MEDIATION IN COERCIVE JURISDICTION PROCESSES.

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ABSTRACT:
Throughout history, the solution of controversies has been submitted to judges and courts, through procedures established in accordance with the principle of access to justice, at the same time alternative methods have been incorporated for the solution of conflicts, detached from the ordinary justice, but effectively enforceable in this way, protected by the legal effect they hold, providing the citizen with quick and effective options for their disputes. In this virtue, the present scientific work has been elaborated in order to determine if this procedure that is constitutionally protected can be applied in the coercive jurisdiction, for which an investigation with a qualitative approach has been used, cross-sectional with the use of the methods of historical-logical research, analytical synthetic, and documentary review with the review of several legal and doctrinal texts that have allowed to obtain as a result that mediation is a mechanism that can be perfectly applied in coercive processes since it does not affect the procedures of public institutions and their faculty of administrative self-management, but rather opens up a range of possibilities that benefit both the Administration and the citizens.
Keywords: *Mediation; coercive jurisdiction; administrative self-administration; public administration.*

INTRODUCTION

The alternative means of conflict resolution have been present in Ecuador for several decades, and that for review events it can be noted that in 1963 the first Commercial Arbitration Law was issued that is intended for the resolution of conflicts arising between merchants, for which chambers of Commerce were established who were granted the power to provide the service in a particular way, A situation that did not generate major advances for several reasons such as the ignorance of the parties, lack of promotion of the service and its particularities, and others that quieted the progress of this alternative until then. (Galindo 2001)

In the year of 1997 in official register 145 of September 4 is dictated the first mediation law that was reformed in 2006, this law incorporates certain doctrinal concepts with the purpose of providing an alternative that can improve the administration of justice that was defective, for the same reason with the incorporation of this new method would seek quick and agile solutions without losing confidence in the justice.

The weaknesses in the administration of justice in Ecuador and in general in Latin America required solutions, since the dispatch of the cases was too slow either because of the repression of processes, or because of the system that at that time did not have orality, which for some authors like Mejía the procedural and procedural principles related to orality will only regulate the conduct of justice administrators In the office of the causes as well as the behavior of the lawyers who sponsor them, which is not the cure but a momentary remedy, so that the evils and other sufferings persist that perhaps although they have not been overcome in their entirety has generated an improvement, for

the same reason it is necessary to incorporate alternatives that contribute to the desire for an effective administration of justice. (Mejía 2017)

The Ecuadorian Constitution as the instrument guaranteeing rights in its article 190 recognizes mediation as one of the alternative means of conflict resolution, only for those matters in which it can be compromised, therefore one of the essential requirements for the realization of these acts is linked to the possibility of negotiation without implying waiver of rights, In this regard, it is worth mentioning that mediation acts have a result similar to that of a judgment, so what is resolved in mediation must be strictly complied with under penalty of forced execution that would go against the party that does not comply. (A. N. Ecuador 2008)

What has been said in previous lines makes it necessary to describe the validity of mediation agreements, for this The Arbitration and Mediation Law (LAM) in its article 47 fourth paragraph states: [..."The act of mediation in which the agreement is recorded has the effect of an enforceable judgment and res judicata and will be executed in the same way as judgments of last instance following the means of enforcement, without the judge of enforcement accepting any exception, except those that originate after the signing of the act of mediation "...], which places the parties in a commitment that has legal effects, despite the fact that no judicial authority has resolved it, of course that does not destroy the principle of jurisdictional unity referred to in article 168.3, since at no time is a resolution being issued, but the voluntary negotiation of the parties concludes in an agreement that will have the same effects as the opinions issued by the jurisdictional authority. (C. N. Ecuador 2006)

As has been stated the purpose of mediation is to contribute to justice, because in many of its advantages is to relieve work to the courts without using any of their resources, in the same line saves time since there are no terms that must be fulfilled, but What the parties allocate to reach an agreement, increases creativity since there are no pre-established processes, therefore it also provides ample flexibility, finally we can manifest that it produces "deuterolearning", since if someone found a new formula to solve conflicts. (M. Gonzalez 2018)

The Coercive Jurisdiction is known as the process aimed at recovering what the individual owes to the state and its institutions, as long as this faculty is established normatively, as established in article 941 of the Code of Civil Procedure. (CPC) that although this reformed, part of its regulations is applicable, especially within this aspect, everything that implies that the state as creditor either for debts with the public bank, or for lack of compliance with contributions to the less, for tax debts, etc., all of which is carried out through a process that follows the guidelines of ordinary civil procedure, with the particularity that no jurisdictional authority intervenes throughout the process, except in the case of exceptions, third parties or after the execution of the insolvency process product of impossibility of recovery. (A. N. Ecuador, Código de Procedimiento Civil 2011)

Although the coercive jurisdiction is established in the norm on the basis of the protection of the patrimony of the state and its institutions, for some authors this type of process transgresses the rights of citizens, such as due process, since there is the impossibility on the part of the co-activated to exercise his defense, even support his hypothesis regarding the exceptions in these processes. that in this case the possibility depends on the consignment of values, in any case this procedure constitutes a procedure with respect to an obligation, however, it must be considered that during the development of the process the constitutional precepts regarding the rights of the parties should be taken into account, for the same reason the regulations for these cases provide for the procedures according to what happens in ordinary trials (Loza 2019).

In the preliminary phase to the coercive process there are several alternatives available to the debtor and that can be taken to prevent the obligation from passing to a second stage in which it will be notified before starting the execution of collection, as established by the Organic Administrative Code in the case of voluntary payment as a payment facility, agreements with forgiveness of interest, and others according to the possibilities provided by the institution itself; However, already within the coercive process it is clearly impossible to reach agreements, unless the institution issues resolutions, or laws issued by the state and that as an example we could cite the referral to debtors of the closed bank given by law in 2017, so we can also cite the default purge agreement in the case

of the less, that it can occur intraprocedural, however in the latter case the assets of the co-activated are evaluated, but of this, there is no Possibility of mediation in the coercive phase, except in isolated cases. (ECUADOR, Código Orgánico Administrativo 2017)

Through the Organic Law for Economic Development and Fiscal Sustainability issued in Ecuador in 2021, the possibility that the extraprocedural transaction can be carried out was authorized, in whose norm article 56.7 refers to the stages in which agreements can be reached, the same that can be carried out even if the tax obligation is in the phase of coercive execution, whose commitment of the administered is not alienating their assets, it is worth mentioning that this type of laws have been issued with the purpose of mitigating the consequences of the Covid19 pandemic, in favor of people who have been economically affected and through this they can recover, however, in most institutions the execution of the coercion does not proceed with mediation agreements (República 2021)

METHODS

According to the constitutional regulations, the administration of justice contemplates alternative means of conflict resolution, as one of the means of carrying out justice, such is the case of mediation, in this sense it was necessary within this research to make the observation of usefulness of this method, therefore this work has a qualitative and cross-sectional approach, Since it was necessary to know that even when the rules stipulate methods that provide a series of advantages, some State institutions use them compulsorily.

Since mediation is a procedure that has been introduced several decades ago in Ecuador and Latin America, and that has had its apogee since the publication of the Arbitration and Mediation Law, it has made it necessary to carry out a study regarding the benefits of the process in the last decade, therefore the cross-sectional study has allowed to obtain conclusions of the benefits perceived by the Ecuadorian population that consequently it implies an achievement of the State.

This investigative process was undertaken with the use of scientific methods of research: historical-logical, which has contributed to the review of the facts that forced the merchants of the time to look for alternative ways to solve their disputes, at a time when the administration of justice was experiencing a collapse, and as a result gives way to mediation agreements, that have then evolved to be positioned as an effective and useful means to achieve agreements not only between merchants but for other cases.

A documentary review of legal regulations relating to mediation has been carried out, evidencing the first laws that were published, which has made it possible to know their conception, origins, and essence; Through the analytical-synthetic method, it has been possible to extract the main characteristics of mediation in terms of its nature and effects, in order to identify the possibility of introducing them in the acts carried out by the State through its institutions.

RESULTS

As it could be evidenced, history shows how mediation has been introduced as an alternative method to resolve disputes, without the need to go to the jurisdictional authority, or trying to evade that route due to the crisis evidenced in justice for several years, motivated mainly by the model of administration of justice that prevailed in this period. that was even exacerbated by the political crisis that caused much instability, to the point that the Supreme Court of Justice itself was involved in a series of events, before which reaching agreements was constituted as the greatest gain of the parties, benefited by saving time and money. (Soasti 2017)

As observed in the development of the work the mediation was exclusive of the merchants, as proof of this in 1963 the Commercial Arbitration Law is issued, and the chambers of commerce are created for the purpose, however the processes were not so welcome, this because it was not given the necessary publicity, and many people were ignorant of its existence and benefits, a scenario that has gradually exceeded expectations, so it cannot be said that mediation is a discovery of the last decade, but rather that it has perfected the spectrum in which it was, which for many created distrust, since they prefer that conflicts are submitted to the decision of judges, despite the fact

that in both cases there are credibility markers in which people's confidence is expressed when resorting to both ordinary justice and mediation. (Flores 2021)

The alternative methods of conflict resolution are protected in the Constitution of Ecuador in article 190, therefore the application of mediation is guaranteed, whose validity is framed in the effect of res judicata that it possesses, giving to the instruments that are celebrated through this process legal force of an enforceable judgment of last instance, This contributes to the administration of justice, since it allows the procedural burden to be released since new cases would no longer be presented, even when it is carried out in cases of criminal mediation the solution will be focused on two aspects conciliation and reparation, therefore as it is justified that the regulations protect these acts, There would be no reason not to apply them in the proceedings that the State follows against individuals for the fulfillment of obligations since, as stated, their effects are enforceable before the ordinary judges. (Quiroga 2015)

Public institutions have a primary role in the state, the role they play contributes to socioeconomic development, provide goods and services to people in order to achieve the efficient provision of public services as referred to in article 1 numeral 4 of the Organic Law of Public Companies, likewise they must protect the interests of the state, as stipulated in the fourth of the general provisions of the same law which indicates that public companies will have the exclusive exercise of coercive jurisdiction to collect what is owed to the State. (República Quito)

As provided by law, public institutions to require citizens to comply with outstanding obligations in favor of the state have proposed the coercive route, which although it requires a procedure similar to that of ordinary justice, it is worth mentioning that the role of judge is not always developed by a person familiar with the law, among other particularities of the coercive process. Once the trial has begun, the possibilities of a negotiation depend on the managing lawyer, because the execution is clearly in his hands, in this sense there are very few possibilities of reaching agreements, much less mediation, except in specific cases such as what is carried out by the Internal Revenue Service, the Municipality of Quito in its mediation center for tiny amounts, Therefore, there is no culture of mediation in these processes.

With the implementation of the mediation centers in the country, the culture of peace has been improved, and as has been manifested, it has contributed enormously to mitigate the increase in cases for the administration of justice, of course the object is not to generate competition but support mechanisms in the face of the situation that the country is experiencing and even supporting investment savings by the state to the sector of the In this sense, institutions such as the SRI have decided to take these alternative means to avoid the repression of causes and reach agreements with the taxpayer, although it must be stated that there is still much to be done because the institutions have not yet perfected the processes. (González 2021)

Although mediation is not a process that has been applied in a generalized manner to the institutions of Ecuador, it must be taken into account what is expressed in the Regulations to the Law on Arbitration and Mediation in article 16.1 [... The State or a public sector entity may resolve any dispute over the facts, acts or other administrative actions that are related or arise on the occasion of the legal relationship subject to mediation, including rescinding or modifying acts of termination, expiration, sanctions or fines, regardless of the administrative body that issues them ...], thereby it is evident that mediation with public entities is empowered. (República, Reglamento a la Ley de Arbitraje y Mediación 2021)

DISCUSSION.

The Ecuadorian constitution is guarantor of rights, according to this character of the supreme norm it is pertinent to refer to Ferrajoli in his work "Garantismo" where he states that a rule of law is a mere legality, while a true state of rights consists of subordinating all acts including the law itself to constitutional rights, By virtue of this, the Administration of Justice has accepted in its processes the possibility of resolving conflicts through mediation, a mechanism that, as has been stated, is established in the Constitution itself, and which should be extended in the same way to coercive jurisdiction, providing citizens with a flexible alternative to generate agreements. (Moreno 2007)

Alternative means of conflict resolution are the product of the need of individuals to resolve their disputes through mechanisms other than ordinary justice, but with legal effects that protect their rights, at the same time the use of these contributes to the administration of justice, relieves it of burden, and provides an environment of peace in citizens, By virtue of this, if it is applicable in private relations where the interest of the parties prevails, it should rightly be used by public institutions where the investment of the State should be safeguarded.

Just as the crisis in the administration of justice caused by the collapse of its systems has been evidenced, it has generated in the citizens distrust towards the body in charge, in this same sense the people feel threatened by the government when it acts as a creditor if it is to demand the fulfillment of obligations, since it is invested with coercive power by virtue of the Article 226 of the Ecuadorian Constitution, in accordance with the provisions of article 261 of the Organic Administrative Code, but the coercive process has generated controversy in relation to the competence that derives from the nature of the process and therefore this is only given to judges because they would lack jurisdictional investiture. (Parra 2010)

While it is true that the coercive procedure is an administrative procedure whose purpose is to make effective the payment that for any reason is owed to the state, as referred to in the repealed Code of Civil Procedure, and its execution as has been said is attributed to the officials of the State institution, which, as described by some authors, violates the principle of jurisdictional unity of the administration of justice. Since those who execute are not judges, it is nevertheless worth mentioning that this power has been established based on administrative self-tutelage that consists of the discretionary power enjoyed by the public administration, all of which concludes the protection of the patrimony of the State that must be insured, and for this perception the coercive jurisdiction fits as a coercive measure in which a forced execution "appropriate" that does not admit any opposition except for the exceptions which is stipulated by law.

It may be necessary to refer to where lies the importance of resorting to mediation within the processes of coercive jurisdiction, since as indicated it is a power of the state attributed to some public institutions, whose exercise involves the rapid recovery of their resources, compared to the possibility of exercising collection in the ordinary procedure. However, what is analyzed within this work is the relevance of a constitutionally protected procedure, and that provides a mutual benefit to the parties, so much so that the Administration has the possibility of recovery since it renews the obligations with the coactivated, counting that most of the obligations in favor of the State are no longer recoverable, Therefore, a new responsibility would be generated, which will also make a benefit for the administered because they will be able to access a flexible way to solve their debts.

CONCLUSIONS.

Mediation and other alternative means of conflict resolution constitute a necessary tool for the rapid and peaceful resolution of disputes guaranteed in the constitution since it has legal effects in which people are protected, additionally contribute to ordinary justice avoiding the reprisalamiento of cases in the judicial units, in this sense the population is regaining confidence in the administration of justice, Therefore, the fulfillment of one of the purposes of the State is due to this alternative, however, even when its strengths have been demonstrated, its application has not been generalized, which causes a stumbling block on the road that mediation has won so far.

Public institutions have a preponderant role for the state to fulfill its purposes, likewise within its powers is to protect and protect the assets and resources of the state, and in this last aspect they act based on the principle of administrative self-tutelage, therefore they exercise coercion as a coercive measure to recover debts in favor of the state, Legal exercise independent of ordinary justice in almost all its stages, and because they have sufficient mechanisms, most public companies do not exercise collection through agreements or conventions, but are more inclined towards forced execution that may not be optimal in relation to the possibilities offered by the Constitution and the laws.

Perhaps the intention to introduce mediation within the coercive processes would cause greater procedures in an established process, which currently prioritizes execution of precautionary

measures, auction of movable and immovable property, and in the worst case bankruptcy processes, however, the use of alternative means could generate in the coactivated renewed obligations thereby guaranteeing a better recovery and consequently the protection of state resources in a more effective, with mechanisms that have full legal validity.

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