

## **Mediation and Settlements in the Judiciary: Dilemmas and Meanings<sup>1</sup>**

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### **Abstract**

*The objective of Mediation and Settlements in the Judiciary: Dilemmas and Meanings is to describe and analyse mediation and settlement practices in the sphere of the Rio de Janeiro State Judiciary, Brazil. An understanding is sought of the process of institutional changes through which Brazilian society has been passing since the 1980s, the different meanings attributed to these doctrines by the diverse operators in the legal field and by the users in contexts in which they are engaged. The primary question that guides this research is ascertaining to what extent the State can reduce the gap between the law and the courts of the society, through these new doctrines of conflict management.*

**Keywords:** conflict management, settlement, mediation, Judiciary

### **1. Introduction**

The objective of this paper is to describe and analyze the discourses that characterize mediation and conciliation of legal conflicts, prioritizing the analysis of manuals and documents meant for the qualification of mediators and conciliators in the sphere of the Rio de Janeiro State Judiciary. We have also considered the perception of some operators in this field, to whom we conducted formal and informal interviews, as well as discourses made available in the National Council of Justice's site, which, since 2006, promotes the "*Movimento pela Conciliação*" (Movement for Settlement) at a national level. It is about understanding the different meanings attributed to these institutes by the various social actors involved in their implementation process - those within the legal field and from different fields of knowledge - as well as by the users in contexts in which these meanings are triggered. Since the 1980s, the Brazilian society has witnessed a series of institutional changes - or proposals of changes - which are intended to implement or expand the principles of a democratic Rule of Law. Proposals to reform the Judiciary, for example, express this expectation of transformation.

However, despite all efforts formally consolidated by the 1988 Constitution, the social conflicts seem to have been accentuated, whether in the criminal context, or in regard to interpersonal relationships. Moreover, the adoption of diversified measures, such as mediation and settlement, seems to make converge two antagonistic orders: the tradition of the legal field, which favours the supremacy of legal order over social order, and the multidisciplinary perspective of these new institutions, with the aid of professionals from various areas leading settlements and mediations.

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The main question guiding this research is, therefore, to discover the extent to which the State, through these new institutions of conflict management, can reduce the gap that still separates law and the courts of society. Would it be possible to argue that mediation is simply a new name for the practice of settlement - considered a failure in the sphere of the Judiciary reform? The debate on the deployment of mediation and settlement of conflicts is extended beyond the various courts of the country, and also to other organizations of the society, whether public, private, government or non-government organizations. Many of them have developed actions and proposals in the same sense as, for example, the Schools of Pardon and Settlement (Espere) of the Catholic University of Rio de Janeiro (PUC-Rio); *Mediare Diálogos e Processos Decisórios* (Mediare Dialogues and Decision-Making Processes), a company "specialized in the prevention, evaluation, management and resolution of conflicts, dialogue facilitation, consensus building and decision-making processes". Other are non-governmental organizations, such as *Balcão de Direitos* (Counter of Rights), *Viva Rio*, *Núcleo de Mediação do Carmo* (Carmo Mediation Center) in Olinda, among others. This fact seems to demonstrate the constitution of a *field of forces* (BOURDIEU, 1989) in which perceptions, representations, guidance, proposals and actions become an object of group and institutional disputes, alliances and frontiers. In this paper, we will deal specifically with mediation and settlement of conflicts within the Rio de Janeiro State Appellate Court.

## 2. Judicial Mediation of Conflicts

Unlike countries like Portugal, Argentina, Canada and the United States, Brazil does not have any legislation that regulates practices covered by the denomination *conflict mediation*, neither a professional feature in regards to their mediators. Similarly, judicial mediation and extrajudicial mediation seem to be better defined by the institutions applying its principles. Thus, judicial mediation is associated with the principles put into practice within the judicial institutions, i.e., when conflicting parties are directed by a judge to mediation sessions in the context of judicial proceedings, and, in contrast, extrajudicial mediation is linked to what happens outside the walls of these institutions and the judicial proceedings themselves. As emphasized by Oliveira (2010), some authors and actors even deal with mediation in State Appellate Courts as being marked by judicial logic and practiced by lawyers, unlike what they consider to be actual practice in extrajudicial environments, the one truly considered revolutionary. In our view, this perception seems to conceive the world of the Judiciary as homogeneous, reifying the belief in its autonomy before society when, according to what ethnographic studies have shown, this principle is constitutive of law itself (BOURDIEU, 1989; GARAPON, 1997; SCHRITZMEYER, 2001; FIGUEIRA, 2008). Thus, the idea of homogeneity and autonomy attributed to the Judiciary is, in the terms of Bourdieu (1989), an "illusion" due to lack of knowledge or a lack of recognition of its symbolic force. It is, therefore, possible to describe, analyze and understand the different social actors, procedures, principles and intricacies that are articulated in the various judicial forums where these institutes are being applied.

The sociological literature on the subject points out that, according to many extra-judicial mediators, judicial mediation would be more committed to speed and to decreasing proceedings in charge of judges and, at the same time, would not be more than a new name for the practice of settlement (OLIVEIRA, 2010). However, although there is no consensus on the definition of what constitutes conflict mediation, it must be emphasized that, with regards to the principles of actuation, whereas mediation supposes a discussion between the parties conducted by an impartial *tertius*, not compromised in any way by a particular outcome of the conflict, settlement, also conducted by a third party, is definitely compromised to the dismissal of the process/resolution of the dispute, focusing its attention on the final outcome, taken as a representative of the conflict "peacemaking" and the return to the *status quo ante*. That is, on one hand, mediation bets on the explicitation of arguments so that parties decide, themselves, what will they do with their conflicting interests. On the other hand, it wants to accommodate the conflicting interests of the parties so that harmony is restored between them and the process is complete (NADER 1978, LEITE, 2003).

Though different contexts and objectives may weigh in, *conflict mediation* has become a field of knowledge composed around the National Council of Mediation and Arbitration Institutions (Conima) and Bill 94/02, governing the different institutional practices for implementing the mediation of conflicts, according to what training and qualification courses of mediators inform (SCHUCH, 2008; OLIVEIRA, 2010). In this field, many actors are circulating in different institutions and forums of debate: teachers, lecturers or students of various career paths, both nationally and internationally. Thus, an initial reflection arises: will there be indeed an explicit boundary between what is judicial and what is extrajudicial in the context of conflict mediation practice?

2.1. Judicial mediation of conflicts in Rio de Janeiro There are many proposals institutionalized in both state and federal level, in order to definitively implement settlement and mediation as logics necessary for the operation of the Judiciary. This means that making conflict management measures called "alternative" effective is at the agenda of the Executive and Judiciary.

Its unique characteristics aside, "Expressinho", a service system envisioned by the Rio de Janeiro State Appellate Court - which is also present in other courts - to reduce delays and bureaucracy in the Judiciary, is an example of an institutional policy focused on creating alternatives to the traditional way of conflict management of the courts. In order to implement this project, the Court used rooms in the building of the forum for those services with more demand. The idea is to solve problems in advance and avoid institutionalization of conflicts, i.e., to prevent lawsuits filing. It is interesting to note that the adjective "alternative" is generally used by different workers of this field in reference to techniques and procedures registered in the denomination conflicts mediation. However, as analyzed by Simião (2005), for East Timor society, the term "alternative mediation" of conflicts refers to the traditional mediation practiced outside the courts by villages' elders. It does not refer to the procedures, but to the process, reported orally, which trigger a particular conflict. The author highlights the importance of orality, even during moments in which mediation takes place. It is not without reason that mediators are named *lia na'in*, i.e., "masters of the word" or "speakers". In this case, reconciliation between different groups in conflict is more important, through the redemption of the narratives of each party other than a dispute between people.

In the case of Rio de Janeiro, thinking of the meaning of the word "alternative", we wonder, since we started the research, why do Courts insist on disclosing or categorizing mediation and settlement this way. What called our attention was the fact that these institutes are implemented as a step in the judicial proceedings, within the sphere of the Court itself, and yet, are named "alternative". To which reference would this character apply? In other words: mediation and settlement would be alternatives to what - the judicial process itself or its traditional way of conflict management, based on the privilege of legal order over social order? For us, the "alternative" category was something that referred directly to the existence of an option. In other words, mediation and settlement would be some, among others, of possible forms of institutional conflict management. However, we observed empirically that these are methods of conflict management within the judicial proceedings itself, and not differentiated or "alternative" forms. In the case of mediation, for example, it is the judge itself who forwards the parties to the Mediation Centre and, in the case of settlement, this is a step (or phase) of the judicial proceedings that may even be declined, but cannot be properly characterized as optional or alternative.

In the state of Rio de Janeiro, the first course on conflict mediation offered at the Appellate Court, held in January 2009, culminated in the inauguration of the Mediation Centre of the Central Forum of the Rio de Janeiro State Appellate Court on 12/10/2009. This is a good starting point for thinking about the important role of mediators in the judicial area, as well as the many senses and sensibilities about justice, rights and citizenship that are revealed in this practice, interacting actors, knowledge and visions of world. This qualification course also allows thinking about the qualification process of mediation, with the creation of a new practice area within the Judiciary, with very specific knowledge and practices. On this occasion, for example, the difference between the two institutions of conflict management was clearly specified. In the words of the director of the Mediation Centre of the Central Forum, "settlement aims to obtain an agreement to end the proceedings, whereas mediation will facilitate resolution between the parties, later influencing their relationship after the end of the proceedings"<sup>2</sup>. There were eight courses on mediation offered between January and October 2009, each lasting 40 hours spread over a week and carried out at the Court of Justice, in Rio de Janeiro downtown.

Though a list with the number of students of the course has not been available, on the first one of these courses, the professor mentioned 100 participants, out of which 50 were Judiciary technicians - among them, social workers, psychologists, judicial analysts and administrative staff of notary offices - plus 50 judges and appellate judges. This is a project for the training of mediators in the sphere of the Court, from the perspective that interpersonal conflicts can be resolved peacefully with the presence of an impartial third party (the mediator), who, from the use of specific techniques, can help people in conflict reaching solutions by themselves, without requiring the foreign decision of a court. Furthermore, this technique has been presented as a tool able to get people to realize mutual interests and feelings, providing a connection between them and increasing their ability to manage conflicts, based on what they consider fair.

<sup>2</sup> <<http://srv85.tjrj.jus.br/publicador/exibirnoticia.do?acao=exibirnoticia&ultimasNoticias=17818&classeNoticia=2&v=2>>

The proposed technique assumes that conflict is not a negative interaction. Rather, it is perceived as a process that can generate, from the divergence of interests, goals and interpretations between two or more people, positive changes in their interpersonal interactions. This new perception of conflict allows, therefore, rethinking social relations from another perspective. However, it is worth noting that this perception does not occur spontaneously or automatically. According to the proposal of mediation, there are techniques and skills for the resolution of the dispute by the parties themselves that, if used by the mediator (the impartial third party) allow the conflict to be driven in a positive way. That is, as a process that makes an opportunity for the mediator to enhance reactions of people explicit, in order to change their perceptions of the situation and reflect on their mastery of the technique. The proposal keeps an analogy with models of institutional conflict management processes, present in the system of the *common law* called, properly, *conflict resolution* or *dispute settlement*, where the parties explicit their differences before the arbitrators - judges or jurors - who work to reach possible consensus, either in the civil area or in the criminal area. From the outset, it is not excessive to notice, the deep contrasts of production processes of judicial truth in these two traditions: in the *common law*, one seeks, through an adversary process, to reach consensus on the likelihood of the judicial truth, in the *civil law*, one seeks, in adversarial proceedings, a truth, which will be revealed to the one who judges (GARAPON, 2008; KANT DE LIMA, 2008). 2.2. The 'Judicial Mediation Manual'

Courses on conflict mediation carried out at the Central Forum of Rio de Janeiro were based on the *Manual de mediação judicial* (Judicial Mediation Manual), organized by André Gomma de Azevedo, state judge of the Bahia State Appellate Court. The author has a master's course in law from Columbia University, and was also an intern mediator at the Institute for Mediation and Conflict Resolution and on Small-Claims Courts in Harlem, New York, USA. He is currently a research associate at the Faculty of Law of the University of Brasilia, a lecturer in *lato sensu* postgraduate courses of the Getulio Vargas Foundation in Rio de Janeiro, and an instructor of techniques for the resolution of disputes by parties themselves in the Movement for Settlement of the National Council of Justice (CNJ)<sup>3</sup>. It is worth mentioning his training courses because they are representative of the tradition of a legal order called *common law*, which brings us, based on this constitutive model, to the hypothesis of diffusion and diversification of knowledge within the Rio de Janeiro State Appellate Court principles. The aforementioned manual brings on its cover a photograph of the sculpture —*We shall beat our swords into plowshares*”, evoking, according to the explanation contained in the manual's flap, the figure of a man wielding a hammer with one hand and, with the other, a sword that is being converted into a plowshare, symbolizing the man's desire to put an end to violent forms of conflict resolution and to change some destructive means of resolving disputes into instruments for the benefit of all.

The sculpture is on permanent display in the gardens of the UN headquarters in New York, a gift offered by the former Soviet Union in 1959. It is at least curious the presence of this figure in the manual, since the UN was founded after the Second World War, and aims at maintaining peace and security in the world, in addition to "fostering cordial relations among nations, promoting social progress, better living standards and human rights"<sup>4</sup>.

Would the photograph be a reference to the conversion of a tradition based on the "hammer and sickle" to the proposal of the legal order of the *common law* as a possible alternative, internationally recognized by those who should emanate the principles in search for peace? The *Judicial Mediation Manual*, in its summary, announces mediation as a public policy that considers the conflict as a constitutive part of social relations, which can promote the quality in processes of conflict resolution by the parties themselves. In the section devoted to acknowledgements, the organizer adds that the manual was based on the terms of Article 277, Paragraph 1 of the Brazilian Code of Civil Procedure, and on Article 2 of Law no. 9,099/1995, which, by itself, draws attention to the point of view of the meanings of both institutes, for such legal provisions deal with settlement in judicial proceedings. From this perspective, would settlement and mediation be synonymous? Or would they be differentiated proposals for conflict management by the judiciary?

<sup>3</sup> Though it does not fit the proposal of this paper, it is important to note that this mediation course counted on the dialogue with Gabriela Asmar, chairman of the Mediation Commission of OAB/RJ (Rio de Janeiro State Bar Association), a lawyer also trained in the US and a former member of Mediare. The traffic between professionals involved with the qualification of mediators is intense between different government and non-government, judicial and non-judicial institutions, building up a dialogue that is not particularly restricted to the courts.

<sup>4</sup> <[http://www.onu-brasil.org.br/conheca\\_onu.php](http://www.onu-brasil.org.br/conheca_onu.php)>

The preface, signed by the Minister of Justice back then, Mr. Tarso Genro, highlights that one of the challenges of Justice is "to develop procedures that are considered fair by the users themselves, not only because of the results..." and, furthermore, that "access to Justice should not be confused with access to the Judiciary." This means "true access to Justice includes not only the prevention and remedying of rights, but negotiated solutions and the promotion of the mobilization of society, so that it can actively participate in the dispute resolution procedures, as well as in their results."

As previously mentioned, another fundamental principle of mediation presented by the *Manual* is the perception that conflicts represent a "natural phenomenon in respect of any living beings" and a positive opportunity for mutual gains for people involved with them. It seems to be a principle opposite to the adversary proceedings, present in the traditional proceedings model, according to which the outcome of the process is not only arbitrated by a *tertius* that is not inserted in the relationship between people, but also leads to (in the terms of the manual) "social peacemaking" through the polarization between a winner and a loser. The work also highlights that conflict - a constructive process being conducted with "proper technique" - is one of the reasons why people can complete the proceedings relationship "with a strengthening of the existing social relationship regarding the dispute." It also adds that this re-contextualization of approach about the conflict may drive changes relating to liability and professional ethics. That is, the discourse of the field effectively points to a redirection of the conflict's view, which is now taken as something natural, instead of threatening of social peace. But at the same time it states this, the field also reproduces the idea that mediation and settlement are tools for social peacemaking, which contradicts the previous idea and points to an apparent paradox, which hinders not only the seizure of meanings by these institutions, but also presents us questions about the empirical directions the implementation of these practices will bring.

Incidentally, in reference to this particular issue, what draws attention and is quite curious is the fact that mediation and settlement are transferred to persons other than to judges themselves, pointing to a ratification that, effectively, the legal culture maintains procedures not accustomed to consensus so ingrained, that it is necessary to transfer the role of judges (of mediators and settlement-makers) to other operators. Such an attitude suggests that the measures are alternatives to the Judiciary (which is not at all true, as they also are present in the sphere of the Judiciary) and that judges have difficulty managing conflict by sharing the process participation with the involved actors. It also conveys an idea somewhat "hierarchical" about ways to manage conflict, in which traditional ways are made effective by judges and the other alternative ones, by anyone who takes a specific course for this work - greater expertise being unnecessary. It is interesting to notice that all other chapters of the manual refer to the transmission of techniques of approach that mediators, during their training, should incorporate in the exercise of their function.

We observe that, given the fact there is no regulation of the profession of mediator, the contents of the manual seems to reiterate comments made by Schuch (2008) and Oliveira (2010) in ethnographies on the subject, highlighting that it is a field of knowledge and performance still being formed that has been constituted from a practical knowledge. These authors argue that the techniques and procedures put in place by the mediators in action are constantly referenced in their trajectories of mediation, in which various fields of knowledge blend in, such as psychology, pedagogy, law, social work, anthropology and other fields of knowledge related to humanities. The manual says that anyone can become a mediator, in a sense that, in most cases, humans were already engaged in the mediation of some kind of social interaction in their network of friends and family. The chapter "Panorama do processo de mediação" (Overview of the mediation process) establishes some criteria for the mediator's training, stating that a mediator, in order to take effective action, must have or develop certain skills. This does not mean that only people with a particular profile can act as mediators.

On the contrary, the process of mediation is flexible enough to be compatible with many types of personalities and ways of procedure. Thus, it is understood that although it is more efficient to select people to be trained as mediators, based on their personal characteristics, their skills to deal with a dispute resolution by the parties themselves are acquired predominantly through an appropriate course of techniques of this matter. It is noteworthy that even those people who already have naturally conciliatory profiles must necessarily participate in training programs on technical and skills of dispute resolution by the parties themselves. (AZEVEDO, 2009, p. 59) According to the same manual, there are many indications of the characteristics and skills that an efficient mediator must develop.

Some of them are: applying various techniques for dispute resolution by the parties themselves based on the nature of each conflict; applying the so-called "active listening" or "dynamic listening"; inspiring trust and respect by people involved in conflicts being mediated; managing situations in which "tempers are heating up"; stimulating the search for creative solutions to antagonistic interests, removing judging prospects or their replacement by conciliatory perspectives; motivating prospective solutions without fault; stimulating the reformulation of issues facing impasses; impartially approaching both issues legally protected as those of the order of social relations between people in conflict.

Another aspect highlighted as important in these rooms for debate on mediation and in the environments of their application is the one named *rapport*, which means the establishment of a trust relationship between the mediator and the parties in conflict. Taking into consideration the characteristics of our procedural system, *rapport* seems to be a guidance that assumes and mainly proposes another principle and/or logic, different from those that structure the adversary system and the centrality of the judge. The establishment of trust seems to indicate how the mediator stands. He is a *tertius* acting as a facilitator of communication rescue between parties in conflict. Thus, assuming a more equal position in relation to the parties than that one assumed by a judge, a mediating figure seems to break with the centrality of the foreign person, who would have decision-making power of the conflict resolution, as is the case of the judge. In this position, the guidance of judicial mediation favours nonviolent communication and the impartiality of the mediator, so that s/he does not transmit preconceived notions about what is heard or about the body language of the conflicting parties. In this respect, it is about incorporating into the procedure of conflict management the dimension of the parties' feelings, which, within the structure of the court system, is not considered as part of the judicial process. Thus, what is called "active listening" according to the manual and to the practice of mediators involves consideration of the emotions of the individuals in dispute. In doing so, the institute of mediation seems to advocate the importance of explaining these feelings to understand the controversy in question.

It is the mediator's role, therefore, to assist the parties in distinguishing what is emotion, what is a problem and what is common interest, and thus, to find alternatives for resolving the conflict in question. The proposed fragmentation of the conflict, i.e., the separation of all aspects that may be mixed to the individual emotions aims at targeting the perception of conflict prospectively by both parties. The goal is that people in dispute may become aware of the social nature of the conflict and of the possibility of reaching resolution alternatives with autonomy, precisely because, having all aspects been made explicit and cognitively perceived, the individuals seem qualified to make decisions. It is in this sense that the conflict is considered positive. This way, we could not really say that *rapport* reinforces the principle of bilateralism, i.e., that the individual may not have their interests influenced by any court order. In mediation, the exercise of the practice is not carried out *in disputatio*, but in the dialogue built through the mediator. As highlighted in the *Mediation Manual*, before a dispute, the parties tend to coalesce issues, feelings and interests into one big issue that seems extremely complex and practically insoluble to them. (...) After separating and recognizing issues, feelings and interests, the mediator must consider the dispute in small blocks, starting with less complex factors, common interests and positive feelings. (...) They feel able to resolve the issues themselves, the parties develop a sense of gratitude for the mediator and reinforce the confidence placed in him/her earlier in the process. (AZEVEDO, 2009, p. 142)

### **3. The Judicial Settlement of Conflicts**

There are many ways to conciliate conflicts at the Rio de Janeiro State Appellate Court, chiefly because the judicial system of the state is divided into several jurisdictions<sup>5</sup>, which clearly means that the forms of conciliation implemented there under are equally diverse. Civil Court conciliations are not conducted in the same manner as those observed in the Special Courts, much less in a Family Court or Probates' Court or Orphans' Court. Each of these areas involves practices, formal procedures and different visions of what a conflict is and how it should be managed. Accordingly, as this is mostly a more direct approach with this topic, this paper is not intended to identify the contrasts observed within each of these spheres, but give some more general information on how law operators understand and construe the conciliation doctrine and within which contexts this Alternative Dispute Resolution emerged and has been implemented.

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<sup>5</sup> The Code of Judicial Organization and Division of the State of Rio de Janeiro regulates the administration and operation of the State Judiciary, and also determines the distinct powers of first instance judges in respect of matters and the nature of the conflicts sent to the Judiciary.

The Brazilian Code of Civil Procedure (CPC), Art. 125, Section IV, provides, as a duty of the judge, that —conciliation between the parties should be, at all times, pursued. In addition to this provision, the CPC Articles 277, 331 and 447 require conciliation procedures to be applied when conducting civil proceedings, which points out that courts may opt for permanent conciliatory mechanisms during the course of judicial proceedings. The pre-trial conferences in Civil Courts, for instance, seem purely bureaucratic acts that take place just because the Brazilian Code of Civil Procedure so determines, without expressing genuine concern with both understanding and agreement between the parties, contrary to what the settlement doctrine sustains. The Brazilian Council of Justice's website, for example, defines settlement as follows:

What is settlement?

It is an alternative means of dispute resolution in which the parties are assisted by an impartial person, the conciliator, who drives their negotiations and direct them towards a satisfactory agreement. The conciliator is a person from society who acts voluntarily and after specific training, as a facilitator of the agreement between the parties, creating an environment conducive to mutual understanding, the approximation of interests and harmonization of relations<sup>6</sup>.

However, in observing a pre-trial conference at one of the 50 Civil Courts of the Rio de Janeiro State Appellate Court, we concluded that discourse and practice are not in accordance. As a rule, the parties do not even appear at the hearing, being instead represented by their attorneys, who claim to have power to represent granted by a power of attorney. However, they rarely reach a real consensus, especially because whenever an agreement is actually intended, attorneys do it amicably at their respective offices, then submit a petition to the judge for mere approval of the previously entered into agreement.

The legal resolution of Article 447 of the CPC, which dictates the judge to order both parties — plaintiff and defendant — to appear in court, prior to commencing the evidentiary hearing and trial, in another attempt at conciliation, seems to be totally fictional, as an ever decreasing number of such hearings are being held. Even when they are held, the parties are required to appear in court only if personal statements are deemed necessary. If it is not the case, the parties are not obliged to appear at the hearing, which transfers the so determined attempt at conciliation to the lawyers, who, urged on the possibility of agreement, appear before the judge on behalf of their clients, who are excluded from this procedural stage, albeit being the parties (LUPETTI BAPTISTA, 2008).

Conciliators, in turn, are usually law graduates who work in this capacity with the specific purpose of being granted such title, as this adds points to the exam required to the exercise of judicial powers. As a rule, conciliators are intended neither to seek mutual understanding, nor foster dialogue and consensus between the parties, as sustained by the doctrine<sup>7</sup>. That's what an interviewee informally reported to us while we waited for the interval between hearings in a Civil Division of the Rio de Janeiro State Appellate Court:

We are not compensated for this work. You see, I am a military officer and have another occupation. But I need three years proven experience to be eligible to sit the Prosecutors Office's and the Judiciary's exam. The work I perform here serves to me as professional practice experience, which I will never gain, because I cannot be a lawyer. I enjoy being here, but, in fact, this is a temporary occupation for everybody. Who will stay here for good? Nobody. You are not compensated at all... Most people are here for the reasons I explained: proof of practice to be eligible for public exams. Some also want to learn, as they had no opportunity to do an internship. So, with the experience obtained from here, they get to know a little bit of the process, get an idea of how a notary office works, i.e., they always learn something new. But most people are here for the title. This statement allows us to understand the potential clash between the retentions of the Court and the expectations and interests of conciliators. The interview, which depicts a way to internalize its operations, required the following questioning: Do conciliators actually understand the doctrine discourse, which would encourage the practice of conciliation for considering it really important to change the traditional forms of conflict management used by the judiciary and the legal culture of litigation, or are they unmotivated in doing their jobs?

<sup>6</sup> <[http://www.cnj.jus.br/index.php?option=com\\_content&view=article&id=7932&Itemid=973](http://www.cnj.jus.br/index.php?option=com_content&view=article&id=7932&Itemid=973)>

<sup>7</sup> The state law 4.578/05, which is fully available on Alerj website, provides for conciliators and lay judges in the Judicial Branch of the State of Rio de Janeiro, and provides, in its Art. 12, paragraph 5, that "the exercise of a conciliator' or a lay judge' functions, for a period exceeding one year, shall be considered as a title obtained from a public exam for the Judicial Career in the State of Rio de Janeiro," which motivates law graduates and students recently graduated from universities with no work experience, to act as conciliators with this sole purpose.

The same interviewee stated that an official of that notary office presides over pre-trial conferences when there is not any conciliator present at the court, which gives us the notion that this activity is trivialized to such an extent of being compared to other everyday bureaucratic, notarial activities, for which neither specific expertise nor a different way of thinking jurisdiction is required.

Typically, conciliators are psychologists, social workers and law graduates. We all take a conciliation course, which is very simple. I myself have never heard about anyone who had failed. This course qualifies us as conciliators. The Court announces the course and interested people enrol in it. There always are vacancies. But if circumstances are that no conciliator is available at a given court, other employees of the same court are allowed to preside over a pre-trial conference. From the point of view of lawyers, the pre-trial conference is also trivialized. They deem it as "waste of time", as it requires their presence but does not effects an agreement. A lawyer who works for a financial institution that is considered a "regular suitor" in the State Court, and with whom we had the opportunity to talk, told us that the lawyers who conduct the pre-trial conferences are not the most experienced ones, because such conferences do not include any procedure that requires sophisticated technical and legal expertise, which suggests a disqualification of the jurisdiction itself for the purpose of this conflict resolution method. Our office makes a schedule so that less experienced attorneys presides over the pre-trial conferences, reserving the oldest to represent the clients at the evidentiary hearings and trial, when they have gathered the evidence and heard the witnesses and at which the own judge is present. As pre-trial conferences are conducted by conciliators, who have no authority to decide issues deemed important for the case, and who are there to solely try to reconcile, we reserve pre-trial conferences for less experienced lawyers, as, in general, no agreement is reached at such conferences.

This incipient scenario we just depicted now is an excerpt of the reality in the Civil Division of the Appellate Court that, as we said, changes dramatically if we visit a Family Court or even to a Small-Claims Court during a campaign for conciliation, when there is greater willingness of all to consensus. In this case, the reality is quite different, as there are a greater number of agreements than those of ordinary conciliatory hearings, held with no support from the Campaign for Conciliation created by the CNJ.

This consensus, created from an ethnographic study, initially conducted at the Rio de Janeiro State Appellate Court, is combined, for the purposes of this study, with the idealized discourse that has been built on the implementation of conciliation as an alternative means of conflict resolution by the Judiciary. Conciliation arises within a context in which not only does the Judiciary get through a serious crisis of legitimacy, but also prioritizes speed in its agenda, being alternative mechanisms and, in the case of conciliation, the task force from the Campaign for Conciliation, mere measures to vent the courts, as mentioned earlier. Additionally, conciliation — and mediation, as well — emerges as a more "humanistic" way to manage conflicts in the Judiciary<sup>8</sup>.

A judge told us the following: No matter how hard I try to tackle the issue from a technical standpoint, I could not solve it entirely. So I mostly approved, for instance, an agreement (...), but it is all about a make believe, isn't it? To approve an agreement that in theory did not meet the needs of that child because the parents did not even talk to each other...

Even the conciliation held in court, within the sphere of a pre-trial conference and approved by the judge, neither realizes the nature of the conflict nor solves the real problem, which is concealed behind the court records. The mediation arises, in this context, as an activity that is centred neither on the judge, nor on the procedural technique, but on the attempt to bind the disputing parties and facilitate dialogue between them, in order to allow, from such agreement, their so claimed practical measures to be adopted.

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<sup>8</sup> The Court of the State of Goiás, for instance, implemented the Peacemaking Social Centres (CPS), thought exactly in an attempt to conciliate the interests of the Court in emptying its shelves by means of a more consensual and dialogical way of managing cases. Here's what appears on the TJGO website: "The CPS is a revolutionary idea in regards to a swift and dignified service rendering to the, most often, humble citizen, who sees the court as their last resource for the solution of their problems. In a short time, the PSC conducts judicial and social services through the framework of conciliators and mediators. With this effort, everybody wins: the parties, who have their conflict resolved in a more human and quick way, and the representatives of the judiciary themselves, once the initiative is to prevent more cases from accumulating on the shelves." Available in: <http://www.tjgo.jus.br/bw/?p=35945>



In this sense, we wonder if mediation, with its proposal for conciliation of the parties, would also work as a mechanism of rupture of the logic of conciliation, which, once poorly implemented and absorbed by the bureaucracy of the Court, was discredited by law operators and by the citizens themselves. Mediation, in its intention to centre the administration of the problem on the people involved in it, rather than on the judge, would eventually insert in the legal field a sense of legitimacy to which it is not familiar<sup>9</sup>.

The judge referred to above, who we formally interviewed, is a great motivator of mediation and expressed his concern about this issue.

In mediation — some judges in the court where I work just looked at me with that weird face, while psychologists and social workers cheered by my words — judge is a mere assistant of the mediator. The judge is not the central, the key figure, in mediation. Definitely not! The judge has the great mission to show for those people that the solution given by him is insufficient: it is not the best solution. Our interviewee speech is quite interesting because it also points out certain resistance within the law sphere to realize that their mechanisms are flawed, and that their way of managing conflicts no longer works and does not meet the wishes of people. It further points out that the transfer of central role from the judge to mediators cause discomfort to the judges, which means that the dispute within this sphere for the sole right to render a judgment is still a trait that marks its structure. It is curious to note that everyone compete for a position of power: while the judges felt uncomfortable to realize that they are no longer the central figures in the management of conflicts, social workers and psychologists "cheered".

#### ***4. Final Considerations: Mediation and Settlement of Conflicts in Light of the Brazilian Legal System***

##### **4.1. The Adversary as the Structuring Principle and Logic of Judicial Proceedings**

An issue that seems primary in the discussion on the process of incorporating mediation and settlement in the priority agenda of courts, particularly the Rio de Janeiro State Appellate Court, regards the apparent paradox engendered by the use of these doctrines in judicial proceedings as they are structured today. But why the implementation of such doctrines in judicial proceedings would be seen as a contradiction? Among other reasons, because the Brazilian judicial proceeding does not embrace consensus and dialogue as methods of conflict management, since it is based both on the *principle* and on the *logic* of adversary proceeding, whose structure prevents the cooperation between the parties and, therefore, puts them away from any possibility of mutual understanding (AMORIM, 2006). The logic of adversary procedure is a composition method of legal knowledge and socialization of operators in the field of law, which differs from the adversary principle, albeit supported and inspired by the latter. In this particular case, the basic difference between logic and principle lies in the fact that adversary proceeding, as a principle, is empirical, while its logic entails a broader sense and influences all other manifestations of law devoid of empiricism, whether in doctrine or in the so-called theory. The effectiveness of this logic in the philosophy of law is thus neutralized, being left without demonstrations or testings that would support explanations, understandings or applications. The logic of adversary procedure is built upon thinking and reveals presents the operators' practice.

The adversary principle, also known as the principle of bilaterality, is a precept of procedural law deriving from the exercise of the right of defence, and is defined by dogmatic as the principle by which nobody can be bound by a court order in its jurisdiction without having plenty of chance of effectively influencing its composition at parity of opportunity with the other party (...) the adversary proceeding assumes the bilateral hearing with the parties. (GRECO, 2009, p. 540) The logic of adversary proceeding, in turn, shapes the field of law, and according to the history of legal knowledge, its origin dates back to the years of *contradicta* and *disputatio*, performed at the first universities teaching law during the Middle Ages, especially in Italy, birthplace of such scholarship (BERMAN, 2004). Having endless arguments as its foundation, the logic of adversary proceeding requires to be interrupted by an authority, so the judicial proceedings in Brazilian courts can be carried on. This task is usually reserved for the judge.

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<sup>9</sup> From this standpoint, a mediator interviewed by us highlighted an interesting difference between conciliation and mediation: "Conciliators meddle too much in the dialogue of the parties, they interfere, give their opinion... Mediators listen more than interfere (...). Conciliators are more committed to the agreement, to the end of the case, whereas mediators are not under that commitment. They are more concerned with the conflict itself."

In the absence of a formally constituted authority, the adversary proceeding tends to go on, ruling out the possibility of a consensus between interlocutors. So much it is true that there is a doctrine of procedural law called "confession", provided in Articles 348 to 354 of the Brazilian Code of Civil Procedure, which is precisely defined by the impossibility of agreement between the parties on the matters raised in the proceeding. Otherwise, if an agreement is reached, there would be the risk of losing the case, since the main effect of confession is recognizing that the facts alleged by the defendant are true.

As seen, the Brazilian law is, then, a field that does not adopt consent neither as a form of dialogue within proceedings, nor as a structuring category of knowledge. On the contrary, it assumes adversary proceeding as foundation and reasoning not only of the procedural system, but also of the composition of legal knowledge. That happens mainly because the doctrines, or "doctrinal currents," constituting its theoretical discourse are nothing more than opposite ways of analyzing/interpreting the same object or the same legal provision at the discretion of the *ad hoc* academic authority, often confused, by analogy of method, with the judicial authority. In other words, what Bourdieu calls "consensus in dissent" (BOURDIEU 1968, p. 142) is unfamiliar to the law. Accordingly, in many aspects, the structure of the Brazilian proceedings seems to hinder forms of consensual resolution of conflicts on trial, so that the slightest consideration of adopting mediation and settlement in a system founded on these (adversarial) assumptions seems paradoxical in itself, or perhaps innovative, to the point that its effectiveness would find barriers and clash against tradition. Such obstacles are a rather interesting topic for future analysis based on an anthropological perspective; however, they are not comprised in the scope of this paper. Even though, they will definitely guide us through our next study on this subject. 4.2. The judge at the centre of the proceeding there is another matter that reinforces the arguments mentioned above, and that is quite typical of the Brazilian legal system. It is a feature that draws our attention when we consider the alternative types of conflict resolution discussed herein. We are talking about the fact that the entire handling of proceedings completely lies in the hands of the judge, immediately distancing the parties from conflict management and submitting them to the procedures and procedural acts determined by such authority.

This fact, together with the adversary proceeding, steals away the autonomy and flexibility of the parties to decide on the direction of their own cases, preventing, or perhaps hindering consensual measures of judicial conflict management. In this sense, it is noteworthy observing the rupture that these alternative measures intend to cause to the traditional structure prevailing so far. For the reasons above, the opportunity that mediation and settlement propose to the parties of the procedure, assigning to them the main role in the judicial proceeding, seems to disagree with traditional methods of conflict management in courts. As mentioned, the possibility of citizens accessing the courts and holding an important part in the course of their cases has always been hindered. Spaces given to citizens where they can present their conflicts are rare, and court cases that are opened and closed without the parties being submitted to the venue are very common, a fact that evidences the secondary role played by the parties in judicial proceedings management. The proceeding structure, centred on the judge, prevents a dialogue between the parties that, instead of trying to convince each other of the reasons giving rise to the case, end up compelled or conditioned to worry exclusively about persuading the judge on their arguments - an attitude that, again, hinders consensus. Therefore, the proposed measures of settlement and mediation, as institutionally provided, clash against the prevailing structure while trying to break it. As noted in the previous section, this conclusion brings to light thought-provoking issues about the use of these new mechanisms by operators, issues that definitely deserve to be more closely observed and analyzed.

#### **4.3. Culture of Litigiousness X Quest for Social Peacemaking**

The legal discourse that is being produced on the implementation of the doctrines of settlement and mediation suggests that the Judiciary is rethinking its way of addressing conflicts.

Could the adoption of such doctrines represent a new format in dealing with cases, by focusing more on the conflict itself rather than on court records? On the other hand, when the Judiciary reinforces its role as society's peacemaker, does it not end up embracing mediation and settlement as instruments to promote such role? If so, does that not mean strengthening the traditional viewpoint that assumes (and reproduces) the idea that conflicts indeed threaten social peace<sup>10</sup>, and therefore, instead of handling conflicts, should jurisdiction eradicate them from society?

<sup>10</sup> On this matter and on the use of settlement and mediation as tools for peacemaking and instilling an ideology of harmony for exercising control, see NADER, 1994.

Would not this trend simply represent the dismissal of cases (causes of dismissal: Articles 267 and 269 of the Brazilian Code of Civil Procedure)?

Or would it portray an effort to conceal (and/or dismiss) conflicts within themselves, without an effective solution to the same society from which they came from? Reality shows that dismissing a case does neither necessarily mean managing the interpersonal conflict within it, nor effectively solving people's real problem (AMORIM, KANT DE LIMA, MENDES, 2005). Jurisdiction, as a merely substitutive activity, settles the dispute in terms of its legal effects, but in the majority of cases, instead of eliminating the subjective conflict between the parties, it increases it, generating more animosity and, at large scale, engendering the transfer of responsibilities for the judicial defeat. The defeated party hardly acknowledges that its right was not "better" than the other party's, often blaming the Judiciary for the setback in its expectations. Moreover, the party is hardly convinced by the judgment, and the resentment resulting from the court order fosters new disputes, starting a vicious circle (FERRAZ, 2007).

The institutional discourse about the need to implement these alternative policies in courts usually adopts the grounds that they are paramount to put an end to the "culture of litigiousness"<sup>11</sup> that prevails in our country. There is, therefore, a system's belief that people are too litigious and that such culture is the cause of the depletion of courts' system. This statement fails to consider, for instance, how the legal field is constituted. Within it, every rule has an exception, that is, for every rule set there are always several doctrinal currents with different interpretations. This leads people to believe that they will always, at a certain judicial level, find a judge that will uphold its thesis. In other words, to dispute in this system is to sustain it, as it was developed to always allow the existence of naturally opposing arguments for the same legal device. Laura Nader (1994), when studying the construction of the ideology of harmony in Western modern societies, noted that litigiousness was represented thoroughly negative, publicizing the idea that alternative conflict management would be associated with peace, while the court mode would be related to war.

The reasoning of alternative dispute resolution (ADR), that seems to be landing in Brazil (although our legal culture is completely different from the American one), comprises programs that promote the restructuring of judicial procedures through more informal (and not procedural) dispute resolution means, such as settlement, mediation and arbitration. According to the focus of these programs, the Judiciary should drive its attention to the promotion of agreement, replacing confrontation with harmony, and war by peace. As an alternative to litigation, where you can win or lose, these means advocate the motto "winning or winning," which is only feasible by coming into agreements.

ADR programs were based on a fierce rejection of conflict in society and, thus, they aimed at preventing not the causes of dissension, but its manifestation in the legal system. They were also an apology to the model of efficiency. They promised to solve the problem of the outburst of disputes by fostering a fast, advantageous and alternative court system to judicial conflicts. In other words, the culture of social peace seems to have been inspired by the discourses of the common law, and duly introduced into our system. According to the Brazilian Supreme Court Minister Ms. Ellen Gracie, by launching the Movement for Settlement in August 2006, CNJ "aimed to change the culture of litigiousness and promote the quest for solutions to conflicts by means of agreements."<sup>12</sup> Counsellor Joaquim Falcão similarly stated that the settlement stage, in general, "is not sufficiently prioritized by judges, who are committed to the court system's legal culture in force, which is imposed and not produced by the parties"<sup>13</sup>.

Overcoming this cultural trait, according to the movement's message, seems to be a critical part of a strategy to unburden the Judiciary and give it more speed, as well as making the society more "peaceful."

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<sup>11</sup> Note of the National Council of Justice (CNJ) about the opening of the Settlement National Week. Available at: <[http://www.cnj.jus.br/index.php?view=article&catid=1%3Anotas&id=5441%3Asemana-nacional-pela-conciliacao-terabertura-simultanea-em-cinco-capitais-&format=pdf&option=com\\_content&Itemid=675](http://www.cnj.jus.br/index.php?view=article&catid=1%3Anotas&id=5441%3Asemana-nacional-pela-conciliacao-terabertura-simultanea-em-cinco-capitais-&format=pdf&option=com_content&Itemid=675)>

<sup>12</sup> <[http://www.cnj.jus.br/images/stories/movimento\\_conciliacao/artigos\\_textos/conversar\\_faz\\_diferenca.pdfom\\_content&Itemid=675](http://www.cnj.jus.br/images/stories/movimento_conciliacao/artigos_textos/conversar_faz_diferenca.pdfom_content&Itemid=675)>

<sup>13</sup> <[http://www.cnj.jus.br/images/stories/movimento\\_conciliacao/artigos\\_textos/artigo\\_02.pdf](http://www.cnj.jus.br/images/stories/movimento_conciliacao/artigos_textos/artigo_02.pdf)>

A booklet produced in 2008 summarizes social peacemaking as its main goal (National Council of Justice, 2008). The movement sought to "spread the culture of peace and dialogue, discourage behaviors that tend to generate conflict, and provide the parties with a successful experience of settlement<sup>14</sup>." On one hand, the promotion of alternative measures seems eager to introduce a new perspective for analyzing conflicts, taking them as something inherent to social relationships and therefore, instead of being simply translated into legal devices and filed against a party in a court order, they should be managed by consensus. On the other hand, however, the discourse reinforces that Brazilian society is too litigious and that the culture of social peace must be then incorporated, what will be done through these new methods of conflict management. The contradiction in such wording must be discussed, and that is exactly what we tried to do in this paper, by proposing reflections and a relative approach based on the official discourse produced about this subject<sup>15</sup>. 4.4. Speed as a priority goal in the Judiciary's agenda In line with what has been said above, it is worth highlighting another important issue on the implementation of mediation and settlement as judicial measures: the quest, prioritized by courts, for speed. It makes us wonder whether the use of these alternative mechanisms is at the service of this quest only to clear the shelves of courts. Many changes undertaken in the current Brazilian judicial system aimed to unburden the Judiciary, instead of improving the quality of judicial proceedings and remedies. Thus, there is a noticeable gap between citizen's expectations and courts' objectives, a contrast summarized in the binomial quality vs. quantity, which today represents fairly well the criteria for managing the courts.

Brazilian courts have clearly chosen to deploy, at this moment, the culture of peacemaking and harmony. This fact leads us to the study in which Laura Nader tries to understand the conditions and reasons why Western modern societies oscillate between legal models of harmony and conflict, and how these choices are related to specific political moments (Nader, 1994). Today, policies aimed to carry out measures driven to implement settlement and mediation in the Judiciary, besides considering both methods alike, also face them as the solution for the system's collapse, now immersed in processes clamouring for remedy. Have mediation and settlement actions become synonymous to unburdening?

Amendment No.45/2004 added the item LXXVIII to Article 5 of the Federal Constitution<sup>16</sup>, a provision regarding the individual guarantees of Brazilian citizens. In short, this item raised speed to the category of constitutional guarantee. Since then, the symbolic effect produced by this inclusion led courts to adopt institutional measures aimed at speed (although other actions had already been taken to try to reduce the number of processes). Many of them, such as the "Movement for Settlement"<sup>17</sup> were led, as already mentioned, by the CNJ, created by this same amendment. However, it seems that these measures only aim at speed and, thereby, overlook other major factors for the parties, who, in turn, did not take part in the institutional (and unilateral) election of speed as the current agenda of the courts.

Such speed is hard to define, since, as it is known, abiding by the legally prescribed deadlines for the outset and the close of cases is merely theoretical, as evidenced by recent studies that examined the so-called judicial flow of cases. The fact that proceedings that do comply with the deadline provided by law are exceptions makes us wonder about the criteria, undoubtedly extralegal, capable of defining and determining their delay and/or speed (RIBEIRO, 2009).

Another relevant issue arises: is speed a quality factor of remedy or a measure solely focused on reducing judicial backlog caused by the alleged excessive litigiousness of Brazilian citizens?

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<sup>14</sup> The campaign slogan in 2008 was "Coming to a settlement is wishing you good."

<sup>15</sup> The movement "*Conciliar é Legal*" (Coming to a settlement makes you Legal) should carry on with its activities, as the newly appointed President of the Federal Supreme Court, Minister CezarPeluso, who also chairs the National Council of Justice, has expressly approved the initiative (in an interview with magazine *ConsultorJurídico*, on August 11, 2010). Available online at: <<http://www.stf.jus.br>>

<sup>16</sup> Article 5, Item LXXVIII, Federal Constitution of 1988: "To everyone, at judicial and administrative levels, is ensured the reasonable length of process and the means to guarantee the speed of its prosecution."

<sup>17</sup> There is an extensive and diverse material about the "MovimentopelaConciliação" available at the National Council of Justice website. Available at: <[http://www.cnj.jus.br/index.php?option=com\\_content&view=article&id=7932&Itemid=973](http://www.cnj.jus.br/index.php?option=com_content&view=article&id=7932&Itemid=973)>

And, following this line of thought: does the implementation of mediation and settlement<sup>18</sup> in courts aim to break with the current structure of judicial proceedings, in order to allow greater participation of the parties in the management of conflicts by the Judiciary, seeking consensus and dialogue, or is it another measure, among many others, that merely intends to unburden the courts at any price as quickly as possible? In short, were alternative measures designed to address the parties or the Judiciary needs?

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<sup>18</sup> It is very common noticing, for example, in Small-Claims Courts, that settlement is seen as a threat by those involved in the proceeding, instead of an attempt to harmonize the relationship between people and discuss the conflict that led the to the court. Some women we talked to after a pre trial conference in one of the courts of the Central Court Venue said: "I felt threatened by the conciliator. I am disappointed. The conciliator almost forced me to accept the proposal of R\$ 100.00 made by *Lojas Americanas*. And I accepted it. That is not na agreement."