environmental tragedies require effective and forceful actions to hold responsible parties accountable and address the social and environmental harm caused. However, the complexity of these challenges cannot be disregarded, and in such situations, dialogue becomes essential. In this context, mediation is a crucial instrument as it recognizes that restricting affected individuals' access to the judicial system alone does not fully guarantee access to justice in all its aspects.

The use of specific techniques should be facilitated and encouraged as a mechanism of access to justice and as an instrument capable of restoring the essential ecological minimum necessary for a healthy quality of life through socio-environmental mediation. Furthermore, the harm inflicted upon citizens must also be adequately remedied to their satisfaction.

In order to reach a consensus in the case of large-scale disasters, taking into account the various rights involved and the required technical expertise, it is important to emphasize that the "so-called preparatory sessions (or pre-mediation) can be held in order to lead the mediators to the final session with planning, clarifications, allowing the concretization of environmental information and participation, corollary principles of environmental defense" (DI PIETRO, 2019, p. 13)<sup>13</sup>.

Moreover, when considering the adoption of socio-environmental mediation, the accumulation of legal precedents is limited. In the case of dam bursts,

12 Original text in Portuguese: "A partir da promulgação da Lei 13.140/2015, conhecida como "Marco Legal da Mediação", em 29 de junho de 2015, concretizou-se, no Brasil, a regulamentação das atividades conciliatórias, pois foram compiladas no respectivo texto as principais regras inerentes à mediação de conflitos. O Marco Civil da Mediação se incumbiu de estabelecer expressamente as diretrizes básicas para a realização das atividades conciliatórias e os demais procedimentos alternativos à jurisdição, em todo o território nacional. Com o advento da Lei n. 13.105/2015 (Novo Código de Processo Civil) e da Lei 13.140/2015 (Lei da Mediação), finalmente, passou-se a reconhecer o instituto processual da mediação e das demais práticas de resolução consensual de conflitos (virtuais ou não), tendo sido, inclusive, admitidas tais práticas no âmbito do Poder Judiciário".

13 Original text in Portuguese: "sessões ditas preparatórias (ou pré-mediação) podem ser realizadas com intuito de conduzir os mediados à sessão final com planejamento, esclarecimentos, permitindo a concretização da informação e participação ambiental, princípios corolários da defesa do meio ambiente" (DI PIETRO, 2019, p. 13).

strict liability applies, as per the already established thesis in Repetitive Theme No. 77:

a) liability for environmental damage is objective, based on the theory of integral risk, with the causal connection being the binding factor that allows the risk to be integrated into the unity of the act, it being inappropriate for the company responsible for the environmental damage to invoke any exclusions of civil liability to avoid its obligation to indemnify; b) as a result of the accident, the company must recompose the pecuniary and moral damage caused; c) when fixing the indemnity for moral damages, it is recommended that the arbitration be made case by case and with moderation, proportionally to the degree of guilt, to the plaintiff's socio-economic level, and also to the size of the company, the judge being guided by the criteria suggested by doctrine and jurisprudence, with reasonability, making use of his experience and common sense, paying attention to the reality of life and the peculiarities of each case, so that, on the one hand, there is no unjust enrichment of those who receive the compensation and, on the other hand, there is effective compensation for the moral damages experienced by those who were injured (BRASIL, 2021)<sup>14</sup>.

There is, therefore, a foundation for the approach to resolving the dispute, and it is no way to get away from the strict liability of the entrepreneurs in cases of environmental disasters.

As mentioned in the introductory section of this paper, the right to a balanced environment is constitutionally guaranteed, meaning it is a right for everyone. This right imposes a duty of preservation on both the government and private individuals. Hence, the importance of this right becomes evident, highlighting the need for the resolution of environmental conflicts to be guided, whenever feasible, by mediation, in order to blur “the disjunctive way of thinking (or-or), in order to prevail a model of complementarity (and-and)” (FIGUEIREDO, 2013, p. 17)<sup>15</sup>.

Thus, the use of socio-environmental mediation refers to:

14 Original text in Portuguese: “a) a responsabilidade por dano ambiental é objetiva, informada pela teoria do risco integral, sendo o nexo de causalidade o fator aglutinante que permite que o risco se integre na unidade do ato, sendo descabida a invocação, pela empresa responsável pelo dano ambiental, de excludentes de responsabilidade civil para afastar sua obrigação de indenizar; b) em decorrência do acidente, a empresa deve recompor os danos materiais e morais causados; c) na fixação da indenização por danos morais, recomendável que o arbitramento seja feito caso a caso e com moderação, proporcionalmente ao grau de culpa, ao nível socioeconômico do autor, e, ainda, ao porte da empresa, orientando-se o juiz pelos critérios sugeridos pela doutrina e jurisprudência, com razoabilidade, valendo-se de sua experiência e bom senso, atento à realidade da vida e às peculiaridades de cada caso, de modo a que, de um lado, não haja enriquecimento sem causa de quem recebe a indenização e, de outro, haja efetiva compensação pelos danos morais experimentados por aquele que fora lesado”.

15 Original text in Portuguese: “da maneira de pensar disjuntiva (ou- ou), a fim de prevalecer um modelo de complementaridade (e-e)”.

a fundamental theme for the construction of sustainable societies. The current development of cities, in a multifaceted and complex way, brings at its core the conflict of diverse and often antagonistic interests. The conflict results from the diversity of interests at stake, and its resolution depends on the ability to promote dialogue between the parties involved in order to overcome tensions and seek new forms of interaction and new directions. In this sense, mediation is a fundamental part of education for sustainability, as it cultivates the principles of a culture of peace and proposes dialogue between the parties to resolve conflicts. (TRENTIN; PIRES, 2013)<sup>16</sup>.

In this way, mediation in environmental cases serves as an instrument for social harmony, upholding the right to a balanced environment and improving quality of life. It is important to acknowledge that not all instances of environmental damage or factual situations are suitable for mediation as an appropriate method of conflict resolution. This text does not aim to blindly praise or glorify the legal institution of mediation without critical examination or consideration of its context. Rather, its purpose is to pave the way for exploring the feasibility of utilizing socio-environmental mediation in specific cases. However, it is crucial to recognize the potential benefits that arise from employing this approach in disputes involving environmental rights. This represents the core focus of this work.

#### 4 Socio-environmental mediation and the structural process

Socio-environmental mediation is intricately linked to the concept of structural process, as it provides a genuine opportunity to imbue the process with a structuralist disposition. It is essential, then, to analyze the overall structural process.

It can be said that the concept of structural process originated in the United States of America in the 1950s (DIDIER JR.; ZANETI; OLIVEIRA, 2020). During this period, the Supreme Court was commonly referred to as the “Warren Court”, in reference to Judge Earl Warren. It was a time characterized by the Court’s active involvement in shaping judicial policy, leading to landmark decisions like *Brown v. Board of Education*. The ruling in this famous case can be

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<sup>16</sup> Original text in Portuguese: “uma temática fundamental para a construção de sociedades sustentáveis. O atual desenvolvimento das cidades, de forma multifacetada e complexa, traz em seu âmago o conflito de interesses diversos e muitas vezes antagônicos. O conflito resulta da diversidade de interesses em jogo, e sua resolução depende da capacidade de promover diálogos entre as partes envolvidas visando a superar as tensões e buscar novas formas de interação e novos rumos. Nesse sentido, a mediação é parte fundamental da educação para a sustentabilidade, pois cultiva os princípios de cultura de paz e propõe o diálogo das partes para a resolução dos conflitos”.

regarded as structural decision, as it was based on the fundamental concepts that will be outlined below.

The structural process is the appropriate instrument for addressing structural issues, characterized by the “existence of a state of structured nonconformity – a situation of continuous and permanent illegality or a situation of nonconformity, although not exactly illegal, in the sense of being a situation that does not correspond to the state of affairs considered ideal” (DIDIER JR.; ZANETI; OLIVEIRA, 2020, p. 2)<sup>17</sup>. Based on this, one can develop a concept of structural process, which serves as a means to transform a given reality by resolving a structural problem (DIDIER JR.; ZANETI; OLIVEIRA, 2020).

The structural process is a relatively recent institute in the daily work of Brazilian jurists and courts. Therefore, it is important to analyze its relationship with the collective process, as the inherent complexity of the structural process necessitates the existence of collective litigation. According to Edilson Vitorelli (2016), collective litigation can be categorized as global, local or widespread, depending on the specificities of the case at hand. The author further argues that structural litigation which he refers to as widespread collective litigation in his thesis, awarded the Mauro Capelletti prize. This is because the litigation in such cases arises from the operation of a public or private structure that generates a situation of legal nonconformity, thereby denying the effectiveness of rights. To effectively address the issue, it is necessary to transform the entire structure responsible for its occurrence. Isolated decisions and superficial changes are insufficient to definitively resolve the problem (VITORELLI, 2018).

Structural disputes are complex and necessitate coordinated efforts between the government and civil society organizations for their resolution. Consequently, consensus stands out as one of their key features (DIDIER JR.; ZANETI; OLIVEIRA, 2020). In the context of a structural process, instruments like mediation gain even greater significance. The opportunity for different sectors of society to express their views on the optimal resolution of the dispute enhances the likelihood of success for the judicial body.

It is evident that the inherent complexity of the majority of environmental disputes gives rise to structural litigation. The vast majority of environmental damages necessitate structural intervention to achieve a definitive cessation. These are cases where merely addressing the symptoms is insufficient to cure the disease.

<sup>17</sup> Original text in Portuguese: “existência de um estado de desconformidade estruturada – uma situação de ilicitude contínua e permanente ou uma situação de desconformidade, ainda que não propriamente ilícita, no sentido de ser uma situação que não corresponde ao estado de coisas considerado ideal” (DIDIER JR.; ZANETI; OLIVEIRA, 2020, p. 2).

In a recent decision by Judge Marcelo Krás Borges of the 6th Federal Court of Florianópolis, the existence of structural litigation was acknowledged in a matter pertaining to environmental law. Below is a transcript of one of the paragraphs of the decision:

Thus, the facts reported effectively indicate a problem of a structural nature, which demands jurisdictional protection through a procedural approach that is also structural. In fact, there is a normative basis for the structural process, in spite of the absence of a specific procedural provision. The principles of consensual solution (Article 3 of the Code of Civil Procedure) and cooperation (Article 6 of the Code of Civil Procedure) should be highlighted. Article 139, IV of the Code of Civil Procedure also authorizes the court to implement structural measures, indicating a wide range of measures that the court can take to ensure effective judicial protection (BRASIL, 2021)<sup>18</sup>.

This is a civil class action initiated by individuals from civil society with the objective of altering the current situation to ensure the right to an ecologically balanced environment, which has been compromised by the systematic pollution occurring in the Lagoon of Conceição. The judge mentions various prior attempts to address the issue that have thus far proven unsuccessful. To tackle the problem in a comprehensive manner, the judge has ordered the establishment of a Judicial Panel for the Protection of the Lagoon of Conceição. This panel consists of several state agencies and representatives from civil society, with the purpose of assisting the court in addressing the environmental damage caused by the pollution of the lagoon.

This, which aims to gather diverse information regarding the possibilities of addressing the illegal situation, is based on the lack of clear guidance from the legal system on how a judge should act when confronted with such a scenario. In the aforementioned case, if the judge had unilaterally and provisionally proposed a specific solution to the problem, it would inevitably be considered judicial activism. This is because legal texts do not provide a definitive answer for analogous situations. Georges Abboud (2021), in a recent article, discusses the immense complexity of the contemporary demands faced by the judiciary. In such cases, the legislative framework often fails to offer a democratically suitable solution that can

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18 Original text in Portuguese: “Deste modo, os fatos relatados efetivamente indicam um problema de natureza estrutural, que demanda tutela jurisdicional através de abordagem processual também estrutural. Com efeito, existe fundamento normativo para o processo estrutural, em que pese a ausência de previsão procedimental específica. Destaque-se os princípios da solução consensual (artigo 3º do CPC) e da cooperação (artigo 6º do CPC). Também há o disposto no artigo 139, IV do CPC, como autorizador à implementação de medidas estruturantes pelo Juízo, por indicar amplo rol de medidas que pode dispor para a efetiva prestação de tutela jurisdicional”.

serve as the basis for the judge's decision. According to Abboud (2021), in order to avoid engaging in activism, the judge must adhere to the procedural paradigm, which involves providing means that facilitate consensual solutions and dialogue based on established procedures between the parties involved. This is precisely the situation at hand.

### **Final considerations**

The numerous environmental disasters and calamities have already demonstrated their severe consequences, such as the destruction of landscapes, depletion of natural resources, high rates of casualties or people living in contaminated areas, and more. Economic development, population growth, urbanization, and technological advancements reflect changes in people's lifestyles, modes of production and consumption, while also contributing to environmental degradation. These factors often lead to conflicts, particularly environmental conflicts. The reflection and change in human behavior are crucial for choosing a more harmonious life, in balance with ensuring quality of life for all, necessitating a shift in cultural habits.

Frequently, environmental disasters give rise to complex structural litigation that is challenging to resolve. In such situations, the judicial response does not always achieve the pacification of the parties involved or the reconciliation of the numerous interests at stake, especially considering the heavy workload that the judiciary handles daily. On one hand, the voices of those affected by environmental damage must be heard. On the other hand, the activities of those responsible for the damage – often private legal entities – cannot come to a halt without causing unemployment and recession, further worsening the already fragile situation. Thus, socio-environmental mediation emerges as an effective, appropriate, and sustainable approach to comprehensively address conflicts. For all the reasons, mediation serves as a true access to justice mechanism capable of promoting social harmony and the realization of a consistent public policy, particularly in socio-environmental disputes.

In this manner, the institution aligns with the development of a Socio-environmental State of Law, as advocated in the heading of Article 225 of the 1988 Constitution of the Federative Republic of Brazil, by fostering integration with the environment and basing its principles on the dignity of the human person, aiming to construct an ecologically balanced environment.

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## ABOUT THE AUTHORS

### Flávia de Almeida Montingelli Zanferdini

Doctor and Master of Law from the Pontifical Catholic University of São Paulo (PUC-SP), São Paulo/SP, Brazil. Graduated in Law from the University of Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil. Professor in the undergraduate, master's, and doctoral programs in Law at UNAERP. Titular Judge of the 4th Civil Court of São Carlos/SP, Brazil. President of the Recourse Court of the 12th Judicial District, São Carlos/SP, Brazil.

### Giovana Carla Atarasi Jurca

Master's student in Collective Rights and Citizenship at the University of Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil. Specialist in MBA in Business Management from the Luiz de Queiroz College of Agriculture (ESALQ), Piracicaba/SP, Brazil. Specialist in Labor Law and Labor Procedure from the Professor Damásio de Jesus Law School (FDDJ), São Paulo/SP, Brazil. Graduated in Law from UniSEB Interativo COC University Center, São Joaquim da Barra/SP, Brazil. Lawyer.

**Luiz Felipe Machado Muraca**

Master's student in Collective Rights and Citizenship at the University of Ribeirão Preto (UNAERP), Ribeirão Preto/SP, Brazil. Bachelor of Law from UNAERP. Member of the Council of the Postgraduate Program in Collective Rights and Citizenship and of the Collegiate of the Humanities Area at UNAERP.

**Authors' participation**

All authors actively participated in the discussions of the research results and in the review and final approval of the paper.

**How to cite this article (ABNT):**

ZANFERDINI, F. A. M.; JURCA, G. C. A.; MURACA, L. F. M. Socio-environmental mediation as an integrating instrument. *Veredas do Direito*, Belo Horizonte, v. 20, e202217, 2023. Available from: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/2217>. Access on: Month, day, year.