ALTERNATIVE RESOLUTION OF DISPUTES IN FAMILY LAW: THE BRAZIL PERSPECTIVE

By

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Alternative Dispute Resolution - Definition

Due to the overburden of the judicial systems, produced by the growing numbers of new disputes and by the delay in resolving the cases, the discussions concerning alternative means of resolution are more prominent across the world.

Therefore, the possibilities of resolving disputes without using the state system, present themselves as the solutions that can benefit not only the judiciary, but also the parties. Precisely for that reason, this is one of the most modern themes discussed in the law field.

The idea, as said, is the result of an imbalance between the number of actions filed and the judiciary's capacity to solve them. Therefore the fundamental issue regarding the justice system becomes evident. It is crucial to find a faster way to solve the demands brought to the legal system. Without finding alternatives to resolve the conflicts, it becomes impossible to achieve the expected efficiency of the judiciary in Brazil and other countries over the world.

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As we know, there are, of course, extra-judicial solutions offered by reliable, well-timed and even cheap procedures, for example, the widespread use of arbitration and conciliation.

However, we now have the following new alternatives for conflict resolution: mediation, independent preliminary evaluation and a decision by a specialist.

Mediation is nothing more than an attempt to compose an agreement between the parties, through the neutral figure of the mediator. It is a very efficient way of alternative resolution of conflict. The independent preliminary evaluation is nothing more than the use of the opinion from a specialist. This theoretically, may be much more helpful than the judge's decision. Based on this evaluation, the rights are emphasized and it becomes possible to determine the direction of the conflict solution. An opinion from a specialist differs from the decision by a specialist aforementioned, due to its non-binding, but merely optional character.

In all these cases, the composition of the dispute resolution process depends, to a greater or lesser degree, on the parties' desire. And just because of this, alternative dispute resolution is applied only to such rights available. In Brazil it is accepted in cases where there is express legal permission, and/or in some cases where there is no express legislative prohibition.

The more the judiciary is away, the better you can perceive the presence of alternative ways of resolution – and thus, there is more efficiency in the system, since it "frees" the courts of the demands that can be resolved by other means than litigation. The greatest Brazilian problem lies in the fact that in our legal

system the state is seen as a being whose mission is to solve disputes, and therefore, there is enormous resistance to implement alternative solutions.

Moreover, in this regard, it is imperative to emphasize that our Constitution prohibits laws which exclude any injury or threatens the removal of rights from the province of the judiciary. For that reason, once the state is the being which grants rights, it shall also assure them. It is surprising that the state could permit the dispute settlement by a non-state body, especially without the establishment of official standards.

On the other hand, it is essential to emphasize that alternative means of conflict resolution are an important way to facilitate the proper access to justice. Releasing the judiciary of conflict resolution that can be solved by alternative means, without prejudice to any parties, it is possible to provide greater efficiency to the courts in judgments of those lawsuits in which state intervention is properly essential. Additionally, the high cost of litigation often imposes a major impediment to access to the justice system. Mediation, for instance, involves a faster and much less expensive mutual solution than those cases that go to trial.

For such reasons, since the 80's the movement toward the transfer of powers to non-judicial bodies has grown considerably. While not yet common in Brazil, European and American continents, the judiciary itself sometimes assumes the role of promoter of alternative means. In several countries, the judges themselves advise or require prior recourse to alternative forms of resolving disputes.

Regarding Brazil, especially in the last two decades of the twentieth century, some alternatives for resolution of conflicts without the intervention of the judiciary were being implemented. They are embodied in the law that restructured arbitration (Law 9307 / 96); in the decree which regulates mediation in labor disputes (Decree 1572 - 7/28/1995), in the bill which regulates the activity of the mediator in civil proceedings (Bill 4.827/98) and also in the bill approved by the Senate, which makes compulsory the use of mediation to attempt to resolve a conflict before submitting it to the traditional judicial process (Bill 94/03).

Gradually we can observe the beginning of the breakup of the state monopoly, and the emergence of new ways of solving disputes without state interference, while at the same time gaining the approval and even the support of the Brazilian judiciary.

Mediation

Mediation is a consensual method of dispute resolution, whose main objective is, using a figure of a mediator, to facilitate dialogue between the parties that are unable by themselves to achieve an intermediate resolution for their demands. The mediator must be totally impartial.

Mediation is suitable for those conflicts arising from continuing relations or whose continuation is important. A good example is family relationships. The agreements allow the restoration or improvement of such relationships and at the same time, avoid possible future misunderstandings.

Brazilian law only allows extra-judicial agreements in disputes involving property rights. For that reason, mediation can only be applied to conflicts of such classes. It is then at the discretion of the parties to decide whether the agreement will be submitted to the judge for approval.

It is no exaggeration to say that mediation seeks as its goal the transformation of the "conflict culture" to the "dialogue culture", since it encourages the parties to find a solution by themselves. In short, the essence of this institute is to demonstrate to the parties how ordinary and necessary are the divergences. They amount to barriers that once solved, provide growth and changes, proving that in reality, the more negative aspect of the barriers between the parties is the mismanagement of the conflict, which generates, by itself, a new problem.

The lack of dialogue between the parties converts a small and easy problem into a huge dispute – that, due to the judicial delay, waits a considerable time until the solution is imposed by the coercive government power. Many times, the parties do not fight because of the original question, but because of new problems arising from the lack of an effective solution for the factor that generated the demand. Other times, they are in dispute because of problems that represent nothing more than a substitute for the real problem they have.

In this particular, we can say that through dialogue mediation allows the knowledge of the real conflict. Due to the difficulty of talking about the real problem, frequently the expressed problems are only the apparent ones, not the real ones. The solution of an apparent conflict does not bring an effective result. In this situation the real conflict remains and generates new ones, as we said at the beginning.

Regarding the mediator's work, his primary function is facilitating communication between the parties, leading them to dialogue, listening to them and asking questions whose answers will lead to a real knowledge of the conflict. Thus, the parties themselves can reach an agreement.

Using the technique of asking questions and listening to answers, the mediation adopts as one of its pillars, the Socratic method of seeking the truth –maieutics.

Far from imposing sentences, the mediator has the obligation to establish the communication rules. They constitute the essence of mediation, since they can provide the right understanding and also the dispute solution.

The mediator must have a flair for identifying the real problems that affect the parties. In most cases they are unable to understand their real interests, often hidden by grief, anxieties and misunderstandings. Usually, when these feelings are overcome, the solution becomes simple for both sides. It works like the fictional case cited by Roberto Portugal Bacellar: Two sisters were fighting over an orange. After agreeing to split it in two halves, one of them took her half, ate the fruit and threw the peel away, while the second sister threw away the fruit and saved the peel to make candy.[1]

In Brazil the law which deals with mediation, provides the extrajudicial proceedings and the judicial proceeding. The latter may occur at the suggestion of the trial judge and consent of the parties, or at the parties' request, suspending the process for three months while the parties attempt to settle the dispute. The parties should always feel comfortable with the appointed

[1] Roberto Portugal Bacellar, *A mediação no contexto dos modelos consensuais de resolução de conflitos, pgs. 122-134.*

mediator. If they do not have this feeling, they may refuse him or her, especially if very personal issues are involved.

Mediation is based on a positive vision of the conflict. That is, when well managed by the parties, the conflicts can contribute to the evolution and development of individuals and the society. Mediation is therefore an activity that should be allowed at any level of jurisdiction, as conceives the bill under discussion.

The practice of mediation as a method of conflict resolution has been increased in Brazil. The reason is not only a latent call for the "alleviation" of the judiciary but the benefits that it brings to the parties. For that reason the development of this alternative method of conflict resolution is natural and necessary, and also presents the possibility of parties' avoidance of the judicial process, as an incentive to use non-adversarial methods of conflict resolution:

> …before the Judiciary the proceedings should only appear at the impossibility of the conflict self-overcoming by the parties, who should have an available consensus model in order to make possible the peaceful resolution of the dispute, rather than the adversarial.[2]

In addition, the current Brazilian procedural system is able to welcome this new institute without any major legal changes, requiring for that, only the resources to materialize its operation by the judiciary. On the other hand, as mentioned

[2] Idem.

above, at the same time that legislative changes occur, some changes in the Brazilian culture are necessary to lead citizens to understand the benefits of conflict resolution through dialogue.

In this regard, the introduction of mediation in the judicial process will contribute to its own disclosure. So it is, without doubt, the most effective way to reduce litigation – a matter, of supreme importance in Brazil.

Mediation in Family Law

The main feature of mediation is the chance for greater acceptance of the final settlement, since its terms are not “thrown down the throats" of the parties in a judicial sentence. The goal of mediation is to make the parties themselves feel the need for the agreement, and thus employ their forces in order to persuade the opposite party, which means that each party understands the other’s position, finding a balance where harm to each party is minimized. However for a successful mediation, it is necessary for the parties to recognize that to make an agreement, each one must give and negotiate. For the composition of the agreement both parties must be prepared to lose the minimum required, which represents nothing more than an intersection of interests point.

With reference specifically to family law, whose core is essentially imbued with human warmth, mediation proves to be a perfect and appropriated instrument. That is, because the demands are neither objective nor free of feelings. Rather, they are issues of strong emotional appeal, where the sorrows and insecurities can become weapons of war used in contentious disputes, disguising the primary matter.

We can safely declare that family is the branch of law that requires the highest degree of listening and a valued dialogue by lawyers, judges, prosecutors and others involved in the cases. Also required are temperance and a real interest in the problems of others. Otherwise, the family disputes turn into battlefields, where sometimes not even the parties can remember the reasons for the conflict.

Therefore it is extremely important to emphasize the role of the specialized family lawyer, as the first "mediator" of the demand brought to him. The lawyer cannot lose his ethics to the greed of fees relating to litigation solutions. It is true that in consensus work, through dialogue between the parties, the fees tend to be more modest compared to those received in litigated financial disputes. One must also consider that many times, some disputes are so cumbersome that even the expensive fees don’t compensate the work.

After each offense, the hurt, the discord, the suffering of children grows and equitable solutions became more unthinkable. Often, it then becomes impossible to determine the rights of the parties, or even to determine where the beginning of the reasons are and where the end of the rights are. In this way, as the judiciary needs to put an end to the controversy, the parties face cold, imposed and almost always unjust sentences. The injustice is not exactly with the parties, because judges decide on the basis of the disagreement and the law brought before the court. The injustice mainly is related to the real, pure and simple problem brought to the court.

To get to this end, the good family lawyer has a fundamental role. He or she must be more than a vocation "mediator". It is like a visionary: while listening to

the demand brought to his office, he must be able to separate, through a frank dialogue, the reasonable attitudes from those which result from unresolved passionate relationships. The lawyer must advise his client, and promote the agreement whenever possible. Family mediation is a healthy attitude of seeking a non-polar dimension of the parties' interests, and must begin at the lawyers' offices.

The peculiar aspect of each family dispute submitted to the legal professionals requires that it be considered in a special and individualized way. Thus, the solutions mentioned by the parties during the mediation sessions, or even after the consultations and dealings in law firms, should be reduced by the term named "mediation term" or "agreement term". There is no requirement for approval of these documents in court.

Therefore, especially in family law: "Mediation is a work on the recognition and rehabilitation of someone, a place of rediscovering the mutual respect: it operates the phenomenon of the 'conversion' of the states of mind. Listening to the other experiences and sufferings, usually the anger is decomposed and reappears the possibility of restoring the lost confidence.[3]

Caetano Lagrasta Neto emphasizes:

> The trouble in Family Law rests on the insecure ground of endless disputes. The exclusion of negotiation is a mistake because it bans the

[3] GANANCIA, Danièle, *Justiça e mediação familiar: uma parceria a serviço da parentalidade. Revista do Advogado,* n. 62, p. 7 e ss., mar. 2001.

> involvement of the stakeholders. Negotiating is different from imposing a will; it works by accentuating one of the wills against another, arguing against one party in favor of another until reaching a solution that satisfies everyone and protects the weak side. Negotiation is, first of all, the opportunity to restore the dialogue, broken by separation due to failure of the marital relationship.[4]

The prime difference between the family disputes and other conflicts in the law area is that they require an emotional charge that spreads through time. Consequently, a simple agreement is not enough to end the demand. It is necessary, more than that, to avoid further attrition between the parties, and also to arrive at a quick and really efficient solution, finally placing an end to the litigation. Therefore, the efficiency of mediation is not just a simple agreement signed, but the maturity of the parties in foregoing the opportunity to plead in court things that are really fair. So that the parties do not need to use, for instance, the children as war weapons.[5]

The Brazilian legal culture, following the global trend in conflict resolution, must change itself. Society needs to understand the many benefits coming from good dialogue.

People must eliminate the culture of greed and punishment, very well represented by the proverb: “I give an ox to avoid getting into a fight, and a herd

[4] NETO, Caetano Lagrasta. *Mediação e Direito de Familia.* R. CEJ, Brasilia, n. 17, p. 112, abr/jun. 2002.
[5] PINTO, Ana Célia Roland Guedes. O conflito familiar na Justiça – Mediação e o exercicio dos papéis. *Revista do Advogado,* n. 62, p. 64 e ss., mar. 2001.

for not leaving it." And once again, this task must be initiated within the law firms, by the specialized lawyers.

The parties must understand that inquiring and insisting on unfair advantages, just to punish the opposite party, produces no lasting results, and brings, many disadvantages in the future. In this sense, read once more, the exact words of Caetano Lagrasta Neto:

> The superficiality of the solutions perpetuates the conflict. Frequently the parties return to the forums or courtrooms, filling the courts with avoidable demands, because based on criteria of respect for the individual personality and desires, the nature of the family issues requires all stakeholders' views.
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> Futile reconciliations are common and usual in mere compromise proposals, fruits of the insensitivity of judges and lawyers, the first worried about the impartiality or the daily schedule; while the latter, despite initial conciliators or innate mediators, often motivated by the possibility of fat fees, stimulate the useless demands, reiterated lawsuits and new resources subjecting the parties to a long wait for the State decision.[6]

[6] NETO, Caetano Lagrasta. *Mediação e Direito de Familia,*. R. CEJ, Brasilia, n. 17, p. 113, abr/jun. 2002.

For sure, the family conflicts, transformed into large disputes often become disastrous, not only for solving the cases, but for the family structure. It is essential that the hired lawyer always encourages dialogue to deal with specific points, not necessarily the whole case. Consequently, it is also necessary that the judiciary itself stimulates the mediation process, through judicial mediation, or by encouraging extrajudicial mediation. Family law deals with unstable, malleable, hesitant and often perpetual relationships (parents and children cases). They are therefore special relationships that persist over time. And if the problem is not solved at the root, the troubles will be eternal.

Conclusion

The modern global trend is to encourage the use of alternative means of conflict resolution: first, because cases remaining in the court system can be resolved faster and more effectively once the number of disputes decreases, and secondly, because those mechanisms are frequently more effective than occasional lawsuits settled by the sentences imposed by a judge.

In Brazil, it is still necessary to revolutionize the legal culture, and invert some values. Mediation, as well as other alternative means of conflict resolution should be directed to the benefit of the parties, so that judiciary relief becomes nothing more than a consequence.

The practical advantages of dialogue must be spread so that, even gradually, society and the legal community will accept the idea that the losses are usually greater if the litigation route is followed. Avoiding the domino effect, where one

lawsuit leads to another, the society matures, and the real protection of the rights and duties established by our legal system, become more evident.

At this point, it is vital for the lawyers to preserve their ethics, being not exclusively focused on overweight fees from endless lawsuits. First of all, the challenge of the lawyer is finding the real resolution of the demand at hand – because that should be the noble goal of every legal professional.

To better resolve the conflicting points in the family law field – at which the human being is absolutely emotionally engaged, with their feelings of susceptibility, anguish and indecision finely tuned – it would be ideal to use a third specialized office to mediate between the two also specialized offices involved on the disputes. That approach may offer the greatest opportunity for resolution of the dispute.