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Mediation as a Tool for the Consolidation of Human Rights

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Abstract: Given the progressive phenomenon of violence in our daily lives, there is an urgent need for an appropriate approach, mainly in the community, a space where citizens spend their time, displaying experiences, learning and links that are especially significant there. Contemporary societies are demonstrating the need for a paradigm shift around conflict resolution, since the high and complex conflictivity of the context demands different responses to those traditionally given. It is essential to find a tool capable of fostering synergistic relationships and building common and vital areas that interpret differences and the possible clash of interests as training instruments and forgers of a culture of peace, which can be appropriated and replicated in various spheres such as the family, the school, the club, the neighborhood, the work spaces. Is there the possibility that mediation is the appropriate path of justice to solve conflicts and show another way of relating to humans? Is this form of communication and interaction linking the key to reach new answers to this linking crisis in human coexistence since it implies the active participation of all parties in the solution of the conflict, it poses it not as a mere crime but as a fact interactional, always considering the need for a subsequent subjective relationship, recognition of the damage, responsibility and reparation, de-victimization and collaboration of all the protagonists in solving the problem? To carry out this analysis, a documentary investigation of the current systems of administration of justice was carried out, observing the success of the so-called alternative methods of dispute resolution (or conflicts), their attachment to self-compositive justice, finding that mediation is a method primary choice to any other, with increasing success and progressive acceptance in society. Hence, it is possible to conclude that mediation, as an alternative practice, is considered the necessary response to a high escalation of social conflict, closely linked to human rights and the creation of new modalities of justice and cooperation, as opposed to its passive reception and the experience of anomie, relational deterioration and lack of citizen satisfaction that the courts are throwing.

Keywords: Conflict, Mediation, Human Rights, Justice

1. Introduction

Moral Philosophy and Ethics define Justice as the cardinal virtue that resides in the will through which the person is inclined to give each his own, either individually, as a society or as groups of members of the community. society. To better understand this definition, it is necessary to make some clarifications:

Justice is a virtue and the characteristic of all virtue and habit is to be a disposition that inclines in a firm and permanent way to their actions.

Justice, as indicated, is a cardinal virtue, a principal virtue, since the moral life of the person revolves around it.

It is a virtue that resides in the will, that is, in the "rational appetite", as Saint Thomas Aquinas indicates; it is not fair who knows what is right but who works rightly. For this reason, justice is in an appetitive faculty and since it cannot be rooted in the sensible appetite, it resides in the rational appetite, in the will.

It is a virtue in which, by inclining to give each his own, objectivity predominates.

From this perspective, access to justice is a civil human right and a protective mechanism for fundamental rights whose anchorage rests on the dignity of all people, which guarantees their equality before the law and non-discrimination. If the modern State has determined the prohibition that its citizens take the law into their own hands, it is up to it to provide a wide possibility of access to an impartial body to settle conflicts. Since the State has monopolized, in principle, the resolution of controversies, it has the duty to give all people the certain possibility of being able to easily access the available means, which is the process. Undoubtedly, this access must be effective, since it would be useless to recognize that people have the right to access justice if later, in the reality of the facts, this possibility turns out to be limited or lacking; that is, equality

of access must be ensured and not a utopian formal equality unknown in real life.

Today, the complexity of contemporary societies, the progressive strengthening of the various social sectors, the migratory crisis, the worsening of international conflicts, the dilemma of citizen security at borders and the historical gaps that remain unresolved generate a growing social conflict. and politics between and within countries, which is reflected in community coexistence. When there is a conflict or litigation, it is possible that this can not only be solved through the jurisdictional route, but that it can be settled through alternative methods of conflict resolution. Even more: it can be affirmed that these mechanisms are occupying an important and extremely necessary place to deal with social problems, which enables the empowerment of all voices and prevents violent escalations. These methods are not modern, since ancient societies knew about them and used them before the judicial process and –to tell the truth– they are not even considered alternatives because, precisely, they are the principle solution that has followed the human being for many years; Through them, social peace, harmony among people, is sought and often achieved. It is the solution postulated by very old societies such as China, from the time of Confucius, in which such an end is pursued through mediation, or in African society, for which the process causes a certain horror and sees reconciliation as a way that the dispute ends without losers or winners.

The public perception of justice is currently one of great distrust. It is not believed to be impartial, it is judged to be corrupt and to promote impunity. This negative perception is justified by the excessive formalism, distance, and delay in the administration of justice by the current system. It is the duty of the State to offer different alternatives for people to solve their conflicts; There is no single path, it is necessary to offer multiple exits, so that you have the opportunity to choose the closest and most relevant, but, above all, appropriate to the needs of those who come to seek help.

So, formal justice is not the only solution, there are also Alternative Dispute Resolution Mechanisms (ADRM), including mediation, as efficient ways to resolve conflicts. We must break with the paradigm that justice is equal to judge and move from adversarial and confrontation to participatory forms of conflict management and transformation. Mediation is proposed, in this way, as one of the most propitious and simple ways to access justice.

2. Development

Effective judicial protection –beyond being a tautological expression, but accepted– is, depending on how you look at it, a fundamental right that benefits the defendants, a functional duty for the court called to make it a reality and also a principle in the sense of be a bearer of values. In truth, it has justly been described as the most important of the rights because it constitutes the right to enforce the others; for this reason, it is, for some, a human right close to the natural one.

Effective judicial protection does not have an express reception in the constitutional text of many nations, such as Argentina, although it is thought that the wording of article 43 of the Constitution of my country [12] allows it to be considered among the rights and guarantees not enumerated. However, there is some coincidence in maintaining that said fundamental right enjoys constitutional rank by virtue of article 75, inc. 22 of the National Constitution that among the treaties with constitutional hierarchy lists the American Convention on Human Rights [14] and the International Covenant on Civil and Political Rights [13], whose texts, although they do not use the locution called "effective judicial protection" use terms that unequivocally lead one to think that the intention is to incorporate it into their ideology. There is no doubt, then, the constitutional rank that corresponds to recognize effective judicial protection in the national legal order. Similar happens in other countries. This translates, in a few simple words, into the right that any person has to access justice without strictness or complicated formulas that deny the exercise of the rights of which they are the holder. For this reason, this right implies the obligation for the courts to resolve conflicts that arise without obstacles or unnecessary delays and avoiding formalities or unreasonable interpretations that prevent or hinder substantive prosecution and authentic judicial protection. If justice is a set of essential values on which a society and the State must be based, and these values are respect, equity, equality and freedom, mediation -which we could define as the procedure by virtue of which a third, who is aware of the conflict and the position of the parties, collaborates with them guiding the negotiations with the aim of reaching an agreement that resolves the controversy – undoubtedly, with its praxis, it guarantees that access to justice (González de Cossio [4], p. 64). Mediation, then, is based on those values: tolerance, impartiality, equity and autonomy, which are the motor that the mediator must promote in each meeting between the mediated. There are many benefits that emerge from its implementation:

1. Quick and economical solutions with more stable, useful and lasting results.
2. Avoids the dilation of judicial processes and the personal and material wear and tear that they entail.
3. It is voluntary and confidential.
4. The parties are protagonists and decide.
5. Promotes communication and peaceful coexistence.

Each of these aspects materializes the conception of the jurist Ulpiano: "Justice is the constant and perpetual will to give each one his own" (quoted in Faz Arredondo, [3]). If mediation is a non-adversarial and voluntary method where the conflict between people of a certain system is managed, and its main function is to help them negotiate, collaborate, reflect, enhance their skills, rationalize the conflict, agree, correct perceptions, information false and establish a better relationship, isn't that exactly giving everyone their right? Shouldn't that be the framework from which to intervene within all societies and the perspective to resolve international conflict?

It is important to point out that mediation as a mechanism does not have the purpose of usurping the functions of the States and the institutions that they have to administer justice. The concept of justice also has its own history and there are sufficient reasons to think that its administration should be at the head of the State, although on some occasions it is observed that it fails to satisfactorily address or resolve

conflicts that arise between the parties. In these specific cases, mediation appears as a useful tool. Marina Caireta Sampere [1] proposes it as follows:

We understand mediation as that technique in which two or more parties involved in a conflict, after trying different possibilities, conclude that they cannot resolve it alone and decide to ask a third party to help them in their process. For mediation to be successful, two things must happen: that the conflicting needs are resolved in the most essential way and that the relationship between the parties is strengthened. (p. 15)

One of the most complex parts in the matter of mediation has to do, possibly, with the role of the mediator and the neutrality of the mediator in the face of the conflict and the parties; hence its role is company. His presence accompanies the search for answers, as indicated by Osvaldo Gozaini [5], without becoming a judge:

Through mediation, the aim is to incorporate the so-called coexistent justice, where the acting body "accompanies" the parties in conflict, guiding them with its advice in the rational search for responses that overcome crises. Mediation incorporates another objective element for conflict resolution. It is about exercising an independent cleaning task in the interests of each party. (p. 97)

Regarding the interests of the parties, the role of mediation and, specifically, the mediator, what is sought is to help them make the leap from private interests to the identification of the needs that unite them. Aleix Ripòl-Millet [10] says that:

Mediation can be defined as an intervention in a conflict or in a negotiation by a third person acceptable to the parties, impartial and neutral, without any decision-making power and who intends to help them develop a viable, satisfactory and satisfactory agreement. able to respond to the needs of all members. (p. 44)

Mediation, from its possibilities, can refer to the reparation of the damage, the restitution or compensation of the damages caused, the performance or abstention of a certain conduct or the provision of services to the community. It is important to point out at this point what Wilde [11] says: "Mediation has nothing to do with solutions imposed by a third person unrelated to the parties, but rather it is a decision emanating from themselves, to which they have arrived encouraged and helped by a mediator" (p. 9). The mediating function is to create conditions of equity, leadership, participation and autonomy: Justice in all its fullness.

Obarrio [9], for his part, speaks of mediation in these terms: "I define mediation as a process in which the parties in conflict decide to try to find a solution to their conflicting interests in a cooperative way, with the help of a third party called a mediator" (p. 36). It is clear, then, that mediation is a concept with various interpretative possibilities and that it tends to various purposes and possibilities that must be carefully analyzed in such a way that the real dimension of the concept can be understood. Regardless of the prism through which one looks at it, undoubtedly in all the enunciations the idea of justice is concretized, with different variables.

One of the main characteristics of mediation is that it can be carried out by a public servant or by an individual. This first consideration places it outside the traditional mechanisms of justice, which results in the decongestion of the judicial system, while avoiding high levels of corruption. In addition, in criminal matters, mediation is a mechanism through which a neutral third party, individual or public servant appointed by the nation's Attorney General or his delegate tries to allow the exchange of opinions between the victim and the accused or defendant to confront their points of view and, with their help, manage to solve the conflict that confronts term Mediation encourages dialogue between the victims, the community and the offender of the act, facilitates the search for a creative and conscious solution and allows the protagonists know the facts from the point of view of the opposite, so that the parties find in reconciliation an experience where they have the feeling that they are creating justice instead of passively receiving it (Márquez [6], p. 208). It is important to point out the close relationship that exists between mediation and reparation. It could be said that all mediation entails in one way or another a restoration process, since it is about repairing in a way that goes far beyond the material and addresses moral, psychological and affective aspects.

Mediation implies the intervention of an acceptable, impartial and neutral third party, who lacks decision-making power and is empowered to help the disputing parties to voluntarily reach a mutually acceptable settlement of the issues under discussion; As in the case of negotiation, mediation leaves the power of decision in the hands of the people in conflict (Moore [8], p. 32). Justice is administered by the parties, not by the third party: the establishment of alternative means for dispute resolution respects the right of access to the administration of justice to the extent that the parties are not obliged to reach an agreement; If this does not happen, the possibility of going to the judge of the case opens. In other words, the right to obtain effective justice is not prohibited or restricted, because once the alternative means (mediation, conciliation or the restorative board) have been exhausted without an agreement, formal justice is enabled for the decision by the party. who performs the judicial function (Mazo [7], p. 102). So, it is clear that what is privileged is the alternative solution of conflicts, but, in the event that a satisfactory agreement is not reached, or the agreement reached by the parties is breached, the rights of individuals through traditional means for dispute resolution.

All the aforementioned aspects are why it is considered that with the implementation of alternative dispute resolution mechanisms, especially with mediation, the right of access to the administration of justice is not restricted, on the contrary, certainty and security are given. on the prompt, expeditious and genuine solution of conflicts in which the governed may be involved. So much so that their active participation in the exercise of their autonomy of will is privileged and the right to resort to the corresponding court is left safe in order to resolve their disputes through the traditional remuneration system. These two mechanisms complement each other and make it affordable to achieve full enjoyment of rights.

Although conflicts are part of social nature itself, it is also true that never before in human history have so many changes been experienced and in such a short period of time as the current society is experiencing. In fact, some of the contemporary societies are changing at such a speed that the

dizzying pace of change alone constitutes one of the main stressors for the people who make them up. For this reason, to the current social condition must be added the current era as an inexhaustible source of new tensions between people, institutions and nations.

Mediation, due to its spirit of giving full prominence to the parties, realizes the integral idea of justice, although society is still in transition in many of its conceptualizations and tries (sometimes not so successfully) to shape many of its rights. and its laws, in the midst of conflicting paradigms, dilemmatic thoughts and conflicting looks. The scenario would be different if these debates took place from a dialectical and integrating perspective that would further enhance the experience of coexistence (and not mere coexistence) in a more just society.

3. Conclusions

Since its inception, globalization has manifested itself as an event of extraordinary scope, especially for overcoming the distances of relationships and values between individuals. Globalization has expanded the spaces for regulation, but it has also revealed how the hyperproduction of regulations corresponds to an inadequacy of regulations to solve complex social problems. Hence the growing conflict or contradiction between law and society, as well as the inability of law to produce justice or do justice, in the sense of bridging the gap between individuals and between individuals and institutions. The apparently decisive response to this problem has come from practice, from the multiplication of mediating instruments that seem to be able to stop the generalized emergency situation that characterizes the world of justice today. Mediation is, at the same time, the result of a radical process of innovation in the regulation and management of conflict, as well as a communicative modality of the new expectations of social and individual justice. Mediation and the remaining alternative dispute resolution mechanisms enjoy the same constitutional dignity as jurisdiction as a means of exercising the human right of access to justice and, as we wanted to develop in this writing, mediation is the embodiment of the conception of justice in all its aspects because it promotes respect, equity, equality, leadership and freedom of people.

If we understand that access to justice is a fundamental right in itself that allows the other rights to be ensured, there is an urgent need for a cultural change that directs justice administrators to the search for collaborative justice in all countries and corners of the world. This happens since the obstacles to access to justice are not always of a legislative nature, but often arise from the interpretations of the laws made by judges or by the mediators themselves, who must assume the challenge and courage to spread their practice from an ethic at the service of the legitimate needs of the mediated. It is time that those of us who give our professional efforts to assist people so that they can reach self-composed solutions (altruistic, multilateral, thoughtful and consensual) assume ourselves with this dignity, no less, no more.

It aspires to have a comprehensive justice system, which allows the development of diversity, which manages to implement strategies so that access to justice services reach citizens of the impoverished middle class, with operators of the aware of the duty to facilitate and broaden access to justice: a basic human right. Access to justice and not access to the judicial system, since justice is not only what judges decide, but also, and above all, what people can decide for themselves; That is the idea that this writing has sought to expose.

One of the great reforms that judicial systems have undergone in recent decades has been related to the need to define the issues that should really be heard in the traditional judicial system and those that can be resolved through administrative channels, alternative dispute resolution mechanisms conflicts or other type of agreement between the parties. The judiciaries of Latin America (and Argentina is a clear example) have faced in recent years an overload of work that has generated a delay in the resolution of conflicts, for which reason many countries, seeking to ensure greater effectiveness in the procedural legal order, have focused their attention on self-composition mechanisms (especially mediation) aimed at transforming the state conflict resolution process into a constructive process through which the parties can address their issues, needs and interests in order to allow that the existing links between them are not broken but can be strengthened. These new self-composition models allow the parties, through a participatory procedure, to resolve their disputes constructively while educating themselves for a better reciprocal understanding.

Para el avance del acceso a justicia y el cumplimiento cabal de la garantía constitucional del derecho a que esta sea accesible, oportuna y gratuita, es preciso producir (en cada uno de los paises) avances en esta línea de acción claramente definida por el Poder Judicial de Argentina, tal como expresara la vicepresidenta de la Corte Suprema de Justicia de la República Argentina, doctora Elena Highton de Nolasco:

Una política de justicia debe brindar a todos los ciudadanos la posibilidad de protección de sus propios derechos, pero no a través de la vía jurisdiccional […]. El hecho de que se está hablando de métodos alternativos de resolución de conflictos no significa que los jueces queden al margen de esta tarea. Es imprescindible que desde el Poder Judicial se promuevan programas que brinden la posibilidad a todas las personas por igual de acceder al conocimiento, al ejercicio y la defensa de sus derechos. (Centro de Información Judicial [2], párr. 5-6)

In order to advance access to justice and full compliance with the constitutional guarantee of the right to have it accessible, timely and free of charge, it is necessary to produce (in each of the countries) advances in this line of action clearly defined by the Judiciary. of Argentina, as expressed by the Vice President of the Supreme Court of Justice of the Argentine Republic, Dr. Elena Highton de Nolasco:

A justice policy must offer all citizens the possibility of protecting their own rights, but not through the jurisdictional channel […]. The fact that alternative conflict resolution methods are being discussed does not mean that judges are left out of this task. It is essential that the Judiciary promote programs that offer the possibility to all people equally to access the knowledge, exercise and defense of their rights.

(Center for Judicial Information [2], para. 5-6)

In any human conflict, some form of mediation can be applied if the rights of third parties or public order are not affected. The lack of a culture of ADRM has been one of the main obstacles to its spread. This lack is, still today, the element that casts doubt on the effectiveness of the system and the solidity of its future development. Despite the efforts made and the progress made in recent years, the change of mentality that accepts the idea of a private jurisdiction without hesitation is, definitely, the pending matter and it will be necessary to insist on it. The constitutionally recognized principle of access to justice refers to the fact that whoever so desires can choose ordinary or alternative justice, depending on their interests, the matter of the controversy, the complexity of the conflict and the advice they receive. Freedom of choice must be a guarantee of the governed and the State must be focused on that objective, without seeking to compel the individual with sanctions or incorporating fines in the processes that are not the ideal stimulus for mechanisms in which the will and good faith play a primary role

It is time to promote greater access to justice through the strengthening of public policies and the implementation of programs and initiatives that directly affect the possibility of offering alternative avenues to jurisdiction. It is also time for citizens to assert that right, claim it and use it without qualms. The increase in social conflict in a large number of nations presents us with the challenge of reviewing the traditional ways of resolving our legal conflicts by assuming access to justice from a broad perspective and not merely a formal one. And, clearly, it is an achievement that mediation has the conditions to achieve, while its doing positions us, certainly, on the level of equity.

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