

**THE MEANING OF CONFLICT MEDIATION AFTER 15 YEARS OF LUIS
ALBERTO WARAT'S ABSENCE AND 15 YEARS OF CNJ RESOLUTION 125**

**OS SENTIDOS DA MEDIAÇÃO DE CONFLITOS APÓS 15 ANOS DE
AUSÊNCIA DE LUIS ALBERTO WARAT E 15 ANOS DA RESOLUÇÃO Nº 125
DO CNJ**

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RESUMO

O ano de 2010 representa, simultaneamente, o início da Política Judiciária Nacional de Tratamento Adequado dos Conflitos no Brasil, formalizada pela Resolução nº 125 do CNJ. Nesse mesmo período, ocorreu o falecimento de Luis Alberto Warat, figura central da teoria do direito na América Latina, cuja atuação foi fundamental para o desenvolvimento do ensino jurídico e da pós-graduação *stricto sensu* em Direito no país. Tanto a normativa editada quanto as reflexões de Warat reconhecem a mediação como instrumento jurídico apto a lidar de modo adequado com os conflitos. Diante disso, o presente estudo busca analisar a introdução da mediação no Brasil após a publicação da Resolução nº 125 do CNJ, contrapondo-a à perspectiva waratiana sobre os sentidos desse instituto. A partir desta análise, a pesquisa questiona: A estruturação promovida pela Resolução nº 125 do CNJ para implementar a mediação no sistema jurídico brasileiro está alinhada ou diverge da proposta de Luiz Alberto Warat? Para responder a essa questão, será adotado o método hipotético-dedutivo, com análise qualitativa de bibliografia especializada. Os resultados apontam que a Política Judiciária Nacional de Tratamento Adequado dos Conflitos, instituída pela Resolução nº 125 do CNJ, vem sendo organizada sob uma ótica procedimentalista, diferentemente do enfoque substancialista defendido por Warat.

Palavras-Chave: Resolução nº 125 do CNJ. Luis Alberto Warat. Mediação. Procedimentalismo. Substancialismo.

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ABSTRACT

At the same time, 2010 marked the beginning of the National Judicial Policy for the Adequate Treatment of Conflicts in Brazil, formalized by CNJ Resolution 125. In the same period, Luis Alberto Warat died, a central figure in the theory of law in Latin America, whose work was fundamental to the development of legal education and stricto sensu postgraduate studies in law in the country. Both the regulations issued and Warat's reflections recognize mediation as a legal instrument capable of dealing adequately with conflicts. In light of this, this study seeks to analyze the introduction of mediation in Brazil after the publication of CNJ Resolution 125, contrasting it with the Waratian perspective on the meanings of this institute. Based on this analysis, the research asks: is the structuring promoted by CNJ Resolution 125 to implement mediation in the Brazilian legal system in line with or different from Luiz Alberto Warat's proposal? To answer this question, the hypothetical-deductive method will be adopted, with a qualitative analysis of specialized bibliography. The results show that the National Judicial Policy for the Adequate Treatment of Conflicts, established by CNJ Resolution 125, has been organized from a proceduralist perspective, unlike the substantialist approach advocated by Warat.

Keywords: CNJ Resolution nº 125. Luis Alberto Warat. Mediation. Proceduralism. Substantialism.

INTRODUCTION

The year 2010 marked the emergence in Brazil of the National Judicial Policy for the Proper Treatment of Conflicts, with the issue of the Resolution 125 of the National Council of Justice (CNJ). Also that year we lost Luis Alberto Warat, one of the exponents of the theory of law in Latin America and who greatly contributed to the formation of legal education in the country and to the organization of graduate stricto sensu in law.

Thus, considering that both the normative and the studies of Warat identify mediation as a legal institution capable of adequately dealing with conflicts, it was chosen as a research problem the following question: The structuring initiated by the Resolution 125 of the CNJ for the implementation of mediation in the Brazilian legal system meets or encounters the proposal of Luiz Alberto Warat?

To answer the proposed problem it was elaborated as a general objective to investigate the introduction of mediation in the country, after the edition of the Resolution no 125 of the CNJ confronting it with the Waratian thought on the meanings of mediation. And as specific objectives: a) demonstrate the paradigm change of access

to Justice in Brazil, from its silent reform; b) present the Resolution no 125 of the CNJ and the national judicial policy of adequate treatment of conflicts; and c) highlight the theoretical proposal of Luis Alberto Warat and the option for the mediation institute.

The research is carried out with compliance to the method of hypothetical-deductive approach of Karl Popper, and as procedures, the bibliographical search and the analysis of judicial decision. The hypothetical-deductive method has in common with the "deductive method the rational procedure that transits from general to particular, and with the inductive method, the experimental procedure as its founding condition" (Mezzaroba, 2009, p. 68). In the hypothetical-deductive method of Karl Popper, there is the verification of the problem, then the formulation of the hypothesis of its solution (conjectures) and, after conducting the process of falsifying these conjectures, objectifying their refutation; otherwise, the hypotheses will be provisionally corroborated (Mezzaroba, 2009, p. 70). Therefore, the study starts from the hypothesis that the proceduralism used by the CNJ for the implementation of the National Judicial Policy of Adequate Treatment of Conflicts is distorting the constitutional commitment of pacification of conflicts in favor of meeting quantitative goals.

The present work is divided into three parts. In a first moment, the work will demonstrate the paradigm change of access to Justice in Brazil, from its silent reform. Then, it will present the Resolution no 125 of the CNJ and the national judicial policy of Adequate Treatment of Conflicts. Finally, it will highlight the theoretical proposal of Luis Alberto Warat and his option for the institute of mediation hedonist-citizen.

1 THE PARADIGM CHANGE OF ACCESS TO JUSTICE IN BRAZIL FROM ITS SILENT REFORM

In the Brazilian context, the consolidation of the Democratic State of Law brought profound transformations to the legal system, revitalizing constitutional principles and reorienting judicial practice. The current conception of jurisdiction has broken with nineteenth-century paradigms, marked by legal positivism and the limited performance of the Judiciary in the Liberal State. Instead, the constitutional jurisdiction model was strengthened, which prioritizes the implementation of the fundamental values established in the Federal Constitution of 1988. As highlighted by specialized

studies, the understanding of modern constitutionalism is intrinsically linked to the interaction between the constitutional text and the performance of the courts in its interpretation (Meleu, 2014).

In this new scenario, the Judiciary assumes a strategic role in mediating social conflicts. The judicial action transcends the mere mechanical application of the law, requiring from the magistrates a proactive attitude in the search for social peace and the effective resolution of disputes. This change of perspective reveals the inadequacy of traditional concepts of jurisdiction, which no longer correspond to the complex demands of a plural society. As contemporary analyses point out, the jurisdictional phenomenon needs to be reinterpreted in the light of the principles of the Democratic State, incorporating mechanisms of social participation and institutional dialogue (Meleu, 2014).

Despite these theoretical developments, there is a discrepancy between theory and practice in Brazil. While the doctrine advances in the construction of jurisdictional models aligned with fundamental rights, a significant part of the judicial system still operates under remnants of the nineteenth-century formalism. This duality generates challenges such as procedural slowness and difficulty in harmonizing technical decisions with social expectations, requiring structural reforms to fully implement the constitutional postulates (Meleu, 2014).

The reforms, from 1988, must sustain a Democratic State of Law inaugurated in Brazil, aimed at ensuring "equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society" (Brazil, 1988), these commitments listed since the preamble of the Federal Constitution of 1988, "[...] who was responsible for the expansion of the list of rights, not only civil, political, economic, social and cultural, but also the so-called third generation rights"⁴ (Gaglietti; Meleu; Costa, 2009, p. 9). In addition, ensuring the peaceful resolution of conflicts ⁵.

⁴Sem adentrar aqui a discussão da terminologia adequada, Sarlet, entendendo ser mais adequada a moderna doutrina, opta por se filiar àqueles que elegeram o termo "dimensões"; todavia, destaca que, para parcela da doutrina, o termo "gerações" pode ensejar, como afirma Sarlet a "[...] falsa impressão da substituição gradativa de uma geração para a outra [...]". (Sarlet, 2007, p. 54). Romita (2007, p. 99), critica este termo por considerar que ele estaria se referindo "[...] a um significado e função distinta do mesmo direito, e não de um grupo de direitos [...]" o que faz com que aquele autor prefira falar em "naipes" ou "famílias" de direitos.

⁵Como refere o preâmbulo da Constituição (Brasil, 1988), que assim dispõe: "Nós, representantes do povo brasileiro, reunidos em Assembléia Nacional Constituinte para instituir um Estado Democrático, destinado a assegurar o exercício dos direitos sociais e individuais, a liberdade, a segurança, o bem-estar, o desenvolvimento, a igualdade e a justiça como valores supremos de uma **sociedade fraterna, pluralista e sem preconceitos, fundada na harmonia social e comprometida, na ordem interna e internacional, com a solução pacífica das controvérsias**, promulgamos, sob a proteção de Deus, a seguinte Constituição da República Federativa do Brasil". (grifo nosso)

The Preamble of the Brazilian Constitution of 1988, in which, according to the understanding of the Supreme Federal Court (STF), the legally⁶; however, as Minister Cármen Lúcia of the STF pointed out when she expressed her vote in the ADI 2649/DF,

[...] contém a explicitação dos valores que dominam a obra constitucional de 1988. Ali se esclarece que os trabalhos constituintes se desenvolveram “*para instituir um Estado democrático destinado a assegurar o exercício dos direitos sociais e individuais, a liberdade, a segurança, o bem-estar, o desenvolvimento, a igualdade e a justiça como valores supremos de uma sociedade fraterna, pluralista e sem preconceitos...*”.

Não apenas o Estado haverá de ser convocado para formular as políticas públicas que podem conduzir ao bem estar, à igualdade e à justiça, mas a sociedade haverá de se organizar segundo aqueles valores, a fim de que se afirme como uma comunidade fraterna, pluralista e sem preconceitos.

12. É certo que parte da doutrina não considera o Preâmbulo como dotado de força normativa [...] (Brasil, STF, 2008).

Thus, the constitutional preamble, although devoid of an autonomous normative force, serves as a hermeneutic guideline for the realization of social rights, in line with the values of fraternity and human dignity that underlie the Democratic State of Law (Brazil, 2008).

Given this scenario inaugurated in 1988, and to implement actions necessary for the fulfillment of the commitments assumed for the achievement of a democratic state of law, changes in the organization of the Judiciary were necessary, after all is the guardian of these promises. Therefore, according to Garapon (2001), arises as a response to the crisis of legitimacy of political institutions in contemporary democracies. In this context, justice becomes a space of political enforcement, in which individuals challenge rulers and demand answers to social issues not resolved by the Legislative or the Executive.

This change of the Brazilian Justice System, post-Constitution of 1988, is now being debated in the national legislature. On March 26th, 1992, the federal deputy Hélio

⁶Para Kelsen, o preâmbulo de uma constituição “tem caráter antes ideológico que jurídico” (Kelsen, 1995, p. 309). Esse também foi o entendimento consolidado na ADI 2076, com a relatoria do ministro Carlos Velloso, que em seu voto sustenta “O preâmbulo, ressaí das lições transcritas, não se situa no âmbito do Direito, mas no domínio da política, refletindo posição ideológica do constituinte. É claro que uma constituição que consagra princípios democráticos, liberais, não poderia conter preâmbulo que proclamasse princípios diversos. Não contém o preâmbulo, portanto, relevância jurídica. O preâmbulo não constitui norma central da Constituição, de reprodução obrigatória na Constituição do Estado-membro. O que acontece é que o preâmbulo contém, de regra, proclamação ou exortação no sentido dos princípios inscritos na Carta: princípio do Estado Democrático de Direito, princípio republicano, princípio dos direitos e garantias etc. Esses princípios, sim, inscritos na Constituição, constituem normas centrais de reprodução obrigatória, ou que não pode a Constituição do Estado-membro dispor de forma contrária, dado que, reproduzidos, ou não, na Constituição estadual, incidirão na ordem local. (Brasil, 2002).

Bicudo (PT-SP) filed the Constitutional Amendment Proposal no 96 of 1992 (PEC 96), in order to promote significant changes in the organization of the Judiciary (Brazil, 1996). After intense parliamentary debates and adjustments to the original text, which lasted for twelve years, the initial stage of the Judicial Reform was completed. Its promulgation occurred on December 8th, 2004 - a symbolic date, coinciding with the Day of Justice -, being incorporated into the Federal Constitution of 1988 as the Constitutional Amendment no 45, 2004⁷. The final text was published in the Official Gazette of the Union on December 31st of 2004 (Brazil, 2004).

The main goal of the Reform was to optimize the Brazilian judicial system, modernizing the structure of the Judiciary and the State Prosecution in order to increase administrative efficiency and ensure greater access by the population to judicial services. Among its advances, it highlighted the integration of Brazil to the International Criminal Court and the adoption of a simplified procedure for internalizing international human rights treaties, giving them status as constitutional norm. These measures sought not only to expedite legal proceedings, but also to strengthen the position of the country in the global scenario regarding fundamental rights.

But, as highlighted by Joaquim Falcão,

Compreender a complexidade da reforma não é obstáculo. É antes condição necessária para tornar produtiva a convergência entre poderes em torno desta questão de Estado. Uma compreensão sistêmica da crise do Judiciário nos ajuda a perceber tal complexidade, refletida nas múltiplas dimensões da reforma:

- 1) Na multiplicidade das frentes: a frente do judiciário, a frente da reforma silenciosa da Justiça, a frente do passivo contencioso da Administração Pública e a frente da crescente demanda jurisdicional da sociedade;
- 2) Na multiplicidade de poderes judiciários – constitucional, administrativa, sociológica e/ou politicamente fragmentados;
- 3) Finalmente, a reforma não prescinde da multiplicidade das responsabilidades do juiz, tanto como principal operador da justiça quanto como cidadão republicano.

Por que é fundamental haver consciência e consenso dos atores envolvidos em torno dessas multiplicidades, em especial da multiplicidade frentes? Fácil perceber. A reforma constitucional e o Pacto Nacional por um Judiciário mais ágil e republicano não teria acontecido se a tarefa da reforma continuasse a ser enfrentada apenas na frente legislativa ou, quando muito, na frente da reforma silenciosa da justiça. O consenso conceitual mínimo que propus

⁷A qual cria o Conselho Nacional de Justiça (CNJ). Também como consequência dos debates e da tramitação dessa PEC nº 96, de 1992, “e de outras a ela apensadas, a criação do Conselho Nacional de Justiça foi novamente inserida na pauta do Parlamento. Após mais de uma década, com o cenário da crise do Judiciário se agravando, a tramitação da PEC ganhou impulso com a criação, em 2003, da Secretaria de Reforma do Judiciário do Ministério da Justiça, instituída para colaborar a atender às demandas de modernização da Justiça brasileira e, na primeira fase de sua existência, agilizar a Reforma. Com a continuidade do trâmite da PEC nº 96, de 1992, por pouco mais de um ano, em 8 de dezembro de 2004, no Dia da Justiça, a Emenda Constitucional nº 45 foi finalmente promulgada e publicada em 31 de dezembro de 2004, oficializando a Reforma do Judiciário” (Toffoli, 2020, p. 18-19).

ilustra bem a necessidade de convergência de todos os atores estatais e particulares para que este desafio: todos contribuem de uma forma ou de outra para a lentidão do Judiciário. É obra coletiva. Consequentemente, todos podem e devem contribuir para a reforma. Reforma que não é mais do Judiciário, mas do sistema judicial, em toda a sua extensão de atores e participantes (Falcão, 2005, p. 27).

The actions required for the intended reform, which here focuses its attention on the realization of the constitutional commitment to promote, internally and internationally, the peaceful settlement of disputes in the year 2010 are intensified. This year, on June 8th, Senator José Sarney protocols the PLS no 166 of 2010⁸, which was then referred to the Chamber of Deputies (PL no 8.046, of 2010) and culminated in the current Code of Civil Procedure (Law no 13.105, of 2015), which establishes that it is the duty of judges, lawyers, public defenders and members of the mediation and other methods of consensual conflict resolution, as expressed in the third paragraph of the Article 3 of the Law no 13.105, of 2015 (Brazil, 2015).

Thus, "attentive and anticipating this legislative change, the CNJ issued the Resolution no 125 of November 29th, 2010, in which it reinforces the use of non-adversarial methods of conflict management" (Meleu, 2014, p. 120), creating the National Policy for the Appropriate Treatment of Conflicts.

2 THE RESOLUTION No 125 OF THE CNJ AND THE NATIONAL JUDICIAL POLICY OF APPROPRIATE TREATMENT OF CONFLICTS

Resolution no 125 of the CNJ, of 2010, was born from a movement started in the 1980s, with the Law of Special Courts (Law no 7.244, of 1984), which prioritized consensual solutions. In the 2000s, the Movement for Conciliation (2006) and the Judicial Reform (EC no 45, 2004) consolidated the need for public policies to reduce excessive judicialization and modernize the system. In 2010, the CNJ established a working group to structure a national policy, resulting in the Resolution 125 (Fernandes, 2015)

One of the main actions related to the new policy is in stimulating conciliation, because,

Com a Resolução 125, instituída em 2010, a conciliação começou a ser vista não como uma prática de exceção, mas como um mecanismo que deve fazer

⁸O PLS nº 166, de 2010, propôs a reforma do Código de Processo Civil, incorporando 37 projetos apensados e 106 emendas, com o objetivo de modernizar a legislação processual brasileira (BRASIL, 2010).

parte da rotina dos tribunais brasileiros, por meio da implantação de Centros Judiciários de Solução de Conflitos e de Cidadania (Cejusc), determinada pelo ato normativo. Com o Cejusc, qualquer cidadão que queira conciliar pode, em qualquer tempo, fazer o acordo.

Outro avanço proporcionado pela Resolução 125 é a necessidade de capacitação de conciliadores e mediadores por meio de critérios mínimos como a formação em cursos ministrados pelos tribunais, a reciclagem permanente e a avaliação do usuário. O ato do CNJ criou, inclusive, o Código de Ética de Conciliadores e Mediadores Judiciais, que trata dos princípios e garantias, das regras que regem os procedimentos e das responsabilidades dos conciliadores e mediadores no Brasil.

Ao longo desta semana, a Agência CNJ de Notícias publicará uma série de matérias e entrevistas de magistrados e especialistas que participaram da implantação e vêm atuando na consolidação da Resolução 125, além de relatar histórias de conflitos pessoais e financeiros solucionados por meio da conciliação e mediação (Fernandes, 2015).

As a method of self-composition, conciliation is most effective in material conflicts - such as consumer relations -, where there are no lasting bonds between the parties. In such cases, an impartial professional seeks a pragmatically viable agreement, although not ideal, to avoid future disputes. This practice can occur both in the judicial sphere and in private instances, such as consumer protection bodies (Meleu, 2014).

In the Judiciary scenario, conciliation gained strength from institutional policies, such as the National Week of Conciliation, promoted annually by the CNJ. During the event, held in December, parties involved in federal, state or labor justice processes are encouraged to negotiate agreements, reducing the overload of the system and accelerating the resolution of conflicts (Meleu, 2014).

It can be seen, therefore, that "the CNJ studies solutions for the reduction of procedural waste and for the prevention of judicial disputes, encouraging appropriate conflict solutions, including conciliation and mediation" (Brazil, 2024, p. 251). About these forms of resolution, it is recalled that in 2006 there was the implementation of the Movement for Conciliation that became the programs: National Week of Conciliation and Conciliar (Conciliating) Prize is Legal.

Figure 140, from the edition of 2014 of the Yearbook of Justice in Numbers and reproduced below, shows the proportion of court decisions that homologate agreements in relation to the total number of judgments and final decisions. In 2023, these agreements represented 12.1% of the total, registering a slight decrease from 2022. In the implementation phase, however, there was significant growth: approved agreements reached 9.1% in 2023, more than doubling compared to 2015 (an increase

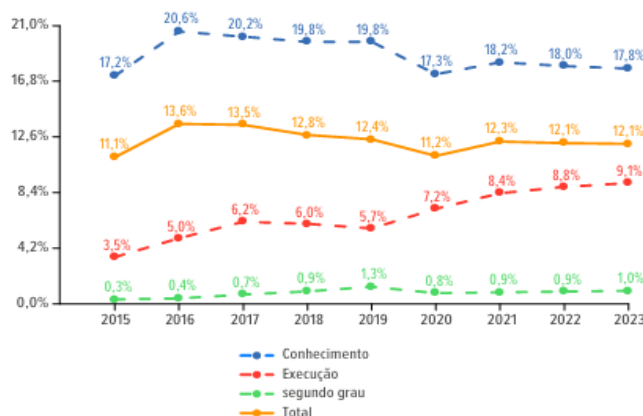
of 5.6 percentage points in 8 years). This advance can be linked to the guidelines of the CNJ to stimulate conciliation in this procedural stage (Brazil, 2024, p. 252-253).

In the knowledge phase, the reconciliation rate was 17.8% in 2023, 0.2 percentage points lower than the previous year. There were no significant changes between the first and second degrees of jurisdiction: in the second degree, the index rose by 0.1 points, while in the first degree it decreased by 0.2 points. It is curious to note that the mandatory conciliation hearings, introduced by the CPC in 2015, was not reflected in significant changes in the historical series analyzed (Brazil, 2024, p. 252-253).

In absolute terms, the number of approved agreements grew by 32.2% between 2015 and 2023, jumping from 3 million to 4 million. In 2023 alone, there were 386.5 thousand more agreements than in 2022 (+10.8%), indicating a progressive adherence to self-composition mechanisms (Brazil, 2024, p. 252-253).

These data are expressed in the chart taken from the Justice in Numbers Yearbook of the CNJ (Brazil, 2024, p. 253).

Figure 1 - Historical series of the Conciliation Index

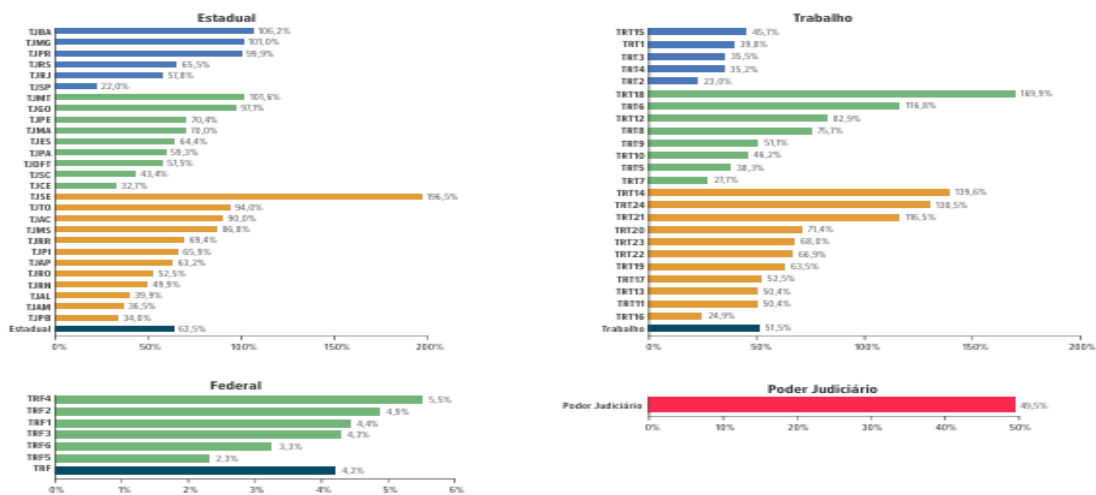


Source: Justice in Numbers Yearbook of the CNJ (Brazil, 2024, p. 253)

According to the survey of the CNJ, "the Justice that most conciliates is the Labor Court, which solved 20.2% of its cases through agreement - a figure that increases to 36.5%, when analyzed only the first-degree knowledge phase. The Regional Labor Court presented the highest rate of conciliation in the Judiciary, with 26.8% of homologatory judgments of agreement" (Brazil, 2024, p. 254).

It is interesting to note that the survey carried out by the CNJ does not differentiate mediation conciliation, because it highlights, according to the Figure 147 below reproduced, "[...] the index of conducting hearings, measured by the relationship between the total number of conciliation and mediation hearings held in the pre-procedural phase and in the knowledge phase, in relation to the sum of received pre-procedural procedures and new cases of non-criminal knowledge”.

Figure 2 - Percentage of conciliation hearings for new cases, by court



Source: Justice in Numbers Yearbook of the CNJ (Brazil, 2024, p. 261)

From the bases already referenced, it is observed that the administration of Justice, especially by its National Council of Justice (CNJ) has been stimulating a "quanti" and not necessarily a "quali" Justice, based on compliance with procedural goals. Indeed, recently the CNJ reinforced that "focus is to judge more processes than distributed and must be fully fulfilled by all segments of Justice" (Camimura, 2025, n.p.). This objective constitutes the Target 1.

It is not overlooked that the Resolution no 125, of 2010, represents a milestone in the democratization of access to Justice, aligning Brazil to international trends of Multiport Justice, while "instrument capable of contributing to the expansion of access to Justice, the improvement of the conflict resolution system in Brazil and the consequent reduction of legal proceedings" (p. 7); however, the procedural operationalization of conciliation and mediation may result in the emptying of these important institutes and in the very intention to deal adequately with the conflict. This is

the purpose, and the reduction of processes should be a consequence and not the main goal.

Following the critical profile⁹ of the authors, this work highlights the insufficiency of the proceduralist/instrumentalist postures, aligning with the instrumentalist proposals, thus turning to substantialist theses. The polemic "proceduralism versus substantialism" continues to produce dissonant communications on the role of the Democratic State of Law¹⁰, que atravessam o *modos* de reconhecimento dos direitos fundamentais.

Also maintaining a concern against dogmatic and substantialist, through the bet on otherness, Luis Alberto Warat opposed the positivist model that creates a theoretical common sense of jurists¹¹, pointing, at the end, the mediation as a space of approach of souls, desires.

⁹Nesse ponto é importante esclarecer que não se está estritamente vinculado ao percurso filosófico clássico de Max Horkheimer, mas dialoga com todas as posturas críticas à razão instrumental, que almejam a transformação da realidade, pois, a visão crítica não deve se contentar em apenas interpretar o mundo, mas transformá-lo. Como destacou Marx na 11ª Tese sobre Feuerbach, “os filósofos apenas interpretaram o mundo de diferentes maneiras; o importante, porém, é transformá-lo” (Marx; Engels, 2010, p. 114). Sobre a distinção entre teoria clássica e teoria crítica consultar Horkheimer, 1980, p. 31-54).

¹⁰No viés procedimentalista, “a legitimidade do Direito moderno somente pode ser compreendida a partir da própria racionalidade democrática moderna, pois o sentido do ordenamento não advém de sua forma ou dos conteúdos morais estabelecidos de forma antecipada. Decorre dos procedimentos legislativos viabilizados pela própria estrutura da democracia [...]. Não interessa uma pauta de valores previamente estabelecidos que organize o debate e estimule a participação das pluralidades instituidoras da legitimação da política e do Direito [...]”. Já as posturas substancialistas sustentam, por exemplo, “que as decisões judiciais auxiliam na afirmação dos direitos fundamentais e na realização de uma “agenda igualitária”, especialmente por se tratar da realização, pelo Direito, de princípios jurídicos já admitidos socialmente, os procedimentalistas acham que o Direito, em excesso, pode ser prejudicial ao regime democrático. [...] as posturas substancialistas [...] têm valorizado a Constituição como instrumento vinculante e programático, diretriz e argumento de conservação do Estado Democrático de Direito, que ainda resguarda, na medida do possível, a ordem e a liberdade nos Estados de periferia, não desconhecendo a politização do Direito e a impossibilidade de se reduzi-lo a mero procedimento. [...] No caso do Brasil, é particularmente necessário apostar no debate entre procedimentalismo e substancialismo, mas, sobretudo, defender a força normativa e condicionante da Constituição, sem o que restarão desprotegidos os direitos e as garantias fundamentais do cidadão. Se o texto constitucional é condição de possibilidade para transformação social, a ele não pode ser dado valor meramente procedimental. A postura substancialista leva em consideração a mudança de visão que se deve ter em relação à Constituição, ao Poder Judiciário [...]” (Hommerding, 2007, p. 27-39).

¹¹Expressão assumida por Warat há mais de trinta anos para se referir ao racionalismo jurídico. Aqui se faz “necessário distinguir a razão jurídica do racionalismo. A primeira seria somente a sensatez do conhecimento, a segunda uma sensatez tóxica, uma febre virótica da razão; uma razão exercida em suas funções, tornada ideia maligna como se fosse uma célula que se reproduz excedida em seu funcionamento” (Warat, 2010, p. 52). Warat, ao conceituar o senso comum teórico dos juristas, aduz que esses “contam com um arsenal de pequenas condensações de saber: fragmentos de teorias vagamente identificáveis, coágulos de sentido surgidos do discurso dos outros, elos rápidos que formam uma minoria do direito a serviço do poder. [...] uma linguagem eletrificada e invisível [...] no interior da linguagem do Direito positivo, que vaga indefinidamente servindo ao poder. Resumindo: os juristas contam com um emaranhado de costumes intelectuais que são aceitos como verdades de princípios para ocultar o componente político da investigação de verdades. Por conseguinte, canonizam-se certas imagens e crenças para preservar o segredo que escondem verdades. O senso comum teórico dos juristas é o lugar dossegredo” (Warat, 1994, p. 15).

3 THE THEORETICAL PROPOSAL OF LUIS ALBERTO WARAT AND THE OPTION FOR THE MEDIATION INSTITUTE

Luis Alberto Warat, affectionately known as Luis, was born in Argentina and adopted the Brazilian nationality. Over more than four decades dedicated to teaching, he stood out as a teacher, writer and intellectual whose work transcended the borders of law. With an extensive published work, Warat combined profound legal knowledge with incursions into fields such as philosophy, psychoanalysis and literature, always with theoretical rigor. His contribution to legal thought was marked by critical and innovative thinking, which challenged traditional paradigms by introducing interdisciplinary perspectives and radical questioning. His ideas, often derived from unconventional approaches, influenced generations of jurists and redefined debates in the academic world (Meleu; Thaines; Rocha, 2021, p. 613).

Warat mentions that, at the time of his doctorate held in the College of Law of the University of the city of Buenos Aires, between 1969 and 1972, the world was impacted by the cultural revolution provided by the movement known as May 68, an almost rupture, designated by Claude Lefort and Edgar Morin as "La Brèche", which consisted of a real social cycratic, a "hurricane that overthrew the traditional teaching method in the west" (Rocha, 2012, p. 205) and its legitimacy, having Warat immediately realized that this movement would come to Brazil.

In a context marked by the censorship of the military regime, Warat, with intellectual audacity, built a critical approach by incorporating semiotics as an analysis methodology. His challenging stance allowed him to break with traditional paradigms, even under political restrictions that limited academic freedom. In this context, he formulates his critical perception of the teaching of law based on the following thesis: "if the teaching of law based on analytics is a conservative and dogmatic teaching, perhaps there is the problem" (Rocha, 2012, p. 205).

Recognized for rebellious attitudes towards knowledge and the teaching of law, Warat sought not to be alone and so in 1972, after being invited by Thompson Flores to participate in the II Brazilian Meeting of Law Schools, held together with the I Latin-American Meeting of Methodology of the Teaching of the Law, in the city of Bagé of the state of Rio Grande do Sul, met the Professor Joaquim Falcão from the state of Pernambuco, who also had a bold profile for the time, surprised the legal circle of the

country by proposing ruptures. At the time, as coordinator of the Master's Degree in Law at the University of PUC/Rio, Falcão sought to insert political-sociological investigations into the curriculum of his course (Mondardo, 1992, p. 10).

For the said change, Joaquim Falcão had already hired Tércio Sampaio Ferraz Júnior and Boaventura de Souza Santos and, establishing an intellectual link with Warat immediately, when in the event of Bagé this "presented a communication on the importance of Semiology in the teaching of Law" (Mondardo, 1992, p. 10), invited the Argentinian professor to teach, in the Master's Degree in Law of the University of PUC/Rio, the discipline Semiology of Law, a utopian audacity, still influenced by the winds of May 68.

The life of Warat is confused with the history of the law criticism¹² that characterized the Brazilian graduate school of the eighties, which formed many lawyers who are now prominent in the national scene. He had as a great differential the ability to inspire people to gather friends around their ideas, motivation that by itself turned any meeting into a scenario of great affection and genius, especially in his philosophical cafes, in Cabaret Macunaína and other spaces (Rocha, 2012, p. 204).

Albano Pepe, in the preface to the work of Warat, recalls that surrealism was one of the "vessels that Warat uses to search for signs so that they free themselves from what is imposed upon them by meaning". For Warat "[...] as for the other surrealists, words as well as art do not exist to appease, [...], they exist to experience the [...] that only serves to castrate the desirous in each one". In this sense, he teaches to produce uncertainties and to walk on your own feet (Pêpe, 2010).

Warat, who called himself a "seduction addict", stood out for his ability to charm intellectually. Through sensory mapping - a methodology that maps perceptions and emotions -, he proposed creative ways of feeling, analyzing and reinterpreting the law, arguing that it must undergo a profound and transformative revision to accompany human and social complexities (Meleu; Thaines; Rocha, 2021, p. 615). Therefore, he always "invites us to adopt a poetic and Dionysian posture of the world [...]" (Rosa, 2010).

¹²Como outrora se destacou, "Warat se utilizaria, mais tarde, da ideia de 'pinguins'. Dizia que o sonho de todo estudante de Direito era se tornar o que já são os profissionais de nossa área: 'pinguins'. Todos iguais, sem desejos, sem vontades, uma padronização, além de tudo, estética. E, sobretudo, conformista e comprometida com os valores dos grupos dominantes" (Rocha, 2012, p. 209).

In the work: "A Rua Grita Dionísio" (The Street Screams Dionysius), Warat questions rationalism, since this leads to the loss of sensitivity, not letting realize that the street cries and is not heard by law operators or its institutions, points out that the common theoretical sense of jurists supports the practices of law, disciplining men from the Enlightenment to the present day. However, the author understands that rationality and the search for certainties are identified from two pillars throughout the development of this story. Therefore, from the psychoanalytic interpretations it can be said that one is in search of re finding with the great Other or responding to the impulses derived from the nostalgia of the first feeding¹³.

For the author, this legal rationalism would be the "evil of the century", since it leads to the loss of sensitivity in the way of perceiving the world, not letting the lawyers realize what "the street cries out", which makes them unable to think ways of emancipation. Warat highlights the need to overcome a model that aims to "symbolically legitimize the monopoly of state coercion" (Warat, 2009, p. 38). This idea was stated by Kelsen as one of the pillars of the Pure Theory, not having as normativism is an instrument of emancipation.

For Warat,

Entender a emancipação como as experiências que permitem aos homens se encontrarem com eles mesmos, com sua própria estima, e os permita construir vínculos de cuidado e afeto com os outros, que dizer, vínculos de alteridade. Com outras palavra, poderia conceituar a emancipação como o conjunto das experiências radicais de alteridade, entendendo esta última expressão como minha possibilidade de estabelecer vínculos de cuidado e afeto mais além do que qualquer distorção tóxica, que nos torne reciprocamente dependentes codependentes ou alienados (Warat, 2009, p. 38).

By characterizing postmodernity as a zone of risk, of indifference, Warat emphasizes that there are zones of hope, "escape zones that ensure the formation of a Society with more sustainable conditions of existence, that ensure ecologically the globalization of a major quality of life for all" (Warat, 1997, p. 5), which are linked to transmodernity. For the Argentinian professor, rationalism, in a way, barbarizes, because it does not resist the street sun, it does not oxygenate.

One of the escape zones for a more sustainable society, according to Warat lies in mediation, but such an institute executed by substantialist positions, in which the mediator is biodegradable, that is, it will disappear in a successful mediation. For Warat,

¹³Segundo Warat, "diz respeito à necessidade psicológica do homem de reencontrar com uma sensação de segurança derivada do momento mítico de sua imbricação simbiótica com a mãe" (Warat, 2010, p. 51).

O mediador ajuda, sem impor seu critério, as partes a decidirem, não tem poder legal para decidir, não emprega a palavra para persuadir, tenta ajudar a solucionar a controvérsia sem centrar tudo na adjudicação da justiça às partes, facilita o esclarecimento da posição e o grau de participação das partes no conflito. Tudo isto o torna, abstratamente, um intermediário imparcial, um condutor neutro (2018, p. 54),

In the view of Warat, mediation should provide a hedonistic climate, it does not seem reasonable that the end of the performance of the mediator is the formalization of the agreement. Mediation should provide mutual gain, and this occurs by stimulating a participatory dialogue of approximation with promotion and respect for difference, which allows to conclude that consensus is not and cannot be the end of the mediation process, being thus insufficient the Habermasian consensus (Thaines, Meleu, 2015).

Meleu (2014, p. 142) appoints a model of citizen-hedonist mediation, since, in Warat, the mediator must not worry about intervening in the conflict, in order to transform it, because many things in the conflict are hidden, but even if they are not evident, you can feel them. Moreover, in the conception of Luis Alberto Warat, "as for the other surrealists, words and art do not exist to appease, on the contrary, they exist to experience what is repressed" (Pepe, 2010). Mediation, in this conception, therefore assumes vital importance "as a revolutionary pedagogy of reconstruction of crushed bonds" (Warat, 2010, p. 18). This substantialist bias, after 15 years of the Resolution no 125 of the CNJ, which would lead to an adequate treatment of continuing relationship conflicts (family, neighborhood, among others), has not yet been implemented by the system, being in charge of some members of the Judiciary contrary to the goals and their proceduralism.

CONCLUSION

The present research aimed to investigate the introduction, in Brazil, of mediation as a legal institute, after the edition of the Resolution no 125 of the CNJ, confronting it with the thought of Luis Alberto Warat. In a retrospective analysis, the work recalls that both the emergence of that Resolution and the loss of the Argentinian philosopher (one of the exponents of the theory of Law in Latin America and that greatly contributed to the formation of legal education in the country and to the organization of graduate *stricto sensu* in Law), occurred in 2010, therefore 15 years ago.

Thus, considering that both the normative and the studies of Warat identify mediation as a legal institute capable of adequately dealing with conflicts, the study chooses as a research problem the following question: Does the structuring initiated by the Resolution 125 of the CNJ for the implementation of mediation in the Brazilian legal system meet or encounter the proposal of Luiz Alberto Warat?

The path to the presentation of a possible answer to the chosen research problem, part of the hypothesis that the proceduralism used by the CNJ for the implementation of the National Judicial Policy of Adequate Treatment of Conflicts is distorting the constitutional commitment to pacification of conflicts in favor of meeting quantitative goals.

For the purpose of investigating the hypothesis, the research demonstrated the paradigmatic change of access to Justice in Brazil, from a silent reform, necessary after the introduction of the model of democratic rule of law in the country, "aimed at ensuring the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society founded on social harmony and committed, in the domestic and international order, with the peaceful settlement of controversies" (Brazil, 1988). This commitment already described in the preamble of the Constitution, even if it does not have normative force, contains the explanation of the values of the new society desired after years of dictatorship.

In this scenario, not only the State has the duty to formulate public policies that can lead to welfare, equality and justice, but society will have to be organized according to those values, so that it affirms itself as a fraternal community, pluralistic and without prejudice. Soon after the promulgation of the Brazilian Constitution, there were legislative movements that culminated with the creation of the National Council of Justice, from the approval in 2004 of the Constitutional Amendment 45, and other reforms. Promoting the culture of conciliation and mediation, breaking with the litigant perspective, would help in building a fraternal society committed to the peaceful resolution of disputes, based on social harmony. With this laudable logic, new legislative changes were being implemented. In the civil process, there was an express determination that all actors of a constitutional jurisdiction should encourage conciliation and/or mediation, whether they are judges, lawyers, public defenders, prosecutors, among others.

The evolution of reforms establishes in the country a National Judicial Policy for the Adequate Treatment of Conflicts, from the introduction of the Resolution 125 by the CNJ. With it arise several actions to implement and strengthen conciliation and mediation, such as the installation and supervision of Judicial Centers for Conflict Resolution and Citizenship (Cejuscs), being these considered privileged spaces for the functioning of Public Policy, since they include the conciliators, mediators and other conflict resolution facilitators, as well as the servers of the Judiciary, to whom it is the development of these practices and the referral to the most appropriate door for the treatment of the narrated conflict. Being the door of conciliation more affected to conflicts of nature not continued, such as those arising from consumer relationship. Already the door of mediation should prioritize the treatment of continuing relationship conflicts, such as those related to family or neighborhood relationships.

It happens that, despite the undeniable zeal in the structuring of the National Judicial Policy for the Adequate Treatment of Conflicts, the National Council of Justice (CNJ) has been demanding from the servers the achievement of goals, with a view to reducing processes. For this, it stops to a proceduralism, which can help for the increase of conciliations, because in these the agreement is the end. However, this model of quanti justice is not consistent with the institution of mediation, which requires that the mediator be a facilitator of the resumption of dialogue by the conflicting parties. In mediation, the focus is not on agreement or the promotion of consensus, but on respect and the promotion of difference. In this way, an agreement may or may not be signed, the parties reach a consensus on the need to instrumentalize the treatment they agreed upon about the conflict. Therefore, the focus is on the restoration of relations, and this may require more time than the Judiciary has for the end of the sessions.

The re-establishment of relations that in Warat is translated by the resumption of affections, from otherness, therefore, concern for the other and his pains, identifies a hedonist-citizen model, therefore substancialist. This position values the Constitution and its values as binding and programmatic instruments, without which the fundamental rights and guarantees of the citizen will remain unprotected.

Given this scenario, the research concludes by answering the chosen problem, in order to confirm the hypothesis raised at the beginning, that is, that the proceduralism used by the CNJ for the implementation of the National Judicial Policy of with regard to the implementation of mediation, is distorting the constitutional commitment of

pacification of conflicts in favor of meeting quantitative goals, which contradicts the proposal of Luiz Alberto Warat.

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