
MEDIATION FOR THE SOLUTION OF URBAN PROBLEMS: THE SEARCH FOR ENVIRONMENTAL QUALITY FOR PRESENT AND FUTURE GENERATIONS BY APPLYING GOVERNANCE PROCESSES

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This article analyzes the role of the new forms of conflict resolution, focusing on mediation, for solving urban problems. At first, it indicates the historical development of irregular occupation in Brazil, addressing how it arose in the country. After, it evaluates the historical development of mediation in the Brazilian legislation as a way of solution to urban conflicts generated by the illegal occupation. Lastly, it addresses the governance, assessing its concept and importance, as well as how it can be performed for the defense and protection of the urban environment, with a view to maintaining environmental quality for present and future generations in respect for the principle of intergenerational solidarity (adopted by the Brazilian Constitution), by combining with the mediation.

Keywords

Governance; Mediation; New forms of conflict resolution; Urban environment

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INTRODUCTION

This paper aims to demonstrate the importance of Law 13.140/2015, which provides mediation as a mean of settling disputes within public administration for the materialization and execution of intergenerational solidarity. In this sense, this paper is not just a study of a specific case, but it has the intention to highlight the importance of this regulation for the solution of urban conflicts.

This law solidifies a Brazilian public policy of consensual methods for conflict resolution, which began with the Constitutional amendment n°. 45/2004, considered the framework for judicial reform in pursuit of efficiency. Afterwards, the National Judicial Council issued the Resolution n°.125/2010, establishing mediation as an appropriate tool for conflict resolution. The historical course for consolidation of this trend was the enactment of Law 13.140/2015, with importance closely related to management, prevention and resolution of urban environmental conflicts.

These conflicts have materialized around the use and occupation of urban land, as in most large Brazilian centers, accelerated urbanization, coupled with the imbalance of income distribution, generated towns with peripheral human settlements, that reflect and perpetuate inequalities, promote social exclusion, environmental degradation and exposes the inability of State to intervene in the implementation of effective public policies for environmental protection, social inclusion and conflict resolution.

Moreover, it is timely an analysis and interpretation of Mediation Act, to determine whether it may contribute to resilience of urban system, in the sense that the resilient societies are also those that have the capacity to mediate the differences with cordiality and tolerance.

Following this dynamic, the implementation of mediation can be seen as an important tool for urban environmental governance arrangements, which will manage, prevent and resolve conflicts around the urban areas in search of intergenerational solidarity, because this new form of conflict resolution is an undeniable part of the mechanisms for the implementation of a effective governance, as it allows the participation and dialogue between different actors, seeking a beneficial solution and adopting a peaceful model based on cooperation.

In this line of reasoning, this paper discusses, at first, through a historical building, how the illegal occupation occurred in Brazil, giving rise to urban environmental conflicts. Then, it analyzes the role of new forms of conflict resolution, focusing on mediation for solving these urban problems caused by occupation, indicating the historical development of mediation in the Brazilian legislation. After that, it ponders on governance, Evaluating its concept and importance.

Finally, it discusses the possibility of using this mechanism for the defense and protection of urban environment, aiming the maintenance of environmental quality for present and future generations, in respect to the principle of intergenerational solidarity, adopted by the Brazilian Federal Constitution of 1988.

ENVIRONMENTAL CONFLICTS: HISTORICAL DIMENSION OF IRREGULAR OCCUPATION

Environmental conflicts are characterized by having a constantly changing and evolving nature. In general, it can be conceptualized as a social dispute, which occurs when someone has a certain claim to make use of a natural resource and the other creates a barrier to prevent or regulate such conduct. It can be divided into two types: a) conflicts of use, in which there is a dispute between individuals, or individuals with the government, which have intention to make use of some good or resource environment; and, b) conflicts between entrepreneurs, both public and private, that are aimed at the exploitation of resources, while the society seeks to preserve or conservation of it.¹

One of the main environmental conflicts is regarding to the urban environment surrounding, the use and occupation of the land. Commonly, it arises around housing needs, whose result is the uncontrolled illegal occupation of urban land.

Population growth, trend to urbanization, inconsistent public policies, lack of preparation and inadequate planning have resulted in increased degradation of socio-economic conditions of people, especially in cities and suburbs.

Within the historical context, the formation of illegal areas in Brazil is directly related to the exclusionary process of urbanization and housing throughout the twentieth century.

The capitalist real estate market, low wages and social inequality present from the beginning of the formation of Brazilian society, prevented access to housing for much of the population. World Bank data show that from 1 million homes in Brazil, about 700,000 are illegal, which implies that the part of the population lives in informal housing.

This happens because, the alternative found to housing is the occupation of peripheral land in large cities, where the value is lower for the maintenance of residence, given that, in the last century, there was an intense migration of the population to major urban centers, in the search of better working conditions.

However, since the beginning of the construction process of cities and Brazilian society, there was a gap between access to housing and population growth.

The first form of recognition of illegal areas in the city takes place in the nineteenth century, when people interested in the urban setting in Brazil and Europe discovers the slums: *“property whose main characteristic is the precariousness of housing conditions, mostly result in living conditions and subhuman housing”*².

This population is sometimes marginalized, without access to clean water, sanitation, sewerage, electricity, suitable and adequate health services, education and other basic human rights that must be promoted for minimal quality life (even in the environmental aspect).

Based on the European movement for hygienist urban reform, Brazilian cities start building large avenues and sanitation deployment to the landscape composition to meet the interests of the bourgeoisie of the industrial period.

These reforms did not create enough affordable housing to shelter the resident working class in the slums, giving rise to other forms of illegal areas to these families, starting the peripheries.

At the moment, despite constitutional guarantees and the City Statute, that brought forecasting tools to implement participatory planning, the problems generated throughout history on the growth of Brazilian cities still exist and need to be addressed.

There are several problems caused by irregular occupations, including disasters caused by occupation of risk areas, flooding the silting of watercourses, commitment watercourses that turned waste dumps, disappearance of green areas and occupation of environmental protection areas.

Thus, one of the important features of this conflict is the high social impact, which makes the participation of society a key in its resolution. This is a multipart conflict and imbalance of power (between public and private), which involves the interests of the population, economic conditions, access to information, and other factors.

MEDIATION AS A SOLUTION TO URBAN PROBLEMS

We can illustrate this scenario with urban land conflicts, which, for the most part, has as taxable event invasions of public and private areas for housing purposes. The contest for possession or urban property ownership, and the impact of public and private projects, involves low-income families and vulnerable social groups that need or demand the protection of the State in ensuring the human right to housing.

For the solution of such conflicts, as a rule, the government or the individual who find themselves injured, trigger the Judiciary. However, this does not seem the most appropriate measure, because besides the complexity of the procedure, the, solution of environmental conflict is not only in the hands of justice bodies, but it depends on measures to be taken by other public bodies. Where and how to remove the occupants are always recurring issues, that rely on actors who are not always involved in the process.

Thus, there is no doubt that environmental conflicts, by its nature, require the use of consensual methods, such as mediation, which favors the dialogue.

The choice of mediation as a instrument to conflict resolution promotes participatory planning, by giving voice and empowering citizens in the search for just and sustainable solutions, which is essential to promoting peace in the cities.

HISTORY OF MEDIATION IN BRAZILIAN LAW

Given the inefficiency and inadequacy of traditional means of conflict resolution, such as administrative and judicial ones, for a few decades, it has intensified the adoption of consensual means, focusing on a pacifying solution.

Increasingly, it has been sought or tried to find other ways, giving focus to negotiation, conciliation and mediation which can be applied extra or judicially.

Mediation is an effective and satisfactory mechanism for all involved in the search for a more suitable way to the conflict resolution and a sense of justice, since the parties actively participate in the construction of the solution with the help of an impartial third party.

Since the nineties, Brazil has faced a challenge in the quest to find and develop methods that are considered more equitable for its users, in order to provide a more active role through its participation in the construction of solutions to the conflict. To this end, it has begun a reform in the judiciary, whose main objective is to educate and encourage citizens in the use of consensual means in order to spread it as the best way of resolving the conflicts. The stance of encouraging these methods allows real access to justice so that the parties can reach a negotiated and most appropriate solution. Given this perspective, this reform should be based on mediation as an important mechanism to conflicts.

It will be through the use of mediation that Justice will become rapid, efficient and modern, in order to facilitate the approach of the parties to reach, in a consensual way, a satisfactory result.

In Brazil, mediation started to gain momentum with the implementation of initiatives such as the foundation of the National Council of Mediation and Arbitration Institutions (known as CONIMA), in 1997, and with projects of laws to regulate the mediation as a method of prevention and resolution of conflicts.

The Constitutional Amendment n°. 45/2004 established the framework of the judicial reform, in the search of a system that expands access to justice and promotes the principle of reasonable duration of court proceedings as a fundamental right. But, it was only in 2010, when the National Judicial Council issued the Resolution n°. 125, the conciliation and judicial mediation activities were regulated.

The article 1, of mentioned Resolution, establishes the National Judicial Policy treatment of conflicts of interest, in order to ensure the right of everyone to the solution by appropriate means..To meet this goals, the courts of all States should establish Permanent Core of Consensual Methods to Conflict Resolution and install the Judicial Centres of Conflict and Citizenship Solution. To reinforce this policy, the new Civil Procedure Code, sanctioned on March 16, of 2015, defines the role of conciliator and mediator, and the obligation of the courts in the creation of these centers.

Mediation aims to encourage the active participation of society in the conflict resolution procedure, so that they can get, through stimulation of a third, a negotiated solution more appropriate.

In 2015, it was approved the Law n°. 13.140/2016, which regulated the judicial mediation and extrajudicial.

ASPECTS OF LAW N^o. 13.140/2015

The Law n^o. 13.140/2015 is a real legal framework, to provide mediation as a means of settling disputes between individuals and the consensual resolution of conflicts within the public administration.

The law provides the possibility of mediation involving available and unavailable rights, that admit transaction, as well as provides the extrajudicial and judicial mediation.

The extrajudicial mediation can be performed by any capable person that has the confidence of the parties. The judicial mediation should be conducted by a capable and graduated mediator with at least two years of higher education course, who has obtained training in an organization recognized.

The Courts must establish and maintain updated records of the qualified and authorized mediators to act in judicial mediation. It is up to the courts the creation of the Judicial Consensual Conflict Solution Centers, responsible for carrying out pre-procedural and procedural conciliation and mediation sessions, as well as developing programs to help, guide and stimulate consensual resolutions.

BRIEF COMPARISON WITH THE MEDIATION CONDUCTED IN OTHER COUNTRIES

Internationally, it is not only Brazil that qualifies mediation, for the reasons stated in this paper. Other countries also do the same, through legislation or specific rules that allow and even regulate the practice of mediation, as an alternative form of conflict resolution in several areas.

Within the European Community, there are the Directive 2008/52/CE of the European Parliament and the Council, of May 21, 2008, on mediation in civil and commercial matters, which claims to be the access to justice a fundamental right and in order to improve it, it calls on the Member States to establish non judicial alternative procedures through voluntary process, given that the parties themselves are responsible for the procedures to be followed, playing a role *“particularly active in efforts to find the solution that suits them better”*³.

The Directive also evaluates mediation as a faster possible extrajudicial solution, inexpensive and adaptable to the needs of the parties, since *“it is more likely that the agreements obtained from mediation be enforced voluntarily and preserves an amicable and sustainable relationship between the parts. These benefits become even more pronounced in situations displaying cross-border aspects”*⁴.

In this sense, by allowing the use of mediation to cross-border problems, the Directive admits its application for solving problems related to the urban environment, in view of the inherent cross-border character of Environmental Law, since its effects are felt by all, often not respecting the pre-established geopolitical boundaries.

On the other hand, in the United States, mediation was carried out decades ago as a form of resolving conflicts through consensus between the parties and, it can be performed on a contractual (so that the parties reach an agreement on behalf of a signed contract) or voluntarily (when the parties prefer to litigate mediate) framework, as well as be applied with judicial determination (when the judge determines there will be mediation in that particular case)⁵.

It is clear, therefore, that mediation is a reality to be applied to the solution of conflicts, not only in the Brazilians cases, but also internationally.

MEDIATION AS A FACILITATOR OF ENVIRONMENTAL PROTECTION THROUGH GOVERNANCE MECHANISMS

It is noticed that, through this voluntary process, it is possible to obtain the fundamental right to access to justice, because the parties will be helped to reach an agreement on their adversity, respecting the legal limits, and “beyond the formal aspects before judicial bodies, implies access to fair legal system”, as Resolution n°. 125/10, of the National Council of Justice.

Through mediation, it is also able to access efficient justice, because it seeks to solve the conflict in a more dynamic way, looking for the maximum effectiveness of the rights, and empowering those involved in the responsibility for the decision and subsequent implementation, giving greater satisfaction, safety and economy to parties, as well as contributing to the restoration and maintenance of interpersonal relationships.

The result is more than merely solve a conflict, it transforms opponents into collaborators, as well as stimulates and vitalizes the communication between individuals in conflict, so as to provide what the public jurisdiction does not have a position to offer (due to its own characteristics): speed and satisfaction among the parties that, thus, can restore their relations.⁶

With features of privacy, oral communication, dialogue, autonomy, balance, speed, lower cost and cooperation, can be the object of mediation:

Problems relating to everyday issues, as disagreements among members of educational institutions and leisure, family or between neighbors discussions and conflicts on the environment have been the main issues brought to discussion through mediation, although it is allowed to discuss in this process almost any conflict that may interest to parties.⁷

Thus, it can be used for issues involving environmental conflicts in the search for negotiated solutions to the creation of public management and policy instruments involving public and private sector and civil society, with the primary objective of encouraging and promoting the rational and sustainable use of currently available resources, to the defense and protection of the environment, under the Federal Constitution of 1988.

Mediation uses the basic processes involving governance, to ensure an ecologically balanced environment for all present and future generations. In this sense, it requires the “expanded participation”, essential to a effective governance in order to ensure proper management for sustainable development, “adopting more stringent social and environmental policies, and ensuring a more active role for citizens and local agents”⁸, as well as to public or private sector institutions.

Governance introduces new mechanisms and actors for discussion and interaction between all those involved in a particular issue. What it is essential to the issues of environmental law, in view of its intrinsic characteristic of transnationality, as the systems and ecosystems do not fit neatly into any kind of predetermined boundary.

This is what happens, for example, in the event of environmental disasters such as emissions, oil spills, accidents with nuclear materials, increase of the Earth’s temperature, increase of organic waste, among other events.

It is, therefore, necessary an integrated management (which can be obtained through the mediation) to the effectiveness of the right to an ecologically balanced environment for present and future generations. Because, the environment does not see borders, it connects people and recontextualises them, forming a new structural and economic reality regarding the need for cooperation for maintenance and/or recovery of the ecologically balanced environment, in respect to the principle of intergenerational solidarity (prioritized by the Brazilian Federal Constitution of 1988), bearing in mind the principle of sustainable development (in any of its three pillars: economic, social and environmental).

THE RESPECT FOR THE PRINCIPLE OF INTERGENERATIONAL SOLIDARITY THROUGH ENVIRONMENTAL MEDIATION

The Brazilian environmental law is guided by the principle of intergenerational solidarity contained in the caput of article 225, of the Constitution, which prescribes that the environmental preservation should be done keeping in mind both the present and the future generations.

Those who were not even born, who have no voice or form of expression, not even procedural, cannot be committed to their right to enjoy quality of life, by the way that current generations use of Earth's natural resources.⁹

It translates into a principle of ethics between generations, since the currently existing resources should be used to ensure a standard of consistent quality for future generations.

This understanding is consistent with the Principle n°. 1, of the Stockholm Declaration, of 1972 (which inspired the Constitution of 1988), which recognizes the right of future generations is closely linked to responsibility of current ones with the balance of the environment.

The Environmental Law has, thus, transgenerational features, since it extrapolates the legal rights of present generations to achieve those yet to come. The environmental protection should, therefore, create a bond of solidarity of present generations towards the future.

“It is a right that translates, for the first time, an inter-generational commitment, a pact of the current generation with the future, to respect and preserve the environmental balance as a common good”.¹⁰

In this sense, the building of cooperative relations between community members is essential, including the public or private sector, through productive dialogue in order to raise awareness about the rights and duties of every citizen, which ultimately favors the concept of a positive change in society.

It is noticed that, mediation emphasizes the culture of democracy through the development of attitudes and behaviors towards peace and mutual respect for the individual to identify their differences from each other, seeking a way to pacify them, beyond treatment most suitable for disputes, encouraging the participation of the parties through cooperation and recognition of citizen role, to facilitate a solution to the conflict, listing viable alternatives and choosing the most appropriate and fair ones, providing efficiency and effectiveness intergenerational solidarity, brought by the Federal Constitution of 1988.

Anyway, this participative management (promoted through collaborative solution building) encourages the active involvement of citizens and the development of a democratic process, besides promoting social inclusion.

CONCLUSIONS

In this work, we have identified the process of urbanization of cities as an environment capable of generating socio-environmental conflicts that commonly arise with housing needs around the use and occupation of land, which result is the uncontrolled illegal occupation of urban land.

These are conflicts that require a multi-disciplinary knowledge, for which there is no isolated solution, but there is the need for intervention in various areas of action such as economics, law and sociology. So, to reach consensus between the parties it takes a close interconnection of these areas in the planning and implementation of solutions.

This interconnection can be achieved in the implementation of agreed methods of conflict resolution, such as mediation. In this sense, the solidification of a legal framework laying down on specific rules for implementation of environmental mediation is essential to implement citizen participation and involve actors, who can build the right solutions to urban environmental problems.

The Law n°. 13.140/2016 reaffirms the possibility of management of environmental conflicts, through effective governance in a view of management, prevention and resolution of these urban conflicts.

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