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## **Intervention in family conflicts through mediation from the comparative perspective of principles of Brazil and Portugal legislation**

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### **Abstract**

The jurisdictional function of a country plays an important role in the resolution of family conflicts, causing a high number of lawsuits. However, the ability to resolve conflicts of this nature is not exclusive to the judiciary, it being possible for other ways, with help of a third party other than the State. Given the growing number of disputes that can be resolved extra judicially, the need for more investment in the development of other means of conflict resolution, such as mediation, to achieve social peace remains evident. This article aims to compare some aspects of mediation in Brazil and Portugal, seeking to focus especially on family conflicts, investigating similarities, equivalences and differences between the family mediation guiding principles in Brazil and Portugal. For this effect, it was privileged bibliographical and legislative research, with qualitative comparative analysis, which led to the conclusion that, despite the differences, the two

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diplomas are very similar, showing equivalences and few absences, which do not compromise the basis of mediation.

### **Key words**

Family conflicts; mediation; comparative; Brazil; Portugal

### **Resumen**

La función jurisdiccional de un país desempeña un papel importante en la resolución de los conflictos familiares, provocando un elevado número de pleitos. Sin embargo, la capacidad de resolver conflictos de esta naturaleza no es exclusiva del poder judicial, siendo posible por otras vías, con ayuda de un tercero distinto del Estado. Dado el creciente número de conflictos que pueden resolverse extrajudicialmente, sigue siendo evidente la necesidad de invertir más en el desarrollo de otros medios de resolución de conflictos, como la mediación, para lograr la paz social. Este artículo pretende comparar algunos aspectos de la mediación en Brasil y Portugal, buscando centrarse especialmente en los conflictos familiares, investigando las similitudes, equivalencias y diferencias entre los principios rectores de la mediación familiar en Brasil y Portugal. Para ello, se ha privilegiado la investigación bibliográfica y legislativa, con un análisis comparativo cualitativo, que llevó a la conclusión de que, a pesar de las diferencias, los dos diplomas son muy similares, mostrando equivalencias y pocas ausencias, que no comprometen las bases de la mediación.

### **Palabras clave**

Conflictos familiares; mediación; comparativa; Brasil; Portugal

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## 1. Introduction

Social peace is an international objective, pursued in all areas by all countries around the world. On the other hand, conflict, as a condition inherent to human beings, is inevitable and impossible with a definitive end. The paradox posed by the inevitability of life in society and the conflicts inherent to it reflects the importance of forms of intervention in the search for social peace. It should be noted, as appropriate, that peace is one of the goals of sustainable development, contained in the 2030 Agenda.<sup>1</sup>

Knowing the need for harmonious coexistence for human development, but also the importance of conflict for the development and enhancement of any relationship, whether personal or social, is that alternatives that can, in addition to resolving the conflict, or simply put an end to litigation, turn it into something positive. These alternatives may be essential for handling some specific types of conflict, such as family conflicts, given their personal and sentimental nature. Because they are complex relationships, the disputes arising from family life require a treatment that not only resolves the conflicting situation, but also – and mainly – aims to recover the relationship that may be devastated by the conflict. Naturally, that will happen in situations where this would be possible and if it would be in the interest of the parties (also it should be considered that this interest may be hidden or not promptly revealed by them).

The intimate and highly complex nature of family conflicts also demands a greater understanding to know, including which form of intervention will be used and whether the classic means will be adequate or not. Hence the need to understand, rather, whether the family conflict is of low, medium, high, severe or extreme intensity, because, depending on the extent of the friction of interests, it may be that the use of tools called “alternatives” is not even indicated.

It cannot be overlooked that the current model used by judiciary forms around the world has not served the objective of achieving social peace, nor of re-establishing strong ties between people whose relationship was affected by a dispute. Either because it has a more technical bias, or because this is not the focus of judiciary means, which deal with conflicts that come to them with their own tools and languages, the fact is that the resolution of disputes in this way does not lead to the conflict, nor what is behind it. In addition to this point, which is in itself serious, there is also overloading due to increased litigation, which has affected the administration of the judiciary, and which could be avoided if other methods, other than the judiciary, were used to manage conflicts.

It is in this context that the alternative dispute resolution methods are introduced, with the main examples being conciliation, mediation and negotiation<sup>2</sup>. Sometimes mediation

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<sup>1</sup> The 2030 Agenda is a global policy that aims to improve the development of the world and the quality of life for all. In order to reach this goal, the 193 UN member countries established a commitment to 17 objectives based on 5 areas of importance, which became known by the 5Ps: people, prosperity, peace, partnerships and the planet.

<sup>2</sup> It should be mentioned that the Brazilian Civil Procedure Code, in its art. 175, makes it clear that other forms of extrajudicial conciliation and mediation linked to institutional bodies or carried out through independent professionals, which may be regulated by a specific law, are not excluded. Likewise, Resolution No. 125, of the National Council of Justice (CNJ), which in its entire text, including the opening remarks, leaves open the possibility for “other consensual methods of conflict resolution”. It was precisely this

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is understood to involve a process in which the mediator is more pro-active and evaluative than in conciliation; but sometimes the reverse usage is employed. There is no national or international consistency of usage of these terms (Brown and Marriott 2005, 127). Briefly summarized, the conciliation aims at the agreement and its practice has a fixed time, being that the opportunity to settle the dispute in a friendly way. In this case, the conciliator can intervene in order to facilitate reaching an agreement, offering suggestions. Mediation is a form of intervention which impartial third party who does not participate with suggestions, not having the agreement as its purpose, but rather the reestablishment of the relationship that underlies the conflict, even minimally. Negotiation, on the other hand, presents itself as a self-composition form, in which the contenders will not necessarily have to resort to a third party to mediate, as they will be able to carry out it autonomously. It is interesting to note that negotiation can be present in both conciliation and mediation, but it is not confused with them.

It so happens that the use of mediation has been gaining ground, notably because it is concerned not only with the end of the conflict, but with the preservation or restoration of the relationships that preceded it. This attention is reflected in the regulation of mediation, as in the case of Brazil, Law No. 13,140/2015 and Portugal, Law No. 29/2013, of April 19, which, in accordance with their social and cultural peculiarities, point out their principles guiding the conduct of the mediation process.

With the aim of comparing some aspects of mediation in Brazil and Portugal, this study focuses primarily on conflicts of family origin, going through the nuances of mediation in general, adopting the methodology of bibliographic and legislative research, from a comparative approach and qualitative analysis of the two legislations. Therefore, this study initially focuses on the nature and intensity of family conflict, seeking to expose its differences in relation to other conflicts, as well as identifying family conflict based on its intensity, that can be separately understood as mild, medium, high and severe. In a second moment, after pointing out the specificities of family conflicts, the article turns to the legislation of both countries, denoting the differences between them, especially considering the existence, in Portugal, of a mediation focused exclusively on family conflicts, which does not exist in Brazil. For this reason, the guiding principles of mediation in Brazil do not always correspond to the principles of family mediation in Portugal, which will be addressed in topic 2.2. Nevertheless, it will be pointed out that the principles applicable to family mediation have similarities, equivalences and discrepancies, whose comparative analysis can lead to the conclusion that the absences found may not affect the essence of mediation, nor of family mediation, despite putting into question essential points for conducting the procedure.

## **2. Specificities of the nature and intensity of the family conflict**

If social relationships are natural generators of conflict, family relationships, with more obviousness, are too. Living with such different thoughts and cultures is imposed on us by life in society without being able to avoid it, and it is in the family that we have the first contact with this reality. As in social relationships, conflict cannot be avoided in

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openness that made possible, for example, family constellations in judicial proceedings and restorative circles.

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family relationships either, being equally natural to coexistence, as well as it cannot be seen only as something negative.

It is also noticeable that family conflicts have different causes, which go through situations of greater or lesser severity, but which can lead to undesirable outcomes and cause great dissatisfaction. The family, as a social phenomenon, has manifested itself in different ways throughout History, and with each change, the causes of conflicts also changed. The notion of what is understood today by family has undergone many changes, including in relation to its composition, in an elastic movement of enlargement and reduction of its components, which progressively increases its various forms of expression, with its typologies being diversified (Severino 2012, 18).

Flandrin (1991, 12) also exposes the reality experienced between the 16<sup>th</sup> and 17<sup>th</sup> century, in which the term family designated a set of relatives who did not live together, as well as people who lived under the same roof, but who did not have consanguinity or conjugality. The same sense of cohabitation was also given in the 17<sup>th</sup> and 18<sup>th</sup> centuries, which means that servants were also considered members of the family, as they were under the authority of the same family head (Flandrin 1991, 13). Even the sacred family was portrayed in different ways over the years, whose seventeenth-century paintings included St. John the Baptist, alongside the Infant Jesus, St. Joseph, and the Virgin Mary, which were also described in that century's European dictionaries (Flandrin 1991, 16).

The different family realities generate equally different conflicts. The divine nature of paternal authority over his children, for example, was equal to that of the king over his subjects and could not be questioned, not least because it was not a contract, but something "natural" (Flandrin 1991, 9). As holders of authority, they vigorously repelled powers that tried to overwhelm them. Another reality that denotes another type of conflict was experienced, for example, in seventeenth-century France, in which "the descendants of a common ancestor retained certain rights over the set of assets to be divided (Flandrin 1991, 24), which forced them to ask for the consent of the other members of the lineage for the sale of certain assets.

In addition to emblematic cases, faced in adverse situations and remote times, there is the natural condition of the family reality, related to the intensity of daily life. The intimacy of the common life of the members of the organic structure formed by the family, as well as their social and economic interdependence, are factors that generate conflicts (Simmel 1983, 145). Simmel also speaks of the existing coercive force on the presumption of the family unit, which, for him, also configures a fact that generates conflict. As it is an open system, the interaction and development of the family is constant (Severino 2012, 42), which denotes the dynamism of the relationship within it. That is why family conflicts differ from other conflicts, being incomparable with them, since their specific framework.

Family conflict is of a peculiar, *sui generis* type. Its cause, its accentuation, its propagation to non-participants, its form, as well as its form of conciliation, are unique and cannot be compared to corresponding features of other conflicts, because the family feud is based on an organic unity that develops through thousands of internal and external connections (Simmel 1983, 145).

Disagreements in the social environment break relationships that are sometimes ephemeral, sometimes friendship or even work relationship, whose bond does not show a definitive or even long-term character. This condition is differentiated when it comes to a family conflict, since, for Cruz, the family relationship has a “strong bond”, noting that the disagreements that occur in this context involve very sensitive issues (Cruz 2018, 11). In fact, the character tending to the perpetuity<sup>3</sup> of family relationships, whose ties remain regardless of the dispute, give the family conflict an important peculiarity that must be considered, especially in its treatment. When the family dispute involves children, there is also a continuous and interdependent relationship that, whether the parents like it or not, are bonds that will remain. (Marian 2014, 39).

The conviviality, therefore, is a highlight for this type of dispute, regardless of whether this conviviality is under the same roof or not. This is because, like the custody or child support, even if there is no marital bond between the parents, who may even reside in different cities, there will still be a need for permanent contact. The existence of this bond, which is strong and constant, imposes a condition for maintaining communication, the break of which may compromise the well development of the offspring, which in turn may develop antisocial behavior, psychological and even cognitive problems.

The reflexes of family conflicts, therefore, appear to be their problems, unlike what happens in conflicts of another nature, since, commonly, they must remain in the presence of each other (Cruz 2018, 36). Especially for children, these reflexes are more serious, since the family is their first contact with a social group, and its breakdown, by itself, causes great emotional damage. This is because of the nature of family conflict, which is both personal and emotional (Cruz 2018, 5). The family is a basis for personal formation and everything that the individual will build throughout his life is structured on it. It is in the family that the root of our existence lies and where we look for the necessary moral support for the development of our goals in life. It is also in the family that characters of our personality are developed and where we learn to deal with feelings and emotions.

Thus, the degree of complexity (Cruz 2018, 27) of disputes of a personal and emotional nature, such as conflicts of a family origin, although not compromising the biological continuity of the bond, attack their relationship, which is another particularity, as it alters the relational frameworks, affecting the sentimental, material and, especially from the infant’s perspective, cognitive sphere (Silva 2016, 72). Whatever the intensity of the family conflict, the consequences will reverberate sentimentally, because of its nature. This becomes clear from the understanding of the intensity of family conflicts.

We will consider as low intensity the conflict in which those involved are able to maintain a positive attitude towards each other, in which tension is low and the parties are able to communicate and cooperate to resolve the dispute, so that both win. The vision for the other is still friendly and their interactions are focused on the common goals they still hold. The medium intensity ones, on the other hand, will be understood

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<sup>3</sup> It is said to tend to perpetuity because, despite the impossibility of breaking the biological bond, the existing legal bond due to the recognition of family power can be deprived of one or both parents. In this case, they will legally cease to be “parents”, thus extinguishing, by consequences, the resulting responsibilities, such as the duty of custody, which corresponds to family life.

as those in which there is greater tension between those involved, in order to verify greater difficulty in communication, with cooperation being restricted to unavoidable matters, such as those related to children, for example, or to businesses that keep together. The other starts to be seen as an adversary and the focus is shifted to their attitudes that they maintain, which may imply the other's posture.

Those with high intensity will be understood as those conflicts in which there is no longer communication with the other party, and the relationship between them suffers great degradation, accumulating negative emotions. The focus of those involved becomes that of being at an advantage over the other, in a win-lose relationship, using negative means to attack the other party. Feelings of anger and frustration surface, preventing any kind of cooperation, not even those that do not require a minimum of contact. At this intensity, with the children's interest involved, this is no longer considered a point of convergence, and the children start to suffer indirect attacks as a demonstration of the conflict's strength.

Family conflicts in which the risk of violence is imminent, and the use of illicit means becomes a possibility for one or both parties will be considered serious. Those who have a certain control start to abuse their powers to the detriment of the other, promoting attacks that impede or hinder the development of the other party's life. Conflicts that are marked by physical, moral or psychological violence, or by attacks on the lives of others, are already considered to be of extreme intensity. They are characterized by mutual losses, whose focus is not to win while the other loses, but to make them lose even if that means having to lose as well.

Knowing the intensity of the conflict, in addition to being important to manage it, also makes it possible, and mainly, to recognize when an intervention through mediation is or is not possible, for example, or when this is not recommended. Even low intensity ones deserve to be well managed, either because of the risk of turning into something negative and evolving in intensity, or because of the greater possibility of extracting the best from the situation. It is for this reason that we understand that mediation, as it is not intended to reach an agreement, can be used even in the intervention of high intensity conflicts, in order to deal with them properly and promote an attempt to, even if minimally, restore links.

In this regard, Roberts (2014, 207) points out situations in which mediation will probably not be successful, one of which is extreme conflicts, which we indicate here as highly intense. This is because, according to the author, when the conflict between the parties is so intense that even the slightest cooperation is out of the question, intervention through mediation will not be successful, since the desire to place the conflict of side so that any agreement on a given issue is possible (Roberts 2014, 208). We disagree with this point of view and draw attention to an important perspective, as, depending on what is meant by "success", we believe that intervention through mediation in this type of conflict makes sense, despite the fact that an agreement is not reached. Since this is not the ultimate goal of mediation, but rather the care with the relationship that underlies it, the intervention is shown to be beneficial.

On the other hand, interventions in conflicts of serious or extreme intensity have to be seen with special attention, as some forms of intervention, such as mediation, are not indicated. This does not mean that nothing can be done, or that they should not be dealt

with. In fact, it means that the intervention will not necessarily be aimed at reestablishing the relationship, as this would put the lives of the actors in the conflict at risk. These interventions are, therefore, through the instruments that life in society has to resolve issues of greater gravity or greater offensive potential, such as the judiciary, for example.

There are several forms of intervention in the conflict, and many of them involve an attempt to resolve it, but, depending on the intensity of the conflict, it is necessary to be aware that at some point this will not be possible. However, aware that the resolution of the conflict does not necessarily mean its end or reaching an agreement, but rather, and above all, the reestablishment of ties so that a minimum coexistence of peace is possible, we will be able to deal with it (the conflict) in a positive, constructive and appropriate way. This is because, while inherent to the human condition, conflicts will always be part of everyday life, and therefore one cannot intend to extinguish them, denoting the importance of learning and dealing with them. Following this thought, it is possible to conclude that, despite not being the main objective of mediation to reach an agreement, it is possible to reach it. Once an agreement was reached through this tool, it can be said that this means of intervention put an end to that specific dispute, originated by the underlying conflict.

### **3. Intervention in family conflicts through mediation from the comparative perspective of Brazil and Portugal legislation**

Intervening in a conflict of a personal and emotional nature requires special care, as only objective interests are at stake. The subjectivity inherent in this type of conflict, especially due to its complexity, demands a differentiated treatment, aimed not necessarily at resolving the conflict, but rather at maintaining the relationship that underlies it. Obviously, the circumstance of the conflict must be considered in order to assess whether there is a possibility of re-establishing this relationship, even slightly. Of course, there can be cases in which the parties do not wish to remain in any type of relationship, but the importance of mediation for these cases should be also highlighted, given, for example, divorces with children, in which at least minimal contact between the parents can be beneficial.

#### *3.1. General aspects of mediation and family mediation in Brazil and Portugal*

Several countries around the world use mediation as a “way of conflict resolution”,<sup>4</sup> and maintain their own procedures for its application. The objectives are very similar, but some specificities are worth mentioning, as is the case with what happens with mediation in Brazil and Portugal. Both countries adopt mediation as an *alternative dispute resolution*, having their own legislation to regulate the mediator’s activity, also

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<sup>4</sup> The terminology used for this purpose can vary in many respects, prevailing the common usage derived from the English term *Alternative Dispute Resolution* (ADR), used by the Harvard Law School, as well as by Portugal, which adopted the same designation. In Brazil, the official terminology used by the National Council of Justice is the Appropriate Treatment of Conflicts of Interest. In all these cases, there are criticisms regarding the terminology, for which we refer the reading to Cruz (2018), who chose to use the term “complementary” instead of “alternative”, as well as the rules that govern the Courts of New Jersey, United States, whose Rule 1:40 uses the *terminology complementary dispute resolution*. Other terms can also be found for this same designation, such as the one used by the World Trade Organization, which adopted the *Dispute Settlement Body*, and the Université de Paris, which adopts the terminology *Gestion des conflits*.

determining the guiding principles of the practice. There are, however, differences between how the two countries carry out the practice, which will be explored from the perspective of comparative law.

Portuguese mediation law nº 29/2013, of April 19, despite being the first to regulate mediation in general (Cruz 2018, 33), is not the pioneer in the matter in Portugal. The mediation has been officially recognized since the 1990s, in Order No. 12.368/97, of the Minister of Justice, which was the first legislative figure on this topic, dealing specifically with mediation to family members. In the same sense, Law No. 78/2001, of July 13, which regulates the jurisdiction, organization and functioning of the Courts of Peace, dealing with mediation in its art. 16, as well as the protocol of agreement for the creation of the Labor Mediation System, signed on May 6, 2006, and criminal mediation, under the terms of Law No. 21/2007, of June 12<sup>th</sup> (Pinto-Ferreira 2018, 36, 41 and 52). The 1976 Constitution of the Portuguese Republic also provided in its article 202 that "the law may institutionalize instruments and forms of non-judicial composition of conflicts", which also denotes an open door for mediation in the country. Also, in 1999, the Law No. 166/99 of 14 September, which regulates the application of guardianship and other measures to minors between 12 and 16 years of age who have committed a crime, enshrines mediation. What this Law intends is to allow the minor to correct his/her behavior and to have the opportunity to be educated for life in society. These measures aim to insert the child in a responsible way in the community. Within the scope of this Law, recourse to mediation is also possible. Mediation may be used for the purposes of drawing up and executing the conduct plan and may be requested by the judiciary authority, the minor, the minor's parents, by their representative or by whoever has the child's custody (article 42.º). Through mediation, the minor will have an active participation in the determination of the measure that will aim to educate him/her so that he/she can enter the community in a responsible way.

In Brazil, the preamble to the Federal Constitution of 1988 also calls for the peaceful settlement of disputes, which reveals a basis for the framework that was formed later, despite the extinct Code of Civil Procedure of 1973, which ran until 2015, already drawing important guidelines for resolving the conflict through conciliation, which was included by Law No. 8952/94 (Cabral 2017, 357). It was on April 13, 2019, that mediation and conciliation officially appeared in Brazilian legislation, in the II Republican Pact, signed by the legislature, executive and judiciary, with the aim of creating a more accessible, agile and effective justice system. The document included, among other commitments, that of "strengthening mediation and conciliation, stimulating the resolution of conflicts through self-compositional means, aimed at greater social pacification and less jurisdiction" (II Republican Pact from Brazil, 2009). In the following year, in 2010, the National Council of Justice (CNJ), through resolution nº 125, instituted the National Judicial Policy for the Adequate Treatment of Conflicts of Interest, determining that the program be implemented with the participation of all judicial bodies, public and private partner entities, including universities and educational institutions (CNJ, 2010). The document, despite being late, reveals itself as a major step towards the implementation of other means of dealing with conflicts, other than the judiciary. Brazilian Law No. 13,140/15, known as the Mediation Law, provides for mediation as an alternative dispute resolution, dealing with it in general.

There is a particular point in Portuguese mediation, which offers a more specific treatment to family conflicts, with its own system aimed at this type of dispute. Family mediation has existed since 1997 (Order 12368/97, from Ministry of Justice) and has been in operation since before the regulation of mediation in general. However, since Order 18778/2007, of 22 August, it was created the “Family Mediation Service” (FMS) and it remains with the current Order 13/2018, of 22 October. The SMF is a service promoted by the Ministry of Justice and operates throughout the Portuguese national territory, with competence to mediate disputes concerning, among other possibilities, divorce, separation, the destination given to the house used as a family address, as well as about the regulation, alteration or non-fulfillment of parental responsibilities.<sup>5</sup> The service can be requested directly on the internet, without a lawyer. In Brazil, there is no system aimed at requesting mediation, although this can be requested directly at the nucleus, center or conciliation sector.<sup>6</sup> Likewise, it does not have a specific branch for intervention in conflicts of family origin, which is dealt with by the same mediators who handle other types of conflict. This difference draws attention to a point that deserves to be highlighted, which is the training of the mediator. It is important to mention that what is being compared here is not the quality of training, but its specificity.

As already seen, conflicts of a family nature are distinguished by their nature – personal and sentimental – and complexity, whose ties that underlie the conflict are important and must be considered for the purpose of maintaining or re-establishing them. In addition, depending on the degree of intensity, intervention through mediation may not be recommended. In this case, specific training for the management of family conflicts proves to be important, as it is directed towards the peculiarities of this type of demand.

### *3.2. Comparative perspective of Brazilian and Portuguese mediation principles that can be applicable to family mediation*

Both legal frameworks deal with guiding principles, which are mandatory, and mediation is also linked to other general principles of their respective orders. In Portugal, for example, in addition to the principles provided for Order No. 13/2018, of 22 October, which deals with the aforementioned family mediation system, namely, the principles of celerity, proximity and flexibility, there are also the principles in in Law 29/2013, of 19 April. These principles, despite being mentioned in legislation different from the one dealing exclusively with family mediation, may also be applied to it, since the preamble of this Law refers to them as “general principles applicable to mediation carried out in Portugal”. In Brazil, CNJ resolution nº 125 brings empowerment and validation as a guiding principle for conciliators and judicial mediators, as well as the Civil Procedure Code, which deals with the principle of informed decision, composing the principal role to be followed in mediation, apart from those of the Mediation Law. All of them are applied to mediation also dealing with family conflicts, since there is no specific legislation in Brazil for this type of conflict.

<sup>5</sup> Information on the Ministry of Justice website. Available at <https://justica.gov.pt/Servicos/Pedir-mediacao-familiar> [Accessed 8 November 2021].

<sup>6</sup> Information available on the Ministry of Justice website. Available at <https://www.cnj.jus.br/programas-e-acoas/conciliacao-e-mediacao/> [Accessed 8 November 2021].

If in both countries the principles are similar in many aspects, it is also possible to observe differences and equivalences between them. The principles that guide mediation in Brazil are as follows, pursuant to art. 2 of Law 13.140/15:

- I - impartiality of the mediator;
- II - isonomy between the parties;
- III - orality;
- IV - informality;
- V - autonomy of the parties' will;
- VI - seeking consensus;
- VII - confidentiality;
- VIII - good faith.

Those of the Portuguese law, in turn, are described in articles 4 to 9:

- Article 4  
Principle of voluntariness  
(...)
- Article 5  
Principle of confidentiality  
(...)
- Article 6  
Principle of equality and impartiality  
(...)
- Article 7  
principle of independence  
(...)
- Article 8  
Principle of competence and responsibility  
(...)
- Article 9  
Principle of enforceability  
(...)

The simple observation points out that two guiding principles are identical, namely, confidentiality and impartiality, also converging their concepts. Confidentiality is fundamental for mediation, either for the safety of the mediation participants, in knowing that such intimate topics will be treated with discretion, or for the trust that is placed in the mediator, who should not share any information that has been the subject of the session. With this relationship of trust and a feeling of security regarding your personal information, the chances of a successful session can be higher. This principle exerts a double action in conflicts of a family nature, since, in addition to being essential for the mediation itself, confidentiality is indispensable for matters of family origin, due to its intimate nature. In addition, the article 5 of Portuguese law determines that the

mediator must maintain secrecy about all information that he has knowledge of in the context of the mediation procedure.<sup>7</sup>

The Brazilian law does not detail its principles, as the Portuguese law does, but resolution n° 125, of the CNJ, makes this detail in art. 1, §1, of its annex III, providing for the mediator's duty to maintain secrecy over the entire session. The Civil Procedure Code, in its art. 166, also asserts confidentiality as a principle of mediation. In addition, it is possible to understand that the imposition of proceedings in secrecy of justice of procedural acts that deal with matters related to family demands, described in art. 189, II, of the Civil Procedure Code, are also extended to mediation dealing with matters of a family nature. In this case, it is worth noting that mediation can occur in the course of the judicial process, as described in §3 of art. 3 of the Civil Procedure Code of Brazil.

The Civil Procedure Code, in its art. 166, also asserts confidentiality as a principle of mediation. In addition, it is possible to understand that the imposition of proceedings in secrecy of justice of procedural acts that deal with matters related to family demands, described in art. 189, II, of the Civil Procedure Code, are also extended to mediation dealing with matters of a family nature. In this case, it is worth noting that mediation can occur in the course of the judicial process, as described in §3 of art. 3 of the Civil Procedure Code of Brazil.

As for the principle of impartiality, set out along with that of equality in art. 6 of Portuguese law, and separately in item I, of art. 2, of the Brazilian law, the law of Portugal expresses that the mediator, as he is not an interested party in the dispute, must act impartially throughout the mediation, as well as item I, of art. 2 of Brazilian law, also determining the impartiality of the mediator. It should be noted that in none of the cases neutrality was pointed out as a principle expressed in the general law of mediation, despite appearing in other provisions, such as Recommendation No. R (98) on family mediation, adopted by the Committee of Ministers of the Council of Europe, in the Portuguese case. The identity of related terms and concepts denotes a common concern with the tendency that the mediator may demonstrate with respect to one of the parties.

In the same article 6 of the Portuguese law shows equality, and in item II of the aforementioned article of the Brazilian law, there is the option for the term *isonomy*. There is a terminological discussion that hovers over the two terms, drawing attention to their differences.<sup>8</sup> Equality is commonly treated as a barrier to undue discrimination, peremptorily imposing a justification for differential treatment. Isonomy, in turn, has a more concrete character, and is even aimed at the equalization of the procedure, in order to guarantee that everyone is subject to the same rules. In principle, what the legislations protect seems to be different (Rothenburg 2008, 81). The Portuguese, which would aim at material equality, admitting that at some point the parties are treated differently, in order to balance the relationship, when one side is stronger than the other. In the other hand, the Brazilian one, which would aim at formal equality, guaranteeing that the rules of procedure will be applied without distinction, without excluding any of those

<sup>7</sup> Despite the possibility of cessation of confidentiality due to the provisions of paragraph 3 of art. 5 of the Portuguese mediation law.

<sup>8</sup> To discuss the matter in more detail, we refer the reading to Walter Claudius Rothenburg (2008, 77).

involved from the legal mantle. In order to remedy this interpretation, the Federal Court prepared a mediation and conciliation manual, where it highlighted that:

(...) what is sought is material isonomy, and not just formal isonomy. In cases of visible power imbalance between the parties, it is not enough for the third facilitator to give the same speaking time, offer a seat at the round table and use the same technical terms. It is important that, without losing impartiality, measures are taken so that the parties are minimally in isonomic positions, in the material sense of isonomy. (Takahashi *et al.* 2019, 35).

It is also known that there is great similarity between the two terms, which are even treated as synonyms in many cases, so we understand that the two principles, despite not keeping terminological identity, converge in relation to their purposes. We consider, in this respect, that the principles of isonomy and equality are equivalent. In both legal cases, there is an express need for the parties to receive equitable treatment, without prejudice, favoritism or preferences (Azevedo 2016) and the mediator's role is to administer the procedure in order to enable the equal participation of both parties, as well as to guarantee the balance of powers between them (Cruz 2018, 58). In fact, treating the parties unequally in an undue way unbalances the relationship, which is already affected by the conflict, as well as attacks the trust in the mediator, which can compromise the success of the session.

In order to provide this equality between the parties, Brazilian law provided in its art. 10, sole paragraph, that if only one of the parties is accompanied by a lawyer, but the other is not, the session must be suspended by the mediator and will only resume when all are duly assisted. This situation occurs in the context of extrajudicial mediation. In judicial mediation, the parties must be assisted by a lawyer, pursuant to art. 26 of law 13.140/2015. If the parties do not have the financial means to hire a lawyer, the law ensures the assistance of the Public Defender's Office.<sup>9</sup> In the Portuguese case, there is no legal impediment to the continuation of the session if only one of the parties is assisted by a lawyer. The consequence of this is that the mediator in Portugal will have to make more efforts so that the unassisted party does not feel inferior, which would undermine the equality necessary for the procedure.

Portuguese law provides in its art. 7 on the principle of independence, guiding the mediator's conduct towards autonomy and freedom to act without being under the influence of any type of pressure, internal or external. Although the Brazilian mediation law does not have this principle, Annex III, of CNJ resolution nº 125, in its art. 5, expresses the mediator's autonomy, as provided for in art. 25 of the Portuguese mediation law, allowing the mediator to refuse, suspend or interrupt the session if he understands that the basic conditions for its good development are absent. Independence, then, unfolds in two dimensions, described by Patrão as being the mediator's insubordination and his emancipation from his own interests or those of third parties (Lopes and Patrão 2016, 58). The mediator must not be linked or subject to any

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<sup>9</sup> The Public Defender's Office exercises an "autonomous state function, intended to assist the jurisdictional function of the state, without this implying its integration with one of the other state powers (Legislative, Executive and Judiciary)" (Silva 2016, 543-544). In Portugal, although there is no Public Defender's Office, there is provision for legal aid, which includes not only the costs of a lawyer, but also of the process.

interest, and in the exercise of his/her function, he/she may act with freedom and autonomy.

Although it is still possible to trace some correspondence, the beginning of the disparities between the laws can be seen in the principle regarding the autonomy of the parties' will, contained in Brazilian legislation, and the principle of voluntariness, contained in Portuguese law. The mediation law of Brazil imposes the obligation to participate in a mediation session, unless both parties express themselves in the sense that they do not wish to participate. It should be noted that the obligation takes place after starting the process, since in Brazil (and also not in Portugal) a mediation is required prior to the filing of the demand. There are the so-called pre-procedural mediations, or extrajudicial mediations<sup>10</sup>, but these are not mandatory and do not bind the filing of the demand. In this case, even if one of the parties expresses a lack of interest in carrying out mediation, the session will take place. That is why respect for the autonomy of the will is related to permanence in the mediation, and not to its participation, since it is mandatory. The article 2, §2 of the Brazilian Mediation Law only mentions that no one can be obliged to stay in mediation, but does not address the possibility of not participating, which can be a different situation.

The mediation manual offered by the CNJ speaks of voluntarism as a principle, but this is not provided for either in the Brazilian Mediation Law, nor in CNJ Resolution No. 125. In the document there is an express statement in the sense that "the parties remain in the mediation process if they so wish", nothing dealing with their willingness to not participate in the mediation.

Both CNJ resolution n<sup>o</sup> 125 and the mediation law deal with autonomy in the sense that the parties reach consensus by themselves, without the interference of the third mediator, who cannot invade the parties' autonomy in the process of building the decision. This autonomy corresponds, therefore, to the freedom to make one's own decisions, which include interrupting the process at any time, pursuant to art. 2, paragraph 2, of Resolution No. 125, of the CNJ, but not that of not participating in the session.

The voluntariness described in Portuguese law, on the other hand, deals with the freedom to not even participate in the mediation session, emphasizing that this, in turn, is not mandatory. The very definition of the word mediation brought by art. 2 of the Portuguese law emphasizes that the search for an agreement must occur voluntarily. Participation in mediation, therefore, is not mandatory under Portuguese legislation, which is reaffirmed by art. 4 of the same law, which inaugurates its principled role with voluntariness, highlighting in its number 1 that "the mediation procedure is voluntary", requiring that the consent of the parties be clarified and informed. Unlike what happens under Brazilian law, the parties can choose to participate or not in the mediation, and they are also assured the option to terminate the mediation at any time, revoking the permission previously granted. There are severe discussions about it, as the absence of mandatory participation in the session can weaken the dissemination of mediation.

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<sup>10</sup> In Brazil, mediation can take place at different stages of the process, and even outside of it, and may even happen before starting the lawsuit.

In this sense, there is a notorious disparity between the guiding principles of mediation in Brazil and in Portugal. The fact is that, while in Brazil the fullness of attempts to resolve the dispute in a peaceful way is privileged, the law of Portugal privileges the freedom of the parties, the full exercise of which may even nonparticipating in a pre-mediation.

The perception of Lopes and Patrão (2016, 33–34) is interesting, for whom the principle of voluntariness has four dimensions: freedom of choice, freedom of abandonment, freedom of choice of the mediator and the conformation of the agreement. In this regard, following the dimensions pointed out by the author, it can be said that the principle of autonomy of the parties, as a guide to Brazilian mediation, corresponds to the voluntariness of Portuguese law in only three dimensions, since the first of them, aimed at freedom of choice of this method for the solution of the conflict presented before the judiciary, does not exist.

If the obligation to participate in a mediation session hurts voluntariness, we understand that the same cannot be said of the so-called pre-mediation. Pre-mediation, as the name suggests, precedes the mediation session and aims to explain the procedure, its advantages and importance. We believe that only knowing what it is about and knowing its details will the parties be able to say whether or not they want to participate in the mediation. If, after the presentation, the parties choose not to carry out the procedure, they will follow the process normally, without any interference in their will. In this way, voluntarism would be met and, at the same time, breadth of mediation would be granted.

A similar procedure occurs in the Justice Courts of Peace, in Portugal, under the terms of articles. 49 and 50 of Law no. 78/2001, of July 13 (with the changes given by Law n.º 54/2013, of July 31), where a pre-mediation session is held as soon as the request that initiates the process is received. Therefore, it is sufficient that there is no request to withdraw from the session, which can be made by any of the parties, under the terms of n. 1 of art. 49.

However, we need to distinguish between two situations: the first concerns mandatory pre-procedural mediation. Jerónimo deals with the obligation of a mediation session prior to the filing of the demand, which, according to the author, would violate art. 6 of the European Convention on Human Rights (Jerónimo 2018, 111, 115). Claiming mandatory mediation as a condition for filing the claim, as a procedural presupposition, could, in fact, represent an obstacle to access to justice. The second situation concerns mandatory pre-mediation, which differs from the first since it does not link the filing of the claim to the performance of a previous mediation.

Regarding other principles, we proceed to the analysis of informality, which, despite being recognized as an inherent condition of the relationships maintained during the mediation process, there is no mention in Portuguese legislation, nor was there any provision for Order 13/2018, of October 22. In Brazil, informality is a principle expressed in the mediation law, in its item IV. In this sense, seeking an equivalent in Portuguese law, the principle of proximity was found, which was expressed in art. 2, 1, of the aforementioned Order, along with flexibility. The core of informality is an opposition to the judicial system, which separates the judge and the parties, in a hierarchical relationship between who has the power to decide and who has the duty to obey the

decision. In this format, the adversarial stance that is subliminally imposed on the parties is rejected by proximity and informality, leaving aside the judiciary's own, and sometimes unintelligible, language.

It should be noted that the triangulation that exists in mediation is marked by this informality, which is inherent to the mediation process, as well as by the proximity that the mediator must seek to maintain with the parties, without ever placing himself in a superior position to that of the mediated (Cruz 2018, 71).

Another constant principle of Brazilian law that represents this informality is that of orality. It should be noted, however, that despite not being described in the normative provisions, the practice of mediation in Portugal denotes submission to informality, refraining from drafting the content of the conversation held within the scope of the session. Such a stance reveals an explicit, but not normative, presence of orality expressed in Brazilian mediation. It can also be said that orality is a logical consequence of informality, without prejudice, obviously, to the need to write the final term of the mediation session, which will contain the agreement that may have been established there or the closing of the sessions.

Equally without similar or equivalent in the specific ADR legislation of Portugal is the principle of good faith, which we feel is in the Brazilian legislation for an excess of zeal, since it is a general principle of Brazilian Law, being also a general principle in the Portuguese Law. Therefore, Portuguese mediation will be based on good faith, notably because those involved in the mediation process are expected to behave with pacifying purposes, not delaying the process. As a result, there is no absence of law nº 29/2013, of April 19, when comparing to the Brazilian law, which can be understood as a cultural position of the countries. If, on the one hand, there may be a need to reaffirm a basic principle, on the other hand, it may not be necessary to express what is inherent to the expected conduct for the procedure.

Advancing in the comparative study, we arrive at the principle of the search for consensus, described in Brazilian legislation, which cannot be confused with a search for an agreement. If agreement is the ultimate consequence of mediation, not being required or expected by it in the foreground, consensus is the conformity of judgments, the reduction of friction, from which an agreement may or may not result. In this sense, Brazilian mediation, as well as Portuguese mediation, does not aim at agreement, which is not the purpose of mediation. The search for consensus will even be more important than reaching an agreement (Cruz 2018, 25). As with the previous case, it cannot be concluded that Portuguese law is not concerned with consensus for the simple fact of not having mentioned it as a principle in its legislation, so it is understood that such absence does not harm the procedure, notably because it is the very nature of mediation to seek consensus between the parties.

A contrary situation can be observed with the principle of competence, which is expressed in Portuguese legislation, but has no peer or analogue in Brazilian law. However, Resolution No. 125, of the NCJ, states that the mediator must have qualifications that enable him to act in court, through training regulated by the NCJ in the same Resolution, carrying out periodic recycling for continuing education, which is mandatory, under the terms of art. 1 of Annex III, referring to the Code of Ethics for Conciliators and Judicial Mediators (art. 1, Res 125/2010). The Permanent Nucleus of

Consensual Conflict Resolution Methods – NUPEMEC composes the organizational chart of the Brazilian judiciary, being responsible for the training of mediators, as well for the permanent updating of servers, mediators and conciliators in the appropriate methods of conflict resolution.

In the Portuguese case, on the other hand, the provision can be interpreted as non-mandatory, since the mediator may attend training sessions, calling into question whether or not it is mandatory to participate in a refresher course. Thus, while Brazilian legislation determines that the mediator must participate in a refresher course for continuing education, the Portuguese law says that the mediator can carry out training that confers specific, theoretical and practical skills. In this regard, it should be mentioned that, in order to be considered enforceable, without the need for judicial approval, the mediator who signs the agreement must be duly registered in the list of conflict mediators organized by the Ministry of Justice. In other words, if the mediator who signs the agreement is not trained, he will not be included in this list, and the agreement he has signed will not be enforceable, unless judicially ratified, under the terms of Article 9, no. 1, of Portuguese law.

Brazilian law not only requires basic training in a course recognized by the National Council of Justice, but also requires continuing education for refreshing, which is different. Even so, the optional nature suggested by the Portuguese law, not without reason, is objectionable, especially given the complexity of family demands and their constant transformation. In this sense, Cruz emphasizes that

the mediator must have a vast and comprehensive preparation to be able to deal with the emotional and legal issues of the parties. Only a competent and duly prepared professional mediator is able to rescue the communication between the mediated and the trust necessary to focus on the pursuit of interests and not on the controversial demand for positions. (Cruz 2018, 64)

It is interesting to note that family mediation in Portugal has specific training, and it is not possible for a mediator with generic training to act in conflicts of family origin. In this case, the competence of the mediator is specific to acting in family conflicts, which does not occur in Brazil. In this country, training in mediation enables the mediator to work in all areas, including the family, with no distinction in their training. Still on training, it is worth mentioning that, in Brazil, the training of mediators is a task of the judiciary, while in Portugal, it is of the executive. This difference, observed from the objectives of each State function, may reflect the interests of each of these powers. In this sense, it should be noted that the judiciary can eventually be considered biased, since its view of mediation can be affected by a virtual interest in its result, which is to reduce the demands that can be overloading the judiciary.

Still on competence, both Brazil and Portugal require higher education, and in the Portuguese case, this requirement applies to the family mediation system, according to art. 5 of Order No. 13/2018, of October 22. Brazilian law, as it does not specify sub-areas

of mediation, requires training at a higher level regardless of the mediator's performance,<sup>11</sup> however, it does not require it in the case of extrajudicial mediations.

Alongside the principle of competence, the principle of responsibility appears, without similar or equivalent in Brazilian law, despite being expressly included in Resolution No. 125, of the CNJ, in its own chapter. In this Resolution, the responsibilities and sanctions for mediators and which are similar to the provisions of Portuguese law, including the exclusion of the mediator from the register of mediators and his impediment to act as a mediator in any other body of the national Judiciary. It is worth mentioning that Brazilian law mentions the responsibility of the mediator in its Art. 40, contained in section II, which deals with conflicts involving the Public Administration, its autarchies and foundations. Even so, the mediator will only be held liable civilly, administratively or criminally when, through intent or fraud, they receive any undue patrimonial advantage, allow or facilitate their reception by a third party, or compete for such.

To finalize the principled context of the laws in comparison, there is the principle of enforceability, provided for in art. 9, of Portuguese law n<sup>o</sup> 29/2013, of 19 April. This principle gives executive force to the agreement reached in a mediation session, which, having observed the requirements demanded by the article, will not depend on judicial approval. In the case of Brazil, enforceability was not conceived as a principle, however it also has executive force, notably because the agreement term constitutes an extrajudicial executive title, requiring ratification only in cases where the agreement deals with a law that, despite being negotiable, is unavailable, since the hearing of the Public Prosecutor's Office is required. Differently from what happens in Portugal, the approval of the agreement obtained in a mediation session in Brazil is done only by the competent court, even if the agreement does not deal with matters related to family law. In Portugal, it is possible that, when regards to matters of Families and Children, the approval of agreements takes place through the courts or by the Civil Registry Office.<sup>12</sup>

We believe that the executive force of the term of agreement obtained in a mediation session is essential for the autonomy of the procedure, so that it is not doomed to void, or dependent on the seal of the judiciary for its effective validation. This also reveals the importance of disseminating the culture of mediation, its safety and its benefits, as users' trust in the procedure can alleviate the belief in the absolute power of the judicial decision, in the false feeling that their own decisions are less valid than those issued by the judiciary, for the simple fact that they cannot be demanded. Equally important is the awareness of the complementary nature of mediation in relation to the judiciary, so that, acting together, they are able to guarantee respect for public order and those regulated by it.

#### **4. Conclusion**

The understanding that conflict is something natural and inevitable cannot be understood as a way of belittling or underestimating it, so its proper treatment is

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<sup>11</sup> In Brazil, the law speaks of graduation, which is the equivalent of a graduate in Portugal. To be accepted, the graduation must be carried out in a higher education institution recognized by the Brazilian Ministry of Education and must be at least two years old, pursuant to art. 11, of the Brazilian mediation law.

<sup>12</sup> Also, the Public Prosecutor's Office will evaluate the terms of the agreement when children are involved.

relevant for its outcome to be positive and constructive. Among the forms of conflict treatment, mediation stands out for allowing, in addition to an agreement, a way to reestablish the relationships affected by the disputes, especially when it comes to a family conflict. As seen, Brazilian legislation does not have a specific treatment for family mediation, which is why there is no system singularly aimed at this purpose, nor specific legislation. As a consequence, the principles of mediation in general are equally applicable to family mediation. Although Portugal contains specific legislation for family mediation, which also points out principles that guide it, mediation legislation in general is also applicable to family mediation, and for this reason they were included in the comparison made. Despite having an essence that seems to be universal, the laws that regulate mediation as a form of intervention in the conflict have differences, although they also present similarities and equivalence, even when they are countries with strong ties, as is the case of Portugal and Brazil. In this sense, it is possible to conclude that both systems have the same principled root, despite expressing them, in some aspects, differently, which can be attributed to the social and cultural specificities of the two countries.

It was seen that, despite the fact that some absences were verified in both legislations, as was the case with the principle of good faith and orality, contained in Brazilian law, but absent in the ADR specific Portuguese law,<sup>13</sup> and the principle of enforceability, the which is expressed in Portuguese law, but not in Brazilian legislation, there is no way to affirm that such gaps compromise the structure of mediation. This is because the principles that are not expressly described in the law as specific to mediation, either form the basis of its legal system, or are described in other diplomas.

For this same reason, the absences found do not harm the process, since they are remedied by other principled means. The comparison of the two legislations showed that there is no absolute terminological compatibility, highlighting the voluntariness described in the Portuguese law and the autonomy of the will, contained in the Brazilian legislation, whose essence is similar, but at the same time. This is said because, in the case of Portugal, voluntariness is absolute, while that of Brazil is relative, since it does not grant the possibility of not participating in the mediation sessions, despite guaranteeing that the parties are not obliged to remain there.

It was also noted that both legislations presented principles that, not displaying identical terminologies, correspond to the comparative legislation, such as what happens, for example, with the principle of isonomy and equality. In cases where this occurred, such as the principle of responsibility or orality, it was clear that, despite not being expressed in the legislation as a guiding principle in the law dedicated to mediation, its essence is part of everyday practice, as well as provisions in other diplomas not only concerning mediation, but the legal system as a whole.

Some relevant issues can be considered for the comparative laws, notably for the purpose of mutual improvement of the legislation in the questions in which each one stands out. This can be seen in the case of Portugal, which has a system exclusively focused on family mediation, and which, for this very reason, provides specific and differentiated training for mediators who will work in this area (and that training should

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<sup>13</sup> Although it is a general principle in Portuguese Law, as mentioned above.

be updated and revived regularly). In Brazil it is determined in its legislation the obligation of continuous training of mediators as a condition for their maintenance as a mediator. Considering that there is a tie of friendship and cooperation between Brazil and Portugal, it would be an important step for both countries to extract innovations for their respective legislations and their experiences, notably because it has become clear that both countries have identical concerns related to social peace, and the most appropriate ways to achieve it.

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