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*Artículos Científicos*

## **La nueva gerencia pública como limitante de la mediación transformativa en México**

*The new public management as limiting of transformative mediation in  
Mexico*

*A nova gestão pública como limitação da mediação transformadora no  
México*

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## Resumen

El objetivo del presente artículo fue analizar la figura sobre la nueva gerencia pública y su impacto en el modelo transformativo de la mediación. Para ello, se usaron los métodos deductivo, documental, discursivo, sistemático jurídico y funcionalista. Los resultados señalan que el eje denominado *rendición de cuentas* —al focalizar su estudio en términos estadísticos cuantitativos, mas no cualitativos— obliga a los centros de mediación en sede judicial a priorizar la generación de estadísticas sobre acuerdos firmados por encima de la transformación de la conducta de los mediados, lo que impacta de forma negativa en el modelo transformativo y en la no reincidencia en los conflictos.

La limitación más importante fue la obtención de datos estadísticos específicos sobre el número de asuntos presentados y acuerdos signados ante los centros de mediación, siendo el principal hallazgo del estudio, en el sentido de que el Estado mexicano utiliza el modelo clásico de medición, el cual se centra en la obtención de un acuerdo entre las partes, con lo que se sostiene una política de reacción que se aleja cada vez más de la política de prevención del conflicto. Esta situación sirve para concluir que se debe eliminar la política de la nueva gerencia pública en los centros de mediación de sede judicial para brindarles la oportunidad de utilizar el método transformativo para la resolución de conflictos.

El supuesto hipotético del presente artículo consistió en fundamentar la necesidad de aplicar el modelo transformativo para la mediación dentro del Poder Judicial en México; sin embargo, la ideología de la nueva gerencia pública que ha implementado el Estado mexicano dificulta en gran medida los beneficios y alcances de prevención de conflictos y no repetición de los hechos, por lo que es necesario cesar el funcionamiento de la mediación con base en los principios de la nueva gerencia pública para que se puedan adoptar los fines de la mediación transformativa.

**Palabras clave:** administración pública, mediación, resolución de conflictos, sistemas jurídicos.



## Abstract

The objective of this article was to analyze the figure on the new public management and its impact on the transformative model of mediation. For it, the deductive, documentary, discursive, legal systematic and functionalist methods were used. The results indicate that the axis called accountability —by focusing its study in quantitative statistical terms, but not qualitative— forces mediation centers in judicial headquarters to prioritize the generation of statistics on signed agreements over the transformation of behavior of the part mediated, which has a negative impact on the transformative model and the non-recidivism in conflicts.

The most important limitation was the obtaining of specific statistical data on the number of cases presented and agreements signed before the mediation centers, the main finding of the study being, in the sense that the Mexican State uses the classic mediation model, which it focuses on obtaining an agreement between the parts, thereby sustaining a policy of reaction that is increasingly moving away from the policy of conflict prevention. This situation serves to conclude that the policy of the new public management in the mediation centers of judicial headquarters should be eliminated to give them the opportunity to use the transformative method for conflict resolution.

The hypothetical assumption of this article consisted in substantiate the need to apply the transformative model for mediation within the judiciary in Mexico; However, the ideology of the New public management that the Mexican State has implemented greatly hinders the benefits and scope of conflict prevention and non-repetition of the facts, so it is necessary to cease the operation of mediation based on the principles of the new public management so that the aims of transformative mediation can be adopted.

**Keywords:** public administration, mediation, conflict resolution, legal systems.

## Resumo

O objetivo deste artigo foi analisar a figura da nova gestão pública e seu impacto no modelo transformador de mediação. Para tanto, foram utilizados os métodos dedutivo, documental, discursivo, sistemático jurídico e funcionalista. Os resultados indicam que o eixo denominado accountability - por focar seu estudo em termos estatísticos quantitativos, mas não qualitativos - obriga os centros de mediação nas sedes judiciais a priorizar a geração de estatísticas sobre acordos firmados em detrimento da transformação de comportamento do



meio, o que impacta negativamente o modelo transformador e a não reincidência em conflitos.

A limitação mais importante foi a obtenção de dados estatísticos específicos sobre o número de casos apresentados e acordos firmados junto aos centros de mediação, sendo o principal achado do estudo, no sentido de que o Estado mexicano utiliza o modelo clássico de mensuração, que centra-se na obtenção de um acordo entre as partes, sustentando assim uma política de reação que se distancia cada vez mais da política de prevenção de conflitos. Esta situação permite concluir que a política da nova gestão pública nos centros de mediação das sedes judiciais deve ser eliminada para lhes dar a oportunidade de utilizar o método transformador de resolução de conflitos.

O pressuposto hipotético deste artigo consistiu em fundamentar a necessidade de aplicar o modelo transformador de mediação no Poder Judiciário mexicano; No entanto, a ideologia da nova gestão pública que o Estado mexicano tem implementado dificulta sobremaneira os benefícios e alcance da prevenção de conflitos e da não repetição dos eventos, por isso é necessário cessar a operação de mediação com base no princípios da nova gestão pública para que os objetivos da mediação transformadora possam ser adotados.

**Palavras-chave:** administração pública, mediação, resolução de conflitos, sistemas jurídicos.

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## Introduction

The simple application of mediation to specific cases in a discretionary manner — without a sense of order, nor a fixed objective, nor a specific model— is as useless as a trial without evidence. It is innocent to believe that mediation is a conflict resolution process that can be standardized for any problem, since that thought condemned the formal jurisdictional system and its sentences per production line, without taking into account the individualization of the parties. For this reason, the most suitable models should be established depending on the conflict to be resolved in relation to the objectives that the parties are trying to achieve in the mediation process. For this, the most ambitious models are the transformative and the associative, since they promise the structural change of people, which in the mediation model in court is not a minor issue and in various states is considered unreal.



In order to be able to study and better understand the phenomenon of the new public management (NPM), it is necessary to investigate the evolution that public administration has had in the world. In Germany, where the European administrative tradition has its cradle through the concept of cameralism, since the eighteenth century the development of an applied science of public administration aimed at studying the principles of an effective administration and approached mainly from two perspectives and moments different historical events (Gómez Días de León, 2015).

In France during the eighteenth century the science of the police emerged, which considers administration as the art of directing public affairs and has an essentially utilitarian purpose, a utilitarian theory that objectifies everything that enters its philosophy, including people (Gómez Díaz de Leon, 2015).

Finally, in the United States, the doctrinal currents that gave rise to public administration can be divided into three periods: the classical period, the political period, and the "program" period. The classic indicates that the essential purpose of public administration is to rationalize the methods of action of the Executive, and that it is necessary to eradicate from the practices of public servants the empirical disorder that dominated the administration at that time (Gómez Díaz de Leon, 2015 ).

This is how the origin of public management is found in the late 1980s and early 1990s in the neoclassical economic school of the Austrian school and the American public option (Guerrero, 2003), based on some principles of the administration Taylor's scientific and bureaucratic administration of Weber's model of legal-rational domination, aimed at developing the intraorganizational operating factors and influencing administrative modernization (León Corona y Cruz Badillo, 2014).

The new public management emerged in the Anglo-Saxon world to a large extent to account for and overcome the limitations of the old model of government performance, studied in the first decades of the last century by Max Weber, which is why the model of government he studied was known as the Weberian paradigm (Pineda Ortega, 2015).

The main ideas of this new system focus on trying to bring public production closer to private production procedures, but without directly transferring its methods -as managerialism proposes-, but adapting these methods to public production given the peculiarities it raises (Cejudo , 2011).



The phenomenon of the new public management is not new in Latin America either; For example, in Colombia the NPM can be found since 1992, with a normative framework derived from Law 30 of 1992 and Decree 1767 of 2006, through the National Information System of Higher Education (Salcedo Casallas, 2015).

In Mexico, the issue of public administration boomed until it was considered as a university degree in the 70s, being the topics to be dealt with the bureaucracy, the organization and functioning of the public administration, the administrative organization, the financial administration, the reform administrative, miscellaneous and the science of administration (Gómez Días de León, 2015).

The crisis of effectiveness, efficiency and legitimacy - chronic especially in Latin American countries - forced to reconsider the role of the government, the demand for quality in public services, and a better treatment of citizens and users of said services, which It placed the classic administrative model in a great dilemma (Villareal Solis, 2015).

In the 1980s, a trend of analysis of the administration from a fundamentally economic perspective developed with some doctrinal force as a consequence of the various economists trained in the United States, who later became embedded in the ranks of federal public institutions, mainly in the Banco de México and the Ministry of Finance and Public Credit. This - together with restrictive budgetary circumstances as a result of the recurrent economic crises in the country and associated with an accelerated globalization process - resulted in the transformation of the vision of public-administrative discipline from a traditional approach towards the one that later it would be constituted as public management, more specifically the new public management (Gómez Días de León, 2015).

Mediation as a pacifying and repairing tool for interpersonal relationships has different models that determine different objectives and priorities within a mediating process, with three models consolidated so far: the Harvard model, the transformative model, and the narrative circular model, of the from which more than twelve different subtypes emerge, which have small differences in relation to the previous ones, or are the result of the combination of two or even of the three models indicated (Nató, 2006).

In 1994, a year remembered by many events such as the beginning of the social rebellion in Chiapas (Mexico) or the bloody intertribal confrontation in Rwanda led by the ethnic groups of the Hutus and Tutsis, which resulted in a toll of nearly 800,000 victims fatalities and more than 2 million refugees. In that same year, Bush and Folger published a



text that opened - in terms of mediation - a new vision about how to face the conflict through self-empowerment and the recognition of others (Hernández Ramos, 2014). Likewise, they started a methodology that would focus on the improvement or transformation of human relationships, and not so much on the satisfaction of a certain need through the establishment of an agreement (Giménez Romero, 2001).

Specifically, transformative mediation helped address three important concerns that had emerged about the direction and evolution of mediation practice in the United States and elsewhere:

- a) Does the practice of mediation really offer an alternative process of conflict intervention?
- b) Do mediators exercise a clear purpose?
- c) Can mediation preserve its own capacity as a non-adjudicatory space for intervention in conflicts? (Folger, 2006).

Thus, the judicial apparatus is out of date in relation to the real needs of society and its economic and political context, which is why it is incapable of providing an adequate response to the incessant requests for the administration of justice that citizens demand every day. . In addition to the above, it seems that in the jurisdictional system we are more concerned with taking care of the formalism and sacred rituals with which a process is developed than with giving due solution to the true interests pursued by the affected parties and participants in the conflict. This results in a bureaucratized and ineffective justice, oblivious to the justice needs of the citizens and far from having at least an idea of how to solve them (Eiras Nordenstahl, 2010), although everything seems to indicate that they are not urged to discover it either.

As already mentioned, in the current justice system, the victims take a secondary role, and are called before the authorities only to repeat as many times as necessary the facts of which they were victims in order to describe what happened and to try to look for increasingly offensive and destructive details against the alleged perpetrator. However, the authority does not perceive that this constant systematic repetition of the events - scrutinizing or constructing a dark side of the events - also injures the victim, who is doubly victimized by the system in which she is forced to function if she wants to "obtain Justice". In other words, his true intention, his feeling and his thinking have been left aside, since everything is



replaced by cold norms, inert formalities and pretensions typical of a public servant (Revilla González, 2007).

For this reason, Pacheco Pulido (2012) refers to five aspects that influence the current situation of the penal system: the increase in criminality, the inadequate investigation of crime and offenders, the poor integration of the investigation portfolio, the overload of the courts, and the lack of satisfaction of the interests and needs of the parties.

In this way, there is a deficiency in the penal system with the reeducational or resocializing function that was entrusted to it, since at no time does it come off the social reality in those people who have gone through a formal jurisdictional process, and who ultimately They are sentenced to serve a custodial sentence in a prison without having developed a radical change in their daily actions, in their mental structure or in the way they live and develop with the rest of the community that surrounds them. Furthermore, the deplorable conditions in which some social reintegration centers are found - at the local and federal level - are not considered, where they do not have the necessary programs and infrastructures to approach a true re-socialization and social rehabilitation. In other words, if the purpose of the criminal process is only to show the historical truth of the facts and consequently reach the legal truth, at what point does the criminal process intend to re-socialize or re-educate the offender if the interpersonal relationships of the protagonists of the crime are ignored. crime, as well as their personal needs (National Human Rights Commission [CNDH], 2018)

Similarly, recommendation R (87) 21 adopted in September 1987 on assistance to victims and prevention of victimization of the committee of ministers of the Council of Europe indicates that in many cases the mere intervention of the criminal justice system is not enough to repair the harm and damages caused by the crime. For this reason, the need to create another type of intervention to assist victims of criminal conflicts is considered, resolving their real claims (Committee of Ministers of the Council of Europe, 2014).

Hence the need to seek alternatives to the saturated and collapsed formal justice system, having as the most viable alternative the paradigm of alternative justice and its alternative conflict resolution mechanisms, which find a place in the national constitutional framework in the reform of June 2008, specifically in the current fifth paragraph of Article 17 (*Diario Oficial de la Federación [DOF]*, 18 de junio de 2008).





## Method

For the development of the study and organization of knowledge, the following methods were used:

**Deductive:** It was based on general principles, models and paradigms, such as existing mediation models and justice administration paradigms in order to descend into specific realities, such as the use of a particular model (such as the transformative one) and its performance in an individualized problem (such as conflict resolution through mediation in court).

**Documentary:** The main information gathering base was scientific texts (books, articles in indexed journals and legal regulations). Likewise, various ideologies and paradigms were gathered and compared according to the works used, which is why it is considered an exploratory documentary investigation.

**Discursive:** The object of study was approached indirectly, contemplating it from different points of view, optics and ideologies to generate a precise and complete idea, in this case, the study of existing mediation models in combination with public administration systems and conflict resolution systems.

**Legal systematics:** apparently isolated elements were brought together to turn them into a new reality, unifying a new interpretation of these, in this case, the analysis of self-composing conflict resolution figures and the paradigms of public administration. Their theories were unified to know the impact that one has in relation to the other, specifically the impact suffered by alternative means of conflict resolution in relation to the change and imposition of new ideologies of public administration.

**Functionalist:** When analyzing both the phenomenon of mediation and the institutions in charge of imparting it in court, as well as the public management and the institutions that make use of such ideology in relation to their ability to satisfy social needs, specifically in the area of administration of justice and conflict resolution.

## Results

The phenomenon of mediation has different models, which help us to understand its aims and objectives; However, there are three that are recognized globally as the most relevant, as they are the basis for the development of the rest of the existing models within mediation; These are the Harvard model, the narrative circular model, and the transformative



model. What can be considered relevant within the latter is to use the conflict as an opportunity to transform human behavior; that is, the moral growth of each person is fostered through their revaluation (Baruch Bush and Ganong Pope, 2008). In this model, to solve a conflict, one personal right is not confronted with another, but rather the common good and communitarianism are sought. Therefore, the priority is the satisfaction of the general interest over the particular interest, repairing as much as possible the social fabric damaged by the conflict (Márquez Algara, 2004) and stating that mediation is the perfect opportunity for individuals to be more supportive each other (Izasa Gutierrez, 2018).

However, it also has detractors pointing out as the main disadvantage of transformative mediation that it presents a space that we could call of "misunderstanding" on the part of the mediator, since by leaving the media to direct the communication within the session, it becomes a process of mutual recriminations. This practice of distancing by the mediator has been fostered by the transformative model by stating that only in this way can the parties be strengthened, which is a cornerstone for the transformation of behavioral views (Madrid Lira, 2016).

Before fully addressing the issue of public management, it is necessary to specify what is understood by public administration, defined countless times by various writers. According to Luther Gulick, it is that part of the administration that understands with the government, "especially with the executive branch of the government, which is in charge of carrying out the work of the government, in such a way that the public administration it is a division of the political sciences and one of the social sciences" (Gómez Días de León, 2015, p. 24).

Unfortunately, the justice administration system in contemporary Mexico is immersed in an operational crisis that brings about an intense erosion of its credibility before society. This is reflected within the Rule of Law Index 2017-2018, carried out by the World Justice Project, where Mexico was ranked 99th out of 126 countries evaluated, an index that rates issues such as limit of government power, absence of corruption, government open, fundamental rights, order and security, regulatory compliance, civil justice and criminal justice.

The scores obtained within the various areas in which Mexico was evaluated are the following:



- a) limit of governmental power 84/126;
- b) absence of corruption 117/126;
- c) open government 35/126;
- d) fundamental rights 73/126;
- e) order and security 117/126;
- f) regulatory compliance 87/126;
- g) civil justice 113/126 and,
- h) criminal justice 115/126 (World Justice Project [WJP], 2018).

One of the reasons that have led to the existence of this crisis is due to the progressive increase in conflicts before the courts, which have generated a saturation and destabilization of the judicial system, since the culture that they have inherited is based on the idea of that everything must be resolved through violence (that is, through jurisdictional procedures). As a society we do not really seek justice, but rather that the other person, the suffering of the other party, be punished for whatever their actions may have been, that is, legalized revenge (García Carvajal, 2006). Due to this, alternative paradigms of administration of justice have been adopted other than the ideology of retributive justice, in which theories aimed at the minimum intervention of the State have special relevance, such as criminal abolitionism, criminal minimalism, contractualism Nozick's, Ferrajoli's guaranteeism, Carlos Nino's consensual model, the criminal law of alternatives, restorative justice and alternative justice, among other ideologies.

Claus Roxin considers that one of the most important tasks that criminal law has is to find solutions to conflicts that allow restoring social peace, since these come to disturb the population. In the same way, it points out that it will always be willing to prioritize conciliation and dialogue to resolve their conflicts, in the case of petty crimes or where no physical or material damage is suffered (Nino, 1980).

This is how the path towards the minimum intervention of the State in the resolution of social conflicts is traveled until reaching restorative justice and its great ally, alternative justice, within which alternative mechanisms of conflict resolution as means effective impact in reducing recidivism of the conflict.

The implementation of mediation programs in judicial headquarters is aimed at access to justice, judicial referral, decongesting the courts, institutional image, awareness of mediation among citizens and officials of the Judicial Power. The fact that mediation and



resolution systems are dependent on the judicial powers should generate two important changes: first, the change in the perception of citizens who must now know that they can have harmonious solutions to their conflicts, and second, that justice personnel must internalize this fact (Soler Mendizábal, 2011).

Now, along with the changes brought about in the paradigms of the administration of justice, the Mexican State opts for a change of ideology in public management and its institutions; This new ideology is the so-called new public management (Sánchez González, 2010).

Among the various definitions that the NPM has, two of them stand out: “it is defined as the set of knowledge and practices that allow improving the rationality of the State's administrative management in social terms” and “public management supposes a focus on a strategy (rather than a managerial process) on interorganizational relations and on the intersection of management and public policy ”(Cepeda Islas, 2006, p. 4).

The new public management is an attempt to get rid of the Weberian bureaucracy, in which the leader held his position of power within a framework of legal competencies that placed him at the head of a rigorously hierarchical administrative body composed of free individuals, which were subjected to rigorous surveillance and discipline. This ideology, however, became out of date after the Second World War due to its low levels of effectiveness and high percentages of discretion, opacity and corruption, which opens the doors to public management (Martínez Vilchis, 2009). As Cepeda Islas comments, “the objective of public management is to improve the government's capacity to achieve an increase in governability and have administrative processes in conditions of continuous improvement, and thus solve efficiently and expeditiously the problems that society presents ”(Cepeda Islas, 2006, p. 2).

However, the paradigm clash that is observed has to do with the principles of the implementation of the new public management in the administration of justice and specifically in alternative justice, in accordance with the objectives that are intended to be achieved with the application of the transformative model of mediation.

The objectives pursued by the transformative model are the transformation of the ideas of the people who intervene in the mediation process, generating a new vision of fighting the conflict, especially of social coexistence and personal development; that is, the



culturization and moralization of people, improving interpersonal relationships between the protagonists of the conflict in a deep and permanent way.

The foregoing becomes relevant if the pillars or characteristics that support the NPM are observed, these being:

- a) the subindex vision of the citizen as customer,
- b) the sub-index greater use of information technology,
- c) the decentralization sub-index,
- d) the accountability sub-index,
- e) the sub-index planning and strategic management,
- f) the contracts subscript and,
- g) the transparency subscript (Martínez Vilchis, 2009, p. 205).

The sub-index of “accountability” is of special relevance, which can become a severe limitation for transformative mediation in court, because —as already mentioned— consists of the constant evaluation of administrative performance on the use of resources. public based on the goals and objectives set, being the most important performance and results obtained. In this sense, statistics and cold numbers are prioritized over substantial changes and substantive benefits that the public service can make; in this case, mediation in court through the transformative model.

## Discussion

The analysis of the phenomenon of public management is necessary to establish the viability of its implementation and functionality within the institutions in charge of public administration (specifically in the administration of justice), since its ultimate purpose is to transform government institutions to to move from the classic bureaucratic apparatus to a business model, where the objective is to meet people's needs (Arellano and Cabrero, 2005).

The ideology of the new public management prioritizes the operational apparatus, the formalism and the number of people served by public institutions, thereby neglecting the medium and long-term effect that these services may have. Such a situation forces mediation centers to generate agreements as a production line in order to justify its functionality as adequate and, above all, to justify the budget granted annually.

At the national level, the number of cases concluded by alternative justice bodies, centers or units has decreased by nearly 30% between the years 2013-2015, despite the fact



that the personnel working in alternative justice centers - considering the personnel operational and administrative at the national level— has increased by around 20% in the same period, while the number of mediators has remained (Martínez Solís, 2017).

This measurement structure where the institutions or centers in charge of alternative justice in judicial headquarters will be evaluated by the number of files that they resolve regardless of their social impact, or the issue of the recurrence of the conflict, comes to destroy the hopes of a culturalization and moralization by mediation, specifically of transformative mediation. It should be noted that the different mediation models have as their primary objective the structural change in people, which needs enough time to achieve these substantial changes in the media, time that the new public management will not grant, as this would limit the number of cases or files that can be resolved.

This is so because mediators are forced to worry about achieving the signing of an agreement or agreement, which legally translates into the solution of a conflict, thus increasing institutional statistics, an essential element in the new public management, regardless of the moralization or structural change of the mid.

## Conclusions

The constitutional reform of June 18, 2008 in criminal matters - through which alternative justice is established as a pillar of the accusatory criminal system - brought with it an obligation for the federal entities to legislate and offer within their local regulatory frameworks the figure of the alternative means of conflict resolution and its pacifying tools, being the State itself through its alternative justice centers dependent on the Judicial Power those who took the lead to enter and implement the restorative paradigm in Mexico.

The ideal of mediation in court is the proper functioning and updating of the objectives set by the models used; However, the fact of being immersed within the state scaffolding makes them dependent victims of the deficiencies and shortcomings of the State itself, such as lack of budget, lack of personnel, insufficient work material and perpetuation of the vices of the institutions public. This greatly limits the scope of mediation and the type of model that can be used, the most popular being the Harvard model for its ideological practicality.

The mediation model that must be implemented in the alternative justice centers in judicial headquarters is the transformative one, since its main objective is the revaluation and



moralization of the media, which has a direct impact on the reduction of conflicts through of acculturation, prevention and non-recidivism.

The adoption of the ideology of public management is the response that is currently permeating within the institutions or entities of the State in Mexico to respond to the crisis of justice that prevails in the Mexican state, an ideology of public administration that weighs the efficiency of institutions, adopting the characteristics, principles and ends through which private companies function and are conceived.

Unfortunately, the implementation of public management in the administration of justice policy in Mexico has had a negative impact on the application of alternative dispute resolution mechanisms, since it is a model that focuses on quantitative and statistical factors, which they measure their success according to the number of issues that end with a signed agreement, regardless of whether it has a substantial or qualitative impact on the vision and structure of the mediation. In other words, the important thing is whether it helps to reduce recidivism in the conflict, a situation that will inevitably lead to the saturation of the accusatory justice system, since alternative justice is not capable of eliminating 90% of the total cases that are presented to jurisdictional instances, which generates the ineffectiveness of the system and its collapse. As an example of the above, in 2017 158 120 cases were entered into the specialized bodies, centers or units in the Alternative Justice System and / or Alternative Dispute Resolution Mechanisms, according to data from the National Institute of Statistics and Geography.

For all these reasons, it is essential to eliminate the ideology of public management in the alternative justice centers in judicial headquarters, by greatly limiting the benefits and scope that transformative mediation can generate, and at the same time forcing the system operators to use only one mediation model (the Harvard model), since it is the one that best responds to the demands of the new public management.

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