

The practice of conciliation and extra-procedural mediation according to legal operators

La práctica de la conciliación y la mediación extraprocesal según los operadores legales

LETÍCIA CARDOSO DE OLIVEIRA

Universidade Estadual Paulista
letbcardoso@gmail.com

MARIO LÁZARO CAMARGO

Universidade Estadual Paulista
mario.camargo@unesp.br

MARIANNE RAMOS FEIJÓ

Universidade Estadual Paulista
marianne.r.feijo@unesp.br

Abstract

A culture of conflict management established in the adjudicated decision is strongly active in Brazil, that is, it is believed that a conflict can only be resolved through a judicial process and through the ruling of a qualified judge. This ruling culture has potentiated a “crisis in justice”, since the number of cases has become greater than the capacity of the judiciary to manage them. Taking this issue into account, a consensus-based justice model has recently spread, in which alternative dispute resolution practices – conciliation and mediation – are applied for the parties to dialogue and to participate in the solution of disputes. The implementation of a consensus culture is not only the solution to the crisis in the judiciary, but a form of social pacification. The goal of our research was to understand the practice of conciliation and extra-procedural mediation from the viewpoint of conciliators and/or mediators working in Judicial Centers for Conflict Resolution and Citizenship in two counties in the state of São Paulo, Brazil. We conducted interviews with semi-structured script and the participants’ reports were submitted to the content analysis technique. We concluded that they understand conciliation as presented in the literature; however, they do not make the proper distinction regarding mediation in their daily professional practice, lacking better professional qualification, which should be offered by the judiciary itself. Certain of the relevance of their social role, the research participants pointed out a need for greater recognition of their professional practice and more organizational support.

Keywords: Conciliation, Mediation, Conflicts, Access to justice, Culture of peace

Resumen

Una cultura de gestión de conflictos establecida en la decisión adjudicada es muy activa en Brasil, es decir, se cree que un conflicto solo puede resolverse mediante un proceso judicial y mediante el juicio de un juez calificado. Esta cultura de la sentencia ha potenciado una “crisis de justicia”, ya que el número de casos ha superado la capacidad del Poder Judicial para manejarlos. Tomando en cuenta este tema, recientemente se ha difundido un modelo de justicia consensuada, en el que se aplican prácticas alternativas de resolución de disputas – conciliación y mediación - para que las partes dialoguen y participen en la solución. La implementación de la cultura del consenso no solo

es la solución a la crisis del poder judicial, sino una forma de pacificación social. Nuestro objetivo con la investigación fue comprender la práctica de la conciliación y la mediación extraprocésal desde la perspectiva de los conciliadores y/o mediadores que trabajan en los Centros Judiciales de Resolución de Conflictos y Ciudadanía en dos comarcas del Estado de São Paulo, Brasil. Realizamos entrevistas con guiones semiestructurados y los relatos de los participantes fueron sometidos a la técnica de análisis de contenido, lo que nos permitió concluir que entienden la conciliación como presente en la literatura, sin embargo, no hacen la distinción adecuada respecto a la mediación en la práctica profesional diaria, faltando mejor cualificación profesional, que ofrecerá el propio poder judicial. Seguros de la relevancia de su rol social, los participantes de la investigación señalan la necesidad de un mayor reconocimiento de la práctica profesional y más apoyo organizacional.

Palabras clave: Conciliación, Mediación, Conflictos, Acceso a la justicia, Cultura de paz

1. Introduction

1.1 Access to justice

Interpersonal conflict is inherent to social life. According to Tartuce (2015), conflict is synonymous with clashing, opposition, pending, claim; the meaning of clashing ideas or interests, which installs a divergence between facts, things or people, prevails in the legal vocabulary. There is no democratic and plural society without conflict; however, there must be mechanisms in place to prevent or solve it. Thus, access to justice is a structural aspect of modern civil organization, based on a judiciary in which people can claim their rights and resolve litigation under the auspices of the State. Moreover, this system must be accessible to all, producing fair results individually and socially (Cappelletti & Garth, 1988).

In fact, the concept of access to justice has transformed throughout time. According to Cappelletti and Garth (1988), during the liberal bourgeois state of the eighteenth and nineteenth centuries, the right to judicial protection for solving conflict was based on a strictly individualistic philosophy, considered a "natural right" that did not need to be safeguarded by the State. That is, access to justice was a mere formality, in which each person would recognize their own rights and would adequately defend them, and the State remained passive. Those who were not able to do so, including from lack of financial resources to afford the costs, were at the margins of the system, so access to justice was not equal.

With the growth of liberal societies, actions and human behavior turned towards collectivity more than individuality, leading to profound changes in the individual vision of law. The State, and citizens in general, started recognizing social rights and duties, which

generated a new scope of human rights, with the purpose of making the previously self-proclaimed rights into fully accessible formal rights. Among these, we can mention the right to work, health and education. Thus, the importance of the State to guarantee the access to these rights was emphasized, and attention was given to the effective access to justice, so individuals can account for all others. According to the authors, owning rights is devoid of meaning if there are no mechanisms to claim them effectively. Access to justice may, however, be faced as a fundamental requisite – the most basic of human rights – from a modern and egalitarian judiciary that aims to guarantee, not only proclaim, people's rights (Cappelletti & Garth, 1988).

Like different nations around the world, Brazil's Carta Magna adopted the right to effective access to justice. The 1988 Constitution expanded individual's rights and guarantees, including social rights beyond civil and political rights. Especially article 5, section XXXV, of the Constitution of the Federative Republic of Brazil (Brasil, 1988), states that the law will not exclude lesion or threat to rights from appreciation by the Judiciary Power, thus protecting the access to justice, as well as to due process (art. 5, sec. LIV) and to adversary and ample defense (art. 5, sec. LV). Additionally, the Constitution guarantees jurisdictional provision within a reasonable time frame (art. 5, sec. LXXVIII) and free legal aid to those proving insufficient financial resources (art. 5, sec. LXXIV). These are examples of State duties for an effective access to the judicial system (Silva, Santos, & Santos, 2020).

However, despite the search of modern societies for access to justice, there are contemporary practical problems that prevent its concretion, that is, there are some barriers against access that must be overcome, urging a

need for a paradigm shift in how the judiciary is conceived and operates.

1.2 Paradigm shift: from a sentencing culture to a consensus culture

Traditionally, Brazil deals with conflict resolution with adjudicated decisions, that is, based on the belief that a conflict can only be resolved through a judge's ruling; this idea is widespread in academia and forensic practice (Watanabe, 2007). This belief permeates the traditional model of heterocomposition of lawsuits before the judiciary, marked by adversity between the parties; non-cooperation, considering there are no spontaneous concessions to material rights; and verticality, since the judge's decision is imposed, resulting in a winning and a losing party (Gonçalves & Segala, 2016).

However, this sentencing culture ended up potentializing a "crisis in the justice system", since the number of lawsuits is enormous compared to the resources of the judiciary to fulfill its demands. Therefore, there is excess litigation and slowness that hinder the smooth progress of the proceedings and, as a consequence, access to justice. According to Silva and Spengler (2013), delays in resolving litigation has become very expressive and generates dissatisfaction in the parties, so it is not effective to have the right to take action if the aimed solution does not happen within a reasonable time frame. Alternative ways to facilitate access to speedy and effective justice becomes more indispensable by the day. To summarize, the traditional methods for resolving conflicts of interests have been insufficient to fulfill the judicial demands of the population and to promote the co-responsabilization and participation of the people who dispute. Furthermore, consolidating democratic order – although

extremely necessary and beneficial – results in a significant increase in the number of demands reaching a judiciary that is unable to absorb the mass judicialization of disputes (Franco, 2011).

Taking this issue into consideration, a new consensus-based justice model is spreading, in which alternative conflict resolution practices are applied so that the parties negotiate their interests and reach a mutually beneficial solution, thus forwarding them to a more shared resolution of the conflict and generating a kind of training or learning that culminates in a reduction in the tendency to judicialize disputes via the judicial institution and, therefore, a more autonomous action in search of peace. Unlike traditional procedures, in this new arrangement the parties are invited to participate in mediation or conciliation sessions, so they have the opportunity to share their experiences and interests in a less unequal context. The conversation is conducted by a professional who does not view them as opponents, which facilitates cooperation and enables, in some cases, spontaneous concession, including of material rights. In this context there are more horizontal relations and each participant in the conversation is legitimized in the expression of their experience and needs, so co-construction of decisions is more likely. This escapes the win-lose binary logic, since both parties have the opportunity to win together (win-win) based on collaborative and consensual treatment (Gonçalves & Segala, 2016).

According to Silva, Santos and Santos (2020), implement a culture of consensus, which we defend should be an institutional methodological approach, which contributes to the construction of a culture of peace, is not only a solution for the judiciary crisis, but also a way of social pacification, given how it is bound to how society organizes to solve its

conflicts. That is, when speaking of a transition from a sentencing culture to a consensus culture, one speaks of the construction of a conflict resolution model in which decisions that were mainly imposed by a third party (State-judge) return to the interested parties, stimulating communication. Therefore, self-composing ways, such as mediation and conciliation, may be understood as tools to promote a culture of peace, thus belonging to a wide political movement in favor of non-violence. Conciliation, in general, applies to disputes that are not based on close and lasting relationships and can be carried out, in many cases, in one or two conversations. Mediation, on the other hand, may require more meetings with the disputing parties, sometimes separated and sometimes together, so that the grievances and the stories of the relationship and of the dispute itself are reviewed and reconstructed. Mediation, especially with a narrative basis, is a practice that aligns with restorative dialogue circles, therefore it figures as a collaborative dialogical practice to promote the protagonism of people and to strengthen bonds with the family and the community. They are means of transforming realities that sustain disputes and prevent violent acts in an attempt to resolve them, which implies a potential to foster a culture of peace and democracy: participation, respect and appreciation of differences and construction of peaceful coexistence and with lesser inequalities (CNJ, 2018).

The present paper will use the term “dispute s” to characterize situations in which the parties face a deadlock and, thus, mediation or conciliation is applicable. Disputes are frequently based on interpersonal or intergroup conflict, which in turn could be translated as communication and relational difficulties (Carreira & Feijó, 2017).

In 1977, the United Nations (UN) proclaimed the year 2000 as the International

Year for the Culture of Peace, an important mark in the global mobilization to implement this new paradigm. The following year, the UN proclaimed the decade 2001-2010 as the International Decade for a Culture of Peace and Non-Violence for the Children of the World, instituting the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a regulating agency for these actions.

According to Noletto (2010), peace culture is intrinsically related to conflict prevention and non-violent resolution. This culture is based on tolerance and solidarity, a culture that respects all individual rights, that ensures and sustains freedom of opinion, and that strives to prevent conflict, resolving it at its source, which encompass new non-military threats towards peace and safety, such as exclusion, extreme poverty and environmental degradation. The peace culture aims to resolve problems through dialogue, negotiation and mediation, so war and violence become impracticable.

Under this prism, there have been worldwide initiatives to disseminate ideas, values and behaviors related to tolerance, respect towards diversity and human rights, in the individual scope as well as in the structure and functioning of institutions (Galtung, 1998). It is also in this direction that mediation and conciliation have been implemented in the Brazilian and other countries' judicial systems, to promote the protagonism and autonomy of individuals in search of a solution to their disputes in a pacific and communicative way. Such action implies, in short, the consideration of mediation and conciliation as powerful tools at the service of the culture of peace, since they are fertile soils for the development of dialogue and the search for consensus, to the detriment of the violent actions that so negatively mark

relationships interpersonal conflicts and the history of societies.

1.3 Mediation and Conciliation

According to Genro (2009), access to justice must not be understood as a mere access to the judiciary, since efforts to resolve user's conflicts without including those at the margins of the system are not enough. Stimulating, disseminating and educating those in jurisdiction to manage their demands through communicative actions tends to be more comprehensive, and some of the methods used for this are conciliation and mediation, which can occur extrajudicially. Mediation and Conciliation can be applied in Brazil today without resorting to judicialization and thus individuals are not seen as adversaries, but as integral parts of the problem, so they can find a solution that is valid for both, with the help of a third party: the mediator or conciliator (Vasconcelos, 2008).

Albeit similar, conciliation and mediation are not identical, that is, they are distinct methods, since mediation can be defined as a process of dialogue and restructuring, mediated by a professional, with effective participation of those involved (Carreira & Feijó, 2017). According to Vasconcelos (2008), mediation is a generally non-hierarchical means of dispute resolution, in which the parties, with the collaboration of a third party, expose the problem and, based on a constructive dialogue, try to identify common interests, and, possibly, sign an agreement. Mediation may be directed towards the relationship or an agreement. The former is more commonly used when there is dispute between people who maintain continuous or permanent relationships, such as in a family, since it aims to transform the relational patterns between people through communication, appropriation and recognition.

Moreover, the mediating activity focused on agreements receives the title of conciliation, given that it prioritizes meeting eventual demands, balancing material interests when reaching for an agreement.

According to Sales and Chaves (2014), conciliation is a self-contained conflict resolution mechanism that counts on the participation of an impartial third party who, through active listening, guides the discussion and suggests solutions compatible with their interests. In addition, reconciliation is more appropriate when conflicts are objective/patrimonial, in which, preferably, there are no affective/family ties between the parties, and there is no need for further discussion (Sales & Chaves, 2014). In contrast, mediation is a self-contained dispute resolution mechanism that counts on the participation of an impartial third party that facilitates the communication of the parties and avoids proposals or suggestions. In addition to resolving the dispute, mediation aims to reestablish connections and promote peaceful relationships through the cooperation of those involved. Thus, the mediator must work in depth on the issues that are brought to the mediation process, to determine not only the reason for the complaint, but also the real conflict that permeates the relationship of the parties.

Thus, both the mediator and the conciliator must be impartial, the former being responsible for helping the parties understand the conflicts and interests that maintain the dispute. The mediator works cooperatively in a search for improvement in the communication process, and avoids interference, so that the parties may themselves identify the solutions that generate mutual benefits, that is, become protagonists of the solution. The conciliator, in turn, can provide the parties with suggestions on how to solve the conflict, and thus assume a

more participatory and directive role (Sales & Chaves, 2014; Carreira & Feijó, 2017).

The techniques used in each method are not rigid but must be considered. These include active listening, which consists of a position of reciprocal interest of the mediator/conciliator for the ongoing dialogue, so that the parties are the object of their attention. The affirmative method must also be used to emphasize the goals of the procedure, and clarify, reaffirm and reformulate the discussion. In this regard, separating people from problems, sharing perceptions, using positive words and focusing on the future are extremely relevant. In addition, there should be questioning, to allow the parties to speak for themselves, revealing feelings, doubts and emotions, demonstrating the complexity of the conflict and stimulating new ideas (Suarés, 1996).

Mediation and conciliation were recently regulated in Brazil. In 2010, the National Council of Justice published Resolution n. 125, instituting the National Judicial Policy to deal with controversies, stating it is incumbent upon the judiciary to include, in its public policies structure, consensual means, such as conciliation and mediation (Brasil, 2010). In 2015, Law n. 13105 was approved, instituting the New Code of Civil Procedure, a historic step towards the consolidation of consensual means of dispute resolution, since it asserts a new ideology that promotes the approximation of the parties, without clashing their interests. In this law, conciliation and mediation are included in the legal process' common rites, and must be stimulated by the professionals in the judiciary. The law also guides the creation of Judicial Centers for Consensual Conflict Resolution, which are responsible for conducting conciliation and mediation sessions through programs destined to help, guide and stimulate self-composition (Brasil, 2015a).

Moreover, Law n. 13140/2015, the Law of Mediation, was approved, including the guiding principles for mediation: mediator impartiality, equality between parties, orality, informality, autonomy of the parties' volition, search for consensus, confidentiality, and good faith. This law also stated the decision-making power of the parties, guided by an impartial third party (Brasil, 2015b).

According to Gonçalves and Segala (2016), all these legislative changes contributed to the institutionalization of Consensual Justice, however, we must verify whether, in practice (empirical research and data from official agencies), the right to access to justice is bumping against the mentality of law professionals and users who view the judiciary only as a traditional tool. The lack of education in the population and law professionals regarding settling issues through consensual methods is still the greatest obstacle against an effective national policy for the consensual treatment of conflict.

2. Justification and objective

In view of the situation, it is paramount to investigate the practical application of these recently implemented measures in the judiciary to verify whether they promote speedy and effective judicial resolution to the satisfaction of all those involved. Additionally, hearing law professionals will enable us to identify their opinions regarding the consensual justice model and to understand how the mediation and conciliation practices are currently understood and practiced, as well as the challenges faced and the results of their work. This research is socially and scientifically relevant since it is part of contemporary social relations, in favor of the promotion of peace.

Using consensual means to resolve disputes is of particular interest to one of the

researchers, based on her approximation with a Judicial Center for Conflict Resolution and Citizenship (Centro Judiciário de Resolução de Conflitos e Cidadania – Cejusc) from the Justice Court in the state of São Paulo, Brazil, during an administrative internship in the institution. In addition, using the systemic approach to study mediation and conciliation techniques, which are practices based on new paradigms in science, raised our scientific curiosity: are the law professionals, when using their attributions and exercising their activities, adequately acting as conciliators and mediators? Are they acting with the appropriate professional qualifications? Are they committed to the goals of this new paradigm in justice?

Therefore, the main objective of this paper is to understand the practice of extra-procedural conciliation and mediation from the viewpoint of conciliators and/or mediators acting in the Cejusc of two counties in the state of São Paulo, Brazil.

3. Methodology

3.1 Nature of the research

The current research is exploratory in nature (Gil, 2012), since it aims to offer a general view of the conciliation and mediation practices in the judiciary, according to the professionals of the area. This investigation may provide elements to formulate future hypotheses and issues on the topic. Moreover, this research is qualitative, since it uses speech analysis with an emphasis on content, to understand how the participants understand the practice of extra-procedural conciliation and mediation.

3.2 Participants

Six law professionals participated in the research. They were conciliators and mediators directly connected to the conciliation and mediation services offered by the Judicial Centers for Conflict Resolution and Citizenship (Cejuscs) in the counties of two cities in inner state of São Paulo. The sample was determined by the researcher, considering the small number of participants is adequate for a qualitative analysis of speech, as proposed. Also, we adopted a convenience sample (Cozby, 2003) to guarantee easy access to the data collection sites. We were unable to reach a sample of ten participants, as had initially been planned, since in-person meetings were prevented by the COVID-19 pandemic. To select participants, we conducted an initial search in the Justice Court website to find the list of registered conciliators and mediators in the Cejuscs of the selected counties. Then, we found their phone numbers and e-mails searching the web and the Brazilian Bar Association (Ordem dos Advogados do Brasil – OAB) website. Finally, we sent them an electronic invitation to participate in the research and selected those interested and available for interview.

3.3 Location

The interviews were conducted in a reserved space – to ensure participants' privacy and information confidentiality – at the Cejusc of their respective workplaces, when available, or in an appropriate location suggested by the participant

3.4 Data collection

Data was collected through an in-person semi-structured interview. The audio was recorded

using a smartphone application and transcribed afterwards. Before the interview began, we read the Informed Consent Form with the participants who, after showing they understood and agreed to its contents, signed two copies of the document and kept one of them (according to the Brazilian guidelines for research with human beings that guide the actions of the Research Ethics Committees).

Using this instrument is justified by the possibility of obtaining thorough data, as well as the relative flexibility during the interview, that is, allowing new questions to be posed to clarify or complement contents or, even, suppress questions anticipated by the more verbose participants. The questions created for the interview instrument aimed to directly correspond to the research objectives. Thus, we first investigated how conciliators and mediators understand mediation and conciliation, as well as their knowledge of the service offered by the Cejusc. They were then asked about their education and professional performance. Next, we investigated the demands they usually encounter and, finally, we asked about their personal perceptions about the benefits, difficulties, satisfaction and results of the work.

3.5 Data analysis

Initially, we reviewed data from a bibliographic survey, taking into consideration the relevance of the obtained literature regarding the objectives of the research. Next, interviews were conducted, transcribed, and the data was organized and examined based on the Content Analysis technique (Bardin, 2011): content was categorized into topics and organized according to their frequency and relevance. These procedures enabled us to obtain and discuss the results that follow.

4. Results

To better present the results, we decided to relate the seven analysis categories – based on the Content Analysis (Bardin, 2011) of the transcribed interviews – to respective examples of the fragments of the participants' speech (translated from Portuguese) and organize them in the following table (Table 1). In accordance with the ethical norms for research with human beings in Brazil, participant's names were substituted with nomenclature that does not reveal their identities.

TABLE 1. ANALYSIS CATEGORIES (SOURCE: OWN ELABORATION)

Category	Name of category	Synthesis	Speech example
1	Understanding of conciliation and mediation	Category 1 is marked by participants' statements on their understanding of the concepts of conciliation and mediation, showing the difference between them and the techniques used in the sessions.	As an example, see the following excerpt from Participant 1: <i>Mediation... In fact, to be clear, I confuse mediation and conciliation. What is it they tell us? Look, consider family actions like a mediation [...].</i>
2	The conciliation and mediation service offered by Cejusc	Category 2 is about participants' descriptions of the conciliation and mediation services offered by the Cejusc, in terms of procedure and/or quality.	<i>It's not a lawsuit in itself, judicial, it's a minor pre-complaint, it just has a serial number for organization, you know, for internal control. It's not a lawsuit, it has no judicial cost, no conviction, no nothing. [...] Really, the person doesn't even have to show up, the invited party (PARTICIPANT 5).</i>

3	Education and professional trajectories	Category 3 is related to questions about the professional training (preparatory and improvement courses, professional training institutions) and professional practice of the interviewees (experience and places of work).	<i>I took the course in 2015, at Nupemec, which is the course for the judiciary at the Court of Justice of the state of São Paulo, I think the course lasted almost six months, right. This course happened every day, from 7 till 10 am, online. [...] then you acquire much more practice on the day-to-day, because each case is different (PARTICIPANT 4).</i>
4	The demands sent to conciliation and mediation	Category 4 has statements from the interviewees about their main complaints related to conciliation and mediation, in the civil and family areas. It also includes information on the sociodemographic profile of the assisted population.	<i>Ah yes, divorce... they're family cases, right, divorce, custody, alimony, these are, let's say, the most frequent. Then there is a lot of debt collection, which is a civil suit. [...] These are low-income people, right, they are people who live in the periphery, they are people who have no means to hire a lawyer and that's why they come to the Cejusc (PARTICIPANT 2).</i>
5	The benefits of conciliation and mediation	Category 5 shows the benefits of conciliation and mediation, for the institution as well as for the assisted persons, according to the interviewees.	<i>It's very important to people because it's a consensus [...] they will sign an agreement according to their will [...]. For the institution, because it's a quick proceeding, because the parties decide, they will fulfill the agreement, it is much more likely that they will fulfill the agreement and there is practically no cost (PARTICIPANT 2).</i>
6	Difficulties in practice	Category 6 constitutes of the participants' opinions regarding the difficulties in their practice as conciliators and mediators.	<i>[...] but do I have difficulties? I have many. You'll often face situations that you don't know how to deal with that, even with the technique; without technique we also have, for example, a lack of time [...] (PARTICIPANT 3).</i>
7	Professional satisfaction	Category 7 reveals how the interviewees deal with the results of their work, whether they are successful and in which situations, as well as whether they feel professionally fulfilled.	<i>People are satisfied precisely because, like, you avoid, right... a lawsuit. Nobody wants a long lawsuit, that's a lot of work [...]. Sometimes, the person has an easily solvable problem, and for that person it's huge, but no, you sit down, talk, and can solve it. Then you see that this makes a difference in peoples' lives. It's important, it makes me very happy (PARTICIPANT 6).</i>

Given the presentation and synthesis of the categories, together with their respective example statements, what follows is a Content Analysis of the interviewees' responses (translated from Portuguese) per category, considering their relevance and frequencies (Bardin, 2011).

4.1 Understanding of conciliation and mediation

The first question we asked the participants was what they understood by conciliation. Four out of six interviewees said conciliation is a means to resolve issues. Four interviewees also

said that conciliation is about promoting autonomous decision by the parties. Three people cited that conciliation means reaching an agreement. Two people pointed out conciliation as a means of pacification. Another two said that conciliation consists of easing communication between the parties. One explained it is a quick judicial service.

Regarding mediation, which was the second question, four participants stated having difficulties in differentiating the concepts of conciliation and mediation, saying that in practice they are very similar. Those who tried to point out the difference said that mediation is related to working with actions in the family (n = 4) and in cases of lasting interpersonal relationships (n = 1). One interviewee pointed out that mediation was a longer process than conciliation, and another one said that, in mediation, the mediator is inserted in the problem and is more incisive.

When participants were questioned about their understanding of conciliation and mediation as distinct practices, four interviewees revealed that they are distinct only in theory, since in their professional practice they are confounded. Another two stated that yes, they are different practices. The following speech from Participant 5 exemplifies these issues:

Conciliation is... that's hard, it's an agreement, right. It's a... in practice it's a conversation where the parties express their position, each on their side, and us, as conciliators, try to show them what is best for everybody. To conciliate, right... is to let our problems aside and find a mutual solution, that is valid for everyone [...]. So, during the courses we take, conciliation and mediation have a distinction, right. Mediation is a longer process, takes

longer, it requires more time... But, in practice, the day-to-day that we experience, we really see no difference, right. In theory there is a difference, but in our day-to-day we can't differentiate "Oh, I'm going to a conciliation, today it's a mediation", right, it's according to the situation.

The techniques used in the conciliation and mediation sessions were pointed out: active listening, being welcoming, friendliness, analyzing people's behaviors, "ice breaking", non-violent language, reformulation, constructing a respectful environment, facilitating communication, emphasizing points in common, smoothing things over and avoiding a spiral of attacks. Two people said that the techniques used depend on each situation. Moreover, four out of six professionals said they use the techniques learnt at the training course.

4.2 The conciliation and mediation service offered by Cejusc

Participants were asked about how they would describe the conciliation and mediation services offered by Cejusc, in terms of proceedings. All of them pointed out that, since it is an extra-procedural path, the person seeking conflict resolution can reach out to the institution to start the proceedings, that is, without the presence of a lawyer. As soon as a complaint is filed, a conciliation and mediation hearing is scheduled and the other party receives an invitation to appear at the Cejusc in the appointed date, with no legal obligation to do so. When the requested party appears, a conciliation and mediation session occurs, with the presence of mediators and conciliators, which there may or may not lead to an agreement. If there is an agreement, it is sent to

the judge for ratification. Otherwise, the petitioner is oriented towards seeking common law.

Additionally, we obtained the information that the conciliation and mediation services also occur through legal requirement, given that the Civil Procedure Code establishes as an ordinary rite a self-composition hearing immediately after a lawsuit is ensued. Thus, even in common law, actions are sent to Cejusc to attempt conciliation.

Three interviewees said that, in terms of quality, the services offered by the Cejusc are a great opportunity for conflict resolution. One of the participants pointed out how little knowledge people have on the existence of the institution and how people discredit the services without knowing them, so these obstacles must be overcome. Another participant talked about services offered by the Cejusc other than conciliation and mediation, such as psychological counselling and the parenthood workshop, which is a way to support and empower citizens. The following interview excerpt is from one of the participants and represents these conclusions:

It's ample access, easy for the population, not a lot of bureaucracy, it's a simple way for people to express themselves, speak, and seek their rights; there is no need for lawyers, there isn't a lot of formality, they can talk, listen, solve their own problems in a very accessible way, right [...]. I believe the Cejusc offers an excellent service in this sense, because it not only meets demands for the judicial area, but also other areas, right, like psychological, like training, a preparation for that person, isn't it, to really face the problem they are going

through... it's a more humane service (PARTICIPANT 5).

4.3 Education and professional trajectories

When questioned about how they are prepared to practice mediation and conciliation, all replied that they had a specific preparatory course within the molds of the CNJ resolution. That is, four participants took the course offered by the Escola Paulista de Magistratura (EPM) and the other the one from Escola Superior de Advocacia (OAB-ESA). These institutions are private, even though they are related to the public power, and are paid by the students or funded by institutional incentives to expand the services.

Regarding the costs for professional advancement, only half of the interviewees reported having any, and one participant stated having a graduate degree in the area. We should point out that all the participants have an undergraduate law degree.

Regarding the time of professional practice, two interviewees have about two years' experience, three have five to six years, and only one has over ten years of experience. This latter participant clarified they have been conducting conciliation since college, during an internship at the forum in 2006. This practice occurred, initially, intuitively, since there were no preparatory courses in the participant's hometown; who took the course when the Cejusc opened.

Additionally, none of the participants declared practicing conciliation and mediation outside a judicial environment; they were limited to the Cejusc and the Special Courts of the region's venues.

4.4 The demands sent to conciliation and mediation

Regarding the demands sent to conciliation and mediation, five out of six interviewees stated that the family proceedings are predominant, especially custody hearings, alimony, divorce, visitation and dissolution of union. Actions of debt collection, in civil procedures, were the second most common. Participants also mentioned neighborhood law actions, traffic accidents and health insurance. Only one participant said there was no difference in the number of family and civil actions.

The sociodemographic profile of the population accessing the service was predominantly low-income, according to five out of six participants. Four people raised the issue of users having no means to hire a lawyer as well as having low levels of education (n = 2), precarious living situations (n = 2), and many children (n = 1). According to three conciliators-mediators, the age range of this population is between 20 and 40 years old. Only one participant denied that there was a specific sociodemographic profile, stating that all the population was serviced, even in middle to low-income classes.

One interesting issue raised by one of the participants was the possibility of identifying new demands during the conciliation and mediation sessions, including demands that are outside the scope of the services offered, and that must be sent to the responsible specialized agencies such as when crimes are reported. Still according to this participant, this openness for dialogue emerges problems that would not show up in a common judiciary. The following excerpt reports this situation:

Sometimes what is generating all that difficulty is something else that they [the user] hadn't noticed yet, so we talk,

listen intently to the person, listen to all sides and, all of a sudden, can identify the problem, which sometimes isn't even alimony. Sometimes, the father is not visiting the child. I think this is important in conciliation, that is why we can, sometimes, take more direct action, better identify what is really happening. Because, sometimes, justice is not a cold, technical lawsuit; the documents reach the judge, child support is late, this is the amount, he [the judge] acts according to the documents, right. And, sometimes, the amount is okay, the person is not unhappy with the amount, sometimes it's not even that late, she [the complainant] is using this tool, these means, to call attention to the other thing the judge will not be able to see, because he doesn't have this conversation with the person, he can't identify it. That's what I think the Cejusc is important for (PARTICIPANT 5).

4.5 The benefits of conciliation and mediation

Participants were asked about the benefits of conciliation and mediation for the institution as well as for the users. For the Judicial Power, all respondents said the greatest benefit is to unburden the judiciary since there are many ongoing lawsuits. Thus, by resolving litigations through self-composition, the proceedings of common justice are "free" to solve more complex cases. Moreover, three participants saw the benefits of resolutions through a joint decision by the parties compared to a judge's sentence. That is, since complying with a decision is related to the satisfaction of the parties, it is more easily reached through

conciliation and mediation resulting, thus, in the end of the dispute and a guarantee that this action will not re-enter the judiciary. Additional benefits mentioned were the low cost and social pacification, since this process values and encourages dialogue, listening and empathy.

Regarding benefits for the parties, four out of six interviewees said that the likelihood of reaching a consensus is the greatest. That is, the possibility of an autonomous decision is a relevant factor for people because it guarantees freedom to express and resolve their litigation in the best way, without imposition from third parties. One of the participants pointed out that the greatest advantage was the speediness of the process, and another also cited the benefit of the reliability of an effective solution.

About this issue, Participant 1 stated:

Look... for the Judiciary it's a wonder. Because the percentage of conflict resolution [...] is about 80 to 90%. [...] I think that the judiciary... it's becoming unburdened, the goal of the CNJ to unburden the judiciary is being fulfilled. Now, for the parties, I think it's interesting because of how quickly you solve something here, child support, a cheque, a quarrel, a disagreement with a neighbor, how quickly you... it takes about 40 days to schedule a hearing at the Cejusc. [...] When can you get this in the normal judicial proceedings? You can't! [...] So, for the party, the main advantage is speediness.

4.6 Difficulties in practice

Participants were asked about their difficulties during their practical professional work. Five out of six immediately said there are no difficulties in the practical aspects but, after,

some pointed out some quandaries. Among them, the issue of bewilderment (emotional reaction) to some of the words and actions of the users. Another interviewee pointed out the emotional involvement with the cases, and one even cited the lack of openness of people towards self-composition, often due to lack of knowledge about the service. Additionally, one said that the greatest difficulty was that the State did not offer enough professional recognition, translated in terms of pay.

Only one of the conciliator-mediators stated having difficulties in conducting the session, such as dealing with some issues and being assertive, however, this was attributed to their little professional experience. The same participant also cited the short time of the sessions and the scarcity of professionals available to conduct the sessions.

4.7 Professional satisfaction

We asked the participants the following questions: What were the results obtained in your practice? Were they successful? Were people satisfied?

All participants replied that their professional practice is successful, and people are satisfied. Three professionals attributed their success to the agreements and their subsequent fulfillment, resulting in the resolution of the problem/conflict. One participant pointed out that their work was accepted and sought after, and another mentioned that people give a positive evaluation at the end of each session. Only one conciliator-mediator said that they don't always reach their desired goals and that they can improve.

When asked about which situations have a better chance of producing good results, three participants mentioned that family cases are the most successful, and another three answered

that the resolution depends on the parties' predisposition for an agreement, that is, when they already arrive at the session with pre-defined intentions. One of the interviewees said this occurs most frequently in the pre-proceedings, while another stated that it's according to the time since the events that generated the dispute.

Finally, we asked the interviewees about their professional satisfaction. Five responded positively and one negatively to the question. The reasons for the positive responses include personal realization for a voluntary service, socialization, learning from differences, helping find an autonomous solution with the parties, and the culture of peace. The negative response pertained to receiving no pay for the work, as shown below:

Not yet, I still don't feel accomplished [...] I would like there to be a remuneration. Because, well, you do voluntary service when it brings you a very personal benefit, like, a stimulus but I consider that nowadays conciliation is a profession, you know? I don't consider it anymore... I don't see it anymore as altruistic, benevolent, you have to go there... I don't consider this anymore, to me it's a profession and I believe it should be paid, I consider this (PARTICIPANT 3).

5. Discussion

Among the interviewed professionals, the predominant conception about conciliation is that it represents a means of conflict resolution, characterized mainly by the possibility of autonomous decision by the parties. This statement matches the prerogatives of Consensual Justice (Genro, 2009; Vasconcelos, 2008). We also noted that most participants

understand the difference between conciliation and mediation as merely theoretical-conceptual, since in practice both methods are intertwined and cannot be separated.

Although there is information in the literature that the main difference between these practices concerns the directivity of the professional's participation and the more frequent application of mediation of disputes between people with continued relationships (Vasconcelos, 2008), only one interviewee mentioned this aspect. Thus, one can see, from the participants' responses, that conciliation and mediation are understood globally and according to the dynamics of the culture of consensus, but are not practiced in a singular way, according to their peculiarities.

This fact leads us to two considerations, one in the form of a hypothesis and the other in the form of a proposal, namely: 1) the non-differentiation in practice and, therefore, in the professional performance of our participants may result from insufficient training and qualification for the qualitative exercise of the function, which certainly requires, in addition to the appropriation of theoretical contents, supervised practices and a constant process of assessment of the performance, preferably in a shared manner (for example, among groups of continuing education and/or studies); 2) a research with participants (target audience) that were benefited by the practice of conciliation and/or mediation in the Judicial Centers for Conflict Resolution and Citizenship (Cejusc) could help us assess whether, in the reported cases, the methodology used was conciliation or mediation, as well as how efficient they were and how close or distant they were to their concept. In addition, the study stressed that all participants hold a law degree and that, unlike psychologists, they were not prepared to identify certain relational and intersubjective aspects relevant to human phenomena such as

disputes and relational difficulties. Thus, they require conciliation and mediation courses that teach them to identify demands from a theoretical and practical point of view.

When describing the service offered by the Cejusc, it was evident that conciliators and mediators regard the institution as a means of promoting the right of access to justice, due to the ease in filing a lawsuit and the quality of the service. We found that among these professionals, Cejusc has great credibility and is effective. Thus, this paper demonstrated that consensual means of settling disputes are in fact a way of overcoming the “crisis in justice” and expanding access to people with low-income, enforcing rights that are constitutionally guaranteed, that is, the effective access to justice and procedural promptness (Silva, Santos, & Santos, 2020).

Another point raised was that of limiting the professional performance of conciliators and mediators to the scope of justice. The reality revealed in this study demonstrates that these practices are still not widespread in society, making us aware about the need to expand this model of conflict management beyond the judiciary, so that the pacification of social relations is achieved. According to Silva and Lângaro (2014), mediation presupposes a new culture, acting as a tool capable of recovering the fundamental dimension of citizenship, to the point of making the subject go from being an individual, passive, apathetic and dependent on the judiciary, to a true citizen, active, solidary and co-responsible, by participating and dealing with their conflicts. Thus, through an ethics based on inclusion, on non-violent communication and on social responsibility, the mediation paradigm institutes a concept of active democracy, which causes the empowerment and emancipation of citizens and the community to pacify conflicts.

Furthermore, such jobs are mainly fulfilled by law operators, such as lawyers. However, as dictated by Law n. 13140/2015, Art. 11, any capable person, with a degree obtained for at least two years, from an institution recognized by the Ministry of Education, in any area of knowledge, can act as a judicial mediator, provided that such individual has obtained instruction at a legally recognized training institution for mediators, following the terms established by the CNJ (Brasil, 2015).

The majority – i.e. five of the six conciliators and mediators who were interviewed – said they had less than six years of experience in this area, demonstrating that changes in the judiciary still need to mature, but that they have somehow reached the forensic academy. Therefore, there is an urgent need for dissemination so that professionals from other areas, such as social service, legal psychology, education, business administration, etc., join the group of people working in conciliation and mediation, adding their knowledge.

Regarding professional qualification, this study showed that the higher education in magistracy and advocacy are the most sought after, but only half of the participants were concerned about improving their knowledge. Thus, institutional stimuli are needed so that the conciliators and mediators can update their knowledge to maintain good performance. Such stimuli may come in the form of more adequate organizational support (Fleury, Formiga, Souza, & Souza, 2017; Moreira, Oliveira, Lopes, & Pantoja, 2018) which, in addition to providing the physical and material structure for the professional activity, also promotes training, development and continuing education processes. These can favor improvement and sharing of experiences, in order to enrich the technical repertoire of

conciliators and mediators, as well as new interpersonal skills and competences (Goulart Jr., Camargo, & Moreira, 2019), which may favor a more successful and humanized performance.

Another form of organizational support is offering a more attractive system of rewards and professional recognition, either through adequate payment or through the tangible and intangible valuation of professionals (Gonçalves, Corrêa, Santos, & Machado, 2016). Tangible appreciation means material rewards, in the form of bonuses, wage increases proportional to the period of employment or due to professional training. Intangible valuation, on the other hand, means the set of forms of recognition at work that take place in relational and/or subjective realms, such as: status and respect that the position and its occupant receive in the organizational/institutional structure, praise from superiors, public tributes, promotions to positions of greater responsibility and leadership, institutional and social enhancement of the professional activity etc. Payment linked to the percentage of the value of the claim, planned in some sectors of the judiciary in the capital is questionable and must be carefully evaluated. That is a common practice in the legal profession and has generated abuse by some as well as widening the gap between operators and the rights the people with whom mediators and conciliators should empathize.

The study conveyed that the main claims sent to the mediation and conciliation services are family claims. This raises the importance of professional preparation for conducting the work, since the mediator/conciliator will deal with ongoing interpersonal and intra-family relationships. In addition, there is a need for educational measures of a familiar nature in each institution, such as parenting workshops

aiming to provide autonomy and awareness to users. Moreover, we found that most people who search for the service are in a situation of social vulnerability, i.e., people with low income, low education levels and in precarious housing conditions. This demonstrates that alternative means of dispute resolution have expanded access to justice, by including those that were outside the traditional system, as stated by Genro (2009). In this sense, mediators and conciliators need to be very careful in order to avoid spreading the idea that people cannot demand a court ruling whenever they do not feel satisfied by mediation or conciliation. The speediness and low costs of the action cannot determine the outcome of the dispute.

Based on the accounts of the research participants, we also found that everyone rated the relief of the Courts as the main benefit of conciliation and mediation for the institution. Thus, contrary to what Silva, Santos and Santos (2020) assert, the agenda of social pacification can still be regarded as the backdrop for changes in the judiciary, since in the institutional imaginary, self-composing means are just one of the solutions for the judicial crisis. Regarding the benefits for the parties, most interviewees answered that the possibility of consensus is the greatest one. Thus, we can observe an appreciation of the culture of consensus, in which decision-making power leaves the hands of a third party (judge-State) and returns to the participants in the process, giving them autonomy to settle their disputes, as stated by the previously-mentioned authors.

The greatest difficulty observed by the professionals participating in our study concerned the way of dealing with the emotional content of the participants in the conciliation and mediation sessions. Whether due to the impact of how the parties speak,

which sometimes bewilder the professionals, or due to affective involvement, this study demonstrated that professionals in this field should be granted training, guidance, supervision and psychological support to act, or even that psychologists should be encouraged to act as conciliators and mediators. Even if the focus of the session is the discussion of material interests, emotional and psychological issues are at stake and must be duly addressed.

Finally, all the interviewees rated themselves as successful in their work and professionally self-fulfilled, except for one. Most linked this positivity to the fact that they are carrying out a voluntary service, aimed at helping people. Hence the humanizing aspect of Law proved to be a driving force for action, thus strengthening the culture of consensus, which also aims to empower people so that they take autonomous decisions. The only participant who declared himself dissatisfied pointed out the lack of payment as a cause of dissatisfaction, and another participant cited the lack of recognition by the State as a difficulty for the practice. Such narratives highlight that the judiciary must review the payment policy for conciliators and mediators, as well as the type of organizational support offered, to keep them practicing and disseminating the consensual means of settling disputes, professionally and with the possibility of improvement and continued skill development.

6. Conclusions

We concluded that alternative means of settling conflicts represent a good alternative to the “crisis in justice”, with conciliation and mediation as appropriate means of resolving disputes, which have similarities, but also differences. This crisis concerns the large

volume of lawsuits in the Courts, which cause litigiousness and delays within the Brazilian justice, consequences of a culture of court rulings. Recently, a Consensual Justice model has been implemented in the country, which aims to promote conflict resolution between the parties themselves, making the right of access to justice effective with greater participation by those who are in dispute. Conciliation and mediation are characterized as non-hierarchical methods of dispute resolution, in which the parties, with the collaboration of a third party, expose the problem and, based on a constructive dialogue, seek to identify common interests and possibly sign an agreement. Agreement is one of conciliation’s main goals. Mediation, in contrast, focuses on the participation and strengthening of people and their relationships, which can foster understanding.

We found that the research participants understand conciliation as present in the literature, however they do not make the proper distinction from mediation in daily professional practice. In addition, the interviewees regard the Judicial Centers for Conflict Resolution and Citizenship as promoters of the right of access to justice, due to the ease in proposing the measure and the quality of the service provided. We also noted that such an institution includes socially vulnerable people. The greatest difficulty in practice, as observed by the professionals, pertains to dealing with the emotional content of the participants in the conciliation-mediation sessions. However, most of them consider themselves successful and professionally satisfied.

Finally, this study showed a need for institutional incentives for conciliators and mediators to attend professional development courses, as well as to prepare them psychologically for the type of work,

especially in family claims. In addition, the judiciary should review the payment policy and working conditions of conciliators and mediators to make them feel more legitimated

as professionals and continue practicing and disseminating consensual means of settling disputes.

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SOBRE LOS AUTORES ▶ ABOUT THE AUTHORS

Letícia Cardoso de Oliveira - Estudiante de Psicología de la Facultad de Ciencias de la Unesp - Universidad Estadual Paulista "Júlio de Mesquita Filho", Campus Bauru. Realizó una pasantía profesional en el Centro Judicial de Solución de Conflictos y Ciudadanía en un distrito del Estado de São Paulo, Brasil. Es funcionaria con examen público en el Municipio de Bauru, São Paulo, Brasil.

Mário Lázaro Camargo – Psicólogo. Tiene una maestría en Psicología y Sociedad de la Unesp - Universidad Estadual Paulista "Júlio de Mesquita Filho" y un doctorado en Psicología de la USP - Universidad de São Paulo. Se desempeña como Profesor Asistente en el Departamento de Psicología y en el Programa de Posgrado en Psicología del Desarrollo y el Aprendizaje de la Facultad de Ciencias de la Unesp, Campus Bauru, São Paulo, Brasil. Es miembro del Grupo de Investigación CNPq-Unesp "Psicología Organizacional y del Trabajo" y de LaborPOT - Laboratorio de Psicología Organizacional y del Trabajo (Unesp-FC).

Marianne Ramos Feijó. Psicóloga. Tiene una maestría y un doctorado en Psicología por la PUC – Pontificia Universidad Católica de São Paulo. Se desempeña como Profesora Asistente en el Departamento de Psicología y en el Programa de Posgrado en Psicología del Desarrollo y el Aprendizaje de la Facultad de Ciencias de la Unesp - Universidad Estadual Paulista "Júlio de Mesquita Filho", Recinto de Bauru, São Paulo, Brasil. Es miembro del Grupo de Investigación CNPq-Unesp "Psicología Organizacional y del Trabajo" y de LaborPOT - Laboratorio de Psicología Organizacional y del Trabajo (Unesp-FC).