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Alternative dispute resolution methods as mechanisms for simplification, procedural expediency, and access to justice

Métodos alternativos de solución de conflictos como mecanismos para la simplificación, celeridad y acceso a la justicia

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ABSTRACT

The article aimed to analyse alternative dispute resolution methods as mechanisms for simplifying and expediting direct access to justice. The study adopted a qualitative methodology grounded in a hermeneutic approach. The findings revealed that when citizens are aware of the benefits of mediation as an alternative dispute resolution (ADR) mechanism, it naturally fosters patterns of thought and action that contribute to the development of a culture of peace. Furthermore, it was determined that the principles of simplification and procedural expediency within mediation processes play a pivotal role in ensuring direct access to justice. By minimising bureaucratic and judicial formalities, mediation helps reduce congestion within the Ecuadorian judicial system, while simultaneously strengthening the constitutional right to effective judicial protection.

Descriptors: international law; international tribunals; dispute resolution. (Source: UNESCO Thesaurus).

RESUMEN

El artículo tuvo como objetivo analizar los métodos alternativos de solución de conflictos como mecanismos de simplificación y celeridad de acceso directo a la justicia. La metodología empleada con un enfoque cualitativo en base a la hermenéutica. Se evidenció que cuando la ciudadanía conoce los beneficios de utilizar la mediación como un MASC, automáticamente genera una forma de pensamiento y acción, que da como resultado la construcción de una cultura de paz, se determinó que el principio de simplificación y celeridad en los procesos de mediación juegan un papel trascendental si de acceso directo a la justicia se refiere, ya que al minimizar todo trámite burocrático y judicial permite que la congestión del sistema judicial ecuatoriano reduzca, obteniendo a su vez como resultado que se garantice el derecho constitucional a la tutela judicial efectiva.

Descriptores: derecho internacional; tribunal internacional; solución de conflictos. (Fuente: Tesauro UNESCO).

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Research Articles Section

INTRODUCTION

Contemporary society is widely regarded as complex and subject to an accelerated pace of life, in which the methods commonly used to resolve conflicts are, without question, far from adequate, relying instead on primitive, destructive, and costly techniques that produce considerable emotional, economic, and family strain. This research therefore focuses on mediation as the most effective alternative dispute resolution method for preventing, managing, and resolving controversies, one that relies principally on dialogue, respect, tolerance, and recognition of the parties involved.

Given that it is a swift and effective method of resolving disputes, mediation can be seen to be intrinsically linked to the principles of simplification and procedural expediency that form part of the General Theory of Law. Consequently, building a fairer country with lower rates of violence requires a paradigm shift centred on a "culture of peace," which becomes attainable only when mediation is used as an Alternative Dispute Resolution Method (hereinafter ADR) that is more constructive, more participatory, more humane, faster, and less costly, thereby yielding more effective responses for the construction of a new social reality. It should be borne in mind that the principles of simplification and procedural expediency within the mediation procedure play a highly significant role in decongesting the judicial system.

The social or legal problem motivating this scientific article, then, is whether these ADR mechanisms, specifically the mediation procedure, apply the principles of simplification and procedural expediency in such a way that they become known to the general population, allowing citizens to recognise the uses, advantages, and countless positive aspects associated with this procedure.

Accordingly, the outcomes this study seeks to achieve are that ADR mechanisms such as mediation be recognised nationally as one of the most effective alternatives for the effective fulfilment of the principles of simplification and procedural expediency, thereby guaranteeing direct access to justice. The relevance of ADR mechanisms, moreover, lies in their promptness, agility, economy, flexibility, and,

above all, in their preservation of the interpersonal relationships between the parties involved in the process.

The legal problem addressed by this scientific article is thus described as follows: within the Ecuadorian context, ADR mechanisms, as instruments of simplification and procedural expediency, directly materialise access to justice and, in doing so, evidently strengthen a right or jurisdictional guarantee, depending on the specific area involved.

It is therefore necessary to recognise how ADR mechanisms, in this case mediation, function as instruments of simplification and procedural expediency that substantially help minimise case congestion within the ordinary judicial system. As described above, ADR mechanisms are agile, lightweight, and rapid methods for resolving disputes, meaning that they save time relative to ordinary judicial proceedings; however, these methods are not yet fully recognised.

The research set out in this scientific article therefore centres on the following problem: How do Alternative Dispute Resolution Methods, through the principles of simplification and procedural expediency, guarantee direct access to justice?

In order to answer this question, the objective adopted was to analyse alternative dispute resolution methods as mechanisms of simplification and procedural expediency for direct access to justice.

METHOD

With regard to the methodological aspect, it should be noted that a qualitative approach was adopted; it is worth recalling that this approach "is oriented more towards an in-depth description of the phenomenon with a view to understanding and explaining it through the application of methods and techniques derived from its epistemic conceptions and foundations, such as hermeneutics, phenomenology, and the inductive method" (Sánchez, 2019, p. 104).

In this case, the present study was built around hermeneutics and the inductive method. Likewise, use was made of the socio-legal method which, in accordance with Tantaleán (2016), seeks to "understand why we are as we are or why we have arrived where we have arrived, for which reason a more accessible label is that of an 'evolutionary study'" (p. 27).

Along the same lines, the state-of-the-art method was used which, according to Uribe (2005), as cited by Patiño (2016), "makes it possible to reveal the dynamics through which the description, explanation, or understanding of the phenomenon under study, and the construction of knowledge about the accumulated body of learning, have developed. It is, moreover, a basic and indispensable element for defining and structuring research" (p. 169).

RESULTS

To begin building the theoretical foundation regarding Alternative Dispute Resolution Methods, it is first necessary to understand what conflict is, since, according to Pruitt, Rubin, and Kim, as cited by Jorge Zalles (2020, p. 25), it "...means a perceived divergence of interests, or the belief that the parties' current aspirations cannot be simultaneously satisfied."

This definition likewise encompasses several elements: first, it refers to "perception" and "belief," suggesting that conflict is, to a large extent, a psychological reality existing in people's minds. Second, the definition refers to "current aspirations," which, according to Zalles, differ from mere wishes or dreams. Finally, the word "simultaneously" refers to the group of individuals or parties who share the same desire to satisfy a given need without hindering (thereby generating a conflict) the goals of the other party or parties (Zalles, 2020).

Coser (1961), for his part, notes that "conflict serves to maintain relationships by releasing pent-up feelings of hostility." Along the same argumentative line, Vargas (2018, p. 43) states that "conflict sets the boundaries of and between groups, generating greater internal cohesion. Through the 'repulsion' it institutes, conflict allows for the stability of the overall social system."

In light of the foregoing, Max Weber, as cited by Aronson P. (2008, p. 110), explains that "conflict (...) cannot be excluded from cultural life. Its means, its object, even its fundamental orientation and its protagonists may be altered, but it cannot be eliminated." Precisely because it cannot be excluded from cultural life, Kaye (1994, p. 21) notes that "conflict means opportunity; it gives us reasons to stop doing the same things and thinking in the same way. When conflict strikes, an opportunity is

created to exceed our own expectations." París (2009), as cited by Castro Álvarez F. (2018), states in turn that:

> In the search for alternatives, this learning is transmitted with the aim of building a world grounded in the values of peace, one that guides us towards the end of violence and that transforms into the beginning of a spiral of peace, ultimately aiming at the creation of a culture of peace. (p. 65).

Along the same lines, Colunga (2022) indicates that the objective of a culture of peace is to ensure that the conflicts inherent in human relationships are resolved non-violently, on the basis of the traditional values of peace. Reinforcing this point, other authors such as Hernández Arteaga, Luna Hernández, and Cadena Chala (2017) note in their review article that a culture of peace amounts to a process of strengthening the way in which the world is seen, understood, and lived, while also requiring that human beings develop fully and integrally, without eliminating conflicts, since these are precisely what allow cultural interaction to take place without being regarded as obstacles or difficulties for that culture of peace.

Relating this to what Aronson notes concerning Max Weber (1982), conflict cannot be eliminated because it is inherent to human nature; States must nevertheless provide for the creation of norms and public policies that regulate peaceful coexistence among their citizens in order to secure it, and, more importantly, must create mechanisms that give effect to those norms, that is, that protect these rights. What has long been understood, then, is that the only means of enforcing such norms and public policies has been the mechanism of ordinary judicial proceedings, that is, the traditional route; however, the emergence of a culture of peace has given impetus to the use of alternative dispute resolution methods in matters open to settlement. On this point, Lacayo (2000), as cited by Colunga (2022), states that:

> The vision of a culture of peace presupposes a form of sociocultural coexistence characterised by the lived experience of human rights, as well as by sustainable development and human development, justice, respect for differences, democracy, relations with nature, and solidarity. (p. 5)

When it comes to discussing peace, Hernández Arteaga, Luna Hernández, and Cadena Chala (2017) establish that peace forms part of Universal Human Rights, which, in a broader context, Gutiérrez Felipe and Arango Morales (2019, p. 134) explain to be "...the set of rights and freedoms, of universal legal standing, that

protect individuals and groups against acts and omissions that interfere with the enjoyment of human dignity (...)." Nevertheless, these rights continue to be violated, disrupted, and permanently curtailed across time and in different parts of the world. Strengthening peace as a human right therefore requires acknowledging that the construction of that culture of peace is a generational process connected to the use of ADR mechanisms (González, Hernández, & Martínez, 2021); in keeping with that connection, the United Nations (UN) strategically promotes the 17 Sustainable Development Goals (SDGs) in order to bring about a decisive change to the contentious world around us. Among these goals, particular attention should be paid to Goal 16, which establishes: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels." (United Nations (UN), 2015)

Ecuador's legal system holds, as a supreme norm, the guarantee of Sumak Kawsay or Buen Vivir (Good Living), which, according to Figuera Vargas and Cujilema Quinchuela (2018, p. 53), is "a full, balanced, healthy, harmonious, and modest way of life, at both the individual and social levels." Along these lines, Article 275 of the Constitution establishes that the development regime, through national development planning, the pursuit of the development regime's objectives, and the principles enshrined in the Constitution, guarantee the realisation of Buen Vivir or Sumak Kawsay. (Constituent National Assembly, 2008)

In other words, the 2021–2025 Opportunity Creation Plan, approved on 20 September 2021, being the highest political and administrative guideline for designing and implementing public policy in Ecuador, and the robust instrument that will allow the country to improve its quality of life and achieve adequate levels of development (2021), must be aligned with the Sustainable Development Goals (SDGs) (2015).

With regard to the preceding point, the procedural principles of law enshrined in the Constitution are those of simplification, uniformity, effectiveness, publicity, immediacy, procedural expediency, and procedural economy, established in Article 169 (2008); accordingly, Garrido (2016), as cited by Jarama C., Vásquez Ch., and Durán O. (2019, p. 315), explains that "the procedural system is a means for the administration of justice; its rules rest on the principles of simplification, uniformity,

effectiveness, immediacy, procedural expediency, and procedural economy, so as to render the guarantees of due process effective," yet it is specifically through simplification and procedural expediency that Alternative Dispute Resolution Methods become viable, and that also give rise to the construction of a culture of peace.

Consequently, this research centres on the principles of procedural expediency and simplification. On this point, Cevallos and Litardo (2018) note that the principle of procedural expediency:

> Refers to a constitutional principle that, in procedural matters, is associated with judicial efficiency and effectiveness in delivering timely justice without delays (...); this means that the oral system must protect the rights underpinned by the National Plan for Good Living. (p. 252)

Along the same lines, Méndez (2000) states with respect to procedural expediency that:

> It is perhaps here that the greatest problems or barriers to adequate and effective access to justice are found, owing to State inaction or lack of interest in swiftly identifying, together with it, the other fundamental and derivative rights whose violation is being claimed. (p. 18)

Couture (1961), as cited by Cevallos and Litardo (2018), refers to the principle of simplification by noting that "in proceedings, time is not gold, but justice," whereby the efficiency, quality, and effectiveness of the oral system must increase citizens' trust in the bodies administering justice through simplification, the elimination of unnecessary procedures, and the shortening of judicial proceedings. Consequently, these principles enable the use of alternative dispute resolution methods, a mechanism processed through informal justice, also known as alternative justice, which Mondragón (2007), as cited by Nava and Breceda (2017, p. 209), defines as a "procedural structure distinct from the jurisdictional one, which seeks the resolution of disputes or conflicts between private parties through ADR mechanisms, including mediation, conciliation, negotiation, and arbitration."

Similarly, Cabrera Dircio and Aguilera Durán (2019) note that:

> ...alternative justice arises as a response to the demand of a society deeply harmed by the manner of resolving disputes implemented by traditional justice, since jurisdictional authorities base their decisions on a method that is becoming increasingly difficult to determine (...). (p. 247)

Furthermore, González, Hernández, and Martínez (2021) state that the flexibility of alternative justice means that the management of a conflict by the parties involved need not fall solely within institutional, that is, ordinary, jurisdiction, but that the conflict's resolution may instead take place in various settings depending on its nature or the matter open to settlement. This, following Cárdenas (2017, p. 1631), aims to "allow greater citizen participation in dispute resolution, a reduction of social tensions, and thereby an improvement in social relations and quality of life." Regarding the foregoing, Cossio (2003, p. 3) defines ADR mechanisms as "tools that are increasingly used to resolve disputes amicably, without the need to resort to adversarial means such as arbitration and litigation." Continuing with the theoretical grounding of ADR mechanisms, the United Nations (2009), as cited by Amaya and Juanes (2020), notes that:

> Alternative Dispute Resolution Methods are procedures recognised in the legislation of most States as instruments or procedures conducted outside courts or tribunals, as applicable. (p. 521) This is the case in Ecuador, whose Constitution recognises Alternative Dispute Resolution Methods in Article 190.

It is also worth citing Cobo Ordóñez and Mesías Vela (2018), who establish that ADR mechanisms:

> ...arise in response to society's serious and genuine need to find other tools that, swiftly and effectively, allow the parties to reach an agreement without having to resort to ordinary justice." And that "to that end, each country has adopted its own approach to dispute resolution, and the way each State facilitates that process varies according to its legal culture." (p. 38)

Consistent with what these authors note, they further point out that, in Ecuador:

> In the 1990s, owing to the extensive international development of arbitration, the need arose to develop legislation on ADR mechanisms (...). Accordingly, the Arbitration and Mediation Act (LAM) was enacted in 1997, its fundamental premise being to prioritise and guarantee alternative dispute resolution methods. (p. 39)

Thus, in accordance with the citations above, the UN (2009) establishes that:

> ...among the alternative dispute resolution procedures are conciliation, mediation, and arbitration, which are classified into consensual (self-determined) and adjudicative (third-party-determined) forms, characterised

> as instruments that largely depend on the will of the parties involved, whether for their initiation, processing, or even their conclusion. (United Nations (UN), 2009, as cited by Amaya & Juanes, 2020, p. 521)

Regarding the consensual and adjudicative forms mentioned above, Osorio (2021) discusses them in terms of voluntariness, stating that this refers to the exercise of individuals' will as to where and how they wish to resolve their conflicts, whether through a consensual form (submitting to mediation) or an adjudicative form (through ordinary proceedings, the most common route). Among the ADR mechanisms mentioned by the UN, it is mediation, being a consensual procedure, that warrants examination here; accordingly, Palacios-Xochipa (2020, p. 29) establishes that "mediation, considered an ADR mechanism, fulfils the function of managing conflicts, also known as resolving a conflict." Silva Idrovo, Pino Moran, and López Vera (2020), for their part, determine that mediation:

> ...is a form of dispute resolution actively encouraged by the courts (...), instead of proceeding through formal judicial procedures, and is often preferred by disputing parties as a far more efficient means of resolution, saving costs and time for all interested parties as well as for the judicial system. (p. 188)

We next find the definition offered by Lagos and Bravo (2020, p. 211), who note that "mediation is a non-adversarial procedure whose objective is that, through direct communication between the parties and with the intervention of a mediator, they reach an out-of-court agreement regarding a dispute." The Arbitration and Mediation Act (2006) further establishes that mediation is:

> Art. 43.- ...a dispute resolution procedure whereby the parties, assisted by a neutral third party known as the mediator, seek a voluntary agreement concerning a matter open to settlement, of an out-of-court and final nature, that brings the conflict to an end. (p. 16)

To reinforce the argument that mediation is, without question, one of the most effective mechanisms for decongesting the judicial system, through the simplification of bureaucratic processes and the expediency of these processes, it is relevant to cite Valdez Adaya and Cardenas Cabello (2022), who affirm that:

> Mediation is a useful tool for reducing the workload of overburdened jurisdictional bodies. Hence the importance of consolidating it as a

> mechanism for access to justice, as established by various legal systems. (p. 60)

That said, Castillo and Bautista (2018), as cited in Gutiérrez and Chávez (2020), state that:

> Access to justice is, without question, a human right that guarantees every person the means through which they can find a way to resolve the everyday difficulties arising from a conflict. (p. 3)

According to García Mero and Celi Toledo (2021, p. 211), this right "...must be guaranteed by the State under all circumstances, in accordance with the Constitution and international human rights treaties." The authors note, however, that the present reality is that the ordinary justice system in various countries has been overwhelmed as a means of resolving conflicts owing to the high demand and accumulation of disputes, thereby generating delay and congestion in the administration of justice. Riveros et al. (2019, p. 999) accordingly indicate that "the slowness of proceedings, their excessive formalism, and their overly adversarial character stand as the defining features of an anachronistic, depersonalised, and elitist form of justice."

With respect to this difficulty, the authors establish that the principal objective of ADR mechanisms is to bring about a paradigm shift in the handling of disputes and the administration of justice, in addition to achieving the decongestion of the ordinary judicial system. (Silva Gutiérrez & Chávez Meléndez, 2020)

Now, the evaluative and normative structure of human rights acquires effectiveness and validity only from the moment such rights are effectively resolved by jurisdictional bodies through the relevant procedural mechanisms; however, if the system's operators are not prepared, jurisdictional institutions will fail to fulfil their purpose, condemning the entire body of human rights doctrine and the legislation implementing it for its effective force to failure or congestion. (Méndez, 2000)

The current state of the administration of justice in Latin America therefore generates considerable frustration, specifically with regard to the congestion of judicial systems, since no response exists that is consistent with the principles of procedural expediency, effectiveness, and efficiency; this, however, favours initiatives aimed at strengthening the judicial branch through judicial modernisation, offering a significant opportunity for the use of alternative methods, since it is within the

field of the administration of justice that the force of fundamental rights in contemporary societies is defined. (Méndez, 2000). Accordingly, as Méndez (2000) notes:

> The issue of access to justice is not a recently emerged problem. It is a concept that has undergone profound transformations since the eighteenth and nineteenth centuries, moving from a mere declaration of the possibility of defending individual rights to a conception involving the State's duty to provide a public service... (p. 18)

In this vein, Illera Santo (2022, p. 251) states the following: "...whenever a conflict exists, the State must always guarantee that the parties can access formal and informal justice for its resolution, with all the corresponding legal effects (...)." Along the same lines, Ramírez Torrado and Illera Santos (2018, p. 92) affirm that "the resolution of conflicts is achieved not only through the formal and final pronouncements of a judge of the Republic, but also through private individuals acting as facilitators (conciliators) or decision-makers (arbitrators)." With reference to ADR mechanisms, mediators are likewise included among those responsible for guaranteeing direct access to justice.

Analysis and Interpretation of the Results

It is worth noting that Ecuador is a constitutional State of rights and justice and, therefore, a rights-guaranteeing State whose principal objectives in the field of justice include guaranteeing the fundamental rights of its citizens, among which is the right to effective judicial protection. Consistent with this, the Constitution itself establishes in Article 75 that, in every proceeding determining rights and obligations of any kind, the right to due process shall be ensured, a constitutional right directly linked to the procedural principles established in Article 169.

It has nevertheless been observed that, over time, the State, specifically the judicial branch, has failed to give effect to and guarantee the right to effective judicial protection. In countless situations, this right is subject to constant infringement, thereby preventing individuals from accessing effective judicial protection, entailing the considerable physical, emotional, psychological, and economic toll that an exhausting, archaic judicial process brings with it, and, above all, affecting what is

most valuable to a human being: time, and the need for a reasoned response grounded in law.

There are, however, various mechanisms available to prevent this legal problem from continuing to occur; the answer lies in the fact that the Constitution itself points to, and, above all, permits the use of procedural principles of law that function as guidelines for a proceeding, among which are those of simplification and procedural expediency. The Constitution likewise establishes the use of Alternative Dispute Resolution Methods as a viable solution, yet the question remains: How do Alternative Dispute Resolution Methods, through the principles of simplification and procedural expediency, guarantee direct access to justice?

As a result, it was evidenced that genuine decongestion of the Ecuadorian judicial system will indeed occur when these alternative dispute resolution methods are used, and that this strengthening of the right to direct access to justice will be underpinned by the principles of procedural expediency and simplification, which operate from two distinct perspectives yet are given effect jointly.

In the first place, the principle of procedural expediency helps eliminate unnecessary procedures and shorten judicial proceedings; secondly, the principle of simplification allows for prompt resolutions of proceedings, provided these concern matters open to settlement.

Nevertheless, despite the existence of constitutional and legal grounds that orient and guide the use of these mechanisms, genuine judicial decongestion simply fails to materialise. This is due to a great many causes, such as citizens' lack of awareness, scant publicity, limited information and guidance regarding these procedures, and, above all, minimal advice provided by legal professionals in these areas. This means that the Ecuadorian judicial system is perpetually left to accumulate proceedings and cases that go unattended within an optimal and reasonable timeframe.

Consequently, this problem affects not only those involved in such judicial proceedings but, in the long run, also affects the State itself and the Sustainable Development Goals, which aim to promote peaceful and inclusive societies for development, facilitate access to justice, and build effective institutions (2015), as

well as the culture of peace, which presupposes a form of sociocultural coexistence characterised by the lived experience of human rights.

CONCLUSION

It may be concluded that the large number of social conflicts present in society at large has directly affected the caseload of ordinary judicial systems, to such an extent that, owing to this heavy caseload, judicial proceedings are not resolved optimally, thereby affecting the right to direct access to justice. For this reason, Alternative Dispute Resolution Methods are tools that lead to the resolution of these same conflicts, but effectively and, above all, in a simplified manner; as noted earlier with reference to the principle of simplification, they avoid placing these unnecessary burdens on the judicial system as such, and they strengthen the right to effective judicial protection and to direct access to justice.

It is therefore concluded by underscoring the importance of these alternative dispute resolution mechanisms, since, as legal professionals, we must promote and disseminate mediation procedures in order to resolve the disputes arising in society, particularly across the various legal areas concerning matters open to settlement. It should also be taken into account that these mechanisms no longer call for litigants, but rather for problem-solvers oriented towards giving an effective and simplified sense to the resolution of a matter, as is the case with ADR mechanisms.

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