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Access To Justice: Guiding Principles in the Mediation Process

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Abstract:
In the exercise of organizing and planning institutional policies, Law No. 13,140/2015 provides for mediation in the process to resolve conflicts between individuals, establishing guiding principles that are applicable to this modality, namely: impartiality of the mediator, equality between the parties, orality, informality, autonomy of the will of the parties, search for consensus, confidentiality and good faith. The adoption of mediation appears as a possibility for the parties involved in the process to reach an agreement that is beneficial for both, being an instrument of guarantee and access to justice. Therefore, the present work aimed to describe the guiding principles of mediation and how they are applied. The methodology applied to carry it out was qualitative, with bibliographical research covering Law No. 13,140/2015, articles, monographs and legal provisions that report on mediation. Through this research it was possible to observe that measurement is an instrument of access to justice, which guarantees speed and effectiveness of judicial provision.

Keywords*: Autonomy of the Parties. Dialogue. Justice. Conflict resolution.*

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I. Introduction

In Brazil, access to justice has become more widespread since the 1988 Constitution established that the law will not exclude any injury or threat to the right from being heard by the judiciary. As a rule, this access requires the use of the right to lodge a complaint, which is exercised by a lawyer and whose presence is a key factor in the administration of justice (BRASIL, 1988). For this reason, many citizens seek out the Judiciary to resolve their problems and conflicts, increasing the demand and backlog of cases, causing a delay in resolving cases (Cascardo, 2016).

Therefore, some strategies have been created to reduce this congestion in the courts. Among these measures, mediation has gained prominence as an alternative for resolving conflicts. Law No. 13.140/2015 provides for this modality, which aims to resolve disputes between private individuals and on the self-composition of conflicts within the scope of public administration, through the presence of a mediator who plays an important role in the solution and construction of social pacification, mediation promotes the autonomy of the parties and provides the guarantee of the legal order (Gama, 2022; Brasil, 2015).

Mediation, therefore, is considered to be a mechanism that seeks dialog to resolve conflict between people, with the participation of an impartial third party, in which case the mediator facilitates communication between the parties, enabling a construction of the interests and values involved, allowing the parties to reach a fair consensus for both (Sales, 2016). For this process to be effective, the mediator must detect what caused the controversy, as well as checking the personality of those involved, in order to find the best way to help them resolve the conflict, so as to meet the interests and needs of both (Cahali, 2012).

Brazilian legislation, based on the mediation law and the new Code of Civil Procedure (2015), presents a set of principles that govern the work of judicial mediators, namely: impartiality of the mediator, isonomy between the parties, orality, informality, autonomy of the will of the parties, seeking consensus, confidentiality and good faith (BRASIL, 2015). These guiding principles regulate and apply to judicial mediation, extrajudicial mediation and, where applicable, other forms of consensual conflict resolution, such as community and school mediation, and those carried out in extrajudicial offices (Meira & Rodrigues, 2017). Therefore, each of these guiding principles has specific objectives in the mediation scenario and are key factors for its implementation.

Thus, it is pertinent to know the principles that govern mediation, as established by Law No. 13.140/2015, which are important in the Judiciary. Therefore, this article used sources provided through a bibliographic review, with research on current legislation on this subject, using a qualitative approach, as it is adapted to the aspects of reality, through the observation of the norms that make up Brazilian legal relations (Gil, 2019). This paper aims to describe the guiding principles in the mediation process and how they are applied in our legal system.

Access to justice

Historically, the function of resolving conflicts was not exercised by the state. In ancient societies, conflicts were resolved by informal methods, physical force, total or partial sacrifice of interests, mutual trust, priests or elders to judge conflicts (Pantoja & De Almeida, 2016). All these forms were perfected over time, until globalized society found a more effective way to guarantee justice, so the State began to play this role, through the Judiciary, which began to perform these duties (Costa & Fonseca, 2017). In this way, the concept of justice has adapted to the transformative processes of society, as highlighted by Cappelletti and Garth (1988. p. 10-11):

As laissez-faire societies grew in size and complexity, the concept of human rights began to undergo a radical transformation. From the moment that actions and relationships increasingly took on a more collective than individual character, modern societies necessarily left behind the individualistic view of rights reflected in the "declarations of rights" typical of the eighteenth and nineteenth centuries. The movement has been towards recognizing the social rights and duties of governments, communities, associations and individuals.

Therefore, these changes in relation to new social rights and the emergence of constitutions made it necessary to modify the rules. In this way, the state power began to have the capacity it needed to resolve the new conflicts and meet the increased demand for litigation (Zanini, 2017).

Today, access to justice is directly related to citizenship. With the advent of the Constitution of the Federative Republic of 1988, our system enshrined citizenship as a fundamental principle of the Brazilian constitutional legal system and access to justice as a constitutional guarantee of essential fundamental rights (Silva, 2004). Within this context, the Judiciary has the central function of resolving individual and collective conflicts, guaranteeing the broad realization of human rights (BRASIL, 1988).

According to the constitutional institutes above, the right to access to justice is more than a constitutional guarantee, it has become a human rights prerogative. However, it is not enough to guarantee access to justice, it is necessary to ensure that the judicial provision is exercised in a favorable manner and likely to produce practical effects on social life (Costa; Fonseca, 2017).

Jurisdictional activity must be aimed at access to justice, concretizing the law in tune with reality and the social context, through the insertion of real components, such as the subjects and their effective participation in the process and access to a fair and impartial legal order (Caliman, 2018). For this reason, the Brazilian legal system must provide the necessary conditions for all individuals (Zanini, 2017).

II. Theoretical Reference

Mediation

Currently, the Brazilian judicial system has been seeking new ways for citizens to access justice, through faster mechanisms, with the aim of achieving a more accessible and effective outcome (CORRÊA; TESTA; CONCHON, 2020). In this context, the State institutionalized mediation through Law No. 13.140/2015, with the aim of resolving disputes between private individuals and on the self-composition of conflicts within the scope of public administration (BRASIL, 2015). According to Almeida; Rezende; & Pantoja (2015, p.140-41):

Mediation can be defined as a process of negotiation assisted by an impartial third party with no decision-making powers, whose task it is to help the parties reflect on their real interests, restore dialog and co-create mutually beneficial alternatives that take into account the needs and possibilities of everyone involved.

The authors emphasize that there are three elements to mediation: the role and autonomy of the parties concerned in the search for a satisfactory solution for both; the role of the mediator as the conductor of the dialogue, which requires training and the adoption of specific techniques; and the dual purpose of the procedure, which aims not only to resolve the dispute that gave rise to the process, but also to restore communication between the litigants, with a view to preventing further litigation (Almeida; Rezende; & Pantoja, 2015). Law 13.140/2015 defines mediation as:

Sole paragraph. Mediation is considered to be the technical activity carried out by an impartial third party with no decision-making powers, who, having been chosen or accepted by the parties, assists and encourages them to identify or develop consensual solutions to the dispute.

Mediation can have different approaches, depending on its aims. According to Nascimento (2017), the first is represented by the linear Harvard school, whose main aim is to resolve the conflict by reaching an agreement. It is an instrument for reducing litigation pending in the courts, although it does not enable the restoration of dialogue between the parties, it resolves the conflict of law that has been filed or is about to be filed. The second approach is transformative mediation, the main purpose of which is to re-establish ties and dialogue, without reaching an agreement. From this perspective, mediation is seen as a technique that enables those involved to improve forms of communication that help resolve conflicts (Nascimento, 2017).

For mediation to take place, three elements must be present: the parties, the dispute and the mediator (Coutinho & Reis, 2013). From the definition of the legal text itself, we can extract some points that contribute to a better understanding of the figure of the mediator:

The mediator will be appointed by the court or chosen by the parties. § Paragraph 1 The mediator shall conduct the communication procedure between the parties, seeking understanding and consensus and facilitating the resolution of the conflict. § Paragraph 2 - Mediation shall be free of charge for those in need. Art. 5 The same legal hypotheses of impediment and suspicion of the judge apply to the mediator. Sole paragraph. The person appointed to act as mediator has the duty to disclose to the parties, before accepting the role, any fact or circumstance that may give rise to justified doubt regarding their impartiality to mediate the conflict, at which time they may be refused by any of them (BRASIL, 2015).

The Mediator will always be a person who has specific training in the procedure and its techniques and rules, duly qualified by the judicial body, observing art. 11 of Law No. 13.140/2015. They cannot influence the choice through suggestions, opinions or analysis of evidence, but have the duty to help the parties so that, through dialog, they can reach a consensus on the demand presented (Pinheiro, 2020).

Therefore, mediation consists of a consensual, voluntary and informal means of preventing, conducting and pacifying conflicts conducted by a mediator, who has negotiation techniques, acting as an impartial third party, without the power to judge or suggest, welcoming the parties to mediation in order to provide them with the opportunity for reciprocal and effective communication so that they themselves can jointly build the best solution to the conflict (Tartuce, 2020; Pinheiro, 2020).

Guiding principles of mediation

Law 13.140/2015 establishes in its second article the principles that guide the mediation process: impartiality of the mediator, isonomy between the parties, orality, informality, autonomy of the will of the parties, search for consensus, confidentiality and good faith. These principles are also covered by the Code of Civil Procedure, in its article 166, and in article 1 of the Mediators' Code of Ethics.

- Impartiality of the Mediator

The principle of impartiality is laid down in the Mediation Law, as the principle of the mediator's impartiality, in the Code of Civil Procedure and in CNJ Resolution 125/2010. Its concept is established in the Code of Ethics for Conciliators and Court Mediators as:

The mediator's duty to act without favoritism, preference or prejudice, ensuring that personal values and concepts do not interfere with the outcome of the work, understanding the reality of those involved in the conflict and never accepting any kind of favor or gift (CNJ, 2010).

Article 5, only paragraph, of the Mediation Law states that the mediator will always be a third party unrelated to the conflict, preventing any link with the parties. In line with this principle, there is also the duty to observe the rules of impediment and suspicion in accordance with art. 148, item II, of the Code of Civil Procedure, as well as to maintain neutrality, with no room for the proposition of advice, hunches or the expression of any judgment on the issue presented (BRASIL, 2015; Pinheiro, 2020).

- Isonomy between the Parties

This is an extension of the principle of impartiality. It guarantees equal treatment between the parties involved, and does not grant differentiated or privileged treatment to any of the parties. It is understood as the mediator's duty to conduct the consensual composition in a scrupulous manner in relation to all parties, considering them without any distinction or preference (BRASIL, 2015). Therefore, the mediator must use specific methods so that the other party can also express themselves, establishing equal conditions (Pinheiro, 2020; Terto, 2020).

This principle reinforces the idea that the mediator needs to identify whether the consensual choice was a strategy by only one of the parties to obtain their own advantages. If the improper instrumentalization of the procedure is found, the mediator must reinforce the clarification of the issues and interests in conflict or draw up the term of closure of the mediation because further efforts to reach consensus are not justified (BRASIL, 2015; BRASIL, 2015a).

- Orality

This principle emphasizes that the acts of mediation sessions should preferably be carried out orally, so that there is a reduction in written documents, with only the indispensable parts being written down (Faggioni, 2010). It has a threefold objective: to speed up the process; to strengthen the informality of the acts; to promote confidentiality, recording only the important content (Almeida; Pantoja; Pelajo, 2015). As a result, only the agreement must be in writing, and all other interactions are exempt from this formality (BRASIL, 2015).

- Informality

The principle of informality guides the mediation procedure towards simplicity and humanization, seeking to facilitate the participation of the interested party in the stages of the mediation process (Nascimento, 2017). However, informality does not mean the absence of any rules, it is a more flexible application, which allows greater freedom of action for the parties and the third-party facilitator (Takahashi et al., 2019).

In this sense, those involved can choose to extend the time of the procedure, the form and duration of the use of the floor in the sessions, the use of audiovisual resources or remote communication technologies and any other action that favors a positive outcome (BRASIL, 2015; Meira & Rodrigues, 2017). The parties are free to define their own rules of procedure, as long as they are not illegal.

- Autonomy of the will of the parties

Mediation guarantees total freedom for the parties to compromise throughout the negotiation, including the possibility of refusing to participate in the act or agreement, without any prejudice, guaranteeing voluntariness, the autonomy to resolve the conflict according to their own will, without interference (BRASIL, 2015).

It is important to note that this principle is not sovereign in the mediation procedure, being limited in three different dimensions: interpersonal, internal and external (Meira & Rodrigues, 2017). The interpersonal ones concern the fact that the proposals for agreement and procedural changes suggested by one of the parties, within the scope of their respective autonomy, are limited by the autonomy of the opposing party (BRASIL, 2015a). The internal limitations are constituted by other provisions of the mediation's own normative frameworks and the external ones are the norms coming from other normative sources, such as the Civil Code and the Constitution of the Republic itself (Meira; Rodrigues, 2017).

- Seeking consensus

The principle of seeking consensus can be understood from two different perspectives: the search for mutual understanding of relevant facts and rights in the conflict, or the search for a mutually consensual agreement (Meira & Rodrigues, 2017). Based on these two perspectives, it is possible to establish that the mediator will conduct the communication procedure between the parties, seeking understanding and consensus and facilitating the resolution of the conflict (BRASIL, 2015).

The main objective of the search for consensus is to re-establish communication, so that the parties can develop a solution to the dispute, thus, consensus refers to peaceful communicability, which over time will materialize the agreement or the possibility of a future agreement, if this is not the result of the Session (Pinheiro, 2020).

- Confidentiality

This is the fundamental principle to be observed so that the mediation procedure has the credibility of the parties, because, according to this principle, the issues dealt with in mediation are known only to the parties and the mediator, neither of whom may disclose the information obtained in mediation or make use of it in court (Spengler Neto & Spengler, 2016). This establishes the duty to make any and all information relating to the mediation procedure confidential in relation to third parties, and it cannot even be disclosed in arbitration or judicial proceedings unless the parties expressly decide or when its disclosure is required by law or necessary to comply with the agreement reached through mediation (Meira & Rodrigues, 2017).

The duty of confidentiality is imposed not only on the mediator, but also on the parties, their representatives, lawyers, technical advisors and other people they trust who have directly or indirectly participated in the mediation procedure (BRASIL, 2015). Confidentiality has advantages for the parties, as it helps to create the necessary space for open and free communication. And for the third-party facilitator, the principle helps to preserve their impartiality, in that it prevents them from being a witness in the case in which they have acted, and so they may end up having to take sides with one of the parties; it also ensures that they are not forever tied to one case, waiting for certain information obtained during the session to be required in another case (Takahashi et al., 2019)

- Good faith

Good faith can be subdivided into subjective and objective. According to Gagliano and Viana (2012, p. 5):

Subjective good faith consists of a psychological situation, a state of mind or spirit of the agent who performs a certain act or experiences a given situation, without being aware of the defect that undermines it. On the other hand, objective good faith is a norm of behavior, with an ethical background, legally enforceable and independent of any question about the presence of good or bad intentions.

For subjective good faith, it is important to know what the agent's intention was, in objective good faith, the intention is irrelevant, so in the mediation process it is important to balance them (Takahashi et al., 2019). In the subjective modality, the principle emphasizes the mediator's duty to clarify misunderstandings about facts or rights, helping the interested parties to understand the issues and interests in conflict (BRASIL, 2015; Meira; Rodrigues, 2017). In the objective modality, the mediator has a duty to ensure reciprocal honesty between the parties - both in conducting the mediation and in interpreting the issues underlying the conflict and the terms of the agreement reached (Takahashi et al., 2019).

The importance of mediation in access to justice

The right of access to justice is one of the human rights guaranteed in our legal system, and is recognized in the Federal Constitution (1988), in item XXXV of art. 5: "The Law shall not exclude from the appreciation of the Judiciary any injury or threat to the right" (BRASIL, 1988). Therefore, anyone who is the victim of violence or a threat can take legal action to defend their rights that have been violated (Amaral, 2008).

Access to justice involves two perspectives: one is the possibility for all citizens to access the Judiciary and the other is the production of fair and effective results when a conflict is resolved (Calmon, 2008). According to Oliveira Júnior (1998), Mediation has the characteristics of voluntariness, speed, economy, informality, self-determination and a vision of the future. It also has a low cost and a real scope for social pacification, which results in greater effectiveness and justice in resolving conflicts (Fiss, 2004). By using this process, it is possible to provide a celebrated judicial service and preserve future communication between the parties.

In general, what happens in mediation is the presence of three stages marked by past, present and future. These phases correspond to three distinct moments that initially establish the relationships between those involved and the facts, followed by an updated explanation from each party, so that they can explain what they hope to build in order to reach an agreement that is beneficial to the parties (Dantas, 2011). Mediation therefore encourages individuals to reflect on their rights and duties, seeking to strengthen them by showing them the importance of being the subjects of their relationships (Coutinho & Reis, 2013).

Mediation is considered to be an alternative, self-compositional method of resolving conflicts, and is not limited to the composition of those involved:

To resolve more intense emotional issues, which, in the vast majority of cases, are not explored in the traditional way in which disputes are usually resolved, since they tend to be approached in a very superficial way, with the intention of eliminating the discussion, without greater concern for the psychological effects generated (Medeiros Neto & Nunes, 2019, p. 170).

In this way, mediation produces satisfactory results in resolving various conflicts such as: family, community, school, condominium, business and those in which the primary objective is to preserve the relationship between those involved, paying attention to the primary factor of offering a more qualified jurisdictional provision, generating fast, quality and effectively effective options (Medeiros Neto & Nunes, 2019).

Mediation, then, becomes a fundamental tool for access to justice, as it manages to change the paradigms of the litigation culture, promoting the independence of citizens who will be able to resolve their conflicts without judicial intervention (Henchen, 2020). This citizen participation in the administration of justice allows for greater adherence to social reality, instilling a sense of collaboration between those involved, as the mediator assists in resolving the conflict, which greatly contributes to achieving the pacification of society (Motta Júnior, 2014). Furthermore, when we compare mediation with the judicial process, the former is more agile, resulting in greater effectiveness in resolving the conflict and enabling greater access to justice (Tartuce, 2020).

III. Final Considerations

Meeting the demands of new rights has become one of the challenges facing the state, which must ensure that society is able to apply them effectively. This is why access to justice must be seen as a fundamental requirement for citizenship, as this right is guaranteed in order to maintain the fundamental rights established by our Federal Constitution. Mediation is considered one of the forms of alternative access to justice, which allows citizens to appeal to their rights in an agile and practical way, with dialogue being the differential instrument in this process

Therefore, knowing its guiding principles is fundamental to guaranteeing a democratic process that provides proper guidance and awareness of the constitutional rights established in Law 13.140/2015. Due to its informality, low costs, communication associated with dialogue between the parties, the principles of mediation provide the necessary support to promote the realization of citizenship and the autonomy of the parties.

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