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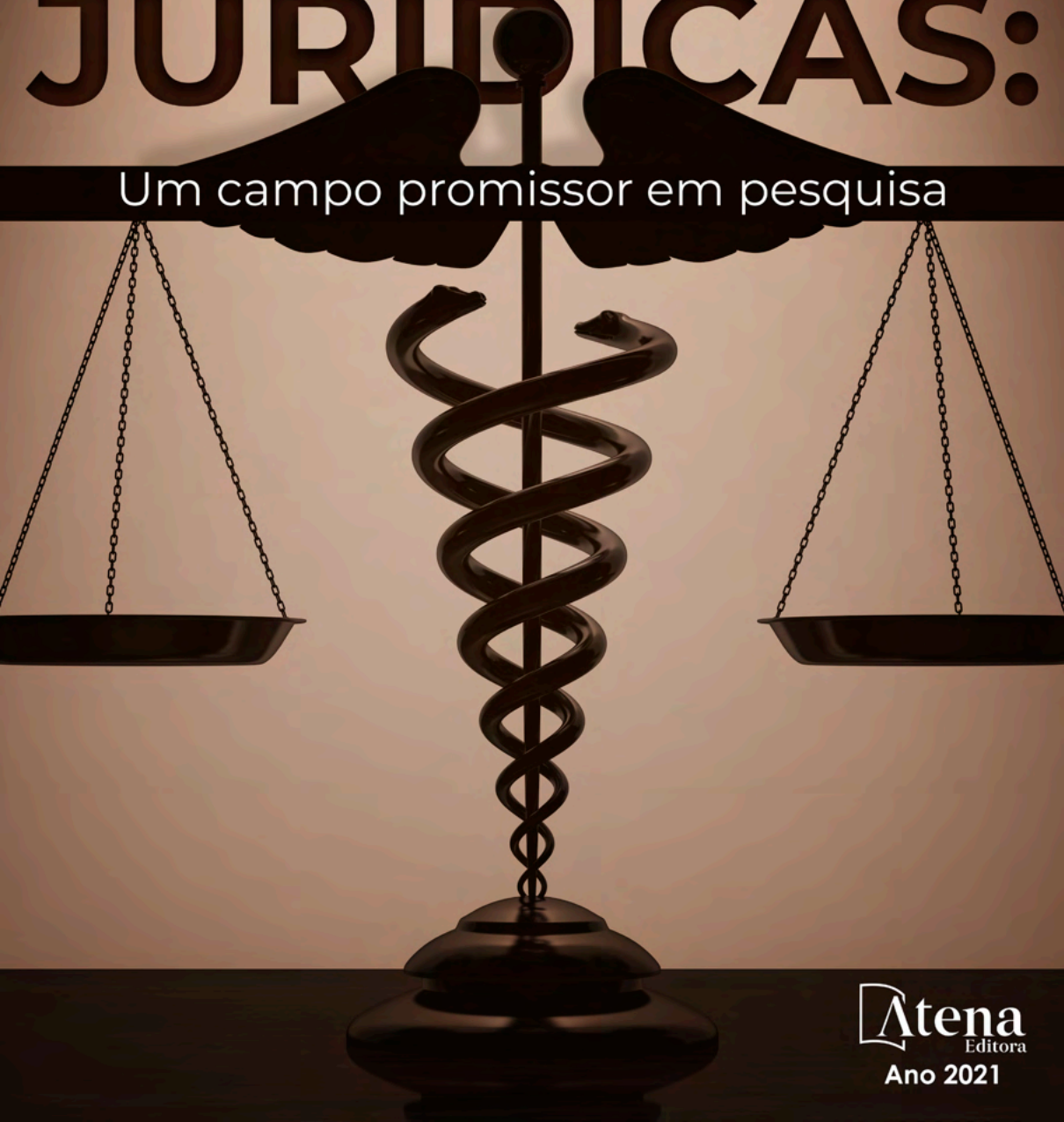
(Organizador)

CIÊNCIAS JURÍDICAS:

Um campo promissor em pesquisa



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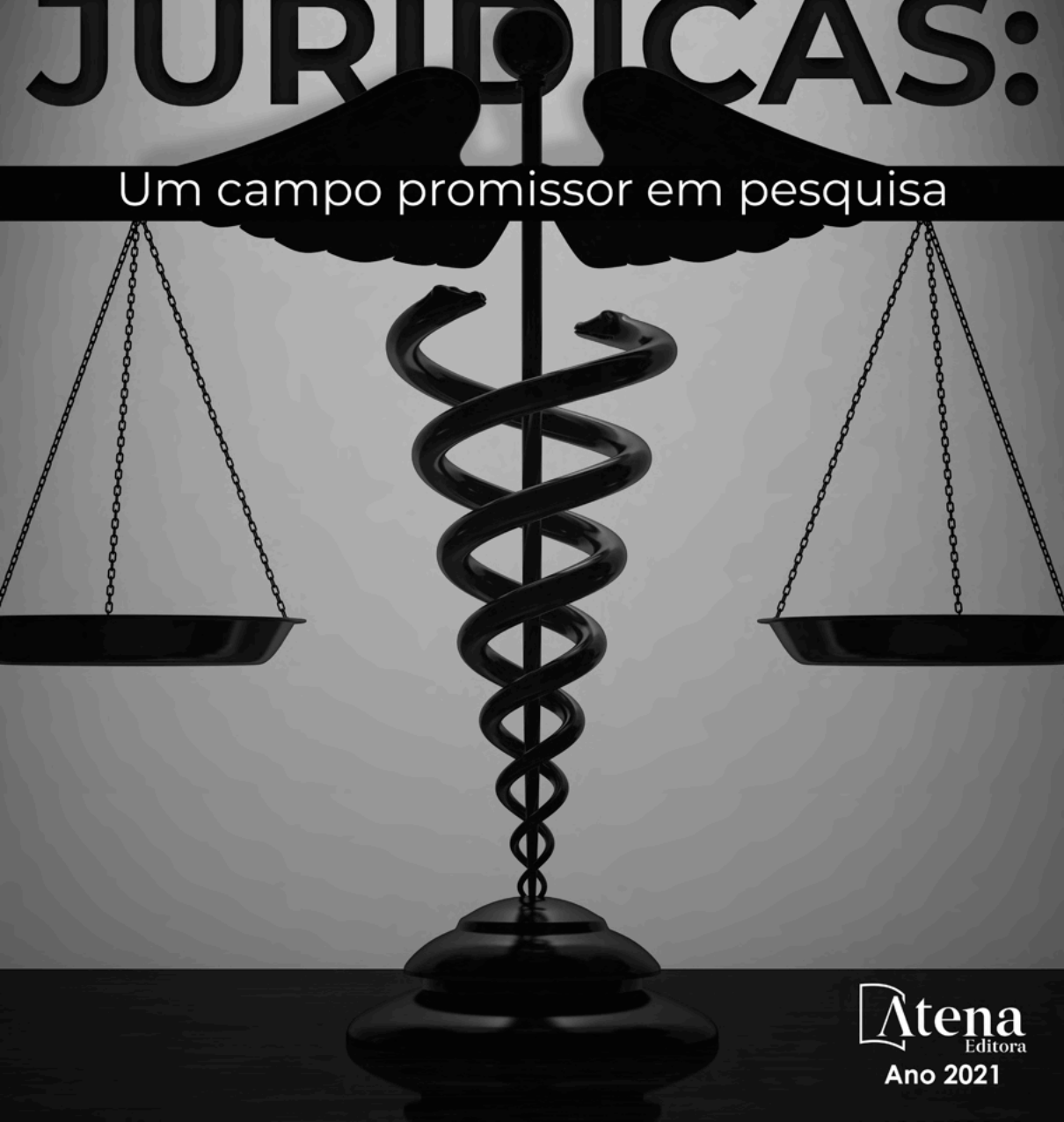

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APRESENTAÇÃO

Em **CIÊNCIAS JURÍDICAS: UM CAMPO PROMISSOR EM PESQUISA**, coletânea de onze capítulos que une pesquisadores de diversas instituições, congregamos discussões e temáticas que circundam a grande área do Direito a partir de uma ótica que contempla as mais vastas questões da sociedade.

Temos, no presente volume, reflexões que versam sobre democracia direta, poder legislativo, mediação, proteção de dados, constelação familiar e resolução de conflitos, multiparentalidade, direitos humanos, feminino, trabalho escravo, concepção de igualdade, verdade moral e justiça restaurativa.

Assim sendo, convidamos todos os leitores para exercitar diálogos com os estudos aqui contemplados.

Tenham proveitosas leituras!

Adaylson Wagner Sousa de Vasconcelos

SUMÁRIO

CAPÍTULO 3

FACILITATIVE MEDIATION AS THEORETICAL MODEL FOR JUDICIAL MEDIATION IN BRAZIL

Data de aceite: 01/12/2021
Data de submissão: 03/11/2021

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ABSTRACT: The article intends to investigate which models influenced the judicial mediation adopted in Brazil, according to Resolution 125/2010 of the National Council of Justice – CNJ. The work will develop a systematization of the main theoretical models of mediation (facilitative, transformative and circular-narrative), in order to identify their influence in Brazil. In sequence, an analysis of Resolution Nº. 125/2010 of the CNJ will be carried out, in order to identify the elements that point to the greatest influence of facilitative mediation, of north american origin, for the judicial mediation adopted in Brazil.
KEYWORDS: Judicial Mediation. Facilitative Model. Resolution nº 125/2010 of the CNJ.

1 | INTRODUCTION

The contemporary resumption of alternative methods of conflict resolution in general, and mediation in particular, is a phenomenon that is directly related to the current crisis in the jurisdictional activity of the State[1]. In this context, mediation has received great encouragement from the Judiciary as a supposed response to its own crisis. Thus, it is necessary to analyze with better attention the development and theoretical foundations that underlie mediation in the scope of the Judiciary, which is the central theme of this work.

This research is justified by the current debate on the practice of mediation in Brazil, especially as a result of Resolution Nº. 125/2010 of the National Council of Justice - CNJ, which established the national judicial policy for the proper treatment of conflicts of interest in the context of the Judiciary, and started to regulate mediation in the judicial sphere. The advancement of normative frameworks for mediation was accompanied by Law No. 13,140/15, which regulates mediation between individuals and within the public administration, and the prominent role assigned to mediation in the Code of Civil Procedure in 2015, in addition to many other initiatives legislation. Thus, it is observed that despite the existence of many studies that have analyzed mediation practices, there is still a significant lack of studies that seek to investigate the theoretical foundations of mediation, especially in Brazil.

From this perspective, the work has as its object of investigation to respond to the following problem: to what extent is it possible to identify the adoption of facilitative mediation as a theoretical model of judicial mediation in Brazil,

1 About the crisis in the jurisdictional activity of the State, read Bezerra (2014).

under the terms of Resolution 125/2010 of the CNJ?

Therefore, we point out as a working hypothesis to be verified throughout the research that: Resolution Nº. 125/2010 of the CNJ points to the adoption in judicial mediation in Brazil of the Havard School's facilitative mediation model, of Anglo-Saxon matrix, through a greater focus on negotiation techniques with the object of reaching agreement and put an end to the procedural dispute.

At first, theoretical research will be carried out on the development of mediation. Thus, the main theoretical models of mediation will be analyzed, according to the dominant literature in the area, namely the facilitative, transformative and circular-narrative mediation models. In the second part of the work, a critical and descriptive analysis of Resolution 125/2010 of the CNJ will be made, in order to identify in the normative text that regulates mediation in the judicial sphere the influence of the practical theoretical model of facilitative mediation in judicial mediation imported in Brazil.

Thus, the work has as general objective to investigate which models influenced the judicial mediation adopted in Brazil, based on the analysis of Resolution 125/2010 of the CNJ, which unfold in the following specific objectives: i) Systematize the main theoretical models of mediation: facilitative, transformative and circular-narrative; and ii) Investigate, through the critical and descriptive analysis of Resolution 125/2010 of the CNJ, elements that point to the greater or lesser influence of model data for judicial mediation.

2 | THE JUDICIAL MEDIATION MODEL IMPORTED BY BRAZIL

Before delving more specifically into the judicial mediation existing in Brazil and the alleged import of foreign models, it is worth making some considerations about the Brazilian legal system.

First, there is no doubt that Brazil's legal system is affiliated with *civil law*. This origin is historical given the Portuguese colonization and its indelible predominance of written law and a centralized legal system that influenced and even prevailed after Brazil's independence and in the first years of the imperial period.

However, it should be noted that despite its clear origin in *civil law*, the Brazilian legal system is currently under a strong influence of typical *common law* institutes, such as the increasing importance of linking decisions to judicial precedents, especially of the Superior Courts, a movement that has its greatest prominence in the Binding Precedents of the Federal Supreme Court – STF, as well as the very importance given to the Principle of Cooperation in CPC/2015, and in the greater autonomy of the parties in celebrating legal-procedural transactions.

The thesis that will be sought to present, and which constitutes one of the presuppositions of this work, is that the Brazilian State, despite having a legal system typical of *civil law*, imported into judicial mediation, under the terms of Resolution Nº. 125/2010

of the National Council of Justice – CNJ, the anglo-saxon mediation model, specially developed in the United States.

Thus, in order to demonstrate Brazil's adoption of the Anglo-Saxon American mediation model, it will be necessary to carry out a careful analysis of the influences that marked the issue of Resolution Nº. 125/2010 of the CNJ. However, before we enter into the analysis of the standard establishing the National Policy for the Adequate Treatment of Conflicts of Interest in the Judiciary, it will be necessary to make a quick overview of the main theories that underpin the practice of mediation, in order to verify if any of them had predominance in the direction indicated for judicial mediation in Brazil.

Consequently, we will now briefly discuss facilitative mediation, transformative mediation, and circular-narrative mediation, in order to observe their possible influences on the model of judicial mediation adopted by the Brazilian State.

3 I THE MAIN THEORETICAL MODELS OF MEDIATION

In this topic, we will approach the main theoretical models of mediation that point to a theoretical framework of mediation aimed at its practice as a specific instrument for conflict resolution.

Despite the great diversity of theoretical models of mediation, according to the classification of different authors, only the main ones will be discussed here, using as a selection criterion a great doctrinal consensus, as well as the wide presence of classification in several important works[2]. Thus, we will analyze the most prominent theoretical approaches, namely: the facilitative (traditional) model – from the Harvard School – centered on the satisfaction of the parties to obtain the agreement, in which the work of Fisher, Ury and Patton stands out, Getting to Yes; the transformative model – developed by Bush and Folger – from which we can highlight the text La Promesa de Mediacion, which focuses on transforming the meaning that people give to conflict, so as to constitute itself as a possibility for growth; and the circular-narrative model – created by Sara Cobb and Marinés Suares – in which we can cite the book Mediación: condición de disputes, comnicacción y Técnicas, which is based on communication and circular causality, but concerned with links and the reflexive question between the parts.

3.1 The facilitative mediation

The school of satisfactory mediation has as its most outstanding authors Roger Fisher and William Ury and originated in the study of negotiation techniques and procedures developed at the University of Harvard, initially intended to contribute to the overcoming of impasses in the relationship between the United States and the Soviet Union. throughout the Cold War (VASCONCELOS, 2008, p. 74). Thus, it is no accident that the facilitative school is also very commonly known as the Harvard school, as well as facilitative or traditional

2 We can cite the classification mentioned by Braga Neto and Sampaio (2007, p. 25).

mediation.

It should be noted at the outset that facilitative mediation has as a clear objective the search for an agreement for the conflict, from the use of negotiation techniques that will be applied in order to overcome the apparent impasses of the conflict, through the facilitation of communication and identification of the interests of those involved.

In contrast to the positional negotiation model, in which one party seeks in every way to gain as much as possible at the expense of the other party's loss, facilitative mediation will incorporate a cooperative negotiation method, through which all involved can win.

In this way, the aim is to make the interaction of the parties no longer constitute a zero sum game, in which the advantage of one corresponds to the disadvantage of the other, transforming the relationship into a non-zero sum game, a situation in which parties will come out with a positive result after the negotiation.

Therefore, it is necessary that the negotiation that will be developed during the mediation has as its focus not the positions of the parties, but that the object is the interests of those involved.

In this sense, facilitative mediation makes use of negotiation techniques that will be applied by the mediator, especially in order to overcome the impasse present in the parties' position, in order to identify the interests that motivate them. It is important to clarify that the position is what the parties declare they want or what some call apparent desire. In turn, interests represent the hidden or real desire, which is actually behind the expressed manifestation of the will.

It should be clarified that in situations of conflict involving parties that have ongoing relationships – such as family, school, neighborhood and community conflicts – there are almost always common interests involved. In this way, facilitative mediation pursues the agreement by overcoming opposing positions and identifying common or compatible interests between the parties. In this sense, Balletto, Briz and Falca (2015, p. 91) commenting on the Havard school state that:

> Cuando dialogamos por un conflcito a partir de posiciones, por lo general se trata de un diálogo muy corto, en que las posiciones se encontrarán enfrentadas y no facilitarán la comunicación y la salida del conflicto.
>
> Lo que propone Harvard es que ante la situación nos cuestionemos el por qué y el para qué. Esto ayudará a que las personas se trasladen desde sus posiciones hacia sus intereses.

In order to achieve the goal of overcoming hostile positions and identifying the interests of the parties, facilitative mediation employs various negotiation techniques that are applied in mediation, from which we can highlight: separating people from the problem; focus on interests rather than positions; identify mutual gain options; and insist on objective criteria.

Separating people from the problem is very important, as conflicts often tend to

confuse the objective problem with the interpersonal relationship. It is often common for one of the parties to identify their own problem with the person they are in conflict with. Consequently, it becomes difficult to solve one problem when the other is the problem itself. Thus, it is necessary to distinguish the relational issue that involves the conflict from the object of the dispute itself. It doesn't seem strange that a conflict will be more easily resolved the better the relationship between the parties involved. Thus, there is no incompatibility between building a good relationship with the party in dispute and getting a good result in the negotiation involving the substance of the conflict. In this sense, Fisher, Ury and Patton (1991, p. 19-20) state that "every negotiator wants to reach an agreement that satisfies his substantive interests. That is why one negotiates. Beyond that, a negotiator also has an interest in his relationship with other side."

Focusing on interests and not on positions is necessary to overcome the impasse of expressed and often antagonistic desires, in order to identify common and/or non-contradictory interests, as previously discussed and exemplified. Interests must be reconciled, not positions.

The identification of mutual gain options should always be sought, as the greatest guarantee of a satisfactory agreement will be meeting the needs and interests of all those involved. The parties must seek cooperation because it is unlikely that an agreement will be reached, or fulfilled if only one of the parties is successful in satisfying their wishes. The most durable and stable solutions are those desired by both parties.

Insisting on objective criteria is the option to get out of the strictly positional bargain in which a party tries to impose itself from the subjective plane of its will. Having objective criteria is the search for standards guided by principles that can serve as a path for negotiation (VASCONCELOS, 2008, p. 77). One can cite as objective standards: market prices, production costs, professional standards, custom, reciprocity, among other criteria.

An important observation that can be made about facilitative mediation is that it ended up incorporating a good part of the negotiation techniques of the Harvard school and in modernity it served as a paradigm for the other models that we will see later (VASCONCELOS, 2008, p. 78).

However, an important caveat must be made regarding facilitative mediation, as its focus on reaching an agreement ends up leaving aside, or sometimes neglecting, issues inherent to the conflicting relationship and the feeling of the parties who are often at the core of some problem situations. In this way, we corroborate the criticism made by Balletto, Briz and Falca (2015, p. 92) to the facilitative mediation by pointing out that "[...] la crítica que se le puede hacer es que, como su única finalidad es lograr el acuerdo, no tiene en cuenta la relación, el contexto ni la historia de las partes."

3.2 The transformative mediation

Transformative mediation is a model that, based on the contributions of the Harvard

School, seeks to deepen the analysis of the conflict beyond the mere pursuit of the agreement, focusing on the communication between the parties and the meaning given to the conflict itself.

The creators of the transformative school are Baruch Busch and Joseph Folger, for whom the relationship between the parties cannot be left out of the mediation process, being essential to act in the relationship of individuals with each other and with society.

Thus, unlike Havard's school, transformative mediation does not consider agreement as the only result to be obtained in a mediation, thus conditioning the success or failure of the process (Balletto; Briz; Falca, 2015). Thus, it is clear that the object of this mediation model is not the agreement, but the modification of the relationship between the parties. In this sense, Balletto, Briz and Falca (2015, p. 92) state that "para esta escuela, la finalidad del proceso de mediación es la transformación que surge en la relación de las partes a través del aprendizaje de la gestión cooperativa del conflicto."

In its development, transformative mediation brought to the mediation process some innovations, such as the incorporation of techniques that improve the mediator's listening and privilege the investigation of conflict in greater depth, especially through the use of reformulation, paraphrase and of questions, seeking to improve communication between those involved and change the point of view of the parties on the conflict (VASCONCELOS, 2008).

In the view of its founders, transformative mediation is the development of empowerment and empathy of the parties, so that they can strengthen their capacity (self-determination) and empathy (recognition). Thus, it seeks to reinforce a relational view of the world, in which people assert themselves as autonomous subjects who are also capable of recognizing otherness (FOLGER; BUSH, 1996). From this perspective, the mediator must encourage those involved to empower them as protagonists of the dilemmas of their lives, but they can also consider the other's points of view and experiences. As stated by Vasconcelos (2008, p. 86), "it is in this sense that mediation is potentially transformative; for offering mediateds the opportunity to develop and integrate their self-determination and responsiveness capabilities to others."

The transformative mediation model seeks to break relational patterns and transform the destructive nature of determining conflict. It is from the identification of the nature of the relationship that the way is opened for understanding the underlying interests, expectations and values. Thus, the focus of mediation is on the relationship between the parties, the objective conflict constituting only the distant object of the process. The issue of concentration in the relationship is well pointed out by Vasconcelos (2008, p. 87) when pointing out that:

> By exploring the relationship, the self-assertion of the mediateds will be reinforced and the door to recognition will be opened. Mediation operates an ethics of alterity, as the acceptance of the difference that the other is in the relationship and in the world of life. This ethics of alterity focuses on the circular and dialectical phenomenon, which is born from the relationship,

is substantiated by self-determination and constructively integrated by recognition.

In this way, it is once again reinforced that, unlike the facilitative mediation of the Harvard school, transformative mediation has a greater focus on the relationship than on the search for agreement. Thus, we can state that in transformative mediation, the relational and objective problems are analyzed together, but always with greater preponderance in the analysis and equalization of the relationship between the parties and in the meaning they give to the conflict.

3.3 The circular-narrative mediation

The circular-narrative mediation developed by Sara Cobb is an approach that added to the traditional model of the Harvard School contributions from systemic family therapy, communication theory and narrative theory (VASCONCELOS, 2008).

Circular-narrative mediation has as its main objective to obtain agreement, but, unlike facilitative mediation, understanding is obtained as a consequence of the circular-narrative process. Thus, in circular-narrative mediation, the agreement is pursued, but without dispensing with the relational aspect of the conflict, based on the deconstruction and reconstruction of the narratives.

Thus, for the circular-narrative model, mediation is conceived as a conversational process that takes place through communication. Thus, Suares (2005) will state that the main task of mediators is: 1) to destabilize the stories; and 2) enable the construction of new stories.

The circular-narrative model is structured by several techniques (microtechniques, minitechniques, techniques and macrotechniques) that are applied together or successively along some steps of the mediation process. However, without presenting the techniques in a structured way, we could cite as the most important and differentiated techniques of narrative circular mediation: legitimation; the positive connotation; outsourcing; the recontextualization; circular questions; and the reflective team.

Legitimation consists in creating a context of trust in mediation, through the positive connotation of the parties' positions, beyond the rigid positions of victim/offender and good/bad (VASCONCELOS, 2008).

The positive connotation implies a reformulation centered on giving a positive character to negative information from one of the parties, focusing on the positive characteristics of what is expressed in the speech.

Externalization is the process through which one seeks to separate people from their dominant reports, in order to identify the problem as something external to the relationship and that needs to be faced by both involved.

Recontextualization is a technique used to contextualize the problem in a different way, either giving it a broader or less comprehensive dimension, as well as just a different

way.

Circular questions are specially applied during the externalization phase and are intended to demonstrate that the relationship of the parties with the problem experienced is dynamic, alerting them to the circularity of cause and effect relationships, seeking to promote the protagonism of those involved and their responsibility in the face of conflict.

The reflective team mentions the possibility that the mediation can count on a team to monitor the work of the parties and the mediator throughout the process. The reflective team aims to contribute to the development of a narrative and a differentiated perception of the conflict. It is important to emphasize, as Vasconcelos (2008) observes, that this technique is very little practiced due to its cost and the inherent difficulties in training a good reflective team.

The technique itself, a central element of the narrative circular model, "[...] seeks the construction of an alternative history that destabilizes previous stories" (VASCONCELOS, 2008, p. 84). In this sense, the words of Suares (2005) are enlightening when pointing out that the best alternative story is not the one that is more real, but the one that allows for greater openings, draws more exits, opens more paths so that the mediators can start the negotiation, recovering the lost capacity, imprisoned in the previous stories.

An important consideration about the circular-narrative mediation model is the fact that it does not seek to understand the interest underlying the speech of the parties, but seeks to deconstruct or destabilize it so that another narrative emerges, with different alternatives for resolving the problem interdependently by the parties involved.

3.4 Reception of Theoretical Models of Mediation in Brazil

Although the debate on the contemporary resumption of alternative methods of conflict resolution, especially mediation, goes back to the 70s of the last century in many countries, in Brazil the process of development of mediation only started around the 90's of the previous century.

In this sense, in addition to a chronological delay in the contemporary resumption of mediation, we can also point out in Brazil the existence of a significant theoretical delay. Despite the already existing in the country several practical experiences of extrajudicial mediation, especially community, and the institutionalization of a national policy for the adequate treatment of conflicts within the scope of the Judiciary, pursuant to Resolution No. 125/2010 of the National Council of Justice - CNJ, it is observed in Brazil that the referred theoretical models, which are covered by a set of their own techniques, were imported without much rigor. In turn, since mediation consists of practical knowledge, the use of such models, especially in communities with a high degree of precariousness, has given rise to what could be called Brazilian-style mediation.

In this way, mediation in *terra brasilis* can be grouped into two broad approaches, which in practice are often employed either together or separately. The first is mediation in its

traditional model, also called focused on agreement, structured according to the American model of the Harvard School, focused on the negotiating issue with a view to reaching an agreement; the second model, widely used in community practices, is transformative mediation whose purpose is not the search for an agreement, but the reestablishment of ties and broken affections and the re-signification of conflict, as an opportunity for transformation.

It is important to highlight that mediation focused on the agreement is guided by a process of conflict resolution, while transformative mediation is proposed as a process of transforming the parties' perception of the conflict.

The resolution process is focused on discussing the content of the conflict, seeking to close it, with the purpose of finding an agreement for a current problem, based on the immediate conflict, in a short-term horizon. In turn, the transformation process assesses how to put an end to something destructive and build something desirable, with the purpose of promoting constructive and inclusive change processes aimed at relationships, not limited to immediate solutions, based on a horizon of medium and long term, seeing conflict as a necessary dynamic for constructive change (SALES, 2010, p. 1).

It should also be mentioned that the separation of mediation practices in Brazil into two major models, the one focused on agreement and the transformative one, is also supported by other important authors who, with different nomenclatures, but with similar proposals, distinguish two groups, as we find in the work of Vasconcelos (2008, p. 73-88) when dealing with mediation models focused on agreement and mediation models focused on relationship.

Having made the necessary clarifications, and despite significant considerations to the contrary, as it will be possible to see further on, it is clearly observed that the Judiciary, in making judicial mediation a State policy, adopted the satisfactory mediation model of the Harvard School of Anglo-Saxon matrix.

It is important to highlight that the mediation resurgence process is commonly seen as a contingent phenomenon and often contradictory to the dominant legal paradigm of modernity: legal positivism.

Mediation would be a phenomenon contingent on modern law, as it would only represent a way of responding to the structural crisis of the jurisdictional function of the State, which has not been able to decide legal proceedings within reasonable deadlines, guaranteeing the effectiveness of the jurisdiction. Thus, the State itself would use mediation in the judicial sphere only as a way to encourage the search for the composition of conflicts, putting an end to the procedural dispute.

On the other hand, contradictorily, the use of mediation can be seen as a threat to the judicial system. The use of extrajudicial mediation could stimulate the empowerment of citizens to resolve conflicts, thereby breaking the State's jurisdictional monopoly. Furthermore, considering the complexity of human desires and dilemmas, which are at the heart of conflicts and which are often not translated by the judicial process, there are

authors who defend the possibility of mediation, building consensus from understandings that go beyond the limits of positive law – true agreements against legem (WARAT, 1998, p. 5).

However, the analysis of the Brazilian case shows that the resumption of mediation is a process largely stimulated by the State itself. The national legal culture is marked by a strong presence of the State, originating in civil law, and the Judiciary Power itself has promoted the search for alternatives to jurisdiction.

Thus, the development of mediation in Brazil, more specifically in the judicial milieu, under the direct sponsorship of the State, does not present itself as any form of threat or incompatibility to the judicial system. On the contrary, it appears that the positive law has sought to regulate the practice of mediation, sometimes colonizing it, sometimes recognizing its validity and efficiency.

Consequently, the option of the Judiciary Power for a theoretical model of mediation that focuses on facilitating communication with a view to reaching an agreement seems too obvious, as without an agreement there is no way to end the procedural dispute. Thus, although mediation has several objectives, such as empowering the parties, promoting the autonomy of subjects and preventing violence, it is observed that the main – if not the only – objective pursued by the Judiciary is to obtain the agreement, because only with it is it possible to end the process, with the corresponding write-off of the records, contributing to the decongestion of the judiciary.

In the following topic, it will be sought to demonstrate that judicial mediation, instituted under the terms of Resolution Nº. 125/2010 of the CNJ, has predominantly adopted the Harvard School's facilitative mediation model for the development of mediation within the scope of the Judiciary. To do so, we will start by analyzing Resolution Nº. 125/2010 of the CNJ, which institutionalized the practice of mediation within the scope of the entire Judiciary.

4 I THE JUDICIAL MEDIATION MODEL ADOPTED IN RES. Nº. 125/2010 OF THE CNJ

The analysis of the judicial mediation model imported by the Brazilian State necessarily involves the discussion of experiences already in development of mediation in the judicial sphere and other elements that influenced the direction adopted by Resolution Nº. 125/2010 of the CNJ when instituting a policy national and uniform for the entire Judiciary with regard to the proper treatment of conflicts of interest through mediation and conciliation. Thus, in this part, it is intended to analyze the existence of experiences that influenced the model of judicial mediation adopted by Resolution 125/2010 of the CNJ, as well as to investigate which of the theoretical models of mediation had greater space or predominance in that standardization

4.1 Background to Judicial Mediation in Brazil

The Resolution Nº. 125/2010 of the CNJ had its origin in a proposal presented by Professor Kazuo Watanabe to the then President of the Federal Supreme Court – STF and the National Council of Justice – CNJ, Minister César Peluso, who appointed a working group consisting of five magistrates to institute a policy for the proper handling of conflicts within the scope of the Judiciary, which resulted in the approval of the aforementioned resolution on November 29, 2010 (LAGASTRA LUCHIARI, 2011, p. 302).

It should be noted that in his inaugural speech as president of the STF and CNJ, on April 23, 2010, Minister Peluso expresses his intention to bring alternative means of conflict resolution to the interior of the Judiciary, as notes from the passage:

> [...] it is time, therefore, to incorporate into the system, without prejudice to other measures, the so-called alternative means of conflict resolution, which, as their own instruments, under strict discipline, direction and control of the Judiciary, are offered to citizens as optional mechanisms of exercising the constitutional function of resolving conflicts.. (LUCHIARI LAGRASTA, 2011, p. 303).

The Resolution Nº. 125/2010 of the CNJ when instituting a national judicial policy for the proper treatment of conflicts of interest within the scope of the Judiciary, has the following objectives: 1) promote the use of alternative means of conflict resolution, in particular conciliation and mediation, within the judicial system; 2) ensure the qualification of mediators and conciliators, establishing parameters for their training; and 3) promote a change in the legal culture of institutional law makers and parties, so that they can become aware of and encourage the use of consensual methods of conflict resolution. Corroborating this understanding, Luchiari Lagastra (2011, p. 304) states that:

> The public policy mentioned above aims to use alternative means of conflict resolution, mainly through conciliation and mediation within the scope of the Judiciary and under its supervision, and, ultimately, to change the mentality of legal actors and of the parties themselves, with the achievement of the magnum scope of jurisdiction, which is social pacification, with only indirect consequences, but of paramount importance, the reduction in the number of processes and the removal of the slowness of the Judiciary.

Indeed, as reported by Luchiari Lagastra (2014, p. 316) – magistrate who was part of the aforementioned working group responsible for drafting the draft resolution – Resolution Nº. 125/2010 of the CNJ when creating the Judiciary Centers for Conflict Resolution and Citizenship – judicial units preferably responsible for conducting and managing conciliation and mediation hearings – used as a parameter the Conciliation and Mediation Sectors of the Court of Justice of the State of São Paulo and the US multi-door court.

Thus, in order to investigate the origins of the judicial mediation model present in Resolution 125/2010 of the CNJ, it is necessary to briefly analyze the Process Management Project that gave rise to the aforementioned TJ Conciliation and Mediation Sectors -SP, as

well as the US multi-door court.

The Process Management Project or Case Management Project, as it was called, originated from studies carried out by a group of judges, prosecutors, lawyers and sociologists, under the guidance of Professor Kazuo Watanabe and Judge Caetano Lagrasta, with a view to improving the role of the Judiciary in the State of São Paulo. The Process Management Project was inspired by the Sttutgart model of the German Civil Procedure Code and by Case Management by North American law (LUCHIARI LAGASTRA, 2011, p. 289-290).

Sttutgart's model is based on a proposal to rescue the principle of orality as originally provided for in the German Civil Procedure Code of 1877, featuring the adoption of the oral word in the course of the process, immediacy, physical identity of the judge, concentration of procedural acts, among others. From this perspective, a new model of hearing in civil proceedings was developed, known as the Sttutgart Model – in reference to the court of the homonymous city – through which the collection of evidence, debates and judgment was concentrated in a single hearing. (LUCHIARI LAGASTRA, 2011, p. 290-291).

In turn, the Case Management of North American law corresponds to a model in which there is a more active participation of the judge in the management of the case, with express recognition of the magistrate's activity in promoting agreements and in the search for other strategies to solve the deal, encouraging the use of alternative methods of conflict resolution (LUCHIARI LAGASTRA, 2011, p. 291-292).

Thus, the Process Management Project proposes a process management activity by the judge supported by three aspects: 1) the rationalization of notary activities; 2) change in the judges' mentality and the effective conduct of the process by magistrates; 3) introduction of alternative means of conflict resolution in the demands presented, all aiming to reduce the number of distributed processes and their duration (LAGASTRA LUCHIARI, 2011, p. 292).

However, the greatest innovation brought by the Process Management Project was the creation of the Conciliation and Mediation Sectors, which allowed the introduction of mediation in the São Paulo Judiciary Branch, from the implementation, in 2004, of the aforementioned project in the Districts of Serra Negra and Patrocínio Paulista (LAGASTRA LUCHIARI, 2011, p. 295-296).

From what has been exposed so far, it is possible to observe that if the creation of CEJUSC had as reference the Conciliation and Mediation Sectors of the TJ-SP, the latter, in turn, were strongly influenced by the Case Management of north american law, which it immediately points to the strong influence of the Anglo-Saxon matrix mediation model in the origin of judicial mediation in Brazil.

With regard to the Multidoor Courthouse, it is important to emphasize that its creation proposal was conceived by Professor Frank Sander, who was responsible in the 1970s for the institutionalization of mediation in the judicial sphere in the United States.

The Multidoor Courthouse can be defined as a form of organization through which

the Judiciary Branch constitutes a dispute resolution center that works with several conflict resolution procedures, each with advantages and disadvantages, to be considered in function of the characteristics of each conflict and the people involved (LAGASTRA LUCHIARI, 2011, p. 306).

Indeed, it is possible to observe once again the strong influence of legal institutes of the North American judicial system in the origin of the mediation imported by the Brazilian Judiciary, under the terms of Resolution Nº. 125/2010 of the CNJ, in view of the express inspiration of the American Multidoor Courthouse.

4.2 The Predominant Theoretical Model in Resolution nº 125/2010 of the CNJ

The question that arises at the present time of this work is to verify the existence of express adoption, or supposed predominance, of some of the theoretical and practical models - facilitative, transformative or circular-narrative mediation - of mediation in the judicial mediation model present in Resolution nº. 125/2010 of the CNJ. Therefore, it will be necessary to carefully analyze some parts of the aforementioned normative act, in order to investigate the expressed and hidden inclinations in its text.

Initially, it is incumbent to clarify the text of Resolution Nº. 125/2010 of the CNJ, approved on November 29, 2010, has already been subject to two amendments. The first of them in 2013 and the second in 2016. In this way, we will also try to analyze the existence of inclinations or changes in positioning in the normative changes introduced in the original text of the resolution.

From the careful reading of the original text of Resolution Nº. 125/2010 of the CNJ, it is clear that the normative text has a strong inclination towards the facilitative mediation approach of the Harvard school. This statement can be demonstrated through the special emphasis that is given in the syllabus for the training of third-party facilitators (mediators and conciliators) to the use of negotiating techniques to seek agreement in the conciliation, as shown in Annex I, module II , of the aforementioned resolution, when dealing with training and improvement courses, more specifically on “reconciliation and its techniques”:

> Subjects:
>
> 1) Introduction (7 hours/class):
>
> a) Concept and philosophy. Judicial and extrajudicial conciliation;
>
> b) Conciliation or mediation?;
>
> c) Negotiation. Concept. Integration and distribution of the value of negotiations. Basic negotiation techniques (the bargaining of positions; the separation of people from problems; concentration on interests; development of options for mutual gain; Objective criteria; best alternative to negotiated agreements). Intermediate negotiation techniques (strategies for establishing rapport; transforming adversaries into partners; effective communication).

In the same direction, the original text of the resolution continues to give special emphasis to the use of negotiating techniques focused on obtaining an agreement

for mediation, as can be seen in Annex I, model II, which deals with "mediation and its techniques":

> 2) Schools or Mediation Models (04 class hours):
>
> a) The different models and their tools: Harward or facilitative, transformative, circular-narrative, evaluative;
>
> b) Harward's cooperative negotiation (positions and interests, emotional aspects that involve negotiation, solution or partial or total solutions).

In 2013, Amendment Nº. 1 of Resolution Nº. 125/2010 of the CNJ was approved, which brought as one of its main innovations the authorization for mediation in the criminal sphere, as well as other restorative practices. With regard to the object of this article, it is observed that the aforementioned amendment promotes an amendment to Annex III, including among the principles and guarantees of judicial conciliation and mediation, empowerment and validation. As for the point, it should be noted that the inclusion of empowerment points to a greater inclination towards transformative mediation, while the principle of validation is identified with elements that characterize circular-narrative mediation. However, this fact did not detract from the strong predominance of facilitative mediation as a preponderant model for judicial mediation.

Subsequently, Amendment Nº. 2/2016 promotes a strong adaptation of Resolution Nº. 125/2010 to Laws Nº. 13.105/2015, which institutes the new Code of Civil Procedure, and Nº. 13.104, which regulated mediation between private individuals and in the public administration. It is only with Amendment Nº. 2/2016 that the resolution becomes disciplinary and, in a way, encourages the development of mediation outside the Judiciary, such as the regulation of the performance of private chambers of mediation. Thus, it is observed that the resolution until then would only be reinforcing the belief that has long been ingrained in our legal culture that only the State has the capacity and legitimacy to resolve conflicts. This criticism is also corroborated by Filpo (2016, p. 49) when stating:

> In fact, the Judiciary is bringing one more task to itself, in the sense of also centralizing the management of this method, reinforcing the already deeply rooted idea that only the State, in this case the State-judge, is legitimated to manage conflicts of interest, when, at least in theory, even the experience of other countries (as in Argentina, according to Almeida and Almeida, 1996), other institutions could handle this task, depending on the nature and intensity of the conflict, without necessarily presenting another front of action of the Judiciary.

Regarding the aspect of training of mediators, Amendment Nº. 2 moves towards recognizing the interdisciplinary knowledge of mediation, but continues to reinforce the rational aspects to pursue the agreement, as observed from the insertion of Game Theory in the syllabus training courses.

Having made these observations, it is possible to see that despite the express absence of importing a specific theoretical model for judicial mediation in Brazil, there is a

clear predominance of characteristics of facilitative mediation, or the Harvard School, based on the greater focus on business methods in the search for an agreement that could end the procedural dispute.

In this sense, despite the statements of Luchiari Lagastra (2014, p. 319) that Resolution N. 125/2010 of the CNJ did not promote the imposition of a single mediation model in any of the theoretical schools, but encouraged the development of a national model of mediation, we can counter-argue that despite the express inexistence of adoption of a specific model, it is possible to see that great emphasis was given to facilitative mediation predominantly and that only techniques and characteristics of this model have been developed within mediation judicial.

However, the fact that facilitative mediation, of Anglo-Saxon origin, has been successful in the United States does not provide any guarantee of its success in Brazil, given the more than significant differences in legal and cultural systems between the two countries.

In this way, the difficulties that Brazilian judicial mediation has faced, in some aspects arising from the importation of a model originating from such a distinct cultural and legal matrix, are not surprising. This perception is shared by Filpo (2016, p. 56) when he states:

> [...] the idea is spread that the adoption of intraprocedural mediation and other consensual methods would be the solution to all the problems of the Judiciary. This argument is often reinforced by the mention of successful experiences abroad, especially in the United States, but without informing that they are dealing with different legal traditions, and what works for Americans, in light of their culture, may not be suitable for Brazilians. This entire context leads me to ask, as does Nader (1996), if we are not facing a mere exercise in rhetoric.

Thus, we will now proceed to make some brief considerations about the difficulties that judicial mediation has faced as a result of the importation of a model that proves to be incompatible with our legal and cultural reality.

4.3 The Difficulties of Judicial Mediation in Brazil

The contemporary resumption of alternative methods of conflict resolution has developed in Brazil – as well as in various parts of the world – as a result of the crisis in the jurisdictional activity of the State, which manifests itself in two faces, one quantitative and the other qualitative.

In the Brazilian case, given the belief that the judicial process is the only legitimate instrument for resolving the most varied conflicts, it is the Judiciary itself that has encouraged the development of alternatives to the judicial system itself. In this way, what was an alternative and should work according to a different logic is sometimes contaminated by the dynamics of the judicial system.

Thus, the mediation that should be developed extrajudicially, becomes colonized by haste, urgency, goals and authoritarianism present in the Judiciary. Mediation within the

judicial space holds a great antagonism, as stated by Filpo (2016, p. 56):

> Such descriptions, however, are not concerned with addressing the empirical dimension of what they are claiming (in the sense that there is no certainty as to the alleged success of judicial mediation), while ignoring the antagonisms present between two forms of administration of conflicts, namely: an informal one, based on consensus and autonomy of the parties, and the other impregnated with formalisms, adversarial and controlled by the judicial authorities.

Thus, we can infer that mediation must have the extrajudicial space as its privileged locus of development, which in fact occurred with the Anglo-Saxon model of mediation, especially in the United States. Even the very matrix of facilitative mediation is also characterized by negotiation of a clearly extrajudicial character.

What can be pointed out in the Brazilian case is that the judicial development of a mediation model that should follow the extrajudicial path may have as a consequence for mediation, in general, all the stains and discredits of which the Judiciary is already there is a lot of target.

Indeed, it seems urgent that mediation in Brazil goes out its way out of the Forum's doors and into society, this being the propitious place for its development.

5 | FINAL CONSIDERATIONS

It was found throughout this work that the development of mediation is a historical and contextual process that is significantly influenced by the legal culture and social regulation systems of each country, as it was possible to verify from the analysis of the Anglo-Saxon model.

With regard to the theoretical models, it is observed that despite the modern pioneering spirit and the great influence exerted on other models by the facilitative mediation of the Harvard School, transformative mediation and narrative-circular with the first have significant differences, both in terms of it refers to the greater or lesser focus on the agreement or on the relationship/communication, as well as on the techniques and methodology used.

When investigating which models influenced the judicial mediation adopted in Brazil, a central problem of the research, based on the analysis of Resolution nº 125/2010 of the CNJ, it was possible to verify that the judicial mediation model imported by Brazil has a strong influence of Anglo-Santon matrix, especially North American, although Brazil is a typical representative of civil law, unlike the United States, which adopts the common law system. Thus, in a contradictory way, Brazil adopts a mediation model that retains much more identity with the Anglo-Saxon mediation model than with the Latin mediation model, which in principle would be the most predictable and expected.

Also in this sense, it was found that Resolution Nº. 125/2010 of the CNJ gave special emphasis to negotiation techniques for mediation, through the syllabus for the training of

mediators, showing a special inclination towards facilitative mediation at the Harvard School.

Furthermore, there is no doubt that the entire structuring of judicial mediation in Brazil has as an almost exclusive focus of the mediation process the search for an agreement. Thus, obtaining the agreement is pursued throughout the judicial mediation, as it is only by obtaining it that it is possible to close the process, contributing to the reduction of processes in progress in the Judiciary.

Thus, responding to the initially raised problem and resuming the presented hypothesis, it can be affirmed that despite not being expressed and not being exclusive, the influence of the facilitative mediation model, of the Harvard School, of Anglo-Saxon matrix, is quite predominant through the greater focus on negotiating techniques with the object of reaching an agreement and putting an end to the procedural

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ÍNDICE REMISSIVO

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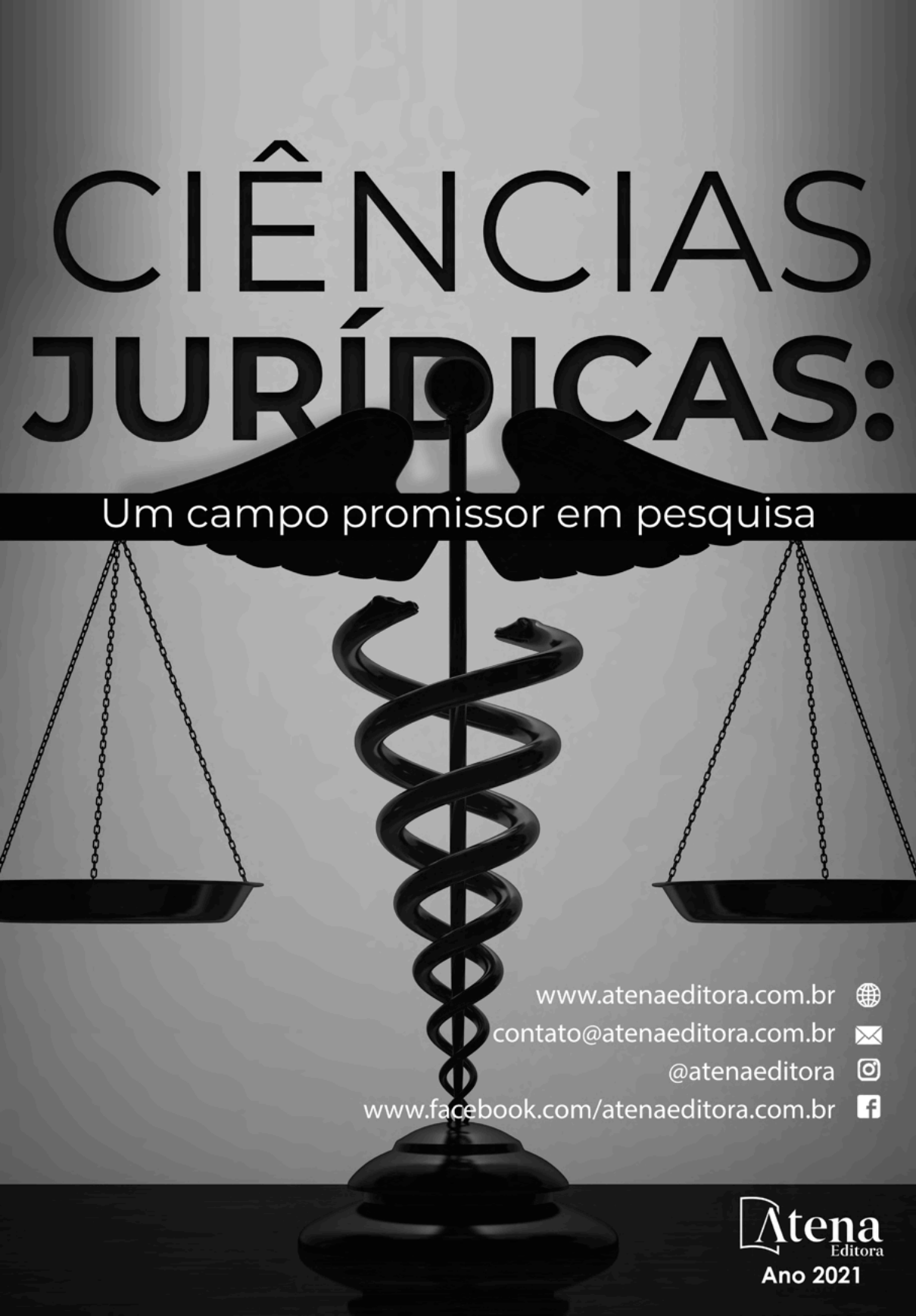
V

CIÊNCIAS JURÍDICAS:

Um campo promissor em pesquisa



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