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Prejudicial Conflict Mediation, an Alternative Solution to Alleviate the Civil Procedural Burden of the Ecuadorian Justice

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Abstract

Today, pre-trial mediation of conflicts as an alternative solution to alleviate the civil procedural burden of Ecuadorian justice, a situation that leads to changes in the civil code, civil procedure code and the organic code of the judicial function. Among the problems that cause the conglomeration of the civil procedural burden in Ecuadorian justice, is the judicialization of all conflicts, the complex norms and procedures and the lack of offer of other alternative means of conflict resolution that is fast, efficient, and effective. The objective of the investigation was to know the viability of pre-trial mediation as an efficient, immediate, fast alternative mechanism, with procedural economy, in conflict resolution, to alleviate the civil procedural burden of the Ecuadorian judicial system and the full satisfaction of the parties. The applied methodology had a non-experimental, quantitative, cross-sectional, and descriptive design, using an instrument that generated results where it can be found that, according to the explorations carried out on pre-trial mediation of conflicts, it can be determined that most legal professionals and authorities, argue that this way of resolving conflicts would help to relieve the civil procedural burden of the courts.

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1 Introduction

The research was developed in order to present the various approaches that, from an axiological and humanist vision, based on the philosophy that the Ecuadorian Judicial System, is dealing with the crisis of a saturated procedural load, with procedural rules that cause wear and tear on lawyers, officials, and the parties; in short, a slow and expensive process. All of this leads to the fact that those who have litigious problems are sometimes unable to go to court or choose not to do so. In both cases, the result is the dissatisfaction of the users in the face of the insufficiencies of the timely dispatch of the cases in dispute entrusted to the judicial system of the State. Hence, the pre-trial mediation of conflicts constitutes one of the alternative mechanisms of very important conflict resolution; because it would be able to satisfy the aspirations of the parties after solving a dispute, it would help to alleviate the civil procedural burden, conflicts can be resolved in a culture of peace, fair for the parties, accessible, fast, less expensive or of cost foreseeable; It would comply with the principles of speed, immediacy, suitability, and reliability.

In general, taking into account that mediation is not an alternative to replace inefficient state justice; but, for its better development, it needs an effective state justice; but that the intrinsic value of an open alternative for those who wish to resort to it must be taken into account (Alvarez, 2018), he stated that, like all work produced by human beings, it must maintain certain errors that have been inadvertently committed, however , the best effort has been made to reverse everything that the Private University of Loja has forged in me; In any case, I hope that this work becomes the benchmark for instilling a culture of peace in future generations. The importance of procedural theory the conciliation procedure has an eminently procedural nature; because in many countries conciliation has been established as a mandatory stage prior to trial, therefore, if mediation corresponds to a stage of the process as a requirement to initiate a judicial process, then the legal nature must be procedural (Castaño Ríos et al., 2021).

Another possibility of this theory is to configure an intermediate model between a public service and a private one, comparable to the figure of the Notary; therefore, the mediator could be recognized with a status like that of the notary, the reason would not be so much public faith, but guarantees, thus avoiding the existing risks as the mediator is an exclusively private professional. Although different authors consider that the success of the jurisdictional function of individuals who act as arbitrators or conciliators allowed strengthening the use of alternative means of conflict resolution as legal institutions that citizens have at their disposal to resolve conflicts, without the need for a ruling. judicial. Mediation comes from the Latin word interventus and more properly from the aphorism in medio situm ese or mediatio, this is an expanded negotiation, an assisted or directed negotiation; that is, it is a conflict resolution technique created by an impartial third party called a mediator (Wilde & Gaibrois, 1994; Quinaluiza & Carolina, 2017).

Mediation is an "Out-of-court conflict resolution mechanism, generally prior to the judicial instance"; Hence (Goldstein, 2008), in his dictionary, he defines mediation as a process through which a conflict is resolved outside the courts; that is to say, ordinary justice would not have joint and several responsibilities even worse direct in the solution of the solved problem, therefore, the execution of the act of mediation would be subject to the will of the judges; a situation that up to now has had serious consequences, when there are magistrates who do not enforce what is resolved in the mediation act and start a new legal process, which disqualifies the written agreement reached by the parties in a mediation center.

Cabanellas refers that mediation is "Appeasement, real or attempted, in a dispute, conflict or fight." The definition that is very broad, since it is possible to put the parties that are facing a conflict at peace, in different ways, such as through the Law itself, issuing some exhortations to the parties, or through what are commonly called godparents, therefore, appeasement does not necessarily put an end to a conflict (Cabanellas & Cabanellas, 1979). state that mediation "is a means or procedure by which an impartial third person called a mediator facilitates or makes possible the dialogue between two people or more parties that are involved in a controversy or dispute, seeking the formation of a voluntary agreement based on to the decisions and interests of the disputants themselves" (Vintimilla & Santiago, 2005).

These authors clarify the definition of conflict mediation a little more, since the essence of mediation is to seek that the parties in conflict reach a voluntary agreement in the solution of the conflict, either by ceding certain interests and gaining others; but ultimately, once the conflict is resolved, they want them to live as true friends and neighbors without resentment and in healthy harmony, a situation that cannot be won with the cumbersome and bureaucratic process that is carried out through ordinary justice, since here , the opinions of the judges always favor some and harm others; that is to say, at the end of a dispute there are losers and winners.

The Ecuadorian Arbitration and Measurement Law defines mediation as “a conflict resolution procedure by which the parties, assisted by a neutral third party called a mediator, seek a voluntary agreement, to be dealt with on transmissible matters, of an extrajudicial and definitive nature, that puts an end to the conflict" (Judiciatura, 2006), this is quite complete, since, if mediation is a procedure to settle conflicts, guided by a third party called a mediator, then the mediation act must have equal or better value than the sentences issued by judges; equal to the other sentences because these are equivalent to the sentences in healthy peace and harmony between human beings and nature, in the face of a globalizing, ambitious, dominant, bizarre and lying thought, which has made easy prey for the great social masses of the world whole; As such, mediation becomes the complementary instrument of the Administration of Justice, insofar as it allows its fluidity and effectiveness.

2 Materials and Methods

It was designed as exploratory and descriptive research of a qualitative nature, the bibliographic review was used, which allowed contextualizing both the topic and the research scenario, where it was seen that both this research indicates the Legal Regulations and the use of mediation in the Ecuador, where the constitutional foundation was considered; the legal bases of the Ecuadorian mediation process (Legal, 2008), (Legislation, 2006), mediation and the principles of simplification, uniformity, efficiency, immediacy, speed and procedural economy; the procedure and execution of the Mediation Act; due process and execution of the sentence; the similarities and differences between extrajudicial mediation and the civil process; the gaps and inconsistencies in the Civil Code, Civil Procedure Code and the Organic Code of the Judiciary; and, the needs to reform these legal bodies and international agreements and Mediation.

A descriptive analysis of the extensive information on the alternative, efficient and effective components in conflict resolution was carried out, such as: family, work, school, community, health, intercultural, penal and prison mediation; according to this proposal they would be in a specialized room in the courts where the people who enter will be guided to resolve their controversies, on the alternative means of existing conflict resolution; and, in particular, pre-trial mediation, as the fastest and most efficient way to resolve conflicts.

3 Results and Discussions

A conflict is a situation in which two or more people they do not agree with the way of acting of an individual or a group; and, for this situation to be established, there must be a disagreement that has not been resolved. For the Germans, a conflict is "a universal situation that can only be solved through social change (Society, 2007). Karl Marx, for his part, located the origin of the conflict in the dialectic of materialism and in the class struggle"; Hence, the existing theories on social conflict allow us to understand the need to have a certain order within a society, whose members must be integrated based on the development of consensus policies and relying on instruments that activate the coercion of the social masses.

In the manual (Cides, 2004), he states that, "There is a conflict when there is a disagreement or a problem"; Therefore, within the social coexistence of humanity, there are daily disagreements on a smaller or larger scale that generally cause an inevitable conflict, since no human being is the same as another because things are thought and seen differently. , which causes individual differences to exist and generates problems that must be solved as soon as possible so that these difficulties do not increase and do not cause discomfort to people.

In one of its definitions (Cabanellas & Cabanellas, 1979), it indicates that the conflict is the "opposition of interests in which the parties do not give in" The conflict can be analyzed from different perspectives at the social level; Generally, it is understood through morality or true justice that people yearn to have, with negative consequences when it fails or is very slow, since it can destroy or even disintegrate an entire society; hence, it can be accepted in any case, that the conflict has a positive function thanks to its dynamism towards a social change.

It is not out of place to point out that there are many types of conflicts, such as: unilateral one that occurs when only one of the parties disagrees and bilateral when all the parties expect something from the other; a conflict can be the product of underlying causes that can be conscious or unconscious, and these can be deep or superficial, according to said importance the conflict will be more or less serious; In addition, a conflict can be of a personal or structural nature. Personal conflicts occur with individuals with certain feelings and ideas at stake, while structural ones are endemic to circumstances Specific conflicts in a group of people are generic conflicts, just as in a structural conflict it is necessary for those involved to manage not to interfere with their own feelings and/or ideas, but to seek the resolution of the problem in favor of the group.

Theories that explain the legal nature of mediation

The very nature of mediation is to involve the parties in a voluntary process to reach an amicable solution to their dispute. Voluntary is a basic and unquestionable principle in mediation, generally used in the definitions of mediation, this principle of voluntary is not inconsistent with the existing requirements in some jurisdictions regarding mandatory mediation briefings, even in jurisdictions where the parties of a dispute are obliged to attempt mediation it can be argued that this is compatible with the voluntary nature of mediation, provided that the parties are not forced to resolve their dispute during mediation; however some writers express some theories that would explain the legal nature.

Sociological and psychological dominance theory

According to the website, it states that mediation is an institution of a legal nature, since, although the mediation methodology is supported by a series of techniques that come from outside the law, from the world of psychology and sociology (theories of perception, communication, conflict, etc.), the truth is that the conflicts referred to in mediation are "essentially legal conflicts, conflicts of interest regulated by law and whose solution requires the application of legal norms and recognition or effectiveness in the legal field, because it affects third parties or the State itself, which must cover the adopted solution, because rights, actions and claims arise from it.

Mediation begins by strengthening the legal nature based on the subjects; since, within its trilateral legal structure are the parties in conflict and with a subordinate character, a third party called mediator; then, this allows us to affirm that the legal nature of mediation is not unique, for a very simple reason, the subjects of the medial structure do not have an equal legal status; The parties in dispute, to cite an example: seller and buyer, are governed by the principle of Equal Conditions, are on the same plane, they are the protagonists of the agreement, therefore, the position of the mediator is subordinate or of simple help between the parties; For this reason, the legal nature of mediation is very complex because it requires seeing based on the subjects, both the parties, between them and the mediator (Middleton, 2003; Mora et al., 2018; Linzan et al., 2018).

Theory of the factual settlement of conflicts

There is a factual relationship between the parties insofar as “it does not create a legal link, but it can have legal consequences”; there is no link because they can withdraw, at any time, from the mediation procedure, without the need for motivation; and, they would have legal consequences when the principles of good faith are infringed. The mediation is initiated with the intention of obtaining information from the other party or simply to gain time and consistent with the factual, the responsibility would be due to an extra-contractual fault. In the same way, between the parties and the mediator, a service leasing relationship arises, since their acceptance is required, in addition to the fact that there is a certain price or the cost of the mediation, in which the supplies are clearly included, determining the different concepts, but a result that has concluded or not

with an agreement is not committed; This explains why the mediator's responsibility is due to contractual fault.

Contractual contract theory

It is necessary to point out the nature of the mediation institution as a legal person, thus, (Ambrocio, 2012), states that it is a "leasing of services that generates contractual responsibility, direct for breach of the obligations incumbent on it, as well as subsidiary or indirect due to the action of the mediator, the latter, without prejudice to the reimbursement action that falls within the aquiliana fault"; For this reason, the legal nature includes the administration of mediation such as the management of collections and deposits of documents that should not be returned to the parties. Accordingly, the legal nature of mediation has the character of a non-successive contract, although the respective services are not consummated in a single act because the mediation process requires a temporary projection, successive acts, which explains that both the parties as well as the mediator can resolve it, instrumented this resolution in the resignation of the mediator or in the rejection of the parties.

Theory of the contractual process

It is argued (Quisbert, 2010), that it maintains that mediation is a voluntary process that is carried out confidentially, in which a person without vested interests, and who has received the necessary training, which is called the mediator, assists parties in reaching a negotiated settlement of a dispute or difference, and in which "the parties themselves are in control of the decision to settle the matter and the terms of any solution" It could be said that mediation has the nature of a process since it has assisted self-composition; since, it is a process in which the parties can choose the mediator and finish or conclude without failure, except in the bankruptcy that necessarily has to be governed by the legal norms that establish the conditions in which the state of non-compliance must be judicially declared. the obligations of the common debtor.

Pseudo-process theory

According to (Cabanellas & Cabanellas, 1979), it determines that some writers support this theory based on the meaning of pseudo process that means "supposed, feigned, procedural appearance"; Therefore, one could speak of this term, assuming that there is no possibility of resources, which, if admitted, would go against the doctrine of the acts themselves and the structural logic of this legal figure; however, this doctrinal position is not incompatible with challenging the mediated or flawed agreement through the courts; For all these reasons, it is not violent to affirm that mediation, in terms of procedure, has a legal nature for assisted procedural, since its guiding principles are typical of resolving a conflict through a culture of peace.

Privatist or contractualist theories

This maintains that mediation is comparable to a "private contract, as one more manifestation of the sovereignty and power of disposition of the parties over their legal relationships" (Delgado, 1968), part of the interpretation that deserves the so-called mutual compromising act, maintaining that just as the legal action of the mediation centers that derive their faculties and their function from private law is private, the mediation act is also private; From this theory, which places the accent on the contract, the search for figures of private law that by analogy give answers to a series of questions has followed; since the mediator is the intermediary of the parties in conflict, who has the function of helping to guide them to resolve the conflict. (Puglianini, 2011), faced with this theory, states that mediation is private because "it is nothing more than the manifestation of two voluntary agreements or contracts; On the one hand, the mediation agreement by virtue of which the parties agree to resort to a third party called a mediator.

Although it is true that, through mediation, a mediation act is signed that would become a commitment contract between the parties in conflict, there is also a commitment of the mediator who acts as a conciliator between them in order to both win and, in this case, the resolution that the parties set is included in the mediation act, which is mandatory for the parties to comply with, having been previously accepted by them,

unless both mutually agreement review what was agreed; while, on the other hand, the third party helps to resolve the conflict according to law or equity, always ensuring that the people in conflict leave satisfied with the resolution taken. (Monroy, 1982), states that the contractarian thesis is followed by Merlin, Fuzier-Herman, Giovenda, Weiss, Brachet, Guasp, Herze and Ogayar, among others, who establish that: "mediation consists of a contract based on the will of the parties, and that they delegate the orientation of the settlement of their differences to a neutral, mediating third party.

Based on the foregoing, it can be concluded that the mediator is not a judge nor is he part of the jurisdiction and is not empowered to execute his own decisions, but those who put their own solution opinions are the people in conflict; Therefore, the contractual principle of the mediation agreement when considering the mediator as a conciliator or counselor of the appearing parties, this only helps the parties in conflict to resolve their differences due to the commitment acquired as a mediator; it is rather the mediation act that has the nature of a judgment of last instance or res judicata, which must be executed by the interested parties, hence, mediation is contractual in nature and, therefore, is private (Andrew, 2003; Mangas & Feliu, 2011; Vela-Almeida et al., 2018).

Procedural jurisdictional theory

Within this (Gil, 2003), he considers that "mediation corresponds to a part of the process or constitutes a requirement to initiate a judicial process, then the nature of the institution must be procedural". This theory bases its argument on the fact that mediation also has a process that includes a series of short acts that take place during the resolution of the conflict carried out by the mediator in order to reach a good conciliation of the parties; but without confusing it with the procedure, since the process is integrated by successive acts that must be fulfilled in the manner established by the procedure. If the jurisdiction is determined by the procedural sense, it is thus designated the empowered power that a subject possesses to obtain the guardianship of their rights by the judicial bodies, that is, a power againstthe state, in order that he coercively recognize his rights.

Mediation as a self-composed, non-adversarial, extrajudicial and alternative conflict resolution system or method is also endowed with a private component since it is the parties who by themselves and voluntarily try to reach an agreement. for the resolution of the dispute that arises between them. The majority doctrine considers that the conflicts treated in mediation constitute files of voluntary jurisdiction; since, they would be preliminary proceedings where a non-jurisdictional, optional and preparation judicial activity is carried out that can often be resolved immediately by the parties.

The legal nature of the jurisdiction in mediation seems wrong, for two reasons: firstly, because the mediation agreement cannot be conferred an executive character, since this would be as much as conferring a jurisdictional character per se to an agreement – but not to a resolution – coming from of a person not invested with jurisdictional power; Secondly, because if mediation were to be conferred a strictly procedural nature, all regional mediation laws would be unconstitutional as the autonomous communities lacked constitutional jurisdiction to be able to issue them (Picazo, 2004).

As this author has well pointed out, in the case of the mediation procedure, it is not before a jurisdictional function, nor should it be in any case. Mediation involves a mechanism to deploy a task by a third party, which does not act heterocompositively or supra partes, but rather self-compositively or intra-partes, the mediator does not impose the decision, as the judge does when exercising the jurisdictional function, but who works with the parties, bringing them closer together, helping them establish their positions and interests, which are not always the same; (Cabanellas & Cabanellas, 1979), defines jurisdiction as: The power to know and rule on civil, criminal or other matters, according to legal provisions or the arbitration granted "

The definition made by the writer fits fully insofar as it has to do with the jurisdiction that magistrates must take into account, since in order to know and proceed to issue a ruling on a dispute, they necessarily have to be competent in the respective jurisdiction; On the other hand, when it comes to mediation, it is very different because the parties in conflict are the ones who decide to resolve their difficulties with the mediator they want and in the mediation center they have selected. According to (Quisbert, 2010), process is the "Succession of concatenated legal phases carried out in accordance with the order established by the law, the judge, the parties and third parties in the exercise of the powers, rights, faculties and charges attributed to them by procedural law"

Being able to state that the process is the coordinated or succession of legal acts derived from the exercise of a procedural act that generally occurs in ordinary justice and whose purpose is to obtain a decision of a jurisdictional nature; However, in mediation, there is no legal process but rather a procedure by which some existing controversies between the parties in conflict are resolved. For this reason, it could be stated that extrajudicial mediation would have a voluntary jurisdiction since the mediator who acts as a friendly mediator does not have the investiture of a judge, but nevertheless, if the parties in conflict want to settle their conflicts, they go to him. to heal their differences; while, if a due process of mediation is not established if there is a certain procedure before signing a mediation act.

In these terms, (Véscovi, 1999), argues that the procedural theory considers that if "mediation corresponds to a part of the process or constitutes a requirement to initiate a judicial process, then the nature of the institution must be procedural." The procedural jurisdictional theory has an eminently procedural and jurisdictional nature; hence, mediation as a judicial process would be dealt with within a judicial process; and extrajudicial mediation or conciliation is carried out outside the judicial process. For procedural theory, the conciliation procedure has an eminently procedural nature; because in many countries' conciliation has been established as a mandatory stage prior to trial, therefore, if mediation corresponds to a stage of the process as a requirement to start a judicial process, then, the legal nature must be procedural. The support of this theory is based on three main aspects: first, "the rules that govern conciliation must be understood as procedural, which implies that they are of public order and mandatory compliance; second, the conciliation procedure must follow due process; and third, the conciliation act would have the nature of a judgment as it derives from a procedure of a procedural nature." (Bustamante, 2009).

Intermediate or syncretic theory

This theory arises with the intention of harmonizing contractual theories with the procedural jurisdictional theory; therefore, it advocates that mediation constitutes a conventional jurisdiction; since the mediation agreement, according to (Cusatelli & Giacalone, 2014), "is a contract, but the mediation procedure as such is subject to a national law that grants the voluntary mediation act that is equivalent to a judgment of last instance that is enforceable, which makes it have quasi-jurisdictional effects". In the investigation it was tried to harmonize the contractarian theories with the procedural jurisdictional theory; pointing out that if, on the one hand, it is justifiable to refute the jurisdiction of the conciliators as a private business; On the other hand, the possibility of assimilating it to that attributed to the bodies of the judicial function of the State is rejected, establishing a structure sui generis for conflict mediation, which is technically called conventional jurisdiction.

For this theory, reconciliation has elements of the first and second theories previously exposed, for which reason characteristics of the mediation are combined in mediation. rights private and public; since the basis of mediation is purely contractual and therefore exclusive of the will of the parties that would come to be constituted in private law, however, the effect of the agreement and the nature of res judicata of the mediation act are given by law , which is within public law. The conventional jurisdiction, "is the one that arises from the agreement of the parties", therefore, by agreeing that the basis of mediation as a private contract is purely contractual and that the effects of both the agreement and the mediation act they are given by law, for these reasons the conciliation is not only a contract, nor an exceptional jurisdiction to the judiciary, much less is it a contract and jurisdiction at the same time; it is rather, something more complex.

Within this theory, (Leifsen, 2017), states that BURNS considers that conciliation "constitutes something more than a pure contract to configure it in a true jurisdiction"; inasmuch as the mediation contract generates, by virtue of the autonomy of the will of the parties, a private jurisdiction, although subject to the effects of legality under the control of judges and courts. As such, for this hypothesis, mediation is a sui generis institution, of a mixed or hybrid nature, in which its contractual origin and the jurisdictional theory that ultimately explains its appearance coexist as an indisputable whole; In short, a contractual institution due to its origin and procedural due to its effects, since if we adopt the contractual point of view in the case, it must be subject to the law chosen by the parties; that is to say, the same point of connection of the conflict rule will be chosen as the one used in matters of contractual obligations.

This theory affirms that, if the contractual view is adopted, the conciliator's responsibility will be regulated by means of the regime of contracted agreements; moreover, if it begins through the jurisdictional route, it will be appropriate to equate the responsibility of the conciliators to that of the judges of ordinary justice, thus

overcoming the exequatur process once the judicial body respects and grants the execution of the mediation act. Another possibility of this theory is to configure an intermediate model between a public service and a private one, comparable to the figure of the Notary; therefore, the mediator could be recognized with a status like that of the notary, the reason would not be so much public faith, but guarantees, thus avoiding the risks existing as the mediator is an exclusively private professional (Cheung, 1999; Passini & Morselli, 2016; Sanchirico, 1997).

Mediation

The Red International Court of Arbitration magazine, says that with mediation you can "keep the solution in your hands, listen to different proposals, define the problem, promote communication, assume an active role, share interests and objectives, devise constructive arrangements, obtain solutions quickly and negotiate to reach agreements" (Elo, 2012). Hence, joining these phrases, conflict mediation can be defined as an alternative means of conflict resolution that is characterized by being informal, fast, flexible, voluntary and confidential, where the parties assisted by an impartial third party (mediator), seek an agreement that puts an end to the conflict, through the mediation act signed by the parties and the mediator that equates to a judgment of last instance or res judicata.

Accordingly, the principles that govern the conciliation of conflicts must be respected, such as: freedom of participation, informed consent, self-determination, impartiality or neutrality, non-critical attitude, confidentiality, and the durability of the agreements, among others. For this reason, it is said that conflict mediation has some advantages, among others, such as: the decision adopted is accepted by all the parties involved, there are no winners or losers, it does not indicate guilt or create feelings of anger and enmity, more lasting results are achieved. , the parties decide where to meet and respects cultural and social differences.

The conciliation

It is "the agreement between discordant parties that decide to give up their hostile attitude, by reciprocal or unilateral resignations" (Cabanellas & Cabanellas, 1979), therefore, conciliation would configure a possible agreement between the parties seeking their compromise, which in case of agreement mutually, the serious effects of a sentence, which can then be requested for the execution of the agreement. This conciliation can be carried out judicially when the controversy has been known by the judicial system and the parties in conflict withdraw from the proposed trial and ask the judge to resolve the case in sound peace through conciliation; In the same way, conciliation can be carried out out of court through mediation, where the parties obtain the signed mediation certificate, which is equivalent to a judgment of last instance or res judicata, which in case of non-compliance would also be requested from the judge. his execution.

Other writers such as (Gil, 2003), speak of conciliation "intra-process, which is the power that the judge and the parties have to resolve the conflict by agreeing on the conflicting interests of the parties at any stage of the first-hand judicial process. instance"; hence, many authors consider that conciliation is a trilateral act; that is, the parties, their representatives, and the judge, however, conciliation should be considered as the forensic activity of an act of the parties and the judge, excluding the representatives, since it would distort the true meaning of the conciliation.

(Gil, 2003), states that "extra-process conciliation, which is a path prior to the judicial process and also implies the participation of a conciliator, the parties and their representatives". In this part would be the conciliators, who can be public administration officials, lawyers, other professionals, or any person with certain skills that the parties have chosen, with the purpose of a judicial process. Finally, the reconcilable matters are generally those rights available to the parties such as: foods, visiting regime and violence familiar; and the amount of civil reparation derived from the commission of crimes; where the conciliator has to have intense persuasion in handling all the tools mediators that are permitted by law; Since the result of the conciliation is merely private, this is peer-to-peer and confidential.

The negotiation

Mediation, "is a non-adversarial or non-confrontational mechanism, it is a voluntary process, usually informal, unstructured, to which the parties resort to reach a mutually acceptable agreement, without the intervention of a neutral third party" (Veintimilla, 2002), this It is related to mutual concessions and commitments where the parties overcome discussions, haggling and pressure in order to reach the solution of their discrepancies, thus reaching the parties to resolve the conflict through a joint decision on matters of mutual interest and in conflictive situations. where they have disagreements; Therefore, a third party (mediator) does not participate in the negotiation, only the parties and their representatives participate, they try to find an agreement and present proposals for it, it is a private process, the agreement does not have the nature of res judicata, the decisions are taken by the parties, it is not mandatory.

(Sovacool & Scarpaci, 2016), defines negotiation as "a mutual communication designed to reach an agreement, when you and the other person have some interests in common and others that are opposed." Negotiation is a mechanism by which the conflicting parties themselves try to solve the dispute without the need for a third party by themselves through dialogue and communication between them. Sometimes there is the presence of third parties, such as, for example, the lawyers of the parties; but their performance is limited to being their representatives; that is to say, the third party does not interfere between the parties, but each of them advises their part.

Prejudicial mediation is one of the alternatives that would help to relieve the civil procedural burden of the courts, since it is efficient, immediate, fast, with the procedural economy in the solution of conflicts. Doctrinal, legal and empirical foundations that support the reform proposal. In this instance, it is propitious to quote the phrase put forth by writer Devis Echandía who says: "slow justice is fast injustice." One of the elements on which the greatest legitimacy of modern states of law rests is the state's ability to resolve conflicts that arise between individuals. In parallel, the primary purpose of any legal and legal system is the establishment of clear rules to find fair and equitable solutions to disputes.

In the case of the project on pre-judicial mediation that Ecuadorian legislation should have, which is the position of this investigation, it would be said that extrajudicial mediation with the figure of the independent mediator is maintained, therefore, the parties can choose between going to a private mediation center or to a duly authorized independent mediator, but when a cause has entered as a demand to the drawing room of the judicial function; Here there is a room of specialists in conflict resolution, who must guide the people who arrive with their disputes, indicating the conflict resolution alternatives provided by the Ecuadorian Judicial System, which may be judicial or through pre-judicial mediation. Then, the conflicting parties will make the decisions as to where they want to resolve their disputes.

Knowing that pre-trial mediation is one of the ways to resolve certain disputes before going to court; and, also knowing that this is done by the will of the parties in conflict; It could be the case that he did not sign the final act of mediation; then we will have to raise the act of impossibility, which enables the conflict to be ventilated by ordinary judicial channels. In this sense, the congestion of judicial offices shows a very high volume of unresolved processes attributable to various factors, such as the duration of the processes, the time required to obtain a first instance ruling that is too long, the training of proceduralists and litigious of lawyers and a total absence of direct settlement of disputes; These are some of the parameters for which the existence of pre-trial mediation is necessary.

Given these measures, the subject of this research gains strength and becomes a real alternative to solving the problem. The State has the non-delegable duty to implement, as a social and State policy, improvements to the current way of administering justice through the modernization of the system and the use of pre-trial mediation as a quick alternative to resolve conflicts, which would transform the reality experienced by the users of the justice system in the country, that is, slowness must be transformed into speed, corruption into transparency, inefficiency into efficiency, all to materialize the common good or good living. The theme developed is related to the lack of articles that guarantee pre-trial mediation in the civil code, the general organic code of processes and the organic code of the judicial function, as a new way of solving people's problems, before starting legal action; At present, mediation is recognized in the Constitution of the Republic of Ecuador, there is the Law of Mediation and Arbitration, which refers to extrajudicial mediation that is commonly known as private mediation and in some cases it has increased in some bodies. legal as the general

organic code of processes, but as an instance of the procedure, where the judge in a preliminary hearing or trial hearing by obligation asks the parties if the conflict they wish to resolve in mediation.

The proposal that pre-judicial mediation exists intends to make known certain shortcomings of the system as well as possible requirements that the codes must contain; Since at present this way of resolving conflicts constitutes an alternative method of conflict resolution and a way of life. If pre-judicial mediation were applied, the beneficiaries of the system are the users and the Judiciary; because it would constitute a containment fence to the entry of several causes, to the different civil courts and that they must resolve; but if this prejudicial act existed, the causes that have to be resolved in pure law would arrive. In the field of civil law, pre-trial mediation is considered as a method of alternative conflict resolution, which is a means of access to justice that avoids and relieves traditional administrative processes of the judiciary; and, that they are based on democracy, social pacification, dialogue, respect, and consensus for social coexistence.

It is evident that this method is governed by the principle of neutrality, seeking an agreement agreed upon and accepted by the parties, who continue to be the protagonists of the process, and the agreement reached in a mediation process is not legally binding for the parties, however, the mediation act to be considered as a sentence of last instance, since the fourth paragraph of art. 47 of the Law on Arbitration and Mediation stipulates that "The mediation act in which the agreement is recorded has the effect of an enforceable judgment and res judicata and will be executed in the same way as the judgments of last instance" (Nacional, 2018), therefore, If the parties fail to comply, the judge, in the event of a judicial claim, would only have to order the execution of the agreements reached in the mediation act.

It is very important to point out that pre-trial mediation is aimed at the parties who will be presented with the advantages they will achieve if they reach an agreement from which they will obtain the most important result, framing themselves within the rules of the mediation process for the parties and focusing in dialogue with objectivity and with the perspective of resolving the conflict; The time that the parties must take to think, reason and state their proposals is important in the mediation process since if they do it in a hurry they can generate frustration.

Mediation processes are inclusive and complementary because they are due to intrinsic and external conditions and characteristics that surround and place conditions for the conflict; one learns to value the dimension of a mediation process tending to effectively and effectively link the subjects involved and look towards the objective of mediation in order to maintain a good relationship between the parties, getting rid of resentments that in their time were probably aroused by a deficient action in society. At present, it would be a reason for reflection by the authorities, who have the arduous task of creating and modifying the laws, recognizing that pre-trial mediation would constitute one of the most important and relevant acts due to the advantages for the judicial system, because it would save time. and money, would decongest the courts.

It is necessary to point out that there are different types of mediation, for the processes that are in progress, but they do not exist prejudicially, that is, before initiating a claim or the solution of the disagreement of the parties to the conflict by judicial means. The Constitution of the Republic of Ecuador rightly reiterates the validity of the use of alternative methods of conflict resolution in the country, including Mediation (Art. 190). Mediation is guaranteed by the Arbitration and Mediation Law, here you can mediate all transigible conflicts such as: family, work, school, community, health, intercultural problems, etc. The Ecuadorian civil code lacks articles that refer to pre-trial mediation. The Ecuadorian General Organic Code of Processes refers to conciliation as a synonym for mediation within the judicial process, a situation that has nothing to do with pre-judicial mediation that is extrajudicial.

It was contacted that the organic code of the judicial function does not establish pre-judicial (extra-procedural) mediation, but rather mediation is to be prosecuted, becoming part of the (intra-procedural) judicial process. In comparative law it was possible to observe that, of the four countries studied (Argentina, Colombia, the United States and Spain), the country that has advanced with the Alternative Means of Conflict Resolution is the United States where most of the conflicts of all type are resolved in a Court called Multidoor courthouse or Court of Multiple Doors, based on the principles of remediation and reparation of the damage to the victim and the resocialization of the offender.

It is necessary that the Ecuadorian judicial system promotes in Ecuadorian society the resolution of conflicts under a culture of peace, to have a true Sumak Kawsay, guiding them through all the media the different forms of dispute resolution, emphasizing alternative means of dispute resolution. The judicial system must create multidisciplinary offices of alternative means of conflict resolution in the courts, where there are

specialized professionals who can guide people who have disputes, on the ways in which they can resolve their conflicts. A special aspect, having clear the multinationalism of the country, strengthens the Indigenous Justice stipulated in the Constitution of the Republic of Ecuador in art. 171, since they practice the harmony of people with nature through mediation, compromise, and the conciliation of conflicts, which would also help ease the civil procedural burden of the courts when they resolve their problems in their own communities.

4 Conclusion

Among the problems that cause the conglomeration of the civil procedural burden in Ecuadorian justice, is the judicialization of all conflicts, the complex norms and procedures and the lack of offer of other alternative means of conflict resolution that is fast, efficient, and effective. The objective of the investigation was to know the viability of pre-trial mediation as an efficient, immediate, fast alternative mechanism, with the procedural economy, in conflict resolution, to alleviate the civil procedural burden of the Ecuadorian judicial system and the full satisfaction of the parties. The applied methodology had a non-experimental, quantitative, cross-sectional, and descriptive design, using an instrument that generated results where it can be found that, according to the explorations carried out on pre-trial mediation of conflicts, it can be determined that most legal professionals and authorities argue that this way of resolving conflicts would help to relieve the civil procedural burden of the courts.

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