Chapter 105

Conflict management beyond the judicial way: Considerations and reflection

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Gustavo Erlo
Graduated in Law from the University Center of Araraquara, current University of Araraquara – UNIARA (2015). Postgraduate degree in Criminal Procedural Law from Complexo Educacional Damásio de Jesus (2018). Postgraduate degree in Civil Law from the Brazilian Law School – EBRADI (2021). Former Legal Advisor of the Public Ministry of the State of Goiás – MPGO. Master's student in Law and Conflict Management at the University of Araraquara – UNIARA (2022-). He is currently a lawyer.
E-mail: g.erlo@advfl.com.br

Aleandro Espelho
Graduated in Social Sciences from the São Paulo State University - Unesp (1996). Graduated in Law from the University of Araraquara - UNIARA (2001). Postgraduate degree in Criminal Law from the University of Araraquara - UNIARA (2015). Postgraduate degree in Agribusiness Law from the University of Araraquara - UNIARA (2018). Master's student in Law and Conflict Management at the University of Araraquara – UNIARA (2022-). He is currently a professor of History at Colégio Objetivo de Matão / SP. and a professor of Administrative Law, Economic and Financial Law, and Labor Procedural Law, in the Law course, at Faculdade Anhanguera, in Matão-SP.
E-mail: aleandro.espelho@hotmail.com

Plínio Gentil
Ph.D. in Social Relations Law (PUC-SP) and in Fundamentals of Education (UFSCar). College professor. Research member of the Research Group Educar Direito at UFSCar. Public Prosecutor in the State of S. Paulo.
E-mail: pabgentil@apmp.com.br

ABSTRACT
The present article deals with two means of resolving two conflicts other than the orbit of the judicial decision – such as, for example, it can be the files of conciliation, mediation, and arbitration - and its non-daily applicability to both cities, as well as how these practices are seen Profissionais hairs do Direito and possíveis usuários own hairs. It seeks to briefly analyze two consensual methods of conflict resolution through extrajudicial interference and how, effectively and technically, these can operate in the construction of a less violent society, without outlining the difficulties and resistance encountered for its concretization of fact, a social and economic context that is placed as the basis of action of the impartial third party, conflict solver.

Keywords: Mediation, Arbitration, Self-composition, Composition of conflicts, Symbolic universe.

1 INTRODUCTION

Conflicts have always existed and are inherent to life in society. They almost always result from structural antagonisms that end up reproducing themselves in the microcosm of everyday, personal, or group relationships. The exercise of self-protection is not consistent with the Democratic State of Law, appearing as an absolute exception, usable only in extreme situations.

In turn, the State, although holding jurisdiction, through the hetero-compositive means of conflict resolution, has not been able to respond, promptly and effectively, to the wishes of those who are involved in the respective pendencies. The dispute, the discord, continues to exist. Regarding the culture of preferentially seeking solutions in the Judiciary, observe CORIM; FORMENTINI (2022):

> The State provided society with the right of access to justice as a fundamental right provided for in the Federal Constitution of 1988, however, over the years, what is called "judicialization of conflicts" has occurred, that is, individuals seek in the foreground the resolution of the conflict, whatever it may be, through the courts, as the only alternative for referral.

Throughout history, the complexity of conflicts increases, which multiply, and intensify, which makes legal theorists and also legislators turn more closely to the search for alternative forms of dispute resolution.

In addition to the pure and simple negotiation between the parties - which, through a direct understanding, reach a solution, without interference from third parties -, **conciliation** and **arbitration** are consolidated, with **mediation** also emerging as another alternative - and extrajudicial - way of dispute resolution; although it is not exactly a novelty, it is being revisited amid the crisis in the judicial system concerning the accumulation of demands.

All these expedients consist of the construction of a peaceful solution, in a way involving the parties themselves, in a procedure intermediated by a third party unfamiliar with the issue. Those involved always look for answers, based on an in-depth reflection of the problem situation, seeking to make the adjusted conclusion as effective as possible.

These constructions are, many times, essential for the pacification of the litigation, to deal with the unpleasantness that involves the parties and prolongs the erosion of the relations. To make use of these institutes, the parties need adequate physical space, conciliators, mediators, or arbitrators, capable of listening and stimulating communication and believing in the possibility of dialogue and construction.

Due to their relative novelty, these forms of alternative forms of conflict resolution encounter some resistance among potential stakeholders and within the institutional environment itself, all accustomed to the traditional way of responding from the Judiciary, with the weight of its authority and coerciveness. This is what constitutes, in addition to the distrust about the third parties called to act in the procedure, the main difficulty in the full implementation of these methods. Among the extrajudicial dispute resolution modalities, this work gives some emphasis to mediation.

It is important to note that, for the elaboration of the research, websites with legal content were consulted, in addition to scientific articles on the subject. During the study, from the consultation of these sources, data were obtained on how alternative means of conflict resolution can work and act, in addition to their demands in terms of time and costs.

2 CONFLICTS, SELF-GUARDIANSHIP AND STATE INTERVENTION

The acute state of conflict alters social peace, breaks or creates relationships, stimulates wear and tension between those involved, directly or indirectly, and not infrequently ends up spilling over into hostility and, often, violence. However, this state of conflict can also provide knowledge and evolution and contribute to the social commitment of those involved, as well as to the promotion of personal growth.

Considering conflict as inherent to the human condition, its existence has always been verified. Not to mention the structural conflicts between groups in a society divided into classes, which is typical of certain models of society and production.

However, even considering everyday interpersonal conflicts, the truth is that, with the increase in the complexity of social relationships, they have become more evident and inevitable; it is in this context that the search for solutions that restore harmony between the interested parties seems opportune.

Proportionately to the complexity of societies, norms, rules, and laws arise and, as a consequence, sanctions for their violation. All this occurs intending to establish organization and control so that social coexistence is possible.

As can be seen, there are enormous difficulties in containing conflicts, and, in territories of more or less industrialized societies, with different levels of production and distribution of wealth, this tension has not been diluted. The population, whenever dissatisfied, calls for more penalties, more norms, that is, more action by the State-judge, and conflicts, in turn, proliferate day by day.

In previous modes of production and low development of productive forces, this model of State, strong and theoretically external to private interests, capable of containing impetus and dictating the law, with autonomy and coerciveness, did not exist. It can be said, with some license, that there weren't even laws as we know them today, because state mediation was unnecessary: power was exercised directly by the force of the holders of economic power. For LAGES (2015),

> In the primitive phase of civilizations, this State did not exist strong enough, capable of containing the impetus and dictating the law, with autonomy and property. There were no laws.

In this way, those involved in the conflict resolved the issue by themselves, sometimes according to the maxim an eye for an eye, a tooth for a tooth, prevailing, as expected, the victory of the strongest over the weakest, of the bravest over the timid. , from richest to poorest.

This form of conflict resolution, called self-protection, has the characteristic features of the absence of a separate judge from the parties and the imposition of a decision by one of them on the other, by the simple exercise of force.

Gradually, invented by the initially revolutionary bourgeoisie, the modern State began to penetrate the merits of conflicts between individuals, by pronouncing sentences and, through its legitimate force, executing them. There was no question of using arbitrators, mediators, conciliators, or negotiators. This period became known as cognitive extraordinary (CABRAL, 2012, p. 232). In this way, the historical cycle of the transition from the so-called private justice to public justice is completed.

These phases occurred gradually and in not markedly distinct ways. The consolidation of the State, through its development, took place primarily through the institutionalization of the sovereign, who dictated the law; Gradually, the idea of an autonomous entity, supposedly neutral and situated above personal

interests, matured and took shape, which led to what is known today as the Judiciary, endowed with structural independence. This Judiciary, as it is known today, is the creation of the so-called modern State.

Due to the natural scope of this power and, as is understandable, notably due to the accumulation of tasks under its responsibility, alternative forms of dispute resolution can be considered and practiced, redefining the third-party model of decision, and admitting the non-exclusivity of jurisdiction, the which is chronically in crisis, given the complexity and dynamism of contemporary society.

Faced with this scenario, of a culture of judicialization of conflicts, the Judiciary is, as said, overcrowded, which means that the jurisdictional provision suffers blockages and the jurisdictional bear the consequences of a delay that sometimes exceeds what is reasonable. In fact, for ZACARIAS (2017),

> The Federal Constitution ensures access to Justice as well as the immediate application of a series of fundamental rights. As a result of the inertia or omission of political powers, as well as legal and economic limits, these rights end up not being implemented, which results in the judicialization of conflicts that can be seen as the greatest cause of the crisis in the Judiciary.

In this context, the State's difficulty in monopolizing this process is truly proven, combined with the countless demands of a complex and constantly changing society. Also in the note of PONCIANO (2007),

> Nowadays, the Judiciary is in a crisis, where the number of pending cases is overloading the courts, which impairs the jurisdictional provision, which is the duty of the State.

For this very reason, there is a tendency to develop alternative dispute resolution procedures, multi-door systems, or even jurisdictional equivalents. Therefore, it seems opportune to think about extrajudicial ways of resolving conflicts, which work with the empowerment and accountability of citizens for decisions, in a self-regulation concept.

3 CONCILIATION, ARBITRATION AND MEDIATION: REFLECTIVE NOTIONS

Conciliation, mediation, and arbitration are, as mentioned above, the main ways of resolving conflicts without depending exclusively on the decision of a court of law. Not that they cannot occur within the scope of the Judiciary, but its action is merely lateral, only sheltering in its institutional contours the action of disinterested third parties that seek to resolve conflicts and give them legitimacy. It is therefore necessary to distinguish between these three types of consensual conflict resolutions.

Conciliation is the procedure through which the parties, having formulated their claims, hear negotiation proposals from a conciliator, aiming at a solution generally identified with a middle ground between the interests placed before them.

Arbitration is the means of solution formulated by a third party, designated as arbitrator, who, after being aware of the claims of the parties and considering the elements that they bring, makes a decision, that the interested parties have previously committed to accept; The arbitrator acts more like a judge who, seeing the efforts to conciliate the parties unfeasibly, ends up deciding the case according to his motivation.

On the other hand, mediation is understood to be a similar procedure, in which the mediator acts more precisely as the forwarder of a reflection of the parties about the context and the conditioning factors of their positions to the point of being able to formulate a possible solution themselves. that at least also meets their interests. In the words of ACS (2018):

> Law 13,140/2015 describes in its text the concept of mediation as a negotiation technique in which a third party, indicated or accepted by the parties, helps them to find a solution that meets both sides.
>
> Article 5 of the aforementioned Law provides that mediation must be guided by the following principles: 1) impartiality of the mediator; 2) equality between the parties; 3) orality; 4) informality; 5) will of the parties; 6) pursuit of common sense; 7) confidentiality; 8) good faith.
>
> Although they are very similar methods, the Code of Civil Procedure, in article 165, differentiates between mediators and judicial conciliators. According to the CPC, the conciliator acts preferentially in actions, in which there is no link between the parties, and can suggest solutions. The mediator, on the other hand, acts in actions in which the parties have ties, intending to reestablish dialogue and allow them to propose solutions to the case.

In the case of mediation, there will be no judgment by an impartial third party, but a decision constructed by the conflicting parties themselves, to soften or harmonize relations, thus enhancing mediation as a tool for the possible conduction and resolution of conflicts with a greater degree of maturity. As CORIM punctuate; FORMENTINI (2022, p. 8),

> In mediation, there is also the participation of an impartial third party, the mediator, who will act to boost the dialogue with the objective that the mediators, after sharing their interests, can resolve the conflict and qualify the dialogue, avoiding the redefinition of the conflict.

It is no coincidence that the new Code of Civil Procedure has been emphasizing mediation as an alternative way of resolving conflicts, including the institute as a mandatory item, regulated by its law since the Judiciary is full of processes and the court decision often does not put an end to the conflict, which continues to produce consequences for those involved. Although potentially efficient, few, as mentioned, have the knowledge and use this procedure.

This happens due to lack of information, lack of available structures, or even due to the very culture of litigation, prone to judicializing small and large conflicts.

Considering all this and aware of this resistance, the mediator must be prepared to receive and listen to the parties, bring balance to the work, and promote communication between those involved, so that they are willing to collaborate with the mediation. This may constitute an efficient means of conflict resolution, capable of bringing benefits to those involved in the dispute and to the Judiciary.

Therefore, it starts from the hypothesis that mediation is a kind of resource, available to the conflicting parties, whose existence and usefulness must be emphasized, including by the Judiciary itself, as a potentially effective means of encouraging interested parties to review their premises. , their points of view, their values, and the context of the issue, with enough goodwill to possibly understand the motivations of their disputes and, with that, put an end to the conflict, in a manner acceptable to all, thus avoiding the

prolongation of the demands. By the way, it is worth remembering the note by Kátia Junqueira (2012, p. 44):

> Mediation and conciliation constitute two of the several alternative forms of dispute resolution capable of avoiding the judicialization of these conflicts, being non-adversarial methods and ways of disseminating the culture of dialogue and social pacification, as they embody the philosophy of the non-existence of losers. or winners.

A reflection is necessary here: we live in a culture of the exaltation of individual merit. This is typical of what is conventionally called globalization, which, constitutes a current expression of imperialism. In the words of COSTA (2008, p. 61), on globalization,

> [...] this phenomenon is not only a fact of reality but also a singularity of contemporary capitalism in the last half of the 20th century. It is linked to the internationalization of production, which occurred in the mid-1950s.

The form of relations of production and sociability presents itself with the contours of neoliberalism. This, especially when it represents the expansion of capital to the periphery of the system, converts rights into merchandise and men into business projects. As DUPAS (2006, p. 149) pointed out over a decade ago,

> Twenty years of neoliberal culture have attempted to create an anthropological pattern in Western culture: in which free, instrumentally rational individuals operate in a world consisting of sellers and buyers. And in this context, those who have strength impose the rules that suit them.

Consequently, when it comes to mediating antagonistic interests, this antagonism must be understood as an expression of a type of sociability that favors individualism. This will require special sensitivity from the mediator, conciliator, or arbitrator. This is because, especially in the case of mediation, the work of the third party will be to lead the parties to understand the structural origins of the antagonism, which will often have roots in the very model of relations stimulated by the culture that neoliberalism has imposed on society.

There may also be one of the bases of the difficult acceptance of these extrajudicial solutions to conflicts, considering that men turned into companies preferentially relate to each other through institutionalized mediations, such as the judicial process. Now, if the affairs of life have become a private business, the demand for the Judiciary will be the path that seems natural to seek, in the view of those interested (CHAUÍ, 2018).

Equally, efforts should be made to circumvent the possibility that the third party, mediator, conciliator, or arbitrator, submits to the force of prevailing private interests in the concrete case, or simply ignores the prominence of fundamental human rights. In the event of not being a civil servant with a guarantee of stability, it is, even more, to be feared an interpretation of reality that removes his necessary impartiality. As already suggested here, neoliberalism is not only a formula for economic structures but also for a certain type of sociability, which contaminates the state and private space, tending to naturalize

inequalities between subjects. In short, a symbolic universe is built in which this inequality makes sense. As noted by CASARA (2021, p. 14),

> The changes provoked in the State by neoliberalism, are understood not only as an economic theory or as a mere ideology, but as a mode of governance and subjectivization, which makes the market the model for all social relations and competition the logic to be followed by individuals, transformed the Judiciary into a company that perceives fundamental rights and guarantees, legal theories and procedural forms as obstacles to the repressive efficiency of the State and the free functioning of the market, that is, to the gains of the holders of economic power.

That is why the present study is relevant, hoping that the result achieved can provide arguments and information capable of helping those involved to safely use this alternative form of conflict resolution, to avoid a sterile perpetuation of disputes within the scope of the Power Judiciary. But it also serves, on the other hand, to warn about the risks of an uncritical adoption of these expedients, pointing out the indispensability of understanding the social and economic structures located at the base of inter-individual conflicts, as well as the capacity of the third party, conciliator, mediator or arbitrator, act based on such understanding and with the guarantee of impartiality and security in their employment relationship.

4 FINAL CONSIDERATIONS

In the line of reasoning developed in this work, it is worth emphasizing that the mediation institute not only resolves the apparent conflict but also treats it from its origin, thus avoiding future misunderstandings or even lawsuits.

It is, in fact, a restoration of the subjects, both the parties directly involved, who are willing to find a solution to the conflict, through its voluntary nature, as well as legal professionals and society in general, who understand mediation and other similar forms as a discursive process of rational debate in favor of the harmony of relations.

So, with the validity of the Mediation Law and the new Code of Civil Procedure, the institute of mediation, specifically, becomes a reality. However, it is up to the State to structure itself, so that mediators are well received and can believe in the capacity of the meditative process, and society is expected to change the paradigm, which finds in dialogue the first basis of a fruitful construction.

Therefore, there is a need to propagate a change of mentality and perspectives, in an individualistic, even selfish society, to process otherness, strengthening the democratic and rational discourse, with a view to the consensual solution of conflicts.

In such a scenario, one can see the difficulties that will arise around the institute, since such a paradigm shift tends to be gradual, especially in a society accustomed to judicialization; as much as this system no longer fully responds to the concerns of those interested, it sounds familiar and somewhat comfortable for those who seek security and reliability in the decision-making process.

Therefore, even if the path is not at all accessible, mediation is a resolution built with the participation of the litigants themselves and, in a way, portrays the maturity of those involved, a new look

at the conflict in line with the Democratic State of Law, as well as with the complex social dynamics of contemporary times.

However, for this tool to become effective, it is necessary to join not only legal professionals but also society, to make it possible to tread through a culture of dialogue.

It is perceived that, although alternative means of conflict resolution may be efficient and quick, there is still visible resistance to their concrete applicability. Some magistrates still do not agree with this type of peaceful resolution, even because of the training they had in law graduations, as a rule, unaccustomed to preparing future justice professionals by encouraging pacification through dialogue. On the contrary, what is called the culture of the sentence is established. The magistrate applies the letter of the law to different cases in an almost mechanical way. There is resistance among many, including the legal community itself, some believing only in the effectiveness of the sentence handed down by a judge invested by the State. Sometimes it seems that society still lacks knowledge, civility, and citizenship. There is still resistance among professionals, who are only prepared to take the cases they face to court.

Alternative means of conflict resolution, due to low costs and greater speed compared to common justice, are presented as alternatives for expanding access to justice, especially for those who do not have financial resources and time, making it more uniform in society. In addition, they also seek to maintain the relationship between the parties without the dichotomous idea remaining between winner and loser or between right and wrong. But it will always be essential to consider the prevalence of the neoliberal narrative, which sees the individual as the radiating center of society's movements, requiring both impartiality and a full understanding of the structures that build such a symbolic universe for conflict solvers, as well as the security of its position, in order not to give in to forces that unbalance the equality between the conflicting parties.

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