

Alternative Dispute Resolution Mechanisms Such As Access To Justice

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Abstract

Alternative justice provides for various types of alternative dispute resolution mechanisms that integrate the right of access to justice. This document aims to describe some of the alternative mechanisms provided for in the Mexican State and their importance in the consolidation of a culture of peace. In which citizens can legitimize their right of access to justice through these mechanisms through a peaceful means based on dialogue and communication assisted by a professional third party called a facilitator. Alternative justice configures processes of consensus, democratic and inclusive for the citizen as that person to develop the ability to manage and solve their own conflict that is reflected in an agreement that has the character of *res judicata*.

Keywords Access to justice, law, State, alternative justice.

Introduction

The system of administration of justice in Mexico contemplates the compositional hetero route that is the one in which the responsibility of resolving a conflict brought to trial falls on a judge or competent authority according to the type of conflict, regularly they are processes of late *litis* and in the wear and tear is not only of time but also economic and psychological. The self-positive way is one in which the responsibility to manage and resolve the conflict is by the protagonists of the conflict themselves, who are assisted by a third professional expert in the field.

The principles of alternative mechanisms of voluntariness, information, confidentiality, flexibility and simplicity, impartiality, equity, honesty (Chamber of Deputies, 2022); they involve consensus processes in which people are legitimized and empowered to be able to narrate the situation of the facts and bring to fruition the creation of the agenda satisfying

the interests and needs of the people involved according to law.

In this sense, the right of access to justice as a human right adhered to the principles of universality, progressivity, interdependence and indivisibility with other rights (peace, dignified life, education, full development, among others) underline the interest of not violating or violating these rights.

Alternative justice underlines the interest of providing the service in a public or private way according to the entity, for its flexibility, principles, tools, techniques, legitimacy and empowerment to the subjects to resolve their conflict, has been used to address conflicts beyond the strict sense of law.

Therefore, this document aims to describe some of the alternative mechanisms provided for in the Mexican State and their importance in the consolidation of a culture of peace; each of them determines a process and distinguishes the role of the professional facilitator who

guides the process. All are based on the aforementioned principles, which have the vision of consolidating a process of culture of peace in citizens in conjunction with the system of administration of justice, for which it is important to have a notion of the scope, relevance and implication of alternative justice not only applicable in the management and resolution of conflicts but as a preventive way of conflicts.

Access to justice

The right of access to justice is an exercise of the citizen's right when the person suffered from a violation or violation of his right. It represents exercising a right of complete justice and greater benefit with access to resources that legitimize the right.

In the Sustainable Development Goals -SDGs, in particular Goal 16 aimed at peace, justice and solid institutions (United Nations, 2015), the permanence and increase of conflicts, insecurity, weak institutions of administration of justice, access to justice in a limited way are addressed as a threat, so the path of integration of the social cell, The government is based on inclusive and democratic processes between and with citizens and institutions that guarantee the right of access to justice. Given this fact, it is important to consider the elements of restorative justice as a mechanism for attention to the reparation of damages and continuous work with the victim and accused.

The United Nations (2022) considers it as a basic principle of the rule of law, without it, people cannot make their voices heard, exercise their rights, face discrimination or hold decision-makers accountable. To this end, the justice system must be exercised on the basis of equality and equity for all in such a way that the justice service is fair, accountable, transparent, effective, impartial without any discrimination.

Article 10 of the Universal Declaration of Human Rights provides:

Everyone has the right, in full equality, to be heard publicly and fairly by an independent and impartial tribunal, for the determination of his rights and obligations or for the examination of any accusation against him in criminal matters (United Nations, 1948).

Although it specifically addresses criminal matters, the precedent leads us to consider the right of access to justice based on the equality in which the courts in charge of dispensing justice provide for their actions in an impartial and neutral manner.

Article 25 of the American Convention on Human Rights with respect to judicial protection states:

1. Everyone has the right to a simple and prompt remedy or to any other effective remedy before the competent judges or courts, which protects him against acts that violate his fundamental rights recognized by the Constitution, the law or this Convention, even if such violation is committed by persons acting in the exercise of their official functions.

2. States Parties undertake:

- (a) to ensure that the competent authority provided for by the legal system of the State shall decide on the rights of any person bringing such a remedy;

(b) to develop the possibilities for judicial review; and

c) to ensure compliance, by the competent authorities, with any decision in which the appeal has been considered appropriate (Organization of American States, 1969).

This international instrument deals with the right to justice with accessible remedies from the moment the person goes to the competent courts, his process and resolution of it.

The International Covenant on Civil and Political Rights pronounces access to justice as follows:

1. All persons are equal before the courts and tribunals of justice. Everyone shall have the right to a fair and public hearing by a competent, independent and impartial tribunal established by law in the substantiation of any criminal charge brought against him or for the determination of his or her civil rights or obligations. The press and the public may be excluded from all or part of the trials for reasons of morality, public order or national security in a democratic society, or when required by the interest of the private life of the parties or, to the extent strictly necessary in the opinion of the court, when by special circumstances of the matter publicity would prejudice the interests of justice; but any judgment in criminal or contentious

matters shall be public, except in cases where the interests of minors require otherwise, or in cases relating to matrimonial disputes or the guardianship of minors (United Nations, para. 1, 1966).

It stages on a level of equal status of access to justice for every citizen, in which the system of administration of justice must be a guarantor of that human right.

Undoubtedly, the right of access to justice must provide new paradigms in the administration of justice based on the understanding of new social, legal and regulatory processes, creating the necessary conditions for the creation of means and environments conducive to a justice system in which citizens have a leading role in the management and resolution of conflicts, in addition to foreseeing and implementing alternative justice through the various alternative dispute resolution mechanisms in areas and scenarios that empower and develop in the citizen the tools and techniques in the attention of latent, emerging and / or manifest conflicts.

Alternative justice. Alternative dispute resolution mechanisms

Alternative justice in the Mexican State is embodied as a human right of access to justice which is provided for in the first Constitutional and seventeen Constitutional articles, in addition to laws and state codes in specific matters of alternative dispute resolution mechanisms, as a public service and according to the State can also be carried out privately.

The Mexican government considers it as:

Alternative Justice is a tool for conflict resolution. Its

purpose is to achieve an agreement between those involved through will, cooperation and dialogue. to resolve conflicts through dialogue between the people involved and is applicable for non-serious cases. This type of justice allows individuals to solve their problems without the need to go to a judge, as it gives the parties the opportunity to agree through will, cooperation and communication. This procedure means a sum of wills, because the parties are willing to reach agreements that will favor them through the support of a neutral person trained to find a peaceful solution, that is, a mediator or conciliator (Ministry of the Interior, 2016).

As it well describes alternative justice through alternative mechanisms, they are considered as a way to assist the system of administration of justice, because not everything is applicable to alternative mechanisms, which is provided for in each law or code competent to the applicable matter of the case.

In this sense, each of the alternative mechanisms provided for in the Mexican State and the elements, as well as characteristics that constitute it, are presented in a conceptual way below.

Mediation. It is a voluntary mechanism in which the subjects, whether natural or legal persons, in assistance of the facilitator, communicate and negotiate in a friendly and satisfactory way the legal solution (Gazette of the Judicial Weekly of the Federation, Thesis: I.3o.C.387 C 10a., 2019). The Law on

Alternative Dispute Resolution Mechanisms in Criminal Matters provides for it as that process that starts from voluntariness, autonomy which is sought to build and propose solution options and achieve the solution of the same.

In the mediation procedure we can distinguish as a characteristic the reconciliation of interests and needs of the parties involved, flexibility, is less expensive in time, money, psychological exhaustion. The role of the facilitator called mediator prevails in being neutral, impartial, based on the principle of confidentiality, generates a state of equity, does not propose or suggest solutions, guides the stages of the premediation, mediation and preparation of the agreement procedure (Gazette of the Judicial Weekly of the Federation, Thesis: I.3o.C.388 C 10a., 2019), being the parties who generate the agreements and solutions.

Conciliation. Process guided by the facilitator called conciliator, the role of the neutral and impartial third party must be totally professional, unlike the mediator the conciliator can suggest or propose agreements and it is up to the parties to consider them. The Law on Alternative Dispute Resolution Mechanisms in Criminal Matters considers this mechanism as voluntary in which the parties, in the exercise of their autonomy, propose options for the resolution of their conflict.

It is a mechanism that humanizes the law, promoting comprehensive, flexible solutions to conflicts, recognizing the importance of the other as a human being (Arboleda, 2017, p.92), of both parties in the process. As the conciliation process develops, the imaginaries of those who are linked by a certain conflict are changing, since each of the steps established or agreed in that process, to reach the restoration of the relationships fractured by

the conflict itself, are part of another tacit, but permanent, pedagogical process, which allows, according to the interactions that are presented there, expand the capacity for thinking in accordance with the dynamics that are propitiated in the relationship of the parties at the time of directly dealing with their conflicts (Montoya & Salinas, 2016, p.142), the interaction of ideas and exposure of emotions and feelings in the process must be handled in an ethical way that allows establishing guidelines of the origin of the conflict and thus be able to have the conditions in the process to arrive to good agreements.

Arbitration. It is a way of access to justice, it is considered in alternative justice since the parties submit themselves voluntarily to the arbitration process, although they are not the ones who reach an agreement and resolve, if they submit the dispute to an arbitral process and this before arbitrators expose, argue and substantiate the facts and the arbitrator or arbitrators resolve in this regard. In this sense, the parties can choose the arbitrator specialized in the subject who will decide definitively and obligatorily for the parties.

González (2008) aims to specifically raise the role and role in the arbitral process of the parties, arbitrators and the judiciary. The main and defining characteristic is its conventional character (Cabrera & Aguilera, 2019). Arbitration in Mexico can be conducted for commercial issues, in the field of the health sector, in cases of the Federal Consumer Prosecutor's Office - PROFECO, among others.

Restorative justice. This mechanism is foreseen in criminal matters, however, due to the scope it has, it is being applied and reproduced in various areas such as education and community where it works as an action or strategy that allows the integration of people in their context.

The National Law on Alternative Dispute Resolution Mechanisms in Criminal Matters provides for it as:

The restorative board is the mechanism through which the victim or offended, the accused and, where appropriate, the affected community, in the free exercise of their autonomy, seek, construct and propose options for resolving the dispute, in order to achieve an Agreement that meets the individual and collective needs and responsibilities, as well as the reintegration of the victim or offended and the accused to the community and the recomposition of the social fabric.

Beyond the reparation of the damage, it seeks the reintegration of the person in the community and establish the link with society, the purpose is that the person does not incur again in actions or crimes that lead him again to deprive him of his freedom or deprive of some right to another person, but that he can recognize and assume responsibility for his actions.

Rodríguez (2016), distinguishes the restorative justice system as one where responsibility is collective, protagonism by the people involved, the community and the State or Institution, relational process from narrative of stories, humanization of the process in order to meet the needs and interests of the parties, the purpose is to visualize a future from the facts of the past built in the present through an institutional interaction and social.

Patiño and Ruiz distinguish elements that must be considered in the application of restorative justice such as:

Restorative justice makes it possible to construct, at the same time, and without any delay, a theory of justice, based on the presence of the perpetrators, the victims and the community. This understanding of justice has to be seen, precisely, with the experiences of people, who allow us to understand the causes and effects of homicides, torture and disappearances, but also of the violent appropriation of territories, the extraction of resources, among other crimes. Doing justice to the victims implies, at the same time, recognizing the folds of the damage, that is, the multiple injustices and affectations that have occurred with respect to them, and, of course, that continue to be committed. To understand the different layers of harm, it is necessary to bear in mind that the presence of the victims in the restorative process is absolutely necessary as long as the concept of justice integrates the healing of the wounds inflicted on the entire body of society.

In that sense, people must be foreseen as a collective and members of a society of integration and inclusion or reconstruction and not fragmented. The role or role of the

facilitator is important because emotions and feelings are very sensitive and must act considering confrontational mishaps that incite him to act quickly and effectively.

Conclusion

Alternative justice in a State governed by the rule of law presupposes for the citizen the provision of alternative mechanisms with accessible and adequate judicial remedies that are resolved by agreement in accordance with the law and are elevated as *res judicata*.

Alternative dispute resolution mechanisms such as access to justice are based on aspects of promptness, economy and satisfaction of the parties in the management and resolution of their conflict led to a tangible agreement in agreement achieved by the dialogue, understanding and communication of both parties.

These mechanisms through the professional facilitator create and establish the conditions for people to assume their responsibility in the management and resolution of the conflict. By its nature, dialogue and communication prevail through tools and techniques that the facilitator develops in each of the processes, the ultimate goal is that the parties involved in the conflict reach agreements that meet their interests, needs and possibilities according to law.

Conflicts are present through various manifestations in all societies and areas, as such alternative justice is a way of access beyond the Law, it is also the pursuit of a state of coexistence where people can understand and assume responsibility for the conflict and foresee situations of controversy through adoption and cultural transition of peace where they are reduced, avoid or reduce such events, transforming the conflict from a negative stance to a transformative and consensus process.

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