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EXTRAJUDICIAL AND JUDICIAL INSTRUMENTS OF ECOLOGICAL PROTECTION: THE IMPORTANCE OF ENVIRONMENTAL MEDIATION AND THE CIVIL PROCEDURE

MEDIAÇÃO AMBIENTAL E O PROCESSO CIVIL: INSTRUMENTOS EXTRAJUDICIAIS E JUDICIAIS DE PROTEÇÃO ECOLÓGICA

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Abscract
This article proposes an analysis of the political-legal context of environmental governance as a crucial tool in the execution and implementation of the ecological constitutional regime through the Judiciary. However, it should be noted that this is not the only way to resolve conflicts. With the shift away from the liberal-individualist conception in favor of the growing recognition of social demands of a plural and collective nature, accompanied by the massification of demands and hyperjudicialization,

Resumo
Este artigo propõe uma análise do contexto político-jurídico da governança ambiental como uma ferramenta crucial na execução e efetivação do regime constitucional ecológico por meio do Poder Judiciário. Busca-se investigar se a mediação, prevista no CPC, pode ser utilizada como instrumento extrajudicial e judicial de proteção ecológica. A mediação, a partir da superação da concepção liberal-individualista em favor do reconhecimento crescente de demandas sociais de natureza plural e coletiva, acompanhada pela massificação das demandas e pela hiperjudicialização,

mediation begins to play an increasingly prominent role in environmental conflicts. It is important to note that, especially when one of the parties involved is a legal entity governed by public law, mediation receives specific treatment in a chapter of Law No. 13.140/15. Given this panorama, viewing the Justice System merely as a "System of Access to the Judiciary" becomes increasingly unsustainable. In the current political-legal context, this system transcends this definition, encompassing the legal status of citizenship in Brazil. Institutions should, whenever possible, adopt the route of extrajudicial conflict resolution and facilitate access to information, thus guaranteeing fundamental rights, including the right to an ecologically balanced environment.
Keywords: dejudicialization; environmental civil procedure; environmental governance; mediation.

passa a desempenhar um papel cada vez mais destacado nos conflitos ambientais. É importante observar, ainda, que, especialmente quando uma das partes envolvidas é uma pessoa jurídica de direito público, a mediação recebe tratamento específico em um capítulo da Lei n. 13.140/15. Diante desse panorama, torna-se cada vez menos sustentável a visão do Sistema de Justiça como meramente um "Sistema de Acesso ao Poder Judiciário". No contexto político-jurídico atual, esse sistema transcende essa definição, abrangendo a própria condição jurídica da cidadania no Brasil. Por fim, este trabalho utilizou o método dedutivo, buscando, a partir de pesquisa bibliográfica, demonstrar que as instituições devem, sempre que possível, adotar a rota da resolução extrajudicial de conflitos e facilitar o acesso à informação, garantindo, assim, direitos fundamentais, incluindo o direito a um meio ambiente ecologicamente equilibrado.
Palavras-chave: *desjudicialização; governança ambiental; mediação; processo civil ambiental.*

Introduction

The judicial and extrajudicial debate involving transindividual rights, such as the right to live in a healthy and balanced environment, poses significant challenges for contemporary jurists. In a society of increasingly mass relations, the Law has moved away from its liberal-individualist conception, embracing plural and collective social demands.

In this scenario, the improvement of the procedural system has proven necessary to allow for adequate mechanisms to protect collective rights and also individual rights affected or threatened by large-scale damage, with the adoption of measures aimed at preserving both the environment, which has been severely damaged by the increased number of polluting agents, and individuals in their capacity as consumers, often exposed to the negative consequences of a market economy blindly focused on profit, in a scenario characterized by recurring inflationary crises.

The emergence of the 4th Industrial Revolution intensifies these challenges, increasing conflicts and demanding innovative legal and technological solutions. Mediation has emerged as a fundamental instrument in this context, as it offers a space for dialogue to balance divergent interests and build effective solutions. These challenges also highlight the relevance of Collective Procedural Law and Structural Procedural Law, which have been consolidating a new paradigm of legal protection, especially in matters of great social and environmental repercussion.

In this evolution, alternative methods of settling disputes, such as mediation, gained prominence with the advent of the 2015 Civil Procedure Code and Law No. 13.140/2015. The latter brought specific provisions on the self-composition of conflicts involving legal entities under public law, promoting a more democratic and participatory approach to settlement of disputes. The judicial route has become legitimate if the administrative or extrajudicial instance is unable to ensure the due exercise of procedural environmental rights, in terms both of access to information and of participation in decision-making.

Thus, this study analyzes mediation within the scope of public administration, considering it an effective instrument to promote the culture of peace and contribute to the implementation of the Sustainable Development Goals (SDGs). The research seeks to understand how mediation can relieve the burden on the judicial system, ensure greater social participation in decision-making, and strengthen the effectiveness of public institutions.

The methodology adopted includes a bibliographic review and critical analysis of regulations, seeking to offer theoretical and practical reflections on the application of mediation in public administration. In addition, the work is structured to present the appropriate methods of settlement of disputes and discuss the foundations and principles of mediation.

Once the indispensable premises on the subject have been established, both the judicial and extrajudicial planes will be addressed, which must ensure the democratic-participatory nature of the constitutional-ecological norm, enabling social actors to have a qualified and active participation in the formation of the will and decision-making of the state in its judicial capacity, especially in collective actions, given their impact and social repercussions.

1 Access to Justice, (hyper)vulnerability in environmental conflicts and ecological judicial governance

The expression "access to justice" has always been the subject of research due

to the difficulty of the adoption of a single conceptual definition. The work of Garth and Cappelletti (1988) already indicated the difficulty of defining "access to justice", which could be seen as the most basic human right inserted in the context of a modern and egalitarian legal system, committed to guaranteeing (and not just proclaiming) all people's rights.

Currently, it is also worth highlighting that, in many countries, due process of law is synonymous with the Rule of Law itself. The development of citizenship in the West denounces the very development of this right, which is a corollary of due process of law, a fundamental principle of civil procedure and the basis of the others.

Therefore, access to justice or even access to Judges and Courts is still configured as a central element of a democratic and republican legal-constitutional regime[1]. Not for any other reason, the Universal Declaration of Human Rights (NAÇÕES UNIDAS, 1948, free translation), in its Art. VIII, enshrined that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"[2], and, in its Art. X, that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"[3].

Regarding access to justice, within the scope of procedural environmental rights, Sarlet (2023, p. 766, free translation) teaches:

> Access to justice, within the scope of procedural environmental rights – also called access rights or participation rights –, is the one that has the most recent development, to the extent that both access to environmental information and public participation in decision-making already had more developed normative mechanisms even before the Aarhus Convention (1998). It is important to highlight that access to justice is not synonymous with access to the Judiciary. It is a broader concept, so much so that the Principle 10 of the Rio Declaration (1992) makes a point of making this clear by providing that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". When dealing with

1 Article 6 of the US Bill of Rights (6th Amendment to the US Constitution), 1791, states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury […]; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence" (United States, 1787).

2 From the original: "toda pessoa tem direito de receber dos Tribunais nacionais competentes recurso efetivo para os atos que violem os direitos fundamentais que lhe sejam reconhecidos pela Constituição ou pela lei".

3 From the original: "toda pessoa tem direito, em plena igualdade, a uma audiência justa e pública por parte de um Tribunal independente e imparcial, para decidir sobre seus direitos e deveres ou do fundamento de qualquer acusação criminal".

> administrative mechanisms, the provision in question opens its normative range beyond the judicial spectrum. In a way, access to justice in environmental matters fulfills a role that can be called "subsidiary", because only when "well-informed public participation" does not have sufficient force to prevent situations of harm or threat of harm to the ecological legal asset in the "extrajudicial" sphere should the "judicial" route be used to correct this situation or even to enforce other procedural environmental rights (in this case, access to information and public participation in decision-making)[4].

The importance of the procedural dimension is recognized as a crucial element in establishing a system of effective protection of the fundamental right to the environment. In this context, the need for an environmental due process that is intrinsically participatory is emphasized, as argued by Ayala (2011). In this sense, it is up to the civil procedure to develop techniques that enable robust and effective protection of rights, especially fundamental rights, always maintaining the perspective that the procedure is an instrument at the service of substantive law, respecting its primacy.

Furthermore, when considering access to environmental justice, it is crucial to highlight the (hyper)vulnerability[5] faced by individuals and social groups that

4 From the original: "O acesso à justiça, no âmbito dos direitos ambientais procedimentais – também denominados direitos de acesso ou direitos de participação –, é aquele que detém o desenvolvimento mais recente, na medida em que tanto o acesso à informação ambiental quanto a participação pública na tomada de decisão já possuíam mecanismos normativos mais desenvolvidos até mesmo antes da Convenção de Aarhus (1998). O acesso à justiça, é importante destacar, não é sinônimo de acesso ao Poder Judiciário. Trata-se de conceito mais amplo, tanto que o Princípio da Declaração do Rio (1992) faz questão de deixar claro isso, ao dispor que será assegurado "acesso efetivo a mecanismos judiciais e administrativos". Quando trata dos mecanismos administrativos, o dispositivo em questão abre o seu leque normativo para além do espectro judicial. De certa forma, o acesso à justiça em questões ambientais cumpre um papel que se pode denominar de "subsidiário", pois somente quando a "participação pública bem informada" não tiver força suficiente para afastar situações de lesão ou ameaça de lesão ao bem jurídico ecológico no âmbito "extrajudicial" é que a via "judicial" deverá ser acionada para corrigir essa situação ou mesmo para fazer valer os demais direitos ambientais procedimentais (no caso, o acesso à informação e a participação pública na tomada de decisão)".

5 Regarding hypervulnerability, Marques and Miragem (2012, p. 188-190) state: "[…] hypervulnerability would be the factual and objective social situation of worsening of the vulnerability of the individual consumer […]. In other words, while the 'general' vulnerability of art. 4, item I, is presumed and inherent to all consumers […], hypervulnerability would be inherent and 'special' to the personal situation of a consumer, whether permanent (prodigality, incapacity, physical or mental disability) or temporary (illness, pregnancy, illiteracy, age). It is possible to agree with the doctrine when it argues that hyper or (high) vulnerability is guaranteed by the Constitution, and thus especially affects the vulnerable mentioned in the Constitution, the disabled, the elderly, children, and adolescents. It seems to me, however, that aggravated vulnerability is, like vulnerability, a multifaceted and multidimensional subjective status, and that, based on the principle of equality (*aequitas*) and equity, it can include other 'weak' individuals, such as the most fragile minorities and the sick, for example". From the original: "[…] a hipervulnerabilidade seria a situação social fática e objetiva de agravamento da vulnerabilidade da pessoa física consumidora […]. Em outras palavras, enquanto a vulnerabilidade 'geral' do art. 4º, I, se presume e é inerente a todos os consumidores […] , a hipervulnerabilidade seria

are victims of ecological disasters, as tragically evidenced in the events of Mariana (2015) and Brumadinho (2019), as well as in the oil spill on the Brazilian Northeast coast (2019)—an incident that has not yet been fully clarified. It is undeniable that there is an evident accumulation of vulnerabilities, to which the ecological element is added, resulting in a situation of ecological (hyper)vulnerability for individuals and social groups in need.

It is precisely on this point that the Superior Court of Justice (STJ) has established an understanding in the sense of applying the *favor debilis* principle in environmental matters, including as a means of ensuring the reversal of the burden of proof and ensuring effective access to the Justice System.

According to Justice Herman Benjamin,

> […] regardless of the legal qualification of the degrader, public or private, in Brazilian law, civil liability for environmental damage is objective, joint and several, and unlimited, and is governed by the polluter pays principle, *in integrum* reparation, priority of *in natura* reparation, and *favor debilis*, and the last legitimize a series of techniques to facilitate access to justice, including the reversal of the burden of proof in favor of the environmental victim […][6] (Brasil, 2010, free translation).

It should be said that environmental degradation imposes a series of responsibilities on the State to be assumed in addressing the causes and consequences of this phenomenon, supported by the prevention and precaution principles. The prevention and precaution principles, in particular, require caution in view of the scientific uncertainty related to new technologies.

The State's failure to implement protective measures, in both the legislative and the executive spheres, with the aim of guaranteeing the effectiveness and efficacy of the associated fundamental rights, constitutes an unconstitutional practice. Such inaction is subject to judicial review, whether through abstract or

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inerente e 'especial' à situação pessoal de um consumidor, seja permanente (prodigalidade, incapacidade, deficiência física ou mental) ou temporária (doença, gravidez, analfabetismo, idade). Concorde-se que com a doutrina quando defende que a hiper ou (alta) vulnerabilidade tem garantia constitucional, e atinge, assim, especialmente os vulneráveis mencionados na Constituição, os portadores de deficiência, idosos, crianças e adolescentes. Parece-me, porém, que a vulnerabilidade agravada é assim como a vulnerabilidade um estado subjetivo multiforme e pluridimensional, e que, com base no princípio da igualdade (*aequitas*) e da equidade, pode se incluir outros 'fracos', como as minorias mais frágeis e os doentes, por exemplo".

6 From the original: "[…] qualquer que seja a qualificação jurídica do degradador, público ou privado, no Direito brasileiro a responsabilidade civil pelo dano ambiental é de natureza objetiva, solidária e ilimitada, sendo regida pelos princípios do poluidor-pagador, da reparação in integrum, da prioridade da reparação in natura, e do favor debilis, este último a legitimar uma série de técnicas de facilitação do acesso à Justiça, entre as quais se inclui a inversão do ônus da prova em favor da vítima ambiental […]".

diffuse actions. Thus, within the scope of the Judiciary's constitutional powers, there arises the normative-constitutional obligation to safeguard Nature in the exercise of jurisdiction, an approach that can be called *ecological judicial governance*[7], highlighting the Judiciary's active role in the protection and preservation of the environment.

The political and legal context of environmental governance is crucial to reflecting on the Judiciary's participation in the execution and enforcement of the ecological constitutional regime. This is particularly evident in view of the growing involvement of Judges and Courts in the settlement of environmental disputes, notably in the three decades following the enactment of the Constitution of the Federative Republic of Brazil (CRFB).

Although there is a movement towards the "dejudicialization" of conflicts and an increase in the use of extrajudicial alternatives for resolution, in accordance with the principles established by the 2015 Civil Procedure Code, and legal and procedural instruments such as the civil inquiry and the conduct adjustment agreement, the Judiciary continues to be a privileged actor in the environment protection.

Ecological judicial governance finds constitutional legitimacy in the guarantee of the inalienability of judicial control over any harm or threat of harm to a right, as established in the CRFB, in its Art. 5, item XXXV. This is stated without ignoring the controversies surrounding judicial intervention in public policies and the control of the actions of other state bodies, a discussion that, naturally, also has implications in the environmental sphere.

The Brazilian High Courts, notably the Federal Supreme Court (STF) and the STJ, have played an active role in the implementation of environmental legislation in the country, committing themselves in a concrete manner to ecological judicial governance. This action is supported by the imperative of defending the constitutional order, enshrined in the immediate applicability and normative force of Art. 225 of the CRFB. In the context of Brazilian ecological judicial governance[8], the discussion about the existence of binding jurisdictional precedents is also gaining increasing prominence. In addition to the consolidated

7 On the topic of environmental governance, including from the point of view of the Judiciary's role, see Kotzé and Paterson (2009).

8 Environmental governance, according to Jacobi and Sinisgalli (2012), "involves each and every one in decisions about the environment, through civil and governmental organizations, in order to obtain broad and unrestricted adherence to the project of maintaining the integrity of the planet". From the original: "envolve todos e cada um nas decisões sobre o meio ambiente, por meio das organizações civis e governamentais, a fim de obter ampla e irrestrita adesão ao projeto de manter a integridade do planeta".

practices of binding effect in the control of constitutionality, in the institute of general repercussion and in binding summaries, the 2015 Civil Procedure Code established a robust system of binding precedents in the Brazilian judicial and procedural structure. This is reflected in the general rule that imposes the obligation of Judges and Courts to comply with the theses established by the Superior Courts, as evidenced, for example, in Arts. 489, Paragraph 1, items V and VI, 926, 927 and 928 of the aforementioned 2015 procedural code (Brasil, 2015a).

This set of regulations strengthens cohesion and consistency in the interpretation and application of environmental standards throughout the Brazilian judicial system. However, it is worth repeating: the judicial route is not the only currently relevant way to settle ecological (and climate) disputes, and the extrajudicial or alternative technical route has the potential to speed up the settlement of disputes that often require urgent resolutions.

2 Mediation in contemporary proceedings

As we have already stated, mediation, in the current context of civil procedure, emerges as a constructive and peaceful method for settling disputes, and is expressly encouraged throughout the procedural trajectory, as stipulated in Art. 3, Paragraph 3, of the Civil Procedure Code (Brasil, 2015a). This procedural approach proves to be appropriate for enabling the self-composition of interests, covering both available and unavailable rights that can be the subject of a transaction.

According to Souza (2012, p. 55, free translation), mediation "can be defined as the constructive intervention of an impartial third party with the parties involved, with a view to seeking a solution by the parties themselves"[9].

To fully understand this concept, it is important to recall the contributions of Bonafé-Schmitt (1992), who describes mediation as an often formal process in which an impartial third party assumes the role of facilitator. This third party is responsible for structuring the interactions between the parties involved, allowing them to express their points of view and confront their perspectives. In doing so, mediation seeks to enable the parties to collaborate in the search for a solution to the conflict that divides them.

This approach highlights the mediator's role, recognizing them as an impartial

9 From the original: "pode ser definida como a intervenção construtiva de um terceiro imparcial junto às partes nele envolvidas, com vistas à busca de uma solução pelas próprias partes".

and capable facilitator. The mediator plays an essential role in promoting effective communication between the parties, creating an environment that is conducive to the constructive discussion of their differences. The mediator's role is to assist in organizing exchanges and in confronting points of view, reflecting the constructive nature inherent in mediation.

The focus on understanding underlying interests and identifying individual needs is a distinctive feature of mediation. In contrast to approaches that focus on the inflexible positions of the parties, mediation encourages the creative exploration of these elements. By collaboratively addressing these aspects, the parties have the opportunity to discover innovative and lasting solutions to their disputes.

Therefore, the approach proposed by Bonafé-Schmitt (1992) highlights mediation as a valuable process in settling disputes, in which an impartial and well-trained third party facilitates communication and collaboration between the parties, allowing them to reach an agreement that best serves their interests. This method promotes not only the resolution of disputes, but also the construction of healthier and more lasting relationships. Thus, the fundamental element of this concept seems to be its relational character.

In the same sense, Warat (2004, p. 212, free translation) proposes mediation from the following perspective:

> Mediation can be seen as a widespread, complex and varied current of intervention in interpersonal relationships in conflict, a group field constituting relationships of help conducted by professionals trained based on a varied set of techniques, strategies and knowledge that facilitate dialogue in conflicting relationships through the discovery, by the parties in conflict, of elective affinities that allow them to develop points in common with which they end up transforming the conflict into a more satisfactory relationship[10].

Warat (2004) broadens the vision of mediation by stating that it transcends its mere function as a legal instrument. The author sees it as an environment conducive to the construction of dialogue, going beyond being simply a mechanism of justice. For Warat (2004), mediation is an activity intrinsically linked to the fullness of the human being, seeking not only to resolve disputes, but also to

10 From the original: "A mediação pode ser vista como uma difundida, complexa e variada corrente de intervenção sobre as relações interpessoais em conflito, um campo grupal constitutivo de relações de ajuda conduzidas por profissionais treinados a partir de um conjunto variado de técnicas, estratégias e saberes que facilitam o diálogo em vínculos conflitivos através da descoberta, pelas partes em conflito, de afinidades eletivas que lhes permitem elaborar pontos em comum com o que terminam transformando o conflito em uma relação mais satisfatória".

promote a symbolic reconstruction of interpersonal relationships that have been affected by the conflict. From this perspective, mediation is understood as a set of practices that aim, in addition to resolving the dispute, to attribute new meanings to relational ties in conflict. The emphasis is on the ability to revitalize and transform damaged relationships, providing a space for the restoration of mutual understanding and the building of bridges between the parties involved. Thus, the approach of Warat (2004) offers a broader and deeper vision of mediation, stressing its value as a means to cultivate dialogue, discover shared meanings, and resignify damaged human connections.

Mediation, from this perspective, becomes not only a means to resolve disputes, but also an opportunity to heal damaged relationships and promote greater harmony between the people involved (Warat, 2004).

In contrast to the judicial procedure, in which a third party, usually a judge, decides the outcome of the dispute based on a perspective that is external to the conflict, mediation offers the parties the opportunity to regain their decision-making power[11]. This opens up space for them to address issues that would not normally be addressed within the scope of conventional jurisdiction, and topics as emotional recognition, expression of affection, promotion of mutual respect and even strengthening of emotional bonds, including love, can be considered (Warat, 2004).

This distinctive characteristic gives the mediation process the ability to

11 In the same line of jurisdiction, arbitration, considered private jurisdiction. According to Figueira Jr. (2019, p. 40, free translation): "Mediation is a non-adversarial technique for settling disputes that aims at consensus to be outlined by the litigating parties themselves, with the intervention of the mediator, in favor of the consensual solution of the dispute; in other words, mediation is a method aimed at self-composition, without the issuing of a sentence—nothing is decided, everything is composed by mutual agreement through transaction, waiver or total or partial recognition of the request. Arbitration is different in every way, as it is known to be a private jurisdiction and, as such, an adversarial (conflictual) method of settling disputes, in which the arbitrator or arbitration court exercises the *ius imperi* and, with this power, dictates the law and, consequently, the right party and, ultimately, the winner and the loser in the lawsuit. In fact, it is no wonder that art. 18 of the LA states that 'the arbitrator is a judge of fact and law, and the ruling they issue is not subject to appeal or approval by the Judiciary'". From the original: "Mediação é técnica não adversarial de resolução de conflitos que tem por escopo o consenso a ser delineado pelas próprias partes litigantes, com a intervenção do mediador, em prol da solução consensual do litígio; em outras palavras, mediação é método tendente à autocomposição, sem a prolação de sentença – nada se decide, tudo se compõe em comum acordo através de transação, renúncia ou reconhecimento total ou parcial do pedido. Diferente em tudo e por tudo é a arbitragem, sabidamente jurisdição privada e, como tal, método adversarial (conflituoso) de resolução de controvérsias, em que o árbitro ou tribunal arbitral exerce o *ius imperi* e, com esse poder, diz o Direito e, por conseguinte, quem tem razão e, ao fim e ao cabo, quem é o vencedor e o sucumbente na demanda. Aliás, não é por menos que dispõe o art. 18 da LA que 'o árbitro é juiz de fato e de Direito, e a sentença que proferir não fica sujeita a recurso ou a homologação pelo Poder Judiciário'".

achieve more satisfactory results for the parties involved.

Mediation adopts an approach that enables the creation of a unique method for making the law, and although this effectiveness is limited to the parties directly involved, it is fully successful when there is harmony between the interests and the results obtained. Therefore, the security and effectiveness of the mediation derive from the commitment of the parties, among themselves and also individually.

Thus, one of the significant challenges of the contemporary era lies in the insertion of Public Administration into this method, especially when directly addressed in a specific chapter of Law No. 13.140/15 (Brasil, 2015b). In this context, the legal foundations often come closer to conflicts involving private interests. However, it is undeniable that the current litigation scenario has powerful effect, characterized by what Boaventura de Sousa Santos describes as an "explosion of litigation" (Santos, 1999).

Given this saturation of the Judiciary, it is imperative to develop mechanisms that transcend the traditional approach to jurisdiction, which is no longer viable for dealing with all "aspects of social life, from family to school, from the city to the environment" (Vianna, 2008, p. 91, free translation)[12].

As Bolzan de Moraes and Spengler (2012, p. 120, free translation) note, the conflict model is being challenged.

> The conflictual jurisdiction model—characterized by the opposition of interests between the parties, generally identified as isolated individuals, and the assignment of a winner and a loser, in which a neutral and impartial third party, representing the State, is called upon to say which of them owns the right – is called into question, causing proposals to rethink the jurisdiction model by appropriating diverse experiences to regain consistency, such as those that put the idea of consensus back on the agenda. As an instrument for resolving demands […][13].

Therefore, the absence of public policies must be dealt with in other ways, with jurisdiction no longer being the only way to find a solution:

> Justice is presented more often as a moral instance by default, and law as the last common morality. The long history of justice is that of its interference in increasingly intimate relationships, where almost none of which escape its jurisdiction, such as in family, romantic, political, commercial, and doctor-patient relationships.

12 From the original: "aspectos da vida social, da família à escola, da cidade ao meio ambiente".

13 From the original: "O modelo conflitual de jurisdição – caracterizado pela oposição de interesses entre as partes, geralmente identificadas como indivíduos isolados, e a atribuição de um ganhador e um perdedor, no qual um terceiro neutro e imparcial, representando o Estado, é chamado a dizer a quem pertence o direito – que é posto em xeque, fazendo com que readquiram consistência as propostas de se repensar o modelo de jurisdição pela apropriação de experiências diversas, tais as que repõem em pauta a ideia do consenso. Como instrumento para a solução de demandas […]".

> It is not so much a question of controlling them socially – which would be frankly impossible for a judge—but of moralizing them, dictating the norm. The law is the last moral in a world devoid of elementary precepts[14] (Garapon, 2001, p. 183, free translation).

There is an urgent need to prepare for a new procedural order, especially for the adoption of new forms of settling disputes, including legal entities under Public Law.

3 Environmental mediation within the scope of legal entities under Public Law

The settlement of environmental disputes is not limited exclusively to the judicial sphere, often finding space in the extrajudicial one. The judicialization of situations involving harm or threats to ecological rights should be considered the last resort, in line with the principle of *ultima ratio* (a term coined by Criminal Law) for settling disputes, both individual and collective.

From this perspective, it is preferable when the path to the settlement of disputes can be shortened, as often occurs outside the judicial sphere. This becomes especially relevant given the overload of the Judiciary and the consequent delay in remedy that often occurs.

In this sense, Soares (2010, p. 136, free translation) points out that,

> […] in environmental controversies, mediation is advantageous because it allows a greater degree of satisfaction and a certain degree of control for the participants; because it has greater flexibility to analyze more creative options than the courts and, most importantly, it promotes cooperation, an element that is normally lacking in the solution of most environmental problems. Given the fact that 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. Furthermore, because it is voluntary, it can reach more lasting solutions, and better implement them[15].

14 From the original: "A justiça se coloca de maneira mais cotidiana como instância moral à revelia, e o direito como a última moral comum. A longa história da justiça é aquela de sua interferência nas relações cada vez mais íntimas, das quais quase nenhuma foge a jurisdição, como nas relações familiares, amorosas, políticas, comerciais, médico-paciente. Não se trata tanto de controlá-las socialmente – o que seria francamente impossível ao juiz-, mas de moralizá-las, ditando a norma. O direito é a última moral num mundo desprovido de preceitos elementares".

15 From the original: "[…] nas controvérsias ambientais, a mediação mostra-se vantajosa por permitir um grau maior de satisfação dos participantes, que mantêm certo grau de controle; por ter maior flexibilidade para analisar opções mais criativas que os tribunais e o mais importante é que promove a cooperação, elemento que falta normalmente na solução da maioria dos problemas ambientais. Por não ter uma postura adversarial, a mediação consegue tratar de um campo maior de dados técnicos e não favorece a obstrução de informações. Ainda, por ser voluntária, consegue chegar a soluções mais

The State's duty to prioritize the extrajudicial settlement of disputes is aligned with the fundamental principles that guided the 2015 Civil Procedure Code. This is evidenced in art. 3, Paragraph 2, which establishes that "the State shall promote, whenever possible, the consensual settlement of disputes"[16], and in Paragraph 3 of the same provision, which determines that "conciliation, mediation and other methods of consensual settlement of disputes must be encouraged by judges, lawyers, public defenders and members of the Public Prosecutor's Office, including during the course of the judicial procedure" (Brasil, 2015a, free translation)[17]. Thus, the dejudicialization in the scope of the environment, through appropriate means of settlement of disputes, constitutes a collective right.

In addition to the duty of good faith (Art. 5) and cooperation (Art. 6) in the procedural field, the 2015 Civil Procedure Code established the consensual settlement of disputes as a new procedural paradigm to be sought in both extrajudicial and judicial spheres.

In this context, administrative jurisdiction represents the state function intended to settle disputes involving the Public Administration and private individuals. This can occur either by the administrative authority itself, in a dualistic system, or by the judicial authority, when there is a monopoly on the jurisdictional function, as is the case in Brazil.

The application of conciliation and mediation in disputes involving the Public Administration is directly linked to the availability of the right in question, especially because the administrator acts in favor of the collective interest, strictly aligned with the principle of strict legality.

In this context, it is crucial to note that the waiver is limited to the parameters established by law. For example, it may involve the recognition of the right to a certain monetary benefit by the administered party, being more flexible only in defining the form of payment. This occurs because the Public Administration is assigned the duty to protect the public interest, as defined not only by law, but also in other complementary acts that confer specific density, such as regulations, statutes, and contracts, among others.

However, resistance to mediation involving public bodies and entities may derive, in part, from a misunderstanding of this principle, highlighting the

duradouras e a uma melhor implementação dessas".

16 From the original: "o Estado promoverá, sempre que possível, a solução consensual dos conflitos".

17 From the original: "a conciliação, a mediação e outros métodos de solução consensual de conflitos deverão ser estimulados por juízes, advogados, defensores públicos e membros do Ministério Público, inclusive no curso do processo judicial".

importance of a clearer and more comprehensible approach to this process. As Mesquita (2016, p. 19, free translation) teaches:

> […] respect for the public interest does not prevent participation and the settlement of disputes by alternative means, on the contrary, the principle of unavailability will be duly complied with when an agreement is reached in which the principles of Public Administration are observed, especially those of legality and efficiency (art. 37, head provision, of the CRFB/1988) and economy (art. 70, head provision, of the CRFB/1988). In other words, the principle of unavailability of the public interest is materialized, in the specific case, based on the consideration of constitutional values.
>
> In this context, it should be noted that Brazilian Administrative Law itself authorizes a certain degree of discretion so that the Administration can assess the interests in disputes, seeking the best solution to the controversy, whether effective or potential, since there are cases in which the State's losses will be greater if the public attorney adheres to the principle of the unavailability of the public interest and fails to reach an agreement in which the portion of the State's position ceded to the adversary is insignificant in the face of a judgment that fully upholds the citizen's requests[18].

Therefore, it is important to reiterate that the public interest does not prevent mediation from taking place. On the contrary: as expressly provided for in several legislative, regulatory, and contractual instruments, the public interest authorizes, if not determines, the attempt to reach a consensual settlement of controversies involving the Public Administration—and mediation is just one of the techniques made available by the principle of legality.

> In the field of encouraging the Public Administration's participation in alternative means of settlement of disputes, the doctrine argues that, with regard to unavailable interests, there is room for a portion of availability that allows for transaction and, consequently, arbitration, for example[19] (Santos, 2016, p. 648, free translation).

18 From the original: "[…] o respeito ao interesse público não impede a participação e a resolução de conflitos por meios alternativos, pelo contrário, o princípio da indisponibilidade será devidamente cumprido quando da realização de acordo em que sejam observados os princípios da Administração Pública, especialmente os da legalidade e da eficiência (art. 37, caput, da CF/1988) e da economicidade (art. 70, caput, da CF/1988). Ou seja, o princípio da indisponibilidade do interesse público materializa-se, no caso concreto, a partir da ponderação de valores constitucionais. Nesse quadro, frise-se que o próprio Direito Administrativo brasileiro autoriza certo grau de discricionariedade para que a Administração possa valorar os interesses em conflitos buscando a melhor solução diante da controvérsia, seja ela efetiva ou potencial, pois há casos em que os prejuízo do Estado será maior se o advogado público agarrar-se ao princípio da indisponibilidade do interesse público e deixar de fazer acordo no qual a parcela de posição do Estado cedida ao adversário é insignificante diante de sentença que julgue totalmente procedentes os pedidos do cidadão".

19 From the original: "No campo do estímulo à participação da Administração Pública em meios alternativos de solução de conflitos, a doutrina defende que, quanto aos interesses indisponíveis, há

When participating in mediation, the bodies and Public Administration's entities bring with them their characteristic legal regimes. These regimes range from the specific regime of state-owned companies (Law No. 13.303/2016 and other related legislation) to that of the direct Administration, including the rules that govern it.

Therefore, to the extent that the law expressly provides for mediation as a hypothesis for settling disputes, with lower public and private costs (financial and chronological), it is clear that the Administration has the competence—or rather, the duty-power—to implement this non-adversarial method of protecting the public interest.

Furthermore, in mediation, at no time do the parties give up any right or interest that could be considered unavailable. Instead, the powers are preserved and the public interest must be decisive in the Public Administration's stance. When condescending and compounding the interests at stake—public and private—the public administrator is not giving up their powers, but exercising them in the exact terms assigned to them by law[20].

Basically, this is the notion of reflexive administrative discretion, using, in this context, the concept proposed by Guerra (2017). This approach aims to make viable and more controllable both (i) the adherence to risk prevention mechanisms and (ii) the connection and reconciliation of interests, ensuring that administrative decisions go through a process that involves a thorough understanding of the particularities of each specific situation (and their respective legal bases).

The unavailability of the public interest does not *generally* prevent the Public Treasury from participating in self-composition. Nevertheless, it is essential to obtain prior normative authorization so that a member of the public lawyering can engage in judicial and extrajudicial settlement procedures, as recommended by the principle of legality (as established in Art. 37 of the CRFB).

In this sense, such authorization may derive from direct provisions of the legislation or be instituted by means of a normative act promulgated by the head of the Executive Branch, which establishes the guidelines for the exercise of self-composition by the state apparatus.

For example, in the context of civil procedure, there are the sole paragraph of

espaço para parcela de disponibilidade que permitem a transação e, por consequência, a arbitragem, por exemplo".

20 On the difference between unavailability and legal transaction, see Souza (2012, p. 170 et seq.).

Art. 10 of Law no. 10.259/2001[21] and Art. 8 of Law no. 12.153/2009[22]. It should be noted that such authorizations are generic and depend on a normative act by each federative entity, in view of the federative autonomy held by each of them[23].

In this sense, it should be said that the Federal Attorney's Office (AGU) issued AGU Ordinance No. 109/07, allowing transactions by attorney-in-fact in cases where there was an administrative error recognized by the competent authority or, when verifiable by simple analysis of the evidence and documents supporting the action, by the attorney or attorney-in-fact acting in the case, with adequate motivation and in cases where there is no controversy regarding the fact and the law applied (Art. 3, items I and II).

Furthermore, Arts. 1 and 2 of Law 9.469/1997[24], as amended by Law

21 "Art. 10. The parties may designate, in writing, representatives for the case, whether or not they are attorneys. Sole paragraph. The judicial representatives of the Union, government agencies, foundations, and federal public companies, as well as those indicated in the head provision, are authorized to conciliate, compromise, or withdraw, in the proceedings under the jurisdiction of the Federal Small-claims Courts" (Brasil, 2001, free translation). From the original: "Art. 10. As partes poderão designar, por escrito, representantes para a causa, advogado ou não. Parágrafo único. Os representantes judiciais da União, autarquias, fundações e empresas públicas federais, bem como os indicados na forma do caput, ficam autorizados a conciliar, transigir ou desistir, nos processos da competência dos Juizados Especiais Federais".

22 "Art. 8. The judicial representatives of the defendants present at the hearing may conciliate, compromise, or withdraw in the proceedings under the jurisdiction of the Small-claims Courts, under the terms and in the cases provided for in the law of the respective entity of the Federation" (Brasil, 2009, free translation). From the original: "Art. 8. Os representantes judiciais dos réus presentes à audiência poderão conciliar, transigir ou desistir nos processos da competência dos Juizados Especiais, nos termos e nas hipóteses previstas na lei do respectivo ente da Federação".

23 In this sense, see Gomes Jr. (2011, p. 125) and Rodrigues (2016, p. 384).

24 "Art. 1 The Attorney General of the Union, directly or by delegation, and the top executives of federal public companies, together with the statutory director of the area affected by the matter, may authorize the execution of agreements or transactions to prevent or end disputes, including legal disputes. (As amended by Law No. 13,140, of 2015) Paragraph 1 Specialized chambers may be created, composed of public servants or effective public employees, with the objective of analyzing and formulating proposals for agreements or transactions. Paragraph 2. Repealed. Paragraph 3 Regulations shall provide for the composition of the chambers referred to in Paragraph 1, which must have as a member at least one effective AGU member or, in the case of public companies, a legal assistant or person holding an equivalent position. Paragraph 4 When the dispute involves amounts higher than those set by regulations, the agreement or transaction, under penalty of nullity, will depend on prior and express authorization from the Attorney General of the Union and the Minister of State to whose area of competence the matter is assigned, or even from the President of the Chamber of Deputies, the Federal Senate, the Federal Court of Auditors, a Court or Council, or the Prosecutor General of the Union, in the case of interest to the bodies of the Legislative and Judicial Branches or the Public Prosecutor's Office, excluding non-dependent federal public companies, which will only require prior and express authorization from the directors referred to in the head provision. Paragraph 5 In the transaction or agreement entered into directly by the party or through an attorney to terminate or close legal proceedings, including cases of administrative extension of payments requested in court, the parties may define the responsibility of each party for the payment of the fees of their respective attorneys. Art. 2 The Prosecutor General of the Union, the Federal Prosecutor General, the Attorney

13.140/2015, authorize the AGU, the Prosecutor General of the Union, the Federal Prosecutor General, the Attorney General of the Central Bank of Brazil and the top executives of public companies, together with the statutory director of the area affected by the matter, to authorize agreements or transactions to prevent or end litigation, including legal disputes (Peixoto, 2016).

Therefore, it is possible to transact in tax matters, an unavailable substantive right. Therefore, once the discussion has been overcome—by formal source—there is no reason to justify any limitation of the plan to the execution of self-composition or even procedural business by the Public Treasury in matters of Environmental Law.

Final considerations

This study sought to conduct an in-depth analysis of the current scenario of (hyper)vulnerability in environmental conflicts, the role of ecological judicial governance, and the possibility of extrajudicial settlement as an appropriate and rapid path. In this context, it was highlighted that extrajudicial settlement of disputes plays a crucial role in the democratization of decision-making processes.

General of the Central Bank of Brazil and the directors of the federal public companies mentioned in the head provision of art. 1 may authorize, directly or by delegation, the execution of agreements to prevent or terminate, judicially or extrajudicially, litigation involving amounts lower than those set by regulations" (Brasil, 2015a, free translation). From the original: "Art. 1º O Advogado-Geral da União, diretamente ou mediante delegação, e os dirigentes máximos das empresas públicas federais, em conjunto com o dirigente estatutário da área afeta ao assunto, poderão autorizar a realização de acordos ou transações para prevenir ou terminar litígios, inclusive os judiciais. (Redação dada pela Lei n. 13.140, de 2015) § 1º Poderão ser criadas câmaras especializadas, compostas por servidores públicos ou empregados públicos efetivos, com o objetivo de analisar e formular propostas de acordos ou transações. § 2º. Revogado. § 3º Regulamento disporá sobre a forma de composição das câmaras de que trata o § 1º, que deverão ter como integrante pelo menos um membro efetivo da Advocacia-Geral da União ou, no caso das empresas públicas, um assistente jurídico ou ocupante de função equivalente. § 4º Quando o litígio envolver valores superiores aos fixados em regulamento, o acordo ou a transação, sob pena de nulidade, dependerá de prévia e expressa autorização do Advogado-Geral da União e do Ministro de Estado a cuja área de competência estiver afeto o assunto, ou ainda do Presidente da Câmara dos Deputados, do Senado Federal, do Tribunal de Contas da União, de Tribunal ou Conselho, ou do Procurador-Geral da República, no caso de interesse dos órgãos dos Poderes Legislativo e Judiciário ou do Ministério Público da União, excluídas as empresas públicas federais não dependentes, que necessitarão apenas de prévia e expressa autorização dos dirigentes de que trata o *caput*. § 5º Na transação ou acordo celebrado diretamente pela parte ou por intermédio de procurador para extinguir ou encerrar processo judicial, inclusive os casos de extensão administrativa de pagamentos postulados em juízo, as partes poderão definir a responsabilidade de cada uma pelo pagamento dos honorários dos respectivos advogados. Art. 2 O Procurador-Geral da União, o Procurador-Geral Federal, o Procurador-Geral do Banco Central do Brasil e os dirigentes das empresas públicas federais mencionadas no *caput* do art. 1º poderão autorizar, diretamente ou mediante delegação, a realização de acordos para prevenir ou terminar, judicial ou extrajudicialmente, litígio que envolver valores inferiores aos fixados em regulamento".

This approach is especially significant for allowing the final solution not to be imposed by an external "authority", but rather produced in a democratic, dialectical, and consensual manner by the parties directly involved.

The research objectives were achieved, as it was demonstrated that mediation, especially in the context of Public Administration, is a valuable technique for democratizing access to justice, reducing costs, and strengthening efficiency in the public interest protection. In addition, the central hypotheses were validated: mediation contributes to social pacification and, at the same time, promotes greater balance and equity between the parties, even in scenarios of significant asymmetry, such as in disputes involving public and private entities.

In the current political and legal scenario, the Justice System cannot be understood only as a "system of access to the Judiciary". It must be expanded to encompass the legal status of citizenship in Brazil, encouraging the extrajudicial settlement of disputes and facilitating access to information and, in some cases, education about rights. This perspective strengthens the public institutions' role in supporting mediation as an instrument of pacification and social inclusion.

With the enactment of the Civil Procedure Code (Law No. 13.105/2015) and the Mediation Law (Law No. 13.140/2015), the studies and practice of mediation within the Public Administration have been deepened. This non-litigious means of settling disputes has emerged as a crucial tool for reducing costs, both public and private, while ensuring efficiency and speed in resolving disputes. The aim is for the Public Administration to transact directly with the interested party in a safe space, endorsed by impartial institutions, such as mediation chambers and trained mediators. These, by acting as facilitators, help the parties overcome subjective, technical, economic, or idiosyncratic obstacles, building lasting consensus.

The extrajudicial settlement of disputes is especially valuable in disputes involving the Public Administration and private entities, since it levels the positions of the parties, providing an equitable platform for the negotiation of interests and rights. This approach is essential to guarantee legal certainty, promote social peace, and optimize the efficiency of proceedings. More than that, by democratizing access to justice and encouraging the parties' active participation, mediation contributes to consolidating community values and reinforcing the democratic-participatory nature of constitutional norms, especially in the ecological field.

Future prospects indicate the need for greater dissemination of mediation as a routine practice in public and private institutions, accompanied by investments in training mediators and education campaigns about rights. The evolution of mediation in Brazil could further strengthen the Justice System, not only as a

mechanism of settling disputes, but also as an instrument of citizenship and promotion of a more just, peaceful, and sustainable society.

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