

Access to women's justice through conflict management and mediation

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— *Abstract* —

The qualities and benefits of public law and other areas of law have always been observed in promoting access to justice, not only for women but for all those who require it, however, it is appropriate to briefly analyze the effectiveness that mediation can have to manage conflicts produced in women, such as the social confinement that derives from the pandemic that is currently taking place and that can be understood as a source of conflicts and opportunities for women to end their disputes alone and obtain access to justice. It is for the above reasons that the objective of this research is to analyze the efficacy that mediation produces as a peace agent to provide women with the necessary empowerment to end conflicts through the management of these and, with it, have access to justice, seeing this access as a human right.

Keywords:

Conflict management; mediation; gender violence; positive discrimination.

The following thoughts about conflict management that results in women's free and full access to justice will be studied in the light of three approaches. The first will analyze Mediation as a Dispute Resolution Method (ADR), seen not only as a flat object that serves only as a method of conflict termination but also as an agent of positive peace. In the second approach, Mediation will be observed from an epistemological level of logic, that is, Mediation will be analyzed as a method that recognizes human rights in the Political Constitution of the United Mexican States (CPEUM), which it institutionalizes through the National Law on the Mechanisms for the Alternative Resolution of Disputes in Criminal Matters (LNMASCMP). While in the third approach, the study will focus on a reflection according to the existence of positive discrimination against women, a conceptual category that emerged within the decade of the seventies in the United Kingdom and that has an important boom in the current era.

CONTEXT OF GENDER-BASED VIOLENCE

One of the great manifestations of gender violence stems from the lack or little access that women must have to justice. In this regard, it is important to delimit this type of violence and clearly differentiate it from violence against women. First, it is necessary to define violence against women and girls, because, although this term is of great importance, it is also not the right one to understand the structural conflict of null access to justice by women. In this sense, the United Nations (UN) defines violence against women as "any act of gender-based violence that results in or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life" (UN, 2021).

As mentioned above, it is considered that the term violence against women and girls is not appropriate, since it seeks to define a structural conflict or, rather, try to analyze gender violence as part of a structural conflict that has not yet been fully mitigated. From this reasoning, it must be understood that gender violence manifests itself as the structural conflict that prevents women from having free and full access to justice.

To contextualize gender violence concerning mediation, it is mentioned that, throughout the history of legal science, there have been limitations in the termination of conflicts, where women who are involved in these conflicts fail to terminate them, therefore, their human right of access to justice is violated. To understand this term, the definition of gender violence proposed by the UN will be taken as a reference, which states that "gender violence refers to harmful acts directed against an individual or a group of

individuals based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms." (UN, 2021).

Currently, access to justice for women has evolved since other types of extrajudicial methods began to be used or, failing that, judicial methods. However, if a comparison is made for the access to justice that women had in previous times, it is possible to notice that even the *patriarchal law*, stigmatizes the right as an exclusive issue for men. The above, allows us to consider the existence of an indirect form of gender violence against women, perhaps not explicitly, but tacitly. However, it should not be overlooked that, equally, many men could suffer from gender-based violence.

Recently, based on the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), UN Women, and the Inter-American Court of Human Rights, have issued recommendations to the Mexican State to demand the assurance of women's free and full access to justice, not only as victims of crime but also as possible participants in the commission of crimes. Likewise, some recommendations are aimed at alternative ways of ending conflicts, which are called extrajudicial methods, also known as Alternative Dispute Resolution Methods (ADRM), whose main function is to end disputes by the parties themselves.

In this regard, CEDAW issued General Recommendation No. 33 on Women's Access to Justice, which states, inter alia, that there should be free access for women to judicial systems and ADRMs, as well as a gender approach in judicial and extrajudicial processes involving women. Likewise, it established that both judicial and extrajudicial mechanisms "use a confidential and gender-sensitive approach to avoid stigmatization during all legal proceedings, including secondary victimization in cases of violence, during questioning, evidence collection and other procedures related to the investigation" (CEDAW, 2015).

THE OBJECT OF MEDIATION AS DRM

To begin with this section of the investigation, we will focus on mediation as the alternative method par excellence that procedural law provides, that is, of all the ADRM mediation has benefits that make it unique and, therefore, effective before the other ADRM. In that sense, it should be understood that "mediation is an alternative mechanism for dispute resolution. Some consider it as the most innovative technique that promises greater success in the field of conflict resolution, because it is up to the parties, assisted by an impartial third party, to resolve their own conflict situation" (Cornelio, 2014:92).

The above definition generates an environment that makes mediation easy to understand. It is interesting to study some elements that this defini-

tion provides, for example, mediation has a duality that tends to be considered a technique and a method to terminate conflicts. We can bring up the topic of justice citizenship by parties through mediation, that is, through mediation, the parties appropriate conflict management by themselves. In short, the parties that are involved in a dispute do not need an authority that directly ends it, it is enough for the parties to reach an agreement of their own will to conclude the dispute satisfactorily.

In this regard, "we can say that mediation is a process or management of conflict resolution, where the parties attend voluntarily and with the help of a professional third party, build agreements by making decisions naturally on the motivating issue of the conflict" (Cornelio, 2014: 92). For these reasons, it is considered important to analyze mediation, not as a flat object, but as a scientific construct, capable of ending conflicts, but with the condition of establishing an epistemology that allows us to see its valuative purpose (axiological plane), its normative regulation (logical-phenomenological plane) and its factual effectiveness (ontological plane).

Based on the above considerations, it is considered that mediation can generate even greater effectiveness than any other method, whether traditional (jurisdictional and administrative processes) or of any other nature, since mediation recognizes the human right of access to justice and, in addition, is institutionalized through a legal norm of a general nature. However, this point of view will be developed later. Therefore, to understand this condition, it is necessary to establish that, from the epistemological construct of mediation, women can empower themselves to end their own conflicts, which generates an aspect of justice citizenship and, therefore, free, and full access to it.

Based on the above, mediation is a novel way to end conflicts through a process called conflict management. Conflict management establishes conflict termination through the satisfaction of agreements between the parties, which leads us to the end pursued by this mediation, that is, positive peace or the culture of peace. As is known, mediation, being a booming scientific construct, has some problems with location within the general theory of the process, since it is complicated to locate it either within auto-composition or in hetero-composition. "As we can see, mediation then, is under a problem of the general theory of the process, since there is a slight confusion in knowing if it is a hetero-compositive or auto-positive method, however, with this deduction, we can infer that it is in a procedural limbo that has been called composition by conflict management" (Palacios, 2020: 31).

To have a greater precision of the context of positive peace and how it benefits women's access to justice, the absence of violence and conflicts must be understood as the purpose pursued by mediation since it seeks the non-existence of conflicts and lack of inequality. "For this reason, peace

culture or, rather, the construction of peace culture establishes the philosophical mechanisms that start from the structure of positive peace, which is understood as the absence of violence" (Palacios, 2020: 28).

THE LOGICAL PART OF MEDIATION, THE NORMATIVE PERSPECTIVE

In the previous sections of this work, it has been established that mediation is conceived as a process to end conflicts, which uses a type of composition by conflict management to achieve this objective. That said, mediation is known as a conflict management method that has positive efficacy concerning other ADR, which has caused this method to be constitutionalized, or, rather, to recognize the human right of access to justice through this method, which generates a way to institutionalize mediation within Mexican positive law.

One of the consequences of constitutionalizing the ADR is the LNMASCMP, which contains the necessary provisions to provide and legitimize the participants of a conflict, as well as the third parties who will serve as mediators or facilitators within these criminal conflicts. As a result of the above, and "given the impossibility and inconvenience of bringing all criminal proceedings to trial, the existence of mechanisms that promote the voluntary settlement between the parties has been foreseen... without the intervention of a judge, through the National Law on the Mechanisms for the Alternative Resolution of Disputes in Criminal Matters" (Fix-Fierro et. al., 2015: 121).

Given this condition, it is important to know the benefits that this legal norm has for women who want to have access to justice, as far as possible, in the face of other types of mechanisms, such as legal, jurisdictional, and administrative processes. Likewise, it is considered relevant to point out that women have an area of opportunity to achieve the management of their social conflicts alongside this law since it is a consequence of the incorporation of the ADR into the constitutional text from the criminal amendment of 2008.

For these reasons, mediation proposes a paradigm of fullness to the human right of access to justice, that is, even when the CPEUM enshrines such access, the monopoly of justice by the State means that there is even institutional resistance so that a person has the desired access to justice (more, if we have as that the null access to justice is considered gender violence), so that alternative justice through mediation, breaks with this paradigm and concretizes the prerogative mentioned above.

Another form of gender violence is that which is manifested by the inequality that people suffer when receiving unequal treatment within a judicial process, which, with mediation, this aspect is null; in this consideration, it is demonstrated how mediation has the advantage to mitigate this gender violence, or rather, it is observed how mediation provides access to justice,

reducing social inequalities, which can be the product of structural conflicts aimed at the normalization of such social inequality. However, regarding the global pandemic due to COVID-19, it is necessary to specify certain considerations that mediation currently has, that is, according to the paradigm of confinement where the courts are in recess given this circumstance, mediation can be carried out from private centers and at a distance.

This generates certainty when it comes to managing structural conflicts, which can trigger other types of conflicts and violence, because mediation, being a method that significantly reduces the time to terminate conflicts, produces an environment of well-being, not only personal but also, social welfare and satisfaction of the parties when it comes to finalizing the respective agreements. Mediation can then bring about the completion of present conflicts more quickly and easily and helps prevent future conflicts.

The above-mentioned finds support in the reports issued by the Judicial Power of Mexico City (PJCDMX, 2020), in which it is shown that in at least the last quarter of 2020, virtual sessions were of vital importance to end disputes, since out of the number of records (85), 35 of them, that is, 41.17% managed to enter a mediation process. This represents a positive step forward in understanding that mediation can give free and full access, not only to women but to anyone else who voluntarily carries out a mediation process to end their conflict.

On the other hand, there were other judicial institutions as well as private centers throughout Mexico that offered their services remotely (virtual) so that people could manage their conflicts without the risk of leaving their homes and getting the SARS-COV-2 virus. "In addition to the private mediators who offer this modality of service in several states of the republic, the judicial powers of Sonora and the State of Mexico have made remote mediation services available to citizens from their respective mediation centers" (Hernandez, 2020).

This condition makes the LNMASCOMP look like a flexible vertex that allows the end of conflicts in times of emergencies, not only health-related, but social, economic, or even political emergencies. On the other hand, since we have reflected on mediation from two perspectives, it is time to see how positive discrimination due to gender violence influences mediation.

POSITIVE DISCRIMINATION AGAINST WOMEN

Many times, the question has arisen regarding the negative effects of discrimination against women; however, it is important to begin to question and reflect on when discrimination becomes positive. At present, the use of this term has not been common, or, if it has been used, it has not been fully understood. In this sense, it refers as an example that within our society, it

is only possible to perceive negative discrimination, which is understood as that discrimination that generates a detriment towards certain people because of their sex, gender, social status, etc.; or to a sector of the population.

In this regard, under the aforementioned conditions, it is possible to clearly observe the detriment of certain people or, rather, of people or social groups' dignity; however, the same does not happen when talking about positive discrimination since due to its characteristics it is a bit difficult to see and understand. For this reason, positive discrimination must be analyzed as a preamble to the study of two situations: gender equality and gender equity, since we cannot notice at first glance the complex difference between one and the other, that is, "the principle of equality has traditionally been configured as a principle of justice" (Alegret, 2006: 17).

Derived from this conception, it is necessary to remember that mediation aims to reduce structural conflicts, such as inequality, both social as well as gender, since one of the objectives of mediation is to provide equality to the parties involved in a conflict, which generates empowerment of women so that they themselves terminate conflicts. In this regard, "the promotion and defense of the concept of positive discrimination has been based, in part, on discussions on structural barriers to equal opportunities and the challenges to overcome the historical effects of sustained exclusions of some groups of people with active or equal participation in civic development, and the political life of the nation" (Jara-Labarthé, 2018: 333)

Under this paradigm of equality, it is necessary to remember that, in many constitutions, including the Mexican one, there is talk of equality between men and women, for having the same rights and obligations as citizens, which implies that, regardless of the condition of sex or gender, a man and a woman have equal rights and, therefore, obligations, however, this does not happen in the daily practice of the exercise of such a human right.

Under the assumption mentioned in the previous paragraph, two ideas prove what has been said. In the first place, there are still barriers between men and women, which have been coexisting for a long time with the culture in which contemporary society has developed, that is, there has been no ability to link the idea that a man and a woman are ultimately human beings and people who have unique abilities that make us balanced with each other.

Secondly, the lack of development for new ways of harmoniously living is due to the previously mentioned conditions of negative discrimination. Thus, it allows us to consider that women are inferior in any situation in life and to consider them capable of carrying out any activity aimed at the development of society. In this sense, it is evident that inequality and discrimination are linked very closely, by finding elements that make possible a difference between groups or sectors of the population, this is best described since "inequality is suffered by the whole group or collective (...),

inequality that has occurred due to various circumstances, fundamentally socio-cultural ones, that have led to certain groups not having access to certain rights, goods or services like the others" (Alegret, 2006: 20).

However, once this part of discrimination has been analyzed, it only remains to define positive discrimination, which is understood as that condition of distinctive treatment towards a person or social group, which is benefited before others by its condition of gender, sexuality, or social condition. Regarding the above, Jara-Labarthe (2018), takes up a definition that, from an objective perspective, is quite close to what has been expressed regarding this concept, that is, "in its simplest form, measures of positive discrimination – also referred to as affirmative action or positive action in some places – are intended to give special considerations to individuals based on their belonging to a social group that has been identified on some basis of disadvantage about other groups in society" (Wang, 1983).

The term positive discrimination tries to solve the problems of equality and gender equity, granting certain benefits to women because of their human condition, however, such a situation falls into positive discrimination by providing them with benefits that men cannot have, by their human nature, also being discriminated against negatively. However, to talk about positive discrimination, it is necessary to address an issue that identifies the equalization of minorities, that is, affirmative actions or positive actions must be understood, which come from court rulings as synonymous with positive discrimination.

Derived from the above, "affirmative actions – a concept that complements that of positive discrimination – aim to question and modify those factual situations that prevent and hinder excluded groups and individuals from achieving effective equality in the claim for their rights" (Durango, 2016: 141). This indicates that it is necessary to place the object of study in the place of people who need to have equality concerning others, or to a certain group of the population, to give them a balance that is projected to combat the inequality and discrimination they suffer day by day. Therefore, affirmative, or positive action is understood as any logical, political, social, legal, economic, or any other approach so that a person or social group is not segregated through inequality or is discriminated against as a result of this inequality.

This principle of positive discrimination is supposed to be a term, whose ideology proposes non-discrimination to another sector or person, against which it is being endowed with positive action. This is because constant social, economic, political, and other changes create new scenarios that do not allow the rights of a person or a group to be correctly assessed or weighed.

For the specific case, feminism is observed as a fully social and positive movement for contemporary dynamics, as an agent that seeks gender equality

and equity. However, the poor performance and radicalization that this movement has had breaks with the main philosophy by which it was started before the seventies, to generate spaces for women.

Similarly, some legal phenomena have given greater weight to the rights of women over those of men, such as the specific case of the presumption of innocence for the case of crimes that arise from gender violence, which, at least within Spanish legislation, protects a woman, while a man is disproportionate to the detriment of his rights guaranteed in the Constitution of that country. That is, there should not be a condition that limits the equality and equity of rights according to the issue of conduct typified as gender violence, at least when a woman is a victim, since the Spanish Substantive Criminal Law so determines, so the question arises: what happens when women are the active and not the passive? The answer refers to a clear example of positive discrimination against women since the presumption of innocence for a man in the crime of gender violence does not have the same conditions as if the active were a woman.

Derived from the above, negative discrimination against a man apparently arises, since, in the first place, there is a positive action to the female victim to the detriment of a man, when the logic of this positive discrimination is not to violate the rights of a person or a social group; second, a woman cannot commit the conduct of gender violence as a man but deploys the conduct of domestic violence within the Spanish substantive criminal coding, which also notes a benefit to a woman compared to a man.

If you continue with this type of example, you can continue to air this type of situation. However, the idea is not to criticize positive discrimination against negative discrimination, what matters is to raise awareness about the capacity of some traditional mechanisms to provide equality to the parties when ending the conflict.

Through this context, we observe what is happening in the European Union, especially in Spain, whose cases of positive discrimination have been aired by the European Court of Human Rights and, which, for our study, has a relevant interest in this regard, since it can be said that mediation is a method that provides the parties with equality, it gives a benefit to women when it comes to accessing justice. Therefore, there is a new way of seeing mediation, not only as an effective method that gives women access to justice but also mitigates gender violence and the new conflicts that society in general faces within this global pandemic.

CONCLUSIONS

The function of mediation has been objectively analyzed from substantive, adjective, normative, or logical perspectives and as a method of conflict termination management. It is concluded, therefore, that gender violence comes from a structural conflict, that permeates in a natural or normal way within the social structures themselves, which causes these behaviors to end up being a serious social conflict.

Similarly, it is observed that mediation provides a new paradigm of access to justice through the culture of peace and justice citizenship, which is a novel system to end any type of conflict effectively, including some of a structural nature.

On the other hand, mediation is very effective when it comes to ending conflicts and mitigating gender violence, especially derived from this confinement that we are going through at a global level since it provides procedural equality between the parties when it comes to ending conflicts.

Another conclusion derives from indicating that mediation recognizes human rights and, in addition, institutionalizes these human rights. This as a whole is called the normalization of mediation, since the recognition is found in the constitutional text of the Mexican fundamental law and, the institutionalization in the LNMASCMP.

Likewise, some traditional methods may have difficulties in terminating conflicts and increasing inequality between women, which can cause an increase in gender violence, translated into zero access to justice by women, an example of this, we observe the positive discrimination against women.

The foregoing leaves a reflection that no matter under what perspective discrimination is visualized, whether positive or negative, the idea here is based on not promoting under any circumstances any type of discrimination so as not to hinder the work of mediation to terminate disputes.

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