http://dx.doi.org/10.18623/rvd.v13i27.869

POWER IMBALANCE BETWEEN THOSE UNDER JURISDICTION AND THE NECESSARY STATE PROTECTION: AN ANALYSIS OF ENVIRONMENTAL MEDIATION IN THE LIGHT OF THE 2015 BRAZILIAN PROCEDURAL CODE

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ABSTRACT

This paper analyses a possible power imbalance between the parties subjected to the mediation of environmental law conflicts in Brazil, in order to draw on the need for State protection in the context of environmental mediation, in the terms authorized by the new Brazilian Civil Procedural Code (CPC), enacted by Law n. 13.105/2015 and into force since March 2016. That Code enacts specific principles, including the Principle of the Governmental Promotion of Consensual Solution to Conflicts, and the postulates regarding self-composition, besides establishing the will of the parties as a value to be defended by the law. Nevertheless, it does not promote a more radical break with the old Brazilian CPC. Regarding environmental mediation, the benefits achievable are equivalent to those often achieved by mediation in general: improvement of the access to justice, mobility, empowerment of the parties, and effectiveness of the agreed solutions. However, it is noteworthy that the complicating factors and risks here

are clearly larger than in other branches of law. Environmental conflicts have coverage, temporal continuity, material implications and richness of meanings that hinder their delimitation. The hypotheses of this study were investigated by means of a bibliographical research. We concluded that in the context of environmental conflicts, the possibility of inequality among the parties involved in mediations constitute a risk to the effectiveness of the solutions mediated.

Keywords: Mediation; Governmental protection; Environmental mediation; Brazilian Civil Procedural Code.

DESEQUILÍBRIOS DE PODER ENTRE OS MEDIANDOS E A NECESSÁRIA TUTELA DO ESTADO: ANÁLISE DA MEDIAÇÃO AMBIENTAL À LUZ DO CPC/2015

RESUMO

O presente trabalho colima refletir sobre o possível desequilíbrio de forças entre mediandos nos conflitos do direito ambiental no Brasil e objetiva analisar a necessidade de tutela estatal no contexto da mediação ambiental, nos termos em que foi autorizada pelo novo Código de Processo Civil, aprovado pela Lei nº 13.105/2015, em vigor desde março de 2016. O diploma deixa transparecer a eleição de princípios específicos, dentre eles o Princípio da Promoção Estatal da Solução Consensual dos Conflitos, e os postulados que enquadram a autocomposição. Elege a vontade dos jurisdicionados como um valor a ser defendido pelo ordenamento jurídico. Entrementes, não promove uma ruptura mais radical com o CPC vetusto. Na mediação ambiental os benefícios alcançáveis são equiparados à mediação generalista: ampliação do acesso à justiça, agilidade, empoderamento das partes, efetividade das soluções acordadas. No entanto, merece realçar que os complicadores e riscos são claramente maiores que em outras áreas do direito. Os conflitos ambientais têm abrangência, continuidade temporal, implicações materiais e riqueza de significados que dificultam sua delimitação. As hipóteses do estudo foram investigadas recorrendo à pesquisa bibliográfica. Concluiu-se que a possibilidade de desigualdade entre os mediandos constitui risco à efetividade das soluções mediadas no contexto dos conflitos ambientais.

Palavras-chave: *Mediação; Tutela do Estado; Mediação Ambiental; Código de Processo Civil.*

INTRODUCTION

This article investigates environmental mediation in the context of Law n. 13.105/2015 (Civil Procedure Code - CPC/2015), which elects the desire of those under jurisdiction as a value to be defended by the legal order. The investigation aims at thinking about the possible unbalance regarding the forces between mediation parties in claims involving environmental law and its purpose is to assess the need for government protection in the context of environmental mediation as it was authorized by CPC/2015.

The study hypothesis was investigated through bibliographic research, trying to apply inter-disciplinarity that "took the form of a patient cooperative and progressive dialogue that develops among tests and errors, attempts and progressive adjustments. This time, it is the translation from a language into the other without giving up his own composition rules or lexicon" (OST, 2015, p. 108, our translation).

To achieve the proposed objectives, the methodological resource used was bibliographic survey focused on more updated authorship production about the Civil Procedure Code and environmental mediation. The final text was based on the production of authors such as Didier (2015), Waldman (2011), Soares (2010) and Bush and Folger (1994).

1 ASSUMPTIONS OF THE 2015 CIVIL PROCEDURE CODE

The legislator explains, in the Statement of Reasons of the Civil Procedure Code, in force since March 2016 (CPC/2015), the belief that the legal document referred to presents among its potentialities the one of generating a jurisdictional conflict resolution process that is faster, simpler and more tuned to the current demands of the society. On that purpose, one of the arguments guiding the legislative performance was:

> Solving problems. Stop seeing the procedure as uncommitted theory in regards to its fundamental nature of a conflict resolution method by means of which constitutional values were conducted. Thus and due to that, one of the Commission's work methods

> was to solve problems over whose existence there is almost unanimous understanding within the legal community (NEW CIVIL PROCEDURE CODE, 2015, p. 307).

Some of the problems identified concern the intense complexity and lack of cohesion among the procedural standards in force by the first months of, with a focus on the difficulty of achieving the principles of Reasonable Duration of the Proceeding and Fullness of Defense. The several possible interstices generated by that lack of cohesion would ultimately force procedural actors to dedicate, under the auspices of the revoked procedural code, the best of their attention to formal edges trimming, relegating to the examination of the substances a secondary role – that should be the primary objective of the jurisdiction promotion.

Although the need for progress is clear, Law n. 13.105/2015 decided not to promote a more radical rupture with the old CPC. Not all the acquisitions were positive once part of the legislative effort was mostly due to the need to relieve [1] the work flows in the judicial circuits and not to the interest in increasing state protection effectiveness. In what regards those innovations, the technicism of Law n. 13.105/2015 bound several rules to whose fulfillment the Judiciary branch has not yet acquired the necessary (structural, technical, human and organizational) instrumentality. It seems reasonable to say that the legislator, maybe as a result of poor contact with the judiciary routine, achieved an idealized civil procedure, lacking to consider the current possibilities of the Brazilian Justice.

As an example of the imbalance between the objective and the result of the legislative effort in favor of a Judiciary branch that better meets the needs of those under jurisdiction, Fernando Távora, during his classes at the University of Fortaleza (2015), notices a capital failure in what concerns the Cooperative Sanitation foreseen in arts. 6 and 354, paragraph 3: before the legal permission to delegate to the parties – or to share with them – the task to define cognitive obscurities and the best technique to solve them, it is possible that some judger feels released from deeply knowing the procedure under development under his jurisdiction, reducing the role of the Judiciary to mere administrator of private interests.

Another retrocession hypothesis, from Távora's perspective, is judgment due to repetitive claims created by art. 978 of the new regulation,

1 In 2014, more than 99.7 million cases passed through the 90 Brazilian courts. The calculation (CNJ, 2015, a) is the sum of the 70.8 million pending cases and 28.9 million new cases registered in the base year. If the average annual growth of 3.4% was maintained, the Judiciary would have surpassed 103.1 million ongoing lawsuits in 2015.

which starts to address individual claims - via decision from Upper Courts – in lots, according to general characteristics and from the allocation of paradigmatic cases, not considering personal idiosyncrasies and objective particularities in each claim brought before the decision power of the State. Távora understands that judgment per repetitive claims – considering the fact that judging bodies' work load shall be reduced – is bringing unavoidable pain to Substantial Adversarial Proceeding, to the Fullness of Defense and to Due Process of Law, those that are some of the bases of democracy – from the perspective of the Citizen Constitution.

CPC/2015 intends to make the state task of providing justice more efficient, creating and improving tools that offer that protection with more simplicity, agility and effectiveness. Especially for that last objective, the Statement of Reasons foresees greater participation of those under the jurisdiction to solve the claim presented to the State, valuing the personal agreement – subject to judicial accreditation – as a suitable tool to say the law in the concrete case.

2 SELF-COMPOSITION IN THE CPC/2015

When dealing with fundamental standards, Chapter I of the CPC/2015, maybe unnecessarily, reproduces in some of its articles the text of the 1988 Federal Constitution once the constitutionality of the procedural infra-legal command would only be supported by the strict and implied obedience to the maximum standard of the order. Nevertheless, along that same article the legal document transpires the election of the specific principles in the Brazilian civil procedure and the postulates that frame self-composition as a desirable and demandable element in stating the right in the concrete case, declaring the importance of the cooperation of all the subjects in the procedure as an assumption of the effectiveness of the right to access to justice.

The Principle of the State Promotion of the Consensual Solution of the Conflicts[2], originally forecasted in Resolution 125 of the National Council of Justice (CNJ, 2010b)[3], says that it is a priority to stimulate the

2 Art. 3 [...]
§1 Arbitration is allowed in the form of the law.
§2 The State shall promote, whenever possible, the consensual solution of the conflicts.
§3 Conciliation, mediation and other methods of consensual solution of conflicts shall be stimulated by judges, lawyers, public defendants and members of the Public Prosecution, including during the judicial claim.

3 Resolution n. 125 dated 29/11/2010 decides about the National Judiciary Policy for the suitable

production of a consensual solution and to make it feasible, a task to be made concrete by all law operators. Article 2 privileges[4] the Principle of Respect for the Self-Ruling of Wishes in the Procedure. Thus, besides the requirement for a self-composition hearing as the initial act of the procedure, it is now submitted to interference from *inter partes* decisions: the mediation parties can, by means of an agreement, modulate the official performance of the judge. In Didier's lesson, that is justified because "the procedure cannot be a hostile environment for the exercise of private autonomy freedom, the power to freely regulate your own life" (DIDIER, 2015a, online).

That *inter partes* regulation of the procedure allows mediation parties to define *sui generis* procedures besides the standard procedural flow, since some values[5] such as reasonability, legality, proportionality are maintained and social purposes and common good requirements are met. From that general clause of procedural negotiation, the parties gain authority to say how the procedure shall flow. Self-ruling has other consequences, as the possibility to include new subjects and demands within the ongoing procedure. It is still possible to exercise extraordinary legitimacy *ad causam* business active, that is, the agreed attribution of legitimacy for a third party to exclusively or concurrently defend the right of the parties, a possibility that is defended by part of the doctrine (DIDIER, 2015b), although it is not literally presented in the text of the code.

Article 4 celebrates[6] the Principles of the Effective Procedure and the Priority of the Decision on the Substance. The last one gives maximum priority to the solution of the core of the process: the core claim. Article 6 emphasizes[7] the Principle of Cooperation or Right to Influence: the actors in the procedure – including the judge – shall create a work community in which loyalty, balance and attached cooperation obligations prevail, as a consequence of the Principle of Good Faith. On that purpose, it is essential that there are no asymmetries between the judge and the

treatment of conflicts of interests within the judiciary branch and makes other provisions.

4 Art. 2 The process starts on the party's initiative and unfolds by official impulse, except for the cases forecasted by the law.

5 Art. 8 When applying the legal order, the judge shall meet the social purposes and the requirements of the common wellness, protecting and promoting the dignity of the human being and respecting the proportionality, reasonability, legality, publicity and efficiency.

6 Art. 4 The parties have the right to obtain, within a reasonable timeframe, the full solution for the substance, including the satisfactive activity.

7 Art. 6 All the subjects in the process shall cooperate among themselves so that a fair an effective decision on the substance is obtained within a reasonable timeframe.

parties. That model is located between the publicist (in which the judge leads the procedure and makes the capital decision, despite the parties) and the adversarial ones (in which the procedure is led by the parties and the judge only decides the claim). Article 7 in turn, highlights[8] Equality in the Procedure, whose parity is also manifested in the reduction of financial, geographic and communication obstacles, as well as the judge impartiality requirement, isonomy regarding access to the case-files and information parity.

Leaving fundamental standards (Chapter I) for the treatment of justice assistants (Chapter III), article 165 touches procedural regulation and reaches the judiciary organization when requiring the creation of a Permanent Center of Consensual Methods for Conflict Solution (NUPEMEC) and, consequently, the Judiciary Centers for Conflict Solution (CEJUSC)[9]. Article 165 reinforces the mission to implement and strengthen a new culture in which self-composition is highlighted, allowing agreements with all contents to be judicially approved according to the axioms that support the legal order.

However, it is important to highlight some dissonances between the CPC/2015 and the Mediation Law (Law n. 13.140/2015). While article 168 of the procedural code states that in Judicial Mediation and Conciliation "the parties may agree on the conciliator, the mediator or the private conciliation and mediation chamber", article 25 of the Mediation Law[10] says that "in judicial mediation, mediators are not subject to previous approval by the parties, pursuant to article 5 of this law".[11] (bolded by us).

The two legal documents have the principles of Impartiality, Orality, Informality, Autonomy of the Will and Confidentiality in common. The Mediation Law[12] also presents the principles da Isonomy, Search for Consensus and Good Faith. In turn, CPC/2015 receives two principles from Resolution 125 of CNJ: Informed Decision and Independence. Finally, both the new procedural code and the Mediation Law are responsive to the

8 Art. 7 The parties are insured parity of treatment regarding the exercise of rights and procedural faculties, the means of defense, the onus, the obligations and the application of procedural penalties. The judge must protect the effective adversarial proceedings.

9 Each Court shall create several CEJUSCs, as necessary.

10 Refer to Law n. 13.140/2015.

11 Law n. 13.140/2015, Art. 5 Only Paragraph. "The person in charge of acting as a mediator has the obligation to tell the parties, prior to accepting the function, any fact or circumstance that may raise any justified doubts in regards to his/her impartiality to mediate the conflict. At that time, any of them may refuse the mediator". −

12 The Mediation Law has not dealt with conciliation. It is important to say that the new CPC was more vigilant at this point.

need and possibility to have mediation hearings via electronic means.

Due to that, it is possible to understand that CPC/2015 makes consensual and peaceful solution an essential element for jurisdictional protection at the same time it elects the arbitration, conciliation and mediation mechanisms as fundamental tools to fulfill this task.

Nevertheless, it may make a mistake when imposing the conciliation or mediation preliminary hearing. Unjustified non-compliance with such an obligation is considered an offense to the dignity of the justice subject to a fine[13] in favor of the Public Power. Here, the legislator places an obstacle to the construction of the peace culture and the pacification of conflicts it wishes to foment. When making the preliminary agreement attempt a coercive rule, it may be seen not as a possibility to exercise freedom in the search for consensus, but as an autocratic stage worth feint in case one does not wish to give up part of the rights when the procedural relationship has just started and before the legitimacy of the claim is factically proven.

3 THE RISK OF INEQUALITY AMONG ENVIRONMENTAL MEDIATION PARTIES

As a basic characteristic, mediation is operated by a neutral and autonomous element that eases understanding regarding the conflicting issue and it approximates opposed interests, although generally prevented from presenting heteronomous solutions. The mediator, axiologically based on the principles of Independence, Impartiality[14], Confidentiality, Orality, Informality, Informed Decision, Autonomy of the Will and Isonomy (implicitly), works in favor of reconnecting communication and that is how he incentives the identification, by the mediation parties themselves,

13 CPC/2015 art. § 4 The hearing shall not be carried out: I - If both parties expressly manifest disinterest in the consensual composition; [...] § 5 The plaintiff shall indicate in the initial petition his lack of interest in self-composition, and the defendant shall do it by means of a petition submitted 10 (ten) days ahead of time as of the date of the hearing. [...] § 8 Unjustified absence of the plaintiff or the defendant to the conciliation hearing is considered an offensive act to the dignity of justice subject to the penalty of fine of up to two per cent of the intended economic advantage or the value of the claim, in favor of the Federal Government or the State.

14 According to Martins and Carmo (2015, p. 18) "The mediator's impartiality and competence are basic principles not only in mediation, but also in other forms of dispute settlement, as it happens even in the Judiciary Power. In order to reach a fair solution, it is necessary and safer that the mediator or judge, depending on the case, is an impartial person besides being a person qualified for the act, in the case of the judge, he should be a natural judge, that is , the one who holds the position in accordance with the legal requirements and competence standards set forth in the Federal Constitution, and the mediator must be an individual with specific training for conflict resolution, since only then will it bring confidence to the parties and perform effective work ".

of discussed and consensual solutions that generate bilateral benefits, thus avoiding the need to look for government protection.

Even when already produced in the procedural environment, mediation has the potential to reduce the duration of the proceedings and inherent procedural costs when it allows the mediation parties to find the best procedural way to solve the conflict. To increase the power of those under the jurisdiction in what refers to the resolution of their own demands reflects the intention of the legislator to return to him part of his freedom of decision.

Granting a portion of responsibility is, in fact, necessary – if the intention is to fulfill the programmatic ideal of a democratic rule of law on the grounds of citizenship and the dignity of the human being. It is interesting that each person, "inserted into an individual responsibility rescue process on the crisis in his interaction" (MENDONÇA, 2014, p. 44), takes up a fraction of his citizen adulticidal, abandons passive attitudes and requires less from the father/provider/judge State as it is possible to self-determine – after the interaction rules of the implicit social contract [15] and the limits set by the law are met.

However, the integrity of the mediation is only guaranteed from the full and effective use of the tool by the mediation parties. That task may become complex in case restrictions of any kind prevent the free exercise of wills. Waldman (2011 p. 28-29) understands that, in those cases, instead of conquering a self-determined solution, the party risks to produce a "*self-defeated solution*".

In that context, Silva (2015, p. 8-9) says that one of the assumptions of efficient mediation is the inequality of the parties, once, "once in the mediation procedure the parties are responsible for finding the solution for a certain problem, unbalance forces between them shall allow for an equally innocuous solution". To illustrate his idea, Silva (2015, p.8) presents an example[16] of an illegal adjustment arising from the legitimate right compromise and the clear fragility of the party: "in an attempt to conciliate a couple, the woman, who experienced daily violence from the husband, after recognizing that her aggressor was careful with their children, she suggested that she would accept an agreement if the aggressions could be reduced to only one day a week".

15 Rousseau (1712-1778) defends the existence of a pact signed within human groups, based on the alienation of the individual will for the will of the state, which would have the primacy of defining the rules and enforcing them, offering in exchange for this submission the blessings of life in community.

16 The author mentions in his article a report dated 2012 in the city of Salvador offered by professor Mônica Carvalho Vasconcelos.

From one point of view, autonomy assumption is commendable, but, in some cases, especially regarding inalienable rights, it should be carefully analyzed. Exercising freedom ties the decider to the consequences of his acts and assuming the responsibility over your choices presumes the necessary internal and external resources are there.

In that context, the idea is not to say that people with some restrictive deficit of their personal power – eventually or continuously – are incapable and, under that argument, they should be protected from their choices. Doing that would be falling into the trap of disempowerment (BUSH; FOLGER, 1994, p. 213-214). Despite that, it is important to consider that, in the context of a claim, the educational, social, cognitive, emotional and financial lack of sufficiency of the involved parties has direct influence on the solution of the claim. If that asymmetry may have dramatic effects on the direction of the solution of a claim restricted to the individual jurisdiction, even more sensitive becomes the weight of the insufficiency when the parties deal with diffuse rights – such is the case of environmental issues.

How often can one wait for the parties to face the conflict bearing the same weapons so that "resources, knowledge, information and accurate data, an advantage in the eyes of the law, moral conviction and safety, advantageous personality traits, ability to impose pain or irritate, perception" (WALDMAN, 2011, p. 87-88), among other important elements on the mediation table, are quite equally divided?

For Waldman (2011 p. 29), the mediator should analyze the possibility of effective participation of a party before the mediative dynamics. The Manual of Judicial Mediation (CNJ, 2015b, p. 251) is compatible with that reasoning when it says that the mediator should interrupt the event whenever he suspects the parties are asymmetric, advising them to look for the assistance of a lawyer or a public defender. Would that order be reasonable? It is possible that this guidance has a positive impact on the prevention of asymmetries once it is not uncommon that environmental conflicts involve private legal entities with favored economic power. However, who should control that evaluation capacity of the mediator?

Waldman (2011, p. 87-88) questions the automatic interruption of the mediation event when a clear unbalance is identified between the parties and he tests solutions for the problem so that the mediator continues to work and puts intervention pressure to reduce or solve the instrumental

inequality of the actors.

Reinforcing the defense of a more participative attitude of the mediator, Mendonça says that mere formal equality of the procedural law is inefficient to protect the parties and that an absolutely neutral posture of the mediator may "potentialize poor results in some mediations with less empowered parties" (2014, p. 57).

That dealing with unforeseen situations and peculiarities – more delicate moments of the mediation process – becomes the exclusive responsibility of the mediator in the concrete case, "an hermit who follows his conscience in the interpretation process" (MENDONÇA, 2014, p. 52).

Before that deadlock, how should the environmental mediator act[17]? Stand absolutely neutral and blind before the inequality of the parties and teratogenic discussions in the mediation flow? Or, on the contrary – aware of the fact that environmental conflicts lose reach in what regards equitable solutions, especially due to the complexity and irreversibility of the damages and the difficulty to produce and equivalent *in natura* reparation – abandon neutrality and act to reduce identified differences, being careful about the fairness of the agreements?

When the first option is followed, authors such as Soares (2010) fear that attaching mediation to a mere reproduction of legality mischaracterizes it as a tool to contextualize the conflict and approximate singular needs of the mediation parties, possibly making it "a dangerous mechanism of private imposition of legal standard interpretations without protections of the due legal process" (SOARES, 2010, p. 133).

Defenders of neutrality, on the other hand, do not extend to the mediator the priority to define what is fair. For them, the operator has no legitimacy or ability to pass sentence, a task that was excluded from the mediative reach (WALDMAN, 2011, p. 5-6). Assuming the role of legal counselor, neutrality, a basic assumption of mediation, would be hurt. That is the posture suggested by the Manual of Judicial Mediation (CNJ, 2015b), which disapproves of the abandonment of neutrality trenches in what refers to mediation events in the Brazilian territory.

Meantime, some questions remain: strict obedience to the legal order or attention to values and belief systems of the mediation parties

17 It is important to notice Martins and Barros's observation (2013, p. 162) as to the function of comedians since "The figure of the co-mediator, acting as a specialist in environmental matters, is also of extreme necessity, due, as already said, to the complexity of the conflicts. To this end, besides mediators having skills in conflict mediation, these should be assisted by the co-mediators, professionals who are specialized in both the legal field, a lawyer, and conflict specialists such as geologists, geographers, engineers, architects, among others".

are more important in what refers to the definition of what is fair in the concrete case? It is a task/priority of mediation to define what is fair and interfere in the directions of mediation so that the result of the dynamics gets close to that ideal of justice?

4 NEED FOR STATE PROTECTION IN ENVIRONMENTAL SELF-COMPOSITIONS

In Brazil, mediation has conquered some space from the implementation of conciliation centers in judicial spheres, but it is a tool that not very often used in what regards environmental demands, "probably because of the lack of forums aimed at mediation, conciliation, transaction, negotiation and arbitration on the purpose of environmental heritage" (RIBAS, 2016, p. 123). According to the author, the culture of claim judicialization through public civil actions remains in the environmental field, under the logic of reparation and not prevention, is more tuned to alternative means to solve disputes. The Samarco case confirms that not even the State has obtained positive results in the preventive treatment of environmental conflicts.

In turn, Mendonça talks about the reasons for that underuse of mediation as a method to solve environmental conflicts:

> In general, fears of using environmental mediation refer to possible manipulations that may occur during the process and to the interests at stake that could be adversely affected if an agreement does not meet the interests of the parties. Such concern is legitimate. However, opening up the possibility of leaving such debates and public decisions in the hands of the people concerned represented far more virtues than offered risks to those involved in the conflict (MENDONÇA, 2014, p.78).

In the environmental area, feasible objectives are the same of the generalist mediation – enlarge the access to justice, agility, empowering the parties, effectiveness of agreed solutions[18] so that:

18 Flavia Rosembuj (2001, p. 162) lists the advantages of using mediation in environmental conflicts "[...] reducción de los costes, plazos, pérdida de control y ansiedad inherentes al pleito; el hecho de que el procedimiento de mediación involucra a todas las partes interesadas que por una parte, pueden encontrar más difícil decir que no a soluciones que les son propuestas y por otra asumirán dichas soluciones como suyas; es un proceso participativo que no cuestiona las responsabilidades de la autoridad competente; mejoran las relaciones entre las partes lo que ayuda a la resolución de posible conflictos futuros; a través del trabajo conjunto las partes pueden llegar a adoptar decisiones mejores que las que habrían adoptado unilateralmente".

> The participation of society, together with the transformative dialogue, allows the construction of a consensus, which promotes a new look at the conflict, contributing to the prevention of damage and sustainable development, differently from what would happen if the conflict was solved by the Judiciary (BUSTAMANTE; SILVA, 2015, p. 20).

However, in environmental issues, complications and risks are clearly greater than in other areas of law, including conflicts with comprehensiveness, temporal continuity, extra-territoriality, indeterminability of the subjects affected by the damage, material implications and excessive meanings that hinder delimitation.

> However, the specific problems surrounding the use of environmental mediation, as an alternative method to traditional litigation, turn around, for example, (a) the delimitation of which environmental conflicts can be brought to this method, due to its complexity and because they involve broader interests than the private ones commonly found in ordinary mediation cases. We can find interests shared by a specific collectivity or that are cannot be delimited now or in the future, diffuse; (b) the determination, choice and form of participation of interested parties in the demand; (c) choosing the mediator, his function, duties and responsibilities, in view of the characteristic of the conflict (O`LEARY, 1995, p. 21).

Soares (2010, p. 117) says that environmental conflicts overcome technical dilemmas. "The objects that form the environment go beyond the subject and the energy, they are also cultural and historic and, due to that, important issues (such as the lack of natural resources) shall be seen in conjunction with the choice of ´what` and ´how` to use".

The multiplicity of directly and indirectly involved actors is one of the main complicating factors of mediation in what regards environmental conflicts. Although the dispute over the Belo Monte Hydroelectric Plant has not undergone a formal process of mediation - a role that has been exercised informally by public agencies linked to the environment - Fleury and Almeida use this conflict to exemplify the delicate, dense, time-consuming and necessary antithetical mixture of the actors' desires and needs, which requires "translation, besides objectives and interests, of often contradictory times" (FLEURY; ALMEIDA, 2013, p. 9).

Faced with this complexity and polysemy, how to make extra-judiciality a channel of effective advantage for the solution of environmental

demands? Susskind (1981, p. 4-8) argues that, in the environmental domain, self-composition must pursue three objectives alongside those already sought by generalist mediation: (a) representation and protection even of the indirectly involved parties, provided they bear the results; (b) stability and equanimity on the largest possible scale, and (c) community-wide agreement and establishment of constructive precedents. However, if it limits itself to the fulfillment of these objectives, it can be insufficient for effective solutions in an area as complex as the environmental one. Along these lines, Bertoldi and Freitas (2015, page 334) warn that legal problems, especially environmental problems, are increasingly complex and require solutions that are compatible with this complexity. For the authors, "linearity, which until then has been proposed as an appropriate solution, has not been shown to be that adequate".

As already mentioned, the mediator is generally bound up with deontological issues and the need to be almost an observer of conflict development. Roughly speaking, the less empowered parties are left to their own (often extremely small) capacity to engage in conflicting, feature-rich negotiations that often require specific technical knowledge: whether legal, environmental, accounting, financial or connected to more specific sectors of knowledge. The strengthening of environmental empowerment can be materialized in the "construction of dialogue and institutional solidarity" since, according to Barreto and Machado (2016, p. 330), "the controls of information and wealth production are not only subject to the holders of this knowledge and of this wealth production."

It is necessary to admit that a possible referendum to consult the citizens on what measure the State should adopt in the Samarco case would result in deciding for the mining company's stay in consideration of the fundamental right of work to the detriment of the repercussion of all damages caused by the rupture of the dam. This finding motivates a "look of lynx" on the mediation of environmental conflicts, in spite of the "ignorance" of the victims as opposed to the economic power of the claimed party(ies).

It is true that there are legally established institutions (such as the Public Prosecutor's Office and the Public Defender's Office) or by institutional purpose (associations such as the Brazilian Environmental Justice Network, the Movement of Dam-Affected People (MAB) and the Landless Rural Workers Movement (MST), among others), of the military task in favor of environmental capital, but the interconnection between

economic and environmental issues shall not be underestimated, as well as the influence of the financial power in the performance of the ecological movements and the technical body of state agencies involved.

Not rarely, a more pragmatic and less combative ecologism has waved positively to speeches that preach consensus in the concrete case and the search for adaptation to economic initiatives for a development that is said to be sustainable - instead of establishing a solid and coherent policy, more robust, visible and defensible because it is national, on the discussions of environmental law. In the words of Arnt and Schwartzman (1992, p. 125), "the uprooted environmentalist idea reveals the crooked truth of its falsity: the modernization it expresses is that of the system that obeys the interests it addresses".

Samarco mining company has as its co-owners, on the one hand BHP Billiton (mining giant having several environmental problems such as radiation contamination or mining waste in Australia, Papua New Guinea and Chile), on the other hand, Vale with 46,2% of foreign investors and a national part controlled by Valepar (see Previ Investment Funds, BNDES Par and the multinational Mitsui - which includes Sony, Yamaha and Toyota).

In spite of the intense presence of foreign capital and state participation, in spite of the constitutional obligation to inspect and preserve the environment, in spite of the company's negative history, in spite of the potential environmental and social damages to the surrounding area, in spite of constant expansions in the waste containment structure and in spite of the impact on the local economic activity, the business initiative that resulted in the largest environmental disaster in Brazil (and the largest one involving a dam in the world) has had irregularities since the installation project, duly ignored by the municipal, state and federal Public Powers, the press, state or private institutions, associations and other actors in the environmental scenario.

There was no systematic monitoring of social and environmental costs. There was no discussion, no proposals, no pondering. People living in the area were inert and hopeful before the weight of the money involved and the promise of work and income. Even now, with the disaster, the homeless have no voice: they are waiting for the social situation to be recovered because the environment, according to experts, is taking tens of years to be recovered, with uncountable damages. The sometimes repressive Public Prosecution is limited to seeking for the guilty ones, a contribution

that is lost in out-of-court settlements in the Terms of Conduct Adjustment - TAC, fines reduced to values that go far from the actual damage caused. The weight of the state was not worth anything when it came to defending the environment. No voice rose.

In spite of the above, thinkers such as Susskind and Cruikshank believe that it is wrong to imply that delegating the environmental solution to extra-judiciality implies giving up the legal responsibility of the State (MENDONÇA, 2014, p. 80-81) to monitor frequently and carefully the mediation environmental discussions.

In the same sense, Silva Junior (2009) argues that, by dealing directly with inalienable rights, the stability and positive effects of the environmental deal can only be guaranteed by the active presence of state agencies in mediation[19]: "it is the presence of these official participants in the self-composition process that is allowing for the observance of the interest to protect the legal environmental asset, especially the one having an inalienable characteristic"(SILVA, 2009, p.12). In his opinion, this public action must be repressive and preventive, correcting distortions and preventing violation of cogent standards and basic values of the legal order to make the self-composition process related to the environmental solution as healthy as possible.

Thus, it is clear that it is still essential – in what regards inalienable rights, such as environmental rights, more objectively - the existence of a hierarchically superior jurisdiction that monitors the progress and the content of the mediation negotiations:

> If there was real inspection by the Public Power, mediation would be a viable alternative to the jurisdictional action in order to solve environmental controversies, having speed and dialogue as a vector in the search of sustainable development, since it is a true exercise of citizenship when promoting the realization of rights and duties, based on the principles of fraternity and solidarity (BUSTAMANTE; SILVA, 2015, p. 7).

This state surveillance is still necessary to prevent possible inequality between direct and/or indirect contenders to thrive for an ephemeral, little representative adjustment, unable to equitably protect the interests of the parties, or that is even illegitimate: disobedient to

19 The Portuguese legal order considers individually inalienable interest pursuant to the Base Law for the Environment (19/2014).

the primary intention of mediation, which is to find, as it is in the state legal guardianship, a solution of merit that produces justice and social pacification.

From a preventive and careful position, Gomes (2014, p. 205) says:

> Increasing awareness over the environmental protection issues, the preservation of the quality of natural environmental components, the close association between environment, health and quality of life, increase environmental litigation; Therefore, the option for ways that are different from those of the exhausted judicial channels raises, prima facie, some expectation.

For the author, a possible path is the broad participation of society in the course of the mediation process, so that possible inequalities between mediation parties are compensated by the public visibility and the technical knowledge provided by exempt authorities, which can be either public bodies, private entities, NGOs or technicians of renowned knowledge in the matter on which the conflict is based. About public visibility, Gomes is emphatic:

> The meta-individual nature of the environment macro-asset (natural environmental components and their interactions) calls for a comprehensive approach, pulverized by social actors - citizens, environmental defense associations, economic operators, public authorities with competence to implement environmental policies. Therefore, public participation moments are identifiable characteristics of the authorizing procedures, mainly through previously announced public hearings in which the information regarding the projects under evaluation and permitting is made available to generate a broad adversarial proceeding from which relevant indications may result for the compliance of the environmental protection duties associated with the final authorizing acts (if granted). The question that must be asked in the light of this observation is: is there useful space for environmental mediation? (GOMES, 2014, p. 214).

Gomes' fear, justified by the intense complexity of the environmental demands, gives birth to the search for possible and satisfactory alternatives for the resolution of these demands. If it is not possible to achieve an acceptable equanimity in the out-of-court jurisdiction, it is necessary to return to state pronouncement of the right through judicial

protection. In this sense, CPC/2015 presents an opportunity for success in this project: the *amicus curiae*, a character that is not strange to the day-to-day life of the Judiciary Power, but that had not yet received due attention from the legislator. The contribution of these technically competent third parties in informing and commenting on environmental issues is interesting as it enlarges the adversarial proceeding and contributes with a technical and preventive intelligence in the creation of the judicial solution

CPC/2015 deals with the *amicus curiae* as a third party, a natural or legal person intervening[20] in the judicial process. The presence of this third party, endowed with the specific knowledge and legitimated to clarify aspects of the issue and provide support for judicial cognition, provided that he proves appropriate representation, can be a contribution to the judicial solution in favor of the hypo-sufficient party and the preservation of environmental capital.

Thinkers adhering to the idea that the environment should be treated with special attention believe that the immediate interest is in fact the one of the parties, but the mediate interest of the entire society justifies popular participation, through the disclosure of negotiations and the real possibility for citizen and State intervention, with its cogent action in favor of cross effectiveness of fundamental rights. At the core of this defense, the belief that abandoning the least favored party in a dispute for which he does not have the necessary parity of weapons is a set of marked cards in which economic logic always wins, to the detriment of balance (which is known to be necessary) between the human being and the environment to which it belongs

CONCLUSION

The investigation notices stiffening regarding the practical order that makes it difficult to choose the best and most feasible solution to environmental conflicts. On the one hand, the lengthy judicial decision

20 Art. 138. The judge or the rapporteur, considering the relevance of the matter, the specificity of the subject matter of the claim or the social repercussion of the controversy, may, by decision, ex officio or at the request of the parties or whoever wishes to manifest, request or admit the participation of a natural person or legal entity, body or specialized entity, with adequate representation, within 15 (fifteen) days as of subpoena

§ 1 The intervention in the caption does not imply in changing the competence neither it authorizes appeals, except for petitions for clarification and the hypothesis in § 3.

§ 2 The judge or the rapporteur shall, in the decision that requests or admits intervention, define the powers of the amicus curiae.

§ 3 The amicus curiae can appeal the decision that judges the incident of repetitive claim resolution.

reflects on losses, the irreversibility of the existing environmental damage aggravated by delay. On the other hand, environmental mediation risks legitimizing misconceptions, due to the lack of independence between mediation parties, a lack of technical knowledge, bad faith and even by the lack of available measures, which binds the mediator to the manuals of conduct and the neutrality requirements.

Before that impasse, and not reducing the importance of family, labor, consumerist and other conflicts, it is urgent to strengthen the idea that environmental conflicts are a field in which society risks full, irreversible and diffuse damage. In this burdensome dimension, it is not always possible to identify the limits of the right that is protected either because of the abstraction and dynamicity of the specificities in dealing with the environment or because of the polysemy that features this field of law opens space for discussions that can extend and encompass a long list of mediation parties.

Mistakes regarding mediation negotiations can result in serious damage not only to environmental capital, but also to communities, cultures and society as a whole, so that they cannot be disregarded by state protection and monitoring, even in the case of a self-composition relationship. The State must participate, interfering in favor of an ethical agreement.

Faced with the seriousness of this fact, doctrine theorizes in the search of strategies that allow the mediated solution to be an instance of justice production, not the perpetuation of inequalities. Some of the solutions suggested for the improvement of mediation as a tool to manage environmental conflicts include the empowerment of mediation parties, the representativeness of involved parties, intense popular participation, state control and even the amici curiae, whenever mediation proves to be so ineffective that it is imperative to bring the claim under judicial protection.

The presence of the State - either as a monitoring element or as the minister of justice itself - does not guarantee the fullness and integrity of the solution presented in a lawsuit involving environmental law, but it is an element that undoubtedly adds democracy to the process, as well as impersonality and honesty. In times when legal agility is sought, it is impossible to abandon the idea that, slowly or quickly, the solution must be equitable, fair and foster social pacification.

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Article received on: 30/08/2016.
Article accepted on: 29/11/2016.

Como citar este artigo (ABNT):

BARROS, Ana Meire Vasconcelos; CAÚLA, Bleine Queiroz; CARMO, Valter Moura do. Desequilíbrios de poder entre os mediandos e a necessária tutela do Estado: análise da mediação ambiental à luz do CPC/2015. *Revista Veredas do Direito*, Belo Horizonte, v. 13, n. 27, p. 267-289 , set./dez. 2016. Disponível em: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/869>. Acesso em: dia mês. ano.