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## **CRITICAL ANALYSIS OF THE USE OF MEDIATION IN CRIMES OF MINOR OFFENSIVE POTENTIAL IN ARGENTINA AND BRAZIL**

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## INTRODUCTION

In the behavioral context of society, there are certain criminal offenses that are considered to be of lesser offensive potential, that is, the degree of reprehensibility and offense to the social and legal order is less severe than crimes considered more serious, which directly offend the whole of society (PACELLI, 2018, p. 477). However, in these criminal offenses of lesser offensive potential, imprisonment is a more costly measure for the State, more harmful to the convicted person, and indifferent to the victim, since in most of these crimes, forgiveness granted to the perpetrator is sufficient and possible, without further damage to fundamental legal rights. In view of this, mediation as a form of conflict resolution is an alternative to the punitive action of the State in response to the commission of *minor crimes*, in which the perpetrator assumes responsibility for fulfilling certain obligations in order to replace the custodial sentence, moving towards restorative rather than punitive justice (PRUDENTE, 2011, p. 57).

Therefore, a procedural alternative to the traditional criminal process established by the State is sought, which has the function of guiding public interests, maintaining and promoting social peace in the exercise of its jurisdictional function (AVENA, 2017, p. 431). That said, this scientific paper aims to critically analyze this state action through mediation, especially in Brazil and Argentina, comparing the differences and similarities in addressing this issue in light of the current state of evolution of the Democratic Rule of Law, in which the jurisdictional function has been influenced by international factors in modern legal and political construction.

With the expansion of the right of access to justice and its elevation to the status of a fundamental right, there has been a search for effectiveness in the material aspect of judicial protection, as opposed to merely formal justice (CAPPELLETTI and GARTH, 1988, p. 111).

In this sense, this scientific work is justified by the necessary adaptation of the judicial system in dealing with criminal offenses of lesser offensive potential, based on the improvement of the realization and effectiveness of justice within society, which, due to its complexity, entrusts the State with the administration of the public interests involved. Therefore, it is up to the State to implement measures to ensure the effectiveness of its jurisdictional function, establishing a legitimate legal order (BONAVIDES, 2000, p. 44).

## JUDICIAL CONFLICT MEDIATION SYSTEM IN ARGENTINA

In Argentina, the use of mediation in criminal offenses of lesser offensive potential is intended to provide greater procedural economy and minimal state intervention in society, enabling it to resolve conflicts on its own (BALESTRINI, 2007, p. 121), since there are crimes whose offense to the victim is limited to civil aspects, and financial compensation is sufficient to bring about social peace. Thus, in these cases, the criminal sanction of deprivation of liberty does not have the power to deliver justice to the victim and society.

To mediate this procedure, *summary proceedings* and *initial summary proceedings* were created, through which agreements can be established between the parties, involving the Public Prosecutor's Office and the accused, with the Court only responsible for ratifying this agreement and establishing alternative measures to imprisonment (BALCARCE, 2009, p. 45). Specifically with regard to *the initial summary trial*, there is the figure of the Investigating Magistrate, who is responsible for mediating between the parties, resulting in criminal conciliation, with the lawyers for the victim and the accused establishing a settlement only on the financial aspect.

The Argentine criminal legal system includes certain criminal offenses in the cases

of self-composition, which can be repaired financially, in which this recomposition or compensation represents an element of greater justice than any other type of punishment carried out by the State (BATTOLA, 2010, p. 44). Thus, unlike in Brazil, where crimes of lesser offensive potential are classified according to the penalty applied, in Argentina the criterion used is the possibility of financial compensation acceptable to society, as expressed in legal provisions.

In contrast, criminal settlement in the Argentine legal system consists of mutual concessions between the *public prosecutor* and the defendant, similar to the Brazilian model, representing a decriminalizing measure that seeks to reform the conduct of the criminal agent, who assumes responsibility before the State to contribute to social peace.

## **JUDICIAL SYSTEM OF CONFLICT MEDIATION IN BRAZIL**

In Brazil, mediation of conflicts with lower offensive potential is regulated by Law No. 9,099/1995, which governs Special Civil and Criminal Courts. In the section on criminal matters, it establishes that offenses are characterized as such when the maximum penalty cannot exceed two years, according to Article 61: "Offenses of lesser offensive potential are considered [...] criminal offenses and crimes for which the law imposes a maximum penalty of no more than two (2) years, whether or not combined with a fine" (BRAZIL, 1995, online); and subsequently extending jurisdiction to the federal sphere through Law No. 10,259/2001.

Within the scope of the Special Criminal Courts, conditional suspension of proceedings and plea bargaining were implemented, whereby an agreement may be reached between the criminal agent and the Public Prosecutor's Office, replacing the traditional procedure of prosecution and criminal punishment,

which are unnecessary and inappropriate for the achievement of justice, as asserted by PACHELLI (2018, p. 414).

Therefore, summary proceedings in Brazil are characterized by speed and informality, whose main purpose is to expand access to justice and bring about greater social peace through effective procedural instruments, not only in the punitive context, but mainly in its restorative sense.

Furthermore, in the Brazilian legal system, the criminal agent is held accountable independently in the criminal, civil, and administrative spheres, and the effects in the criminal sphere are irrelevant to the victim's financial compensation, except in some cases of materiality and authorship (NUCCI, 2016, p. 160). Thus, mediation has the power to bring about greater social peace through a decriminalizing criminal policy whose short-, medium-, and long-term effects can benefit the State, the victim, the offender, and society.

## **THE CONCEPT OF RESTORATIVE JUSTICE AND ITS FUNCTION IN SOCIETY IN THE CRIMINAL CONTEXT**

In view of the development of fundamental rights and guarantees and the valorization of human dignity, States have experienced conceptual conflicts in their public policies on public security and criminal accountability within society, resulting in the need for effective measures to reduce crime rates and their re . In this sense, there has been an international trend toward alternative practices in combating crime, especially in the pre-trial and trial phases, as in Brazil, Argentina, New Zealand, Australia, the United States, etc., as prescribed by (MORRIS, 2005, p. 441).

The ineffectiveness of crime reduction measures, therefore, results in the need for strategic public policies in order to be effective, corresponding to the public interest, that is, for

the benefit of the community. Consequently, Restorative Justice can be conceptualized as measures adopted by the State in the context of criminal prosecution, in which the social actors involved (Public Prosecutor's Office, defendant, victim, social organizations, etc.) participate, seeking to restore the environment of harmony and social peace that was violated by the criminal agent.

Its objective is, after all, to restore what has been violated, not only from a patrimonial perspective, but mainly in the subjective sphere of the victim and the agent, understanding what it means to do justice in a specific case (SCURO NETO, 2000, p. 8). Thus, there are psychological marks that have been imposed on the victim, as well as sociological aspects of the perpetrator that must be addressed, and, together, in the collective context, the effects that the crime has had on society, as well as how to repair this damage, something that is only possible with the participation of the individuals involved, in line with the democratic construction of justice.

In this sense, MACCOLD and WACHTEL (2003, p. 5):

Crimes cause harm to people and relationships. Justice requires that the harm be repaired to the maximum extent possible. Restorative justice is not done because it is deserved, but because it is necessary. Restorative justice is ideally achieved through a cooperative process involving all key stakeholders in determining the best solution to repair the harm caused by the offense.

The main characteristic of Restorative Justice is the existence of a cooperative process between the parties involved in the exercise of the State's jurisdictional function in the criminal sphere, in which the legal rights protected are of greater relevance to society and their violation generates direct and indirect effects. Consequently, mediation in the criminal sphere is the subject of study and analysis at the international level as a criminal policy

measure to help reduce crime rates, for which countries have been developing pilot projects, mainly for less serious crimes, as is the case in Brazil and Argentina.

## **THE POLICE CHIEF AND THE CLERK IN THE IMPLEMENTATION OF MEDIATION IN RESTORATIVE JUSTICE**

In criminal prosecution by the State, the Police Chief and his assistants play a fundamental role, since the former is responsible for administering the administrative phase, which involves gathering information about the perpetrators and the material elements of the crimes committed. In this capacity, the police authority is the first agent of the State in the criminal prosecution process to have direct contact with the criminal agent, being able to verify the facts that occurred and take certain steps in order to prepare the essential elements for the Public Prosecutor's Office to file charges before the Judiciary (LIMA, 2017, p. 162-163).

In Brazil, the concept of community policing is well known, whereby the State and the community work together, with the main purpose of its agents being to promote social peace and resolve conflicts within communities marked by violence and drug trafficking. This is a public security policy already implemented in several American and European countries (SALES, ALENCAR, FEITOSA, 2009, p. 287). p. 287). In view of this, there is a tendency for the police and society to work together to combat crime, since there are fundamental elements that only the social group in which crimes arise is capable of identifying and providing to the State, as well as in the preventive response to criminal incidents.

Despite their administrative role, police chiefs do not have the authority to effectively mediate between parties in criminal proce-

edings in order to eliminate social conflict. Their role is limited to gathering essential information about the facts of the case, leaving it to the Public Prosecutor's Office to request the magistrate to do so, as stated by LIMA (2017, p. 163). Therefore, both the Police Chief and the Clerk perform the essential function of gathering evidence, especially with regard to the statements of the criminal, the victim, and witnesses, recording the subjective aspects inherent to the criminal act.

## FINAL CONSIDERATIONS

In short, it is clear that the existence of crimes of lesser offensive potential in society is a reality in any political-administrative organization, in which the State needs to manage these crimes in order to reduce crime rates and ly promote social peace. As such, mediation has proven to be fundamental to this objective, both in Argentina and Brazil, in an international trend toward improving the State's

judicial function in the criminal sphere.

The role of society in resolving social conflicts related to the criminal sphere has the power to confer legitimacy on the State's judicial action in the enforcement of justice, since mediation represents an advance in participatory democracy in a democratic state governed by the rule of law, resulting in the legal construction of a cooperative criminal process between the parties involved in the dispute.

Finally, both in Argentina and Brazil, progress has been made in this direction, although it is still rooted in traditional procedural practices, given the limitations of conflict management within the Judiciary. It is clear, therefore, that in order to make mediation more effective in line with Restorative Justice, it is essential to dismantle the official institutions responsible for ending social conflict, requiring clearer and more relevant action by administrative bodies and society in the composition between the parties.

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