Adequate Treatment of Conflicts Online: Realising the Right to Health in the Context of the Covid-19 Pandemic

Tratamento Adequado de Conflitos Online: Concreção do Direito à Saúde no Contexto da Pandemia de COVID-19

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ABSTRACT: The article addresses the treatment of conflicts by appropriate methods, especially in health matters, considering the challenges arising from the coronavirus pandemic (COVID-19) and the necessary adaptations for maintaining essential services. The objective of the work is to analyze ways of achieving the right to health during the period of social isolation. To fulfill this purpose, a comparative study of the experiences of Portugal, Argentina and Brazil was carried out, given that the selected countries quickly edited normative instruments that allow or reinforce the authorization of the use of virtual spaces in dissension pacification in the context of the COVID-19 pandemic. The investigation starts from the hypothesis that the appropriate methods of dispute composition are adaptable to the context of the pandemic – especially when taking advantage of the forms of Online Dispute Resolution (ODR). In addition to the comparative study undertaken, it took advantage of dogmatic analysis and bibliographic and documentary research, with a survey of national and international normative texts on the right to health and its forms of materialization. Finally, the work discussed whether the use of Information and Communication Technologies (ICTs) is relevant to continue conflict management. The text concluded by characterizing ODRs as manifest expressions of access to justice in times of COVID-19.

KEYWORDS: COVID-19; coronavirus pandemic; online dispute resolution; adequate treatment of health conflicts; right to health.

RESUMO: O artigo aborda o tratamento de conflitos por métodos adequados, mormente em matéria de saúde, considerando os desafios surgidos em decorrência da pandemia de coronavírus (COVID-19)

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e as adaptações necessárias à manutenção de serviços essenciais. O objetivo do trabalho é analisar formas de concreção do direito à saúde durante o período de isolamento social. Para cumprir esse propósito, realizou-se estudo comparativo das experiências de Portugal, da Argentina e do Brasil, considerando que os países selecionados rapidamente editaram instrumentos normativos que permitem ou reforçam a autorização do uso de espaços virtuais na pacificação de dissensos no contexto da pandemia de COVID-19. A investigação parte da hipótese de serem os métodos adequados de composição de controvérsias adaptáveis ao contexto da pandemia – sobretudo quando aproveitadas as formas de Resolução Online de Disputas (Online Dispute Resolution ou ODR). Para além do estudo comparativo empreendido, aproveitou-se de análise dogmática e de pesquisa bibliográfica e documental, com levantamento de textos normativos nacionais e internacionais relativos ao direito à saúde e às suas formas de materialização. Por fim, o trabalho discutiu se o uso das Tecnologias de Informação e de Comunicação (TICs) é pertinente para dar continuidade à gestão de conflitos. O texto concluiu pela caracterização das ODRs como manifestas expressões do acesso à justiça em tempos de COVID-19.

PALAVRAS-CHAVE: COVID-19; pandemia de coronavírus; resolução de disputas online; tratamento adequado de conflitos em matéria de saúde; direito à saúde.

INTRODUCTION

The disease transmitted by the SARS-CoV-2 coronavirus (COVID-19), declared by the World Health Organization as a pandemic in March 2020, has challenged different social institutions on a universal scale. Certainly, the entities responsible for the materialization of rights are not exempt from facing the difficulties instituted in this critical scenario, considering the emergence of urgent demands and the need to adapt many procedures.

Among the issues whose resolution is emergency in the context of the COVID-19 pandemic are those related to access to health, a human right expressed in several international normative documents and in the legal systems of many countries. As this is a matter of countless conflicts of interest, the realization of the right to health sometimes depends on the resolution of the controversial issues that involve it, as well as the promotion of access to justice.

As rights – especially health – are given priority, it is justified to maintain the application of the most appropriate methods to the peculiarities of issues and parties during the social isolation period. Considering the relevance

of this human right, the article aims to analyze ways of achieving the right to health in different legal systems while in social isolation. The paper starts from the hypothesis that compositional methods such as conciliation and mediation can be applied in that context when using Information and Communication Technologies (ICTs).

In order to fulfill the established objective, the text describes, with support from bibliographic research, methods of conflict treatment spread from the idealization of Multidoor Courthouse. Next, the paper addresses the usefulness of Online Dispute Resolution in the context of the new coronavirus pandemic. In the last part of the work, a comparative study between Portuguese, Argentinean and Brazilian laws is carried out, using dogmatic analysis and documental survey of national and international normative texts related to the right to health. Thus, it is examined how ODRs have been used in the materialization of the right to health during social withdrawal.

1 MULTIDOOR COURTHOUSE SYSTEM AND ADEQUATE TREATMENT OF CONFLICTS: NEW EXPRESSIONS OF ACCESS TO JUSTICE

If the reasons for the emergence of conflicts – from processes of change to situations of acute crisis and disaster – are varied, "the methods of intervention should also be adapted to their characteristics, intervene in their cause and effect [...] to make aid really effective" (free translation) (VINYAMATA, 2005, p. 13).

Taking into account the incongruence in attributing the same form of management to conflicts of interest of various kinds, Frank Sander (1976), professor at Harvard University, proposed, during the Pound Conference, the creation of a "comprehensive center of justice" (popularized as "multidoor courthouse"). On that occasion, Sander stressed that

> We lawyers have been far too single-minded when it comes to dispute resolution. We have tended to assume that the courts are the natural and obvious – and only – dispute resolvers. In fact there exists a rich variety of processes which may resolve conflicts far more effectively. Much as the police have been looked for to 'solve' racial, school and neighborly disputes, so too have we been making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society. Quite obviously, the courts cannot continue to respond effectively to those accelerating demands. It becomes essential therefore to examine other alternatives). (SANDER, 1976, p.13).

From the examination of different forms of approach to conflicts in multiple court arouse the concept of Alternative Dispute Resolution (ADR), a term related to the mechanisms for resolving disputes other than the court proceedings – such as mediation, conciliation and arbitration (SANDER; CRESPO, 2012). Mediation is the procedure by which the parties involved in a dispute receive assistance from a neutral mediator, who has no authority to make decisions in their places, but who uses skills and techniques to help them resolve their differences and reach an agreement not based on adjudication (RAHMAN, 2012).

Similarly, conciliation corresponds to the technique of conflict composition in which an impartial third person (conciliator) assists the parties in order to guide them towards a satisfactory settlement (SGUBINI; PRIEDITIS; MARIGHETTO, 2004). Arbitration, on the other hand, resides in a heterocompositive environment in which the arbitrator (impartial and unrelated) judges and imposes a decision on the case (SGUBINI; PRIEDITIS; MARIGHETTO, 2004).

It is also important to highlight another method often used in the management of matters: negotiation, which is a self-composed way of managing controversies in which at least two subjects have divergent interests on a matter (KUSTER, 2017). Their results tend to be more beneficial when the parties set objective criteria, concentrate on interests instead of positions, create solutions of reciprocal gain and disassociate individuals from problems (FISHER; URY; PATTON, 1981).

Although Sander's comprehensive center is not a reality (as designed) in many countries, the emergence of variant forms of its representation in other legal systems and the expansion of the use of ADRs is expressive. This can be justified by the many benefits of the composition through various mechanisms, that can not be achieved from traditional litigation: reduction of time, lower expenses spent in the procedure and decrease in the number of demands in the courts, besides offering more responsive and effective solutions (SANDER, 2000).

Despite the fact that methods such as mediation are often seen as alternatives to civil proceedings, there are no difficulties in using them during or in parallel with the procedure. In the courts of Bangladesh, for example, about 60% of family cases have been resolved using mediation (in the judicial sphere), according to data provided by the Ministry of Justice and Parliamentary Affairs (ISLAM; SULTANA, 2019).

Given the possibility of applying negotiation, mediation or other means in the civil proceedings, as well as their effectiveness in resolving disputes, these mechanisms are called "adequate". The terminological precision also finds justification in the characterization of procedural techniques as appropriate for the settlement of certain controversies (especially those in which state coercive measures are necessary).

Considering the listed benefits of ADRs and the potential of appropriate methods for the materialization of rights, we conclude by their qualification as doors of "access to justice". For Cappelletti (1988, p. 12), this means the "fundamental requirement – the most basic of human rights – of a modern and egalitarian legal system that intends to guarantee, and not only proclaim, the rights of all". This is reasonable because procedures that are adaptable to the issues and to the individuals involved in them have potential to effect the rights claimed in a more effective and satisfactory way.

Under the view of ADR's wide capacity of materialize normative guarantees and the indispensability of the maintenance of legal services aimed at the accomplishment of the right to health and other attributions, the search for ways to accomplish these techniques during the coronavirus pandemic is correct. In this scenario, the use of Information and Communication Technologies (ICTs) is useful.

2 THE USEFULNESS OF ODRS IN THE COMPOSITION OF LITIGATIONS IN THE CONTEXT OF COVID-19 PANDEMIC

"Online Dispute Resolution" (ODR) is the term used to refer to the means of handling conflicts that take advantage of closed or open networks, partially or totally, as virtual locations for dispute resolution (ANDRADE et al, 2010). The ODRs are subdivided into two generations that differentiate themselves, above all, by the roles attributed to technologies and to human beings in the execution of processes.

Thus, the first generation, whose procedures are very similar to those of ADRs, is marked by the use of Information and Communication Technologies in the establishment of contact between the parties and their assistants, with human actors being the central drivers. The second generation, in turn, is identified by the greater intervention of technology and Artificial Intelligence systems, which can even propose solutions or issue decisions on demand, acting autonomously and reducing human interposition (PERUGINELLI, 2002).

In this article, we will focus on demonstrating how the resources of first generation ODR can serve to pacify health controversies and to accomplish the right expressed in many democratic legal systems during the COVID-19 pandemic.

Certainly, the benefits arising from the use of the Alternative Dispute Resolution pointed out by Sander (2000) – cost containment and others – are even accentuated in the ADR techniques that use virtual spaces. Although ODRs are not limited to the substitution of communication routes and constitute a different door to access to justice (ARBIX, 2017), during social isolation, ICTs play a prominent role. This is due to the facilitation of mediation sessions, conciliation and other mechanisms more used for the attribution of rights using ICTs in the online resolution of disputes contributes, by itself, to the fact that the COVID-19 virus does not spread through the absence of physical contact between parties, representatives and others involved in the proceedings.

In addition to contributing, to the face-to-face dispensation of agents, the intensification of the benefits inherent to ADRs in virtual systems for resolving disagreements is clear in the simplification of actions such as the attachment of documents (useful for speed) and the organization of acts and records. These examples clarify why conflict management in virtual environments becomes faster. Some of the useful resources for carrying out the procedures are electronic mail (e-mail), online forums, electronic conversations or messages (Instant Messaging) and videoconferences (ANDRADE; CARNEIRO; NOVAIS, 2010).

It is also important to point out that the use of ODRs is not exclusive to extrajudicial domains, but also extends to procedural law. The Brazilian company MOL *("Mediação Online")*, for example, made its virtual space available free of charge to all organs of the Brazilian Judiciary during the coronavirus pandemic (MOL, 2020).

Such initiatives ratify the indispensability of maintaining legal services concerned with access to justice. In this sense, the assignment of normative guarantees continues in ways that are adaptable to the needs created by the dissemination of the new COVID-19 – such as in the holding of hearings and conciliation or mediation sessions by means of synchronous image and sound transmission applications.

3 ODRS AND ACCESS TO HEALTH: A COMPARATIVE STUDY

The guarantee of health is a human right expressed in the 25th article of the Universal Declaration of Human Rights (ONU, 1948), in the 12th article of the International Pact on Economic, Social and Cultural Rights (ONU, 1976) and in many legal systems. Access to justice, on the other hand, is a human right essential to the materialization of other guarantees (CAPPELLETTI, 1988) recognized in various normative documents of democratic countries. Since these two prerogatives are human rights, they are interdependent (RAMOS, 2019).

Health can be the subject of conflicts of different kinds, from disputes between doctors and patients, among other professionals in the area, to between parties to contractual obligations for insurance or health care. Its protection, in these cases, depends on the pacification of the controversy and the effective access to justice, achieved by different means. While some of the most serious cases require intervention of the public jurisdiction for the granting of emergency protection, others would be better resolved by mechanisms that would restore the relationship of those involved.

Due to the possibilities of dealing with consumption conflicts (or another category) that interfere in the concretion of the right to health by means of appropriate methods such as mediation and conciliation, it is verified the usefulness of the use of virtual spaces of Online Dispute Resolution, mainly in scenarios such as the pandemic of the new coronavirus. We will examine below how different legal systems that ensure the right to health have made use of ODRs in the assessment of demands and in the substantiation of this guarantee during social isolation motivated by COVID-19 infections.

In this article, we have opted for exposing legal instruments from Argentina, Portugal and Brazil. The choice of these countries with roman tradition (civil law) finds justification in the pioneer and quick initiative to solve challenges related to access to justice by means of legislative updating. The three countries have popular systems of adequate treatment of controversies and have recently published documents that authorize or reinforce the use of Online Dispute Resolution in the management of conflicts during the social isolation resulting from the outbreak of the coronavirus pandemic.

3.1 Argentine law

In Argentina, adequate methods of dispute handling have gained prominence since the 1990s. Before that, arbitration and conciliation were allowed, but their potential was not explored and their application was not effective. From the time when argentine authorities published Decree 1480/1992, which implemented the National Mediation Program, ADRs have gained space in the country. (PNUD ARGENTINA, 2012).

Currently, the use of ADR is even required in Argentina prior to the beginning of almost all procedures (except in the cases prescribed[3]). According to Article 1 of Argentine Law No. 26,589/2010, "mediation prior to any judicial proceeding is established as mandatory and shall be governed by the provisions of this Law. This procedure shall promote direct communication between the parties for the extrajudicial resolution of the dispute" (free translation) (ARGENTINA, 2010).

Argentine law doctrine, while recognizing the importance of mediation for dispute resolution, criticize their country's system of access to justice. The criticism refers to the real existence of alternativity, of real choice of the most appropriate means. In this sense, Leandro J. Giannini explains that

> The mediation system must not be seen as a valuable tool just because it provides alternatives to a justice service that does not respond to the needs of a fair and efficient process. The main concern of the State should not be to provide the citizen with a "flight" mechanism in the face of a slow and costly process, but rather to guarantee effective judicial protection, so that, knowing that the jurisdictional service is an adequate way to remedy their conflicts, the interested party may freely and informally resort to bilateral negotiation to end the dispute (free translation). (GIANNINI, 2014, p. 6).

3 ARTICLE 5 – Disputes excluded from the obligatory pre-court mediation procedure. The obligatory pre-court mediation procedure shall not apply in the following cases: (a) Criminal proceedings; (b) Personal separation and divorce, nullity of marriage, parentage, parental responsibility and adoption, with the exception of property issues arising therefrom. The judge will divide the process, referring the patrimonial part to the mediator; (c) Cases in which the national State, the provinces, the municipalities or the Autonomous City of Buenos Aires or its decentralized entities are parties, except in the case of express authorization and when none of the cases referred to in Article 841 of the Civil Code are involved; (d) Disqualification proceedings, declaration of incapacity and rehabilitation; (e) Support, habeas corpus, habeas data and injunctions; (f) Precautionary measures; (g) Preliminary proceedings and early evidence; (h) Approval proceedings; (i) Preventive insolvency and bankruptcy proceedings; (j) Summons for the meeting of co-owners provided for in Article 10 of Law 13. 512; (k) Conflicts of competence of the labor justice; (l) Voluntary proceedings. (Free translation). (ARGENTINA, 2010).

Giannini's criticism is well placed because mediation may not be the best method of solution for certain conflicts, especially those that require the imposition of a state decision for the effective protection of the right sought.

Although it is necessary to improve the Argentine justice system and it seems inappropriate to determine exclusively mediation as the method used before the judicial process begins, the results obtained have been favorable. In the Court of Río Negro, for example, the percentage of total agreements derived from the mandatory mediation procedure was 71% in 2010, according to data provided by the Court itself (LUZI, 2012).

The indispensability of mediation and ADRs justify the promulgation of Resolution 121/2020, responsible for authorizing the holding of mandatory electronic sessions as a result of the coronavirus pandemic (ARGENTINA, 2020). Initially, the text establishes that

> ARTICLE 1. During the validity of the ambulatory and social distancing restrictions dictated in the scope of the public health emergency established by Decree nº DECNU-2020-260-APN-PTE, due to the Pandemic declared by the WORLD HEALTH ORGANIZATION (WHO) in relation to the coronavirus COVID-19, pre-court mediators may hold hearings by electronic means, videoconference or other similar means of voice or image transmission, provided that the identity of the participants and respect for the principles governing the mandatory pre-court mediation procedure set forth in Law No. 26 are guaranteed. 589. (Free translation). (ARGENTINA, 2020).

The authorization represents an exception to the requirement of personal attendance of the parties, in accordance with Article 19[4] of Argentine Law No. 26,589/2010. Thus, the mediator in charge shall summon the parties and their assistants, certify their identities and hold the conferences individually or collectively. When necessary, the impartial third party facilitator of the dialogue may resort to additional information received by telephones or e-mails necessarily informed before the beginning of the procedure (ARGENTINA, 2020).

4 Article 19. Personal attendance and representation. The parties must appear in person and may not do so by proxy, except legal entities and those domiciled more than 150 (one hundred and fifty) kilometers from the city where the hearings will be held. The representative must have the faculty to agree on transactions. Those authorized to testify ex officio are exempt from appearing in person, in accordance with the provisions of article 407 of the National Code of Civil and Commercial Procedure. Legal assistance is mandatory. A party who attends a hearing without legal assistance shall be deemed not to have attended, unless the parties agree to set a new date for redress of the violation. (Free translation). (ARGENTINA, 2010)

In these situations, the use of Online Dispute Resolution will serve to promote the right to health and to protect the health of consumers and users of goods and services, under the terms of articles 42[5] and 33[6] of the Argentine Constitution (ARGENTINA, 1995).

Thus, we can perceive the concretion of the right to health (i) directly when the ODRs are used in the resolution of conflicts related to this matter and (ii) indirectly by the simple and essential removal of the parties, their representatives and other professionals involved – which minimizes the risk of contamination by the new SARS-CoV-2 virus.

3.2 Portuguese law

In Portugal, the appropriate conflict resolution system was built gradually. Portuguese Constitutional Law No. 1 of 1989 determined that the law could establish instruments and forms of non-jurisdictional conflict settlement. Mediation, for example, had its institutionalization in the administration of justice in 2001, in the structure of the Courts of Peace or *Julgados de Paz* (COSTA, 2017). Arbitration, by contrast, was already taking place before the 2000s.

Presently, the Portuguese Republic has arbitration centers supported by the Ministry of Justice, bodies focused on the treatment of disputes relating to property, contracts, consumer disputes and other similar disputes *(Julgados de Paz)* and specialized mediation systems. These structures support the choice of the most appropriate methods, which weigh the peculiarities of the issues and the characters of the subjects involved in them.

About the effectiveness of Portuguese Courts of Peace, which seem to us particularly useful for resolving health-related conflicts, Elisabete Pinto da Costa points out that

> Conflict mediation has achieved great initial success in the Courts of Peace [...]. Three main aspects can contribute to this: this service has more than half a decade of operation, the scope of the mediate conflict typology is broader and the service is integrated into a permanent physical and organizational

5 Article 42. Consumers and users of goods and services have the right, in the relationship of consumption, to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice; and to conditions of equitable and dignified treatment (free translation. (ARGENTINA, 1995).

6 Article 33. The declarations, rights and guarantees enumerated in the Constitution shall not be understood as a denial of other rights and guarantees not listed; but arise from the principle of the sovereignty of the people and the republican form of government (free translation). (ARGENTINA, 1995).

> structure, being part (optional) of the procedural process (free translation). (COSTA, 2017, p. 96).

The multiple doors to justice available in Portugal have had their use made more flexible because of the new coronavirus pandemic. In this sense, the General-Director of Justice Policy canceled, by order, the presential mediation and pre-mediation procedures. Thus, the sessions will be rescheduled by means of Information and Communication Technologies that allow the synchronous transmission of image and sound, using the ODRs (REPÚBLICA PORTUGUESA, 2020). In sequence, the text states

> the rescheduling of the sessions referred to in the previous paragraph, provided that all those involved have consented, only in a non-presence mode, by means of chat platforms, with voice and image transmission in real time, namely Skype, Zoom, WhatsApp, Messenger or others (free translation) (REPÚBLICA PORTUGUESA, 2020).

Impartial third parties should conduct the sessions in virtual spaces in a way that encourages, facilitates communication and helps people to come to an agreement. However, technical impossibilities, lack of consensus between parties and mediator or other obstacles may delay the procedures until they can be conducted personally (REPÚBLICA PORTUGUESA, 2020).

The new flexibility pointed out is evident when we observe the obligatory personal attendance of the parties in the mediation sessions in some of the public systems, under the terms of article 36[7] of Law 29/2013 on mediation (REPÚBLICA PORTUGUESA, 2013). Given the recent dispensation of agents in the context of the COVID-19 pandemic, the right to health provided for in Article 64[8] of the Portuguese Constitution becomes concrete.

3.3 Brazilian law

The means of adequate resolution of controversies have gained visibility in Brazil due to the difficulties in promoting access to justice – that is to say, because of the significant number of demands submitted to the

7 Article 36 Presence of the parties. The constituent or regulatory acts of public mediation systems may determine the obligation of the parties to attend the mediation sessions in person, and their representation is not possible. (free translation) (REPÚBLICA PORTUGUESA, 2013).

8 Everyone has the right to health protection and the duty to defend and promote it (free translation). (REPÚBLICA PORTUGUESA, 1976).

state jurisdiction and the consequent slowness of proceedings within the Judiciary (SIMÃO, 2016). Ada Pellegrini Grinover (2016, p. 17) clarified that

> formalism, procedural complications, bureaucratization, difficulty of access to the judiciary, growth of litigation in an increasingly complex and conflicting society, the very mentality of legal operators, all contributed to demonstrate the insufficiency or inadequacy of the exclusivity of state tutorage (free translation) (GRINOVER, 2016, p 17).

The greatest advances directed to changing this reality occurred after 2013, from the first amendment of Resolution 125/2010 of the National Council of Justice (CNJ) (SIMÃO, 2016). The Resolution no. 125/2010 of CNJ disposes about the National Judicial Policy of adequate management of conflicts. The text emphasizes the need to employ techniques appropriate to the peculiarities and nature of the conflicts so that access to justice is effective and then materialize the rights claimed[9] (CNJ, 2010).

Certainly, the proposal of the cited Resolution was considered in the composition of important laws that reach the field of adequate conflicts settlement – the Civil Procedure Code (CPC/2015, law no. 13.105/2015) and the Mediation Law (law no. 13.140/2015).

With regard to relevant provisions on online dispute resolution, useful for the management of conflicts during social isolation caused by COVID-19 infections, CPC/2015 allows, in paragraph 7 of Article 334[10], that conciliation or mediation hearings in the judicial sphere be conducted electronically. In parallel, law 13.140/2015[11] authorizes that the mediation sessions are held in virtual spaces or through ICTs that enable remote communication (BRASIL, 2015b).

Even though the legal texts indicated are sufficient for the use of Online Dispute Resolution in the context of the pandemic, a law was enacted

9 Art. 1 – The National Judicial Policy for the Adequate Treatment of Conflicts of Interest is hereby instituted, with the intention of assuring to all the right to the solution of conflicts by means appropriate to their nature and peculiarity.

Paragraph. Under the terms of article 334 of the 2015 Code of Civil Procedure, combined with article 27 of Law 13,140 of June 26, 2015 (Mediation Law), the judicial bodies are responsible for offering other dispute resolution mechanisms, especially the so-called consensual means, such as mediation and conciliation, as well as providing service and guidance to citizens, before the solution adjudicated by decision (free translation). (CNJ, 2010).

10 Art. 334. § 7 – The hearing of conciliation or mediation can be conducted electronically, according to the law (free translation). (BRASIL, 2015a).

11 Art. 46 Mediation may be done through the internet or other means of communication that allow the transaction at a distance, provided that the parties agree (free translation). (BRASIL, 2015b).

(No. 13,994/2020) to allow electronic conciliation in the Civil Special Courts (BRASIL, 2020).

According to Law 13.994/2020,

> Articles 22 and 23 of Law No. 9,099, of September 26, 1995, come into force with the following amendments:
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> "Art. 22, paragraph 2: The non-presential conciliation conducted by the Judge is acceptable through the use of available technological resources for the real-time transmission of sounds and images, and the conciliation attempt shall be reduced to writing with the pertinent annexes" (free translation). (BRASIL, 2020).

The new wording just increases the permission of CPC/2015 to use virtual spaces in hearings. Thus being, the legal documents presented make it possible to maintain access to justice during the peak of coronavirus infections in Brazil. The preservation of the permission to conduct mediation and conciliation procedures online allows, in the context of the COVID-19 pandemic, the maintenance of the right to health expressed in article 6[12] of the Brazilian Constitution (BRASIL, 1988).

4 A COMPARISON BETWEEN THE LEGISLATIONS PRESENTED

The difficulties created by the new coronavirus pandemic have affected legal domain on a global scale. For this reason, many democratic states have had to adapt in order to preserve access to justice (as a guarantee of rights). To note the main forms of adaptation used by state authorities to promote the right to health in the field of conflict resolution, this article analyzed legislative updates from Portugal, Argentina and Brazil.

In Argentine legal system, a substantive change was noticed in Resolution nº 121/2020, which allowed the use of Online Dispute Resolution in mediation hearings during the pandemic. The new determination represents an exception to the agents personal attendance requirement, contained in Article 19 of Argentine Law nº 26,589/2010.

The wording of the new Argentine Resolution is similar to the recent order of the General-Director of Justice Policy of Portugal. Because of this

12 Art. 6 The social rights are education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, and assistance to the helpless, in the form of this Constitution (free translation). (BRASIL, 1988).

order, mediation and pre-mediation are now permitted through synchronous image and sound transmission platforms (first generation ODRs). The recent Portuguese ruling also exempts the physical presence of the parties before required under Article 36 of the Portuguese Law on mediation.

Differently from the recent determinations of Portugal and Argentina, which represent a real change concerning the authorization to use Online Dispute Resolution platforms, the new Brazilian law (law 13.994/2020) only reinforces the authorization to operate via Information and Communication Technologies. In this sense, CPC/2015 and the Brazilian law of mediation already pointed out, long before the beginning of the COVID-19 pandemic, that the hearings or mediation or conciliation sessions could be conducted by electronic means.

The three legal systems examined enable the right to health expressed in the Universal Declaration of Human Rights, Article 64 of the Portuguese Constitution, Articles 42 and 33 of the Argentine Constitution, and Article 6 of the Brazilian Constitution to be implemented. This is because either by new permission to use ODRs in conflict resolution procedures (in the Argentine and Portuguese cases), or by simple maintenance of this permission (in the Brazilian case), the physical dismissal of the parties and other professionals involved obviously prevents the proliferation of the virus. Moreover, the materialization of health may result from the adequate treatment of conflicts in this matter.

In sum, the comparative analysis undertaken shows that it is pertinent to adapt the adequate means of conflict treatment, especially mediation, to virtual environments because it enables the maintenance of services essential to implement rights – especially health. Thus, ODRs are essential for access to justice in the context of the new SARS-CoV-2 coronavirus pandemic.

CONCLUSION

The relevance of proper conflict resolution systems could be noted initially from the propositions of Vinyamata (2005), for whom the methods of treatment should be as varied as the specificities of the conflicts, and Frank Sander (1976), for whom the Courts should not be automatically and exclusively responsible for the management of disputes. It was argued that the particularities of the different techniques are capable of realizing rights and, for this reason, they are characterized as forms of access to justice – as a guarantee of rights, according to Cappelletti (1988).

With support from the qualitative bibliographic research undertaken, we have noticed the usefulness of the alternative forms of dispute resolution (ADRs) disseminated from the idealization of the Courthouse System by Sander (1976) in speeding up procedures and reducing costs.

To sustain the benefits of appropriate methods and preserve access to justice in the context of the new coronavirus pandemic, which has affected the legal domain on a global scale, many democratic states have had to adapt. Indeed, COVID-19 has made it necessary to adjust many activities to attenuate its devastating consequences.

The solutions proposed for maintaining practices related to access to justice were diverse, including through appropriate means of dispute resolution. In this work, we chose to analyze the solutions provided by countries of roman tradition (civil law) that quickly presented legislative answers: Brazil, Argentina and Portugal.

We have observed changes in the dispute resolution scenario in these countries: the use of Information and Communication Technologies (ICTs) is now enhanced. This is because ICTs are important for the continuity of the enforcement of rights (above all, but not only) as long as the social withdrawal is necessary due to the COVID-19 pandemic. In this context, the first generation of online dispute resolution (ODRs) stands out, attributing prominent roles to human beings in the conducted processes.

Among the rights possibly realized via ODR during the peak of SARS-CoV-2 infections, the right to health stands out. Thus, fulfilling the objective of this work, the comparative study allowed identifying that the right to health, expressed in the Portuguese, Brazilian and Argentine constitutions, can be substantiated in the use of ODRs through the physical dispensation of agents and the direct attribution of this right by pacifying litigation.

In this sense, it was possible to verify a tendency to authorize online mediation procedures, conciliation, and other compositional methods, as verified in the Argentinean resolution no. 121/2020 and in the order of the General Director of Justice Policy of the Portuguese Republic, or to reinforce this permission, as in the case of the Brazilian law no. 13.994/2020. In the Argentine scenario, this flexibilization is justified by the success of mandatory mediation, which in the Court of Río Negro resulted in a percentage of 71% of settlements in 2010 (LUZI, 2012). In Portugal, it is important, above all, to maintain the successful system of Courts of Peace, while in Brazil the reinforcement is based on the insufficiency of state tutorage.

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