Akrasia In Mediation And In The Adhesion To Arbitration Processes

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ABSTRACT

In this article we propose, still in an embryonic way, to analyze the Akrasia theme in the mediation pacts and the adhesion to arbitration processes.

For this purpose, we consider some critical subjects for ADRs and, the Right: the asymmetrical relations, the contexts of imbalance of powers (in this article, labor and, gender); the high degree of conflict and violence (as domestic), bringing particular questions that seem relevant to us.

In our point of view the Akrasia theme in ADRs is a significant field to research to a) understand how Akrasia can occur in the adhesion to arbitration and the pacts (settlements or agreements) in the mediation process; b) know how Akrasia can happen in asymmetrical relations and high degree of conflict and violence; c) identify instruments for overcoming Akrasia in ADRs and; d) understand if Akrasia would be able to invalidate the adhesion to ADRs and decision-making acts.

It is relevant to think and talk about Akrasia in ADRs that is currently encouraged by the Brazilian Judicial Justice Policies.

At these days, in Brazil, there is practically an epidemic phenomenon of ADRs chambers creation, projects in the Judiciary, and where we have quickly trained mediators and arbitrators, who start their work without a due reflection time, in a supposed new glamorous business market.

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So, We are talking about Akrasia in ADRs, thinking about autonomy in the decision-making process, especially in delicate situations of asymmetry, bringing any particular questions that seem relevant to us, in this context and to this context.

Are we accepting Akrasia in arbitration adhesions and the mediation decision-making process, against the autonomy of the will? Is this an issue, a theme that interests just Brazil?

Keywords: ADR. Akrasia. Weakness of Will, Labor, Domestic Violence.

1- Introduction

Our interest and choice of the theme Akrasia was based on research in 2012, which made possible our contact with the lectures given by Jon Elster (Elster, 2007), a Norwegian political scientist, at Collège de France, with the title Agir Contre Soi: La Faiblesse de Volonté, or: Act against himself or herself- Weakness of Will.

Then, We start to research other authors who deal extensively with the subject Akrasia. But all of them don't address their studies to Akrasia in ADRs (alternative instruments of dispute resolution), neither to the mediation pacts (settlements and agreements) nor the adhesion to the arbitration (agreements/clauses), as We are working and studying in the last six years.

Since the preliminary studies on the Akrasia theme, we have attempted to identify situations in which it was present empirically. Thus We tried too to locate some instruments to overcome it.

So dealing empirically and theoretically with the Akrasia theme and doing lectures and debates in the disciplines of mediation, in the master's and doctorate disciplines in Human Rights, under the guidance of Professors

Antonio Rodrigues de Freitas Júnior and Guilherme Assis Almeida, in University of São Paulo– Law School- Largo São Francisco, invited to these discussions.

At this point, some points have to be clarified. Since 1997, We have adapted, tested and researched non-adjudicatory management methodologies for conflicts and crises, public judicial and non-judicial justice policies, as well as in private and other public policies such as housing, urban development, health (addictions and mental illness), gender, environment- parks and water, compliance, labor, employment law, therapeutic justice and sports.

The common links to work in the different areas indicated above is the inequality. In other words the lack of economic resources to litigate; the parts low personal repertoire to deal with conflicts and crises; the impact of violence and conflict (moral physical or structural) on the persons involved and, the imbalance of powers among the persons involved: economic, intellectual or social (asymmetric positions/ conditions in the relation).

The conflict and crisis management projects in our conception are always designed in an interdisciplinary approach, very different from the multidisciplinary interlocution of several actors from different knowledge areas acting together in a network. The team of mediators is organized with professionals from several fields. When the strategies for the conflict and crisis management project are designed, from the beginning, the dimensions of human knowledge necessary to operate in context are considered together to delineate a methodology. Adaptations are made during the process whenever necessary, giving plasticity to a work that has been shown to be very organic.

Our purpose or goals is to find the appropriate method for different contexts and ecologies, its design, application, and test.

And so, when we speak of ADRs, especially mediation, especially mediation, we start from the premise that there is no single or general

method. The one that indicates the way to manage the conflict is the conflict itself, inserted in its context. This lesson is not new; it comes from Jean F. Six (1997).

By that perspective, we analyze the question of the Akrasia. In other words, we research Akrasia in the mediation and the adhesion to arbitration in asymmetrical relations and the high degree of conflict and violence.

As we have already experienced, other issues induce the Akrasia Phenomenon, and that should be better analyzed in a scientific approach.

In spite of our formation, as a mediator with the background in law, we are trying to understand the intrapsychic aspects of the will expression, the choices and how the Akrasia mechanism operates in contexts of pacts in mediation processes. It particularly in asymmetrical relations with a high degree of conflict, violence, and imbalance of powers in the light of psychology, and which strategies, tested, can be adapted to prevent and promote their overcoming. That is why, we are proposing a project of academic research on them Akrasia, in the post-graduate strict sense of the psychology of Pontifical Catholic of São Paulo University, under the orientation of Professor Rosane Mantilla e Souza.

2- Akrasia

What leads a person to opt consciously for an alternative, one path, that recognizes to be worse in relation a better one? Is it an absence of knowledge or weakness of the will? Just providing technical information, as an instrument, would be enough to overcome the Akrasia?

Agir Contre Soi or Faiblesse de Volonté, Akrasia, according to Elster (2007), consists of the agent's action against his or her own better judgment. The agent has two or more possible, viable alternatives and decides for the

one who (he or she) perceives and understands to be the worst of them. So, We insist, consciously.

As Elster exemplifies: *I- Ouvidio's Medea: "I see good, approve, and I do evil."*

Elster deals with the rationality in the decision-making and the aspects that interfere with the rationality in the decision-making.

The difference between weak will and weakness of will: Elster (2007) sees "the will" as an individual faculty, susceptible to weakness or strength, as the intelligence and that can be developed, fortified.

For Elster (2007), Akrasia is an action of the subject against herself or himself. For Elster (2007), too, the will is seen as a mental muscle that may be weak or strong. Thus, the will expression and control is possible. But how it could happen? How would it work in contexts of mediation, in adherence to arbitration, in asymmetrical relations; imbalance of powers and; high degree of conflict and violence, including structural ones?

At this point, we can present some aspects of the discussion concerning Akrasia, but still without addressing it under the ADRs approach:

According to Destrée (2004), when analyzing Akrasia from the perspective of philosophy of Aristotle and Socrates:

"The conception and explanation that Aristotle proposes to us of the phenomenon of Akrasia seem to be a true paradox. On the one hand, it seems to give credence to what the common opinion, of the Greeks to our days, has by Akrasia: it is a lack of dominion of itself due to the weakness of the will… However, on the other hand, Aristotle seems also to defend, particularly in the chapter EN VII III / 5, a strong intellectualist conception: Akrasia is not due to a lack or weakness of the will, but a lack of knowledge."

According to Donald Davidson, quoted by Elster (2007) and concerning whom we are precisely at that moment to deepen the studies, the Akrasia

does not deal with paradox or synchronous irrationality. The problem of Akrasia lies in the agent aligning his actions about his judgment, with which Elster does not agree.

The theme Akrasia, nowadays, as in Ancient Greece, is also not unanimous to the philosophers and scholars who approach it.

Thereby, as we can summarize the discussion concerning Akrasia, but still without addressing it under the ADRs approach:

2.1- Akrasia as the alignment between actions and judgment- Davidson;

2.2- Akrasia as an action of the subject against herself or himself, and the will as a mental organ, with the possibility to be controlled and modulated in its expression by the person- Elster;

2.3- Akrasia as a genuine paradox phenomenon and a lack of dominion over itself due to the weakness of the will- Aristotle (Destreé, 2004);

2.4- On the other hand, Akrasia not as due to a lack or weakness of the will, but a lack of knowledge- Aristotle- EN VII III / 5 (Destrée, 2004).

We are currently in research at Cornell University, conducting a bibliographical prospect to deepen my studies on the theme and, in advance, We identify that, despite the profusion of articles and books on the subject the Akrasia, there isn't one single paper about that in ADRs.

Returning generically to Akrasia in Elster: Elster brings assumptions of actions and inactions that reveal to Akrasia. They are the passion; temptation; procrastination; attitude of noncompliance or non-observance; impatience; additions; rigidity of behaviors etc.

Such situations, also point us the second hypothesis of Akrasia by Elster (2007), which stems from the time influence:

The agent has reasons to do "a"; the agent has reason to practice "b"; the reasons for practicing "a" are stronger than those relative to "b," but at the moment of action, despite his decision to "a," the agent practices "b."

In contexts of violence and crime that involve affection and bonds, as in family, domestic relations or affection relationships, Akrasia by time influence is very common. The State's delay or inefficiency in its practices is sometimes also a factor for backsliding and desistance (aband) of the deeds and protection measures by the victims.

Does Akrasia work and differently specifically in labor and employment law relations? In an affirmative answer, how?

As we can see in the examples brought by Elster (2007) and our experience in working in mediation and arbitration in asymmetric situations and those involving affection and violence (and here also includes the structural ones), we verified that just the legal information could not overcome Akrasia.

3- Institutional Answers Against Akrasia

For Elster (2007), generically, there are four ways of responding to the weakness of will: 3.1) individual responses, without institutional support; 3.2) individual responses, assisted by an institution; 3.3) institutional responses, addressed to the individuals; 3. 40 institutional responses, sent to the community.

In this point We will introduce some considerations about the institutional state response against Akrasia, that par excellence is the law: criminal, civil, constitutional law, etc. It would be more appropriate to take account of the rule of law, like: prevent the government from controlling the performance of the Central Bank (Federal Resources), through its interests. Preferably, independence by the Federal Resources by constitutional text; rule the electoral process outside the Federal Constitution. Rationale: the risk of the casting of casuistic manipulations.

In specific contexts, institutional measures and self-limiting political measures against Akrasia are essential, but in others, they may lead to the aggravation of the central problem, to reflective impoverishment, to depriving means of transformation, and to generating side effects. It was, the example brought by Elster (2007), in the hypothesis of the American "Dry Law" that, failed to stop the alcohol intake and also fomented organized crime. Forward We will bring some examples in Brazil.

4- Time as The Answer Against Akrasia

Like an imposition of waiting times (délais) for citizens. The goal is to neutralize the direct impact of emotions on actions: Emotions, although it is not disabling, can temporarily reverse preferences or desire. Some situations: purchase of firearms; marriage; discontinuation of pregnancy; voluntary sterilization etc.

We bring some examples in divorce law in Brazil, which until 2002 required a preliminary judicial decision of separation before de divorce decision or; two years of the "fact" separation (with two witnesses) to get the divorce decision; and the requirement of a one-year marriage for separation, not yet a divorce. Legal limitations that, in one hand did not prevent disconnections and in the other, did not prevent new marriages outside of the country, placing couples in a situation of lack of protection in Brazil.

Likewise, the Brazilian Supreme Court, most recent decision, which restricts of the victim of domestic violence to desist from the criminal process does not prevent the maintenance of the relationship with the aggressor partner, puts the woman in a situation of reflective impoverishment and lies, exposing her possibly to new and silent violence.

State, institutional and political measures of self-restraint against Akrasia,

as Elster (2007) indicate, can generate paternalistic effects of the state or collective self-paternalism. These measures do not overcome the problem of Akrasia itself; they do not work in the decision-making sphere, they only mark the expression of the subject's decision.

The Brazilian Judiciary (we already considering the inequities like in labor employment law relations, gender, consumer, housing, health) in expressive situations in which public opinion claims, tending to be paternalistic in a dysfunctional systemic way.

5- Bonds And Attachments Theories And Adrs

The Attachment Theory stems from studies by Bowlby (1982) who researched the bond developed by newborns with their mothers and other caregivers after contact with orphaned children in World War II who had many difficulties. Bowlby (1982) wanted to understand the development bonds between mother and child, their relevance, and how they behaved.

This theory was deepened with the studies of psychoanalyst Mary Ainsworth and extended to adult relationships in the late 1980s.

Bowlby (1982) distinguished two types of factors that may interfere in the activation of the attachment behavior system: those related to the physical and temperamental conditions of the child, and those related to environmental conditions.

Golse (1998) indicates that, although instinctive, attachment behavior is not inherited and is changeable during the life cycle, in varying intensities and forms. Genetic potential, however, leads to different outcomes in the adaptive field.

There is evidence that children also cling to abusive figures, from the finding that children develop attachment behavior when their caregivers

respond or do not respond to their physiological needs (Cassidy, 1999).

The Adult Attachment Interview- AAI created by C. George, N. Kaplan & M. Main (1985) has the objective of analyzing the representations of the internal models of attachment in adults. This interview explores the individual's relationship with parents during childhood and the effects of these experiences on their current functioning.

The pattern of these behaviors, not their frequency, reveals something about the strength or quality of attachment (Ainsworth, 1989).

Attachment patterns developed in infancy tend to work, to maintain and to be reinforced in adult relational interactions. Individuals put themselves in situations that will strengthen their internal processes of functioning models (Sperling & Berman, 1994).

Psychoanalysts Cindy Hazan and Phillip Shaver turned their studies to attachment in adult romantic relationships, identifying in adult romantic partners similarities with interactions between children and caregivers, concluding that the fundamental principles of attachment theory apply in adult interactions, considering four attachment styles: Safe Attachment; Avoidance Attachment; Ambivalent Attachment; Disorganized Attachment.

Talking about bond and attachment: it is certain that the way that they develop generates effects in the ADRs processes and the quality of the work by the mediator and the arbiter, too.

But, when we talk about "bonds, attachments, relationships, decision and Akrasia," the point that interests us to study is the effects of the attachment styles (Safe Attachment; Avoidance Attachment; Ambivalent Attachment; Disorganized Attachment) on the subject's decision-making; on the rationality and the Akrasia. And then think of instruments of overcoming the Akrasia.

How do the " bonds, attachments, relationships, ADRs, decision, and Akrasia," happen in asymmetrical relations, imbalance of powers, the high

degree of conflict and violence? And so how do bonds and attachments occur in the relationships and how do they influence the conflict?

We hypothesize that the vulnerability to Akrasia situations, dealing with passions; temptations; procrastination; attitudes of noncompliance or non-observance; impatience; additions; rigidity of behaviors, etc., which we also intend to test, can be directly linked to the development of the person from his early age.

The way how a person forms bonds experiences them, transits on the relevant changes in his or her life, the way he or she deals with critical and conflicting situations are connected with the results of the previous experiences.

6- Akrasia And ADRs

Placing Akrasia in ADR- Alternative Dispute Resolution, primarily in mediation, we have already had the opportunity to make a preliminary field study on the issue of reconciliations, after events of interfamilial and gender violence, in which the companions recognized the maintenance of union and coexistence as a worse solution (Zapparolli, 2015).

Akrasia, in the management of conflicts and crises, is undoubtedly an element to be extensively explored through advanced studies, even more in contexts of imbalance of powers, in asymmetrical relations, the high degree of conflict and violence, including structural ones.

On the other hand, the Akrasia phenomenon, would be enough to invalidate or contaminate the contract, agreement or the settlement? Would Akrasia be a kind of temporary loss of decision-making capacity? Would it be an agent's condition that we supposed to overcome to the rational decision-making?

And so, would have alternatives to overcoming Akrasia to avoid insecurity in decision-making in ADRs, for both, who decides and who relates to that decision?

As you can see, we found a theme for lifelong studies.

We are extremely concerned about the quality of the decision, whether in the choice of ADRs or the pacts and how these choices generate effects and changes in the subject's life and impact Justice Policies.

7- Thematic Relevance In Brazil

According to data from the Brazilian National Council of Justice (2017), during the year 2016, 29.4 million cases entered the Judiciary, and 29.4 million were filed- a growth concerning the previous year in the order of 5.6% and 2.7%, respectively.

Even with the annual filing of almost the same number of lawsuits filed, with a demand response rate of 100.3%, the stock of cases in the Judiciary increased by 2.7 million, or 3.6%, reaching at the end of 2016 79.7 million pending lawsuits awaiting some definitive solution.

The Brazilian lawsuit is admittedly slow and, and to some extent, inefficient.

On average, to receive a sentence in the Judiciary, the process takes, in the knowledge phase 1 year and 4 months and; in the execution phase 4 years and 6 months. This is consistent with that observed in the congestion rate, 87% in the execution phase and 64% in the knowledge phase.

The highest timeframes are concentrated in the time of the pending process, specifically in the execution phase of the Federal Justice- 7 years and 6 months- and the State Court- 7 years and 5 months. It is important to clarify that penal executions were excluded from the calculation, since the penal

execution is precisely the fulfillment of the sentence.

In Brazil, the National Policy of Judicial Justice, in a gradual process since 2006, expanded the conceptualization of Jurisdiction to welcome the multiport view, through of reception in the legal system and in the apparatus of Justice, of non-adjudicatory means of conflict management, among them: mediation, arbitration and conciliation by third professional besides the magistrate - See Code of Civil Procedure of 2015; Law of Mediation n. 13.140/15; Law no. 13. 467/2017- Labor and employment law Reform; Resolutions 125 and additives of the National Council of Justice and 174 of the Council of Labor Justice.

However, there is a great pressure of some sectors against the self-composed instruments, under the argument of the imbalance of powers between capital and labor.

In our point of view, the ineffectiveness of jurisdiction contributes much more to this imbalance than instruments that can add to the traditional jurisdiction.

In the knowledge phase of the special courts, the conciliation index was 16%: 19% in the State Court and 6% in the Federal Court.

In the execution phase, the indexes are smaller: 5%. The same research indicates that the most conciliatory area of justice is Labor Justice: 26% of its cases by settlements - 40% in the first-degree knowledge phase.

In absolute numbers, if we think about the number of conciliations, we will have 29.4 million archived deeds, with 79.7 million cases being processed by the end of 2016, awaiting some definitive solution.

And, only 79.2% (63,093,494 cases) were pending in the State Court, where there were 10.9% of approved settlements, resulting from conciliation and mediation.

That is: 6,877,190 cases in which there were settlements. An expressive absolute number, even more if it the subjects are Akrasia, the quality of the

decision and the part autonomy to decide.

These settlements whose observance is commonly not monitored, neither researched and, often done in a fragmented way, don't overcome the sociological conflict as a whole, requiring new lawsuits in different dimensions of the judiciary, with reflections in different spheres of the state, such as Public Security, Health, etc.

As we can see the more modern view of Brazilian Jurisdiction and may be a significant part of the world, spends much of the conflicts to the management by the conciliation, that then mediation.

However, only the reduction of the unusually high number of acts or lawsuits that are in the Judiciary, through punctual pacts, is not able to solve sociological conflicts in a definitive way, nor the systemic problems of the great contentious litigants who perpetuate their abusive acts.

Punctual pacts reduce the number of the lawsuits in the judiciary, do not working on conflict either to prevent the future new trials will come to it. We explain: in permanent, continuous relations and macroscopic conflicts, the partial management of the sociological conflict, limited to the judicial process in progress, through the pact, tends to send a new lawsuit, even more, aggravated.

And, often, the National Justice Policy, to reduce the number of lawsuits through the settlements, promotes conciliation and mediation "efforts" at critical times of the year, such as Christmas. Which makes the parts agree alternatives that they recognize are bad or worse, driven by the need for financial resources to support the Christmas, New Year and the summer vacations outgoings.

The TRT19- Labor Court of Alagoas, one of the Brazilian States with the lowest index of quality of life and that presents relevant social inequalities, exhibited the highest reconciliation index of the Judiciary, with 36% of

homologous sentences of settlements.

Facts that have to be analyzed empirically.

8- Akrasia In Labor Employment Law

8.1- Akrasia In Arbitration Adherence

Returning to our question above, whether in labor employment law relations Akrasia works differently, and, in an affirmative answer, how.

Let us think about a hypothesis: the decisive moment when an unemployed person is about to get a job opportunity and have to sign a contract where he or she waives a right or, for example, renounces a class action to go to arbitration. What are the effects of this legal information in decision-making? How rational are the decisions in these contexts?

Would the legal information prevent Akrasia in that hypothesis?- We are not lecturing the lack of legal knowledge, but considering its significance concerning, decision, rationality, and Akrasia.

In the recent lecture in USP- University Of Sao Paulo, Professor Elizabeth Tippett from the University of Oregon demonstrated the existence of class action exclusion clause in Uber's employment law contracts.

On March 21, 2018, the Supreme Court of the United States of America decided, by a majority of 5 to 4, that NATIONAL LABOR RELATIONS ACT of 1935 did not repeal or derogate the 1925 Arbitration Act for labor and employment relationships. Such a decision considers that the prior commitment of arbitration in an agreement of adhesion should prevent even the removal of the right to class split.

According to Howe (2018): " Justice Ruth Bader Ginsburg took the relatively rare step of reading from her dissent – which was joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan – from the bench.

Criticizing the majority's decision as "egregiously wrong," Ginsburg began by looking back at what she described as the "extreme imbalance" that once characterized the employer-employee relationship: In the late 19th and early 20th century, she observed, "workers often had to accept employment on whatever terms employers dictated." That " imbalance," she continued, prompted Congress to enact the NLRA and the Norris-LaGuardia Act (which preceded it) in the hope that employees could take collective action to "match their employers' clout in setting terms and conditions of employment." The NLRB and federal courts, she contended, have long understood such collective actions to include joint legal proceedings involving the terms and conditions of their employment."

What would lead the employee to sign a contract against himself or herself? Ignorance, lack of legal information or interest in having an employment contract, considering the collateral losses? Is that a hypothesis of Akrasia in arbitration adherence contract or clause?

8.2- Some Important Issues In Labor Employment Law Reality Of Brazil

We have to consider the historical and cultural differences in the way as the relations of the Labor Employment Law are treated in the Japan, US and Brazil.

In Brazil, unlike the US, the autonomy of the worker's will is mitigated, since he or she is considered the great imbalance of power between labor-capital.

In Brazil, Arbitration is refuted in several areas; such entirely was in labor employment law, until the reform of 2017 (Law 13.467/17), and yet is in adhesion contracts (such as the consumer contracts).

However, recent Brazilian labor law reform of 2017 permitted arbitration and arbitration clause, provided that at the initiative of the employee or by

agreement/settlement expressed in individual employment contracts whose remuneration is more than double the ceiling established for the benefits of the General Social Policy System Security. R$11.000,00 or $3.3900,00.

Is this a hipothesys of an institutional state response against Akrasia ?

In Brazil, the choice of the legislator to establish a minimum wage band to allow arbitration in labor employment relations brings with it the idea of the imbalance of power between labor and capital.

But there is a Juditial decition that indicates the bases in: R$ 26,000.00 or $ 8,000.00 / month.

So too the ideology that only the State, through the judiciary, could protect the employee or avoid the effects of relations in imbalance of powers.

Some sectors of the Brazilian jurisdiction end up acting as an administrative entity, moving away from their typical jurisdictional function, perhaps to compensate for the absence of the other branches of the State, which is still a form of paternalism and systemically also is a problem and not a solution.

Paternalism, an issue that Elster addresses in dealing with instruments against Akrasia. Maybe because Brazil is building its identity as a Republic, we have to admit.

Even so, this reform refutes the arbitration pact by the labor employment law adhesion contract, assuming that, in the contract of adhesion, there would be the imposition of will, without an alternative to the employee.

In Brazil, in what concerns the employment contract, the employee can not make his will prevail in the relevant points, even if it were not of adhesion contract.

And if so, if the employee could establish the relevant terms of the employment contract, would he or she have sufficient knowledge to size the effects of his choice in the short, medium and long-term? Even more so in a

country like Brazil in which there is the most absolute jurisprudence instability?

We think that, only then, if the employee made a conscientious decision that he thought was worse than the other possible alternative, it would be possible to analyze the presence of the Akrasia phenomenon.

The question then becomes to be what is the reach of legal information and its understanding by the worker, to be conscientious. Not a generic worker, but that specific worker whom we analyze the Akrasia problem.

Akrasia imposes, we think at this point of my research, accurate analysis of a factual case and proof.

8.3- Extrajudicial Labor Law Settlements In Brazil

In Brazil, labor employment law disputes are necessarily brought to the judiciary. But it is not rare to find lawsuits in Industrial Relations agreements.

That's because, in Brazil, labor employment law settlements without the homologation and in the particular way ratification of the judiciary can be entirely revisited in that sphere by the employee lawsuit.

The recent Brazilian labor reform has enabled, too, the extrajudicial labor employment law settlements as voluntary jurisdiction. But even them must pass for judicial homologation to have effects on the discharge of employment contract.

Notwithstanding, despite the possibility of an extrajudicial labor employment law settlement, there are numerous questions presents in the judiciary that continue to override the autonomy of the part's will, still considering the employee a hyporsufficient person. Let see:

- A juditial homologation of the extrajudicial labor employment law settlement is necessary. There are different positions about who will be the examining judge: from the conciliation center or to the natural judge, by

distribution.

- The extrajudicial labor employment law settlement homologate decision is a matter of material or formal immutability?

- Can the Judge refuse to approve any clause of the labor employment law settlement? Can labor employment law settlement be judged? Can the Judge say whether the labor employment law settlement is valid or not? Could this decision be appealed?

As can it be seen, in Brazil, state intervention in private relations, especially in labor relations (industrial and employment law), is very high, which generates state paternalistic actions. Is it just a capital-labor to Brazilian reality?

9- Akrasia In Mediation

We opted to preliminarily transcribe the excerpt from a joint service in the mediation of a couple, the husband J.S. and the woman M.S., a criminal proceeding instituted by the procedure of Law 9.099/ 1995, not yet in force Law 11.340/ 2006 ("Maria da Penha Law"), which, from practical experience, can not be said to have failed to account for the situation of the Akrasia.

In May 2005, M.S., a victim of intrafamily violence, was admitted to the ICU for the assault of her husband J.S., but nonetheless, she reconciled with J. S. before the first joint mediation session, and again maintained a marital relationship with J.S., not wanting to continue the criminal lawsuits, the reason for the referral of the act to mediation- in verbis a fragment of the mediation session:

"...

M.S.:- We are together. I want to give up the criminal process...

Mediator addressing M.S.: - Did you ever get hurt?

M.S.: - Yes. I went to the ICU.

Mediator: - Do you want talk about this?

M.S.: - I do not even like to remember. Because it 's something that hurts me. I do not like to remember...

Mediator addressing M.S.: - And do you forgive him? Should he repair You?

M.S.: -Yes I do. He never drink again. I'm afraid he'll have a relapse and a drink again. He can never drink in his life again. Because he likes that. He's a good husband. He's a good father... But when he drinks the first glass, he changes.

Mediator: The drinking situation is under control?

M.S.: So far, so far.

...

Mediator: Since when does this not happen? I mean, how long has this not been going on?

J.S.: - Since September.

M.S.: - Since March.

..."

We repeat: What lead a person who has been injured, physically, morally and psychologically, to maintain a marital relationship with his tormentor and to act at his loss, insisting on reviewing protective measures, even without the least coercion? Looking M.S., the woman, does this situation involve Akrasia? What instruments are available for use during mediation to overcome situations such as the above, or at least provide instruments to do so?

Let us turn to the main case study, n. 2, analyzing it step by step according to the lessons of Elster, correlating it to the supratranscribed mediation session of case 1 and trying to answer these and other questions: J.A.B. and F. L.B., by referral from the Domestic Violence Court, came to mediation.

When the protective measures for J. A. B were deferred, to distance maintenance by the companion F.L.B, the case was referred to the mediation, for the organization of legal aspects: divorce, custody, visitation and food for children, sharing etc.

In the first session, J.A.B, brought a recording demonstrating the decay of the protective measure by F.L.B. JAB further said that FLB was a bad father and a bad husband, that there would be no virtue or advantage to maintaining the union.

In the following session, J.A.B. and F.L.B. come together to mediation. Before the session began, J.A.B. asked to speak with the mediator separately. With the agreement of F.L.B., the mediator made a "caucus". Then, J.A.B. communicated to the mediator her reconciliation with F.L.B.. And thus she asked to register her interest in the extinction of all lawsuits.

JAB recognizes how violent F.L.B is, but nonetheless reconciles with him.

The mediator clarified the impossibility of renouncing criminal representation because there was physical violence (decision of the Supreme Court). And the mediator made sure that J.A.B was not reconciling with F.L.B. by pressure, threats, or material issues. J.A.B. able to support herself and the home. **So the question was not material dependence.**

Let us analyze the concrete cases reported in the light of the theme of Akrasia in Elster (2007).

In case n. 2, J.A.B. has reasons to make "a": separate from F.L.B. for the violence suffered, having already obtained a protective measure for this; J.A.B. have reasons to practice "b": stay with F.L.B. by the offspring. The reasons for practicing "a" rationally are stronger than those relating to "b", so much so that J.A.B. asks for and obtains the State's protective guardianship. But J.A.B. decide and practice "b".

As can be seen, J.A.B. fears specifically for FLB violence.

Unlike the preliminarily transcribed case of M.S. and J.S., in which M.S. pardons J.S. and vehemently believes that when J.S. does not drink, which he has not done for some time, he is effectively a good husband and a good father.

In case n. 1 there is no Akrasia, which can be seen in case n. 2.

Thus, what should the mediator do, considering that F.L.B. and J.A.B are already reconciled, even J.A.B., fearing the violence by F.L.B.?

Thinking of Elster (2007), the mediator attempted to reverse the intent of the refusal by J.A.B. It acted at a level of provisional pacts and its monitoring, directing reflective questions to work on the possibility of suspending all deeds for 6 months rather than their definitive extinction, as initially proposed by J.A.B.

The mediator indicated the referral to couple psychotherapy, aiming at means for reflection.

To what extent do these measures taken by the mediator imply directing a determined result, glimpsed by it, distancing hiself from his exemption and from the duty not to define solutions for the mediandos?

To what extent do these measures taken by the mediator imply directing a determined result and to define solutions for the parts?

This, among other questions formulated in this papperdemonstrate a clear interventional and evaluative role of the mediator, contextualized in a system surrounded by violence and crimes.

In the ambiences of intrafamily violence, factors such as psychosocial transitions / mourning, affective bonding, addictions, pathologies and their effects bring imponderable situations, of few rationality.

These measures did not overcome the problem of Akrasia itself, they do not work in the decision-making sphere, but rather, they direct, they only mark the expression of the subject's decision. In certain contexts, institutional

measures and self-limiting political measures against Akrasia are essential, but in others they may lead to the aggravation of the central problem, to reflective impoverishment, to depriving instruments of transformation, and to generating side. effects.But is it in this hypothesis?

And here maybe the trail to answer the last question above. Reconciliation was brought as a fait accompli that places those involved in J.A.B. and F.L.B. at potential risk.

The mediator's action in the concrete case cited came as an institutional response, of a provisional nature, which did not tarnish or prevents mediandes' intention to reconcile, and provided spaces for reflection and future second order changes- from General Theory of the Sistems.

The mediator must use strategies to enable protection, restraint and transformation, so that subjects reach individual responses in which the expression of their will is not contaminated or comes against their judgment. Thus, preparation measures, the mapping of the concrete situation and the immersion in the central theme are essential, before acting in proper mediation.

As a reference, we bring Integra Project (Ref Premino Innovare). Its strategies are not limited to the mediation session, are presented with a whole methodological and parts preparation until its advent. There are: a) interdisciplinarity in the process of mediation; b) spaces of brief therapy in the project, aimed at mediation to provide reception, support and reflection linked to the process of mediation; c) monitored referrals to network, health treatment and addictions (to drugs, gambling etc); d) the involvement of the family, community and social nets; e) other monitored referrals to the network that provide subject, family and social inclusion autonomy; f) thematic reflexive spaces and groups on violence, gender, parenthood, conjugality and addictions. There is a chain of institutional actions that

generate individual responses so that subjects do not decide against their best judgment, do not submit to external pressures, or lack repertoire or "strength" to decide.

In this experience there are also other institutional actions, addressed to individuals, so that, if the subjects come to take decisions against their better judgment, they have the possibility of their reversion, calibration and reduction of the effects of these decisions. These are: a) observance of provisional pacts; b) spaces for resizing provisional pacts; c) monitoring the efficiency of the current pacts; d) monitoring of the referrals to the public network, all before homologation and definitive termination of the processes, in order to ensure the best and effective approved decision.

10- Conclusion- Hypotheses Of Work About Akrasia In ADRs

"Akrasia in ADRs", in our point of view is an instigating theme that is not exhausted in this short paper.

To conclude this article, we have some working hypothesis, which we still carry in the field of scientific inquiries:

10.1- Along with criticism about Akrasia "not being," Akrasia is not a matter of the permanent agent's lack of capacity; nor of its free of the will, nor an error of fact or of right.

10.2- Akrasia it is not a lack of understanding as to the factual and practical possibility of the alternatives put, in face of the concrete reality (reference to reality test).

10.3- In asymmetrical relations; contexts of imbalance of powers and high degree of conflict and violence, including structural ones, the Akrasia tends to manifest itself in an aggravated way.

10.4- In the settlements in ADRs and the adhesion to the arbitration Akrasia

is expressed in a higher number than is currently considered;

10.5-Akrasia in ADRs inputs Justice Policies with new processes.

10.6- There are viable paths (instruments) to overcome Akrasia in the non-adjudicatory instruments of conflict management, as regards mediation and arbitration;

10. 7- Some viable paths to overcome Akrasia in the non-adjudicatory instruments of conflict management, mediation and arbitration, can be simply impediment instruments of the conduct and not to transform the individual or the relationship.

10. 8- The viable paths for overcoming Akrasia in non-adjudicatory instruments of conflict management, mediation and arbitration may be different in relation to a high degree of conflict and violence; in asymmetrical relations; contexts of imbalance of powers.

10.9- Attachments and bonds have effects both in the ADR process, in your choice/adherence, and in the pacts.

10.10- Working in the field of attachments and attachments can help in the responses against Akrasia in times of decision making.

10.11- Akrasia in ADRs aggravates the sociological conflict and high the enforced execution. Akrasia overloads the judiciary system, working of dysfunctional manner, putting the agent in a position of exposure to new conflicts and violence.

10.12- And the more we study the subject, the more likely it is that Akrasia in some point could invalidate the act in the legal parameters.

At this moment, a whirlwind of information that invades us, leading to working hypotheses and issues we want to share with you. But it would still be irresponsible of us, at this point in our studies to say yes or no for any of these questions.

My objective in talking about Akrasia was to promote debates to reflect it

on mediation pacts, adhesion to arbitrage and maybe in other non-adjudicatory instruments of conflict management, disputes, problems, prevention, and crisis management, too.

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