Los mecanismos alternos de solución de conflictos en la ley penal nacional.

Alternate dispute resolution mechanisms in the national criminal law.

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Resumen

El presente estudio tiene como objetivo fundamental desentrañar la aplicación actual y real con la cual cuentan los mecanismos alternos de solución de conflictos, dentro del sistema acusatorio, a través de las legislaciones nacionales en materia penal que imperan en nuestro marco normativo, específicamente en el Código Nacional de Procedimientos Penales y la Ley Nacional de Mecanismos Alternos de Solución de Conflictos en Materia Penal.

Para tales fines, fue dable la utilización del método comparativo para contrastar la realidad de los sistemas de impartición de justicia en donde se basan estas nuevas legislaciones, así como el método deductivo, documental, exegético, sistemático jurídico y dialéctico.

Dicha situación arrojó como resultado la ubicación precisa de las diferentes deficiencias con las cuales se maneja el tema de la justicia alternativa dentro de las leyes nacionales penales y dentro del propio sistema de impartición de justicia, así como sus posibles soluciones.

Palabras clave: leyes, justicia, conflicto, resolución.

Abstract

The present study aims unravel the current and actual application which have alternative mechanisms for resolving disputes, within the accusatorial system, through national legislation in criminal matters prevailing in our regulatory framework, specifically in the National Code of

Criminal Procedure and the National Law of Alternate Mechanisms of Solution of Conflicts in Criminal Matters. For such purposes, the use of the comparative method was be to contrast the reality of the systems of justice where these new laws are based, as well as the documentary, deductive, Exegetical, systematic legal and dialectical method. This situation gave as a result the precise location of the different shortcomings which is handled the issue of alternative within the national criminal laws and justice within the justice system, as well as their possible solutions.

Key words: laws, justice, alternative, conflct, resolution.

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Introduction

As a result of the reform raised in criminal matters in June 2008, a structural change was generated in Mexico justice system, which passes a mixed system with inquisitive shades to a mixed system with accusatory predominance.

This reform represents a paradigm shift on the issue of administration of Justice, every time we will change the way in which we conceive the criminal process, from his research up to the stage of resolution, situation that impacts each and every one of the operators of the judicial system, as well as the population in general. Similarly, we have to keep in mind that this change management system and justice does not only, but brings with it an element that serves as a complement and that it also gives functionality to the accusatory system, that element is the alternative justice and alternative dispute resolution mechanisms, and it is precisely the subject of alternative justice and mediation in criminal matters which we esteremos addressing, every time that it has become a toral theme in the implementation of this new system of criminal justice, since without the proper functioning and implementation of alternative justice, such a system would be surpassed by the number of issues that will be made of their knowledge, sinking it into a crisis of functionality.

Such a situation is that we will be leading to the study of alternative justice, but specifically in the criminal matter and, above all, their implementation by the legislator in the national criminal laws of Mexico, in order to be able to determine failures which have been shouldered with the

constituent at the time of the land issue, but above all to offer possible solutions to these shortcomings. Every time that we want to the adversarial system to work correctly, national legislation in criminal matters should be complemented when talking about alternative justice.

Comparison between the adversarial system and the inquisitorial system

To begin with and later be able to make a comparative study between the systems of law enforcement accusatory inquisitorial system, to be defined in a timely manner what we mean when we talk about a system of law enforcement or judicial system.

Therefore we can define a procedural system is the set of principles and guarantees that define the role played by the protagonists of a judicial process, imposing a set of principles that will guide the procedural subjects in the right direction for the resolution of their claims (Chorres, 2010).

This situation throws us to the conclusion that all procedural system or system of administration of justice shall cover a philosophical-legal ideology, which must meet the current needs of society or community in which it is intended to implement such a procedural system, being the primary the need for security and proper administration of justice, just as should be as clear and precise as possible because this will be eradicated with further own discretion and subjectivity of a fallible system and managed by individuals with different idiosyncrasies.

This reminds us that the most important thing when implementing a new system of administration of justice, is the training of persons responsible for giving functionality to the system, because if this area is weak all the extra efforts we make to to jump-start the system will be in vain, no matter how well done is legal reform, or policy expert in the matter, nor matter how impressive architectural structures are in charge of hosting the new procedural system. All this will fall apart if not solidify the preparation and training of users and players in the process, so we should start by defining precisely each and every one of the new concepts that will bring this new system rigged.

Having said the above, let's study the differences and similarities that keep the inquisitorial system and the adversarial system.

Inquisitive system

This system is characterized by concentrating all the functions and powers of the state, that is, its sovereignty, a single person, has its origins in the thirteenth century, finding its greatest representative in ecclesiastical jurisdiction. In this system both the concentration of power in one person it was combined with the secrecy with which the processes were developed, making nonexistent the principle of publicity, a situation that was exploited to perform processes to the extent where it is incriminated and he sentenced to whom the sovereign wanted, leaving the individuals identified as guilty, helpless against such overwhelming concentration of power, and unfortunately, the corrupt power, as this accumulation of powers became fertile ground for the corruption and procedural irregularities (Reyes Loaeza, 2011).

Similarly, we find that the inquisitorial system has become quintessential in the system used by authoritarian countries and away from democracy, since the common denominator of these countries is prosecuting crimes informally, without I allow the injured party (Armienta Hernandez, 2011) involving, in addition to the system where the authority that investigates the facts is equally the authority resolved the conflict, that is, there is no separation of functions, coupled with the free evaluation of evidence is nonexistent, as it is based for the assessment of the means of conviction in legal proof, leaving aside the study and reasoning of the judge (Zamora Pierce, 2011).

Furthermore, in the inquisitorial system of conflict resolution through autocompositivos methods is virtually impossible, since the most important thing in this system is the punishment of the person identified as the culprit, ie, in this system what is sought is the imposition of increasingly severe penalties, in order to frighten the rest of the citizens, without taking into account the real needs of the victims or the perpetrator, a situation that leads us in an inadequate strategy to combat crime.

Finally, we note some of the characteristics that have shaped the inquisitorial system, starting with the fact that in this system the court is the protagonist of the process, relegating the parties concerned bystanders and repeaters to investigate the facts; secondly we have the accumulation of powers, such as to investigate and prosecute, both minted in one figure; then we have a process where the majority will be developed for print media; thirdly, we find that the religious test saves considerable probative value and, finally, the further purpose of the system is the apprehension and punishment of a person who is to impute criminal acts, who will be imposed severe penalties.

This is because the basis is the exemplification through tougher penalties, to persuade the general public to refrain from committing any act (Gonzalez Obregon, 2014).

Adversarial system

Now, let the study and analysis of the adversarial system, which will be implemented in full at the latest Mexican legal system in 2016, however, most states have instituted this system either greater or lesser extent .

This system has its origins in ancient times, where a group of people emerged from the community were responsible for judging the accused, taking the burden of proof the prosecution, and where the procedural impetus was given by the affected. Similarly, when evaluating the evidence submitted by the parties, it performed for ceremonial way, as they were not obliged to justify its decisions, to finally determine the guilt or innocence of the accused, thus ending the process , since at the time this procedure did not allow any appeal (Reyes Loaeza, 2011).

However, with the inclusion of Roman law breakthroughs were achieved, including the implementation of the principle of innocence, disappearing the Community courts, giving way to the courts made up of civil servants and state-dependent, the characteristics of orality and publicity remained and remedies were added to the resolutions issued by the court (Loaeza Reyes, 2011).

Currently, one of the most important features with which account the adversarial system that separates the powers of investigation of the functions of judge, establishing an authority for each function, resulting in the contemporary accusatory system torales three figures: the prosecutor or public ministry, responsible for research, direct assistance to the security, the supervisory judge, responsible for ensuring the protection of human rights of the people involved in the process, and the judge or court trial, who determines the final stage of the system, the guilt or innocence of the accused (Zamora Pierce, 2011).

As was held in paragraph of the inquisitorial system, we point out some of the most important principles which are of the adversarial system, taking first the fact that the court has regard to their duties vigorously, with the parties responsible for giving procedural procedural momentum, and when they are the protagonists. Likewise, we see a clear distinction and demarcation of roles of each of the agencies involved, which investigates, the accuser and sentencing. As a third point, we note the free assessment of the evidence by the judge, a situation that represents an advance in

the way of administering justice. The next serious point orality as a guiding principle of the adversarial system; similarly, in the adversarial criminal system it exists selectivity, where the authority may determine which facts may be subject to investigation and which are not and can be solved by alternative means (Gonzalez Obregon, 2014). Finally, the present system is implemented as a basis for operation alternate dispute resolution mechanisms, where the parties take up the role when resolving their disputes, always using mechanisms based on dialogue, understanding, empathy and tolerance (González Obregón, 2014).

Thus, we examine some of the details of both inquisitorial systems as accusatorial, from which we can infer that in the legal world there is no pure system, ie, there is no functioning state under a system of purely accusatory or one purely inquisitorial; we have are mixed systems with accusatory questioning trends or trends.

Likewise, taking into account the fact that in our country the mixed accusatory system will be set up, we should not forget that for this system to be truly successful at the time of implementation and produce results when it is necessary first and as a sine qua non, prior and have properly implemented the various alternative mechanisms of conflict resolution, because if we do not implement these alternative mechanisms correctly, unifying concepts, criteria and characteristics in all states of the republic, we stumble with different results when operating the new accusatory system, as are these alternative mechanisms, which will provide new functionality to the system, taking the weight of more than 90% of all matters are processed in court, reiterating that not to apply these tools of alternative justice evenly, we have resulted in the inevitable failure of the new accusatory system.

ANALYSIS OF NATIONAL CRIMINAL PROCEDURE CODE

On 5 March 2014, it was published in the Official Gazette the new National Code of Criminal Procedure, which came to unify the procedural standards in criminal matters in the Mexican state, a situation that brings many benefits, among which the approval process across the country, from procedural lapses to formality requirements, a situation that creates legal certainty for citizens to face criminal proceedings, regardless of the territory where they are.

Another of the successes with which account this new procedure code unique is the fact that contemplates various alternative solutions to criminal proceedings, in order to avoid double victimization of those affected and promotes the delay in proceedings. Within these alternative

solutions we can mention the compensation agreements and conditional process suspension, both figures referred to in this new procedural law, with the figure of compensation agreements which interest for this investigation to be the one directly related to the alternate mechanisms settlement of disputes. This is so as to provide functionality to such compensation agreements, it is necessary to use the tools provided by the alternative justice, a situation that deserves special recognition, as we are in the presence of a different way of administering justice, where the real needs of the affected parties are actually taken into account and are resolved by themselves, thus materializing the new paradigm of fighting crime, based on restorative justice.

However, not all are positive points in this national code, the above is so because if we address in a timely manner the issue of compensation agreements are some shortcomings, which will point out below in order to propose possible solutions.

Our new National Code of Criminal Procedure defines compensation agreements and those agreements concluded between the victim and the accused or injured party, can come to conclude the criminal proceedings, as long as previously approved by the public prosecutor or judge control as appropriate.

However, in this definition are some shortcomings, the first one in the sense that it makes a rather vague conceptualization of compensation agreements, since one merely states that compensation agreements are those where the victim and offender can reach a settlement, but never mentioned by what alternative mechanism will be reached that agreement, that is, through mediation, conciliation or negotiation, which leaves us in a legal uncertainty about as if you do not know what mechanism we use, we can not define who may participate in drafting the agreement, much less with what powers a third party may intervene in the agreement, or if a third party will intervene.

Secondly we find that has limited the use of these compensation agreements, because the legislation itself states that can be used even before the car decreed to trial, a situation that has to limit its scope and for other benefits , since if these compensation agreements respond to the ideology of the alternative justice, it is known then that no matter what stage or procedural moment are used as intended future use of these mechanisms is not only to resolve conflicts between individuals , but its aim is to repair relationships that were damaged by the unlawful, which can be performed even after judgment issued by the court or judge trial.

Finally, we note as deficiency of this procedural figure, the fact that these agreements take effect prior approval by the public prosecutor or the judge of control is needed, as appropriate, thereof, which It is certainly contradictory to the purpose for which they were created these tools of alternative justice. But if it is true it is not their highest end, it is equally true that one of its advantages and benefits of these alternative mechanisms is that they will reduce overwork with which account the system of administration of justice in the country, not facts to inform you of little social relevance or low impact and involvement for those involved, but the fact of forcing the parties to have to appear before the judicial authority or to the Public Prosecutor, to authorize the drafting of an agreement made between the parties concerned, not only does not reduce overwork with which these bodies have and justice, but comes to pollute the ideology of alternative justice, bureaucratized these compensation agreements with requirements that have no reason for being and only hinder the prompt and expeditious justice, and trust and the claims of individuals to settle their disputes through these mechanisms.

Situation in which the agreements emanating from the mediation or conciliation sessions, must have sufficient strength and legal elements to be implemented without the need for the intervention of another authority outside the process, such as the judge or prosecution.

ANALYSIS OF THE NATIONAL LAW OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN CRIMINAL MATTERS

Like as with the National Code of Criminal Procedure, on 4 March 2014 the decree by which the National Law Alternative Dispute Dispute Resolution Criminal Matters is issued is published, which becomes the ideal for this new criminal reform in our country, and that this new legislation is to shore up what has been done by legislators in other criminal laws complement.

This is so because through alternative dispute resolution mechanisms and only through these mechanisms, implementation of the new accusatory system will have functionality and validity, yielding positive results in the fight against crime.

However, this measure also saves aspects that can be improved, but this investigation alone I will mention two of the most important aspects that I think should be corrected, as they form the element without which there can move to thrive future in the delivery and administration of criminal justice, and not only that, since its amendment would entail no error in the implementation of alternative mechanisms. These aspects are as follows.

First there is the fact that the law of alternative mechanisms in criminal matters, only refers to two figures from the world of alternative justice, conciliation and mediation, although it is true both figures are the most representative pillars of the justice Alternatively, it is also true that they are not the only tools which can draw as it would be pushing aside, among other figures, negotiation, alternative method that holds great benefits and can be used the same way as its like. However, in negotiating the parties may agree directly without a third party involved in the process, or they can include representatives of each of the parties involved, which would be carried out subject to the negotiation process.

Secondly we note the figure of restorative procedures, which the law defines as one mechanism in which intervenes the victim, the accused and possibly the affected community, where they seek to find solutions to the conflict that afflicts, with the purpose reintegration of both victim and perpetrator, society, and the recomposition of the social fabric.

From the above I can point out that I agree with this idea in part, because in these processes should involve not only the protagonists of the conflict, but all those who were affected by the illegal, besides putting as ultimate goal recomposition social fabric and reintegration of the victim and offender to the community, meeting situations with which I totally agree.

However, at the point where I do not agree on it is the fact that encases the restorative processes as a further process, ie, places restorative processes alongside mediation, conciliation and negotiation, without taking into account that in speaking of restorative processes we are talking about a much broader than just an alternative conflict resolution mechanisms entity; We are talking about a whole new ideology aimed at resolving conflict non-adversarial manner.

This is so given that the International Institute for Restorative Practices defines these processes as an attitude and different way of life, which is to generate awareness and social discipline in people through a culture of common participation, In order to provide a new way to face life and its vicissitudes, linking this with theory, research and practice in various social fields (Wachtel, 2013).

Finally, in relation to the above points, we can mention that restorative processes are not just a procedure coated formality for a specific purpose, but they are all procedures that aim to resolve the conflicts of the people, where priority is the repair of the social fabric of interpersonal relationships, ie restorative processes encompass each and every one of the processes sharing this new vision to combat crime, through dialogue, empathy, understanding and tolerance, where we

can mention mediation, conciliation, negotiation, family conferences, peace circles, victim assistance, assistance to ex-offenders, among others.

In sum, we conclude that restorative processes are much broader than just that of a specific formalities and procedure with one definite end paradigm. Are a shared ideology, materialized through mechanisms or tools that rely for their operation, dialogue and understanding of others.

And third and last point I want to mention the fact that more than complement when addressing the issue of compensation agreements and mediation in criminal matters, both the National Code of Criminal Procedure as the National Law on Alternative Mechanisms solution Conflict in Criminal Matters, are opposed, since the national code has created a new figure in the alternative justice in criminal matters, which I call compensation agreements, and which endowed properties and own definition, leaving side by mediation and conciliation.

In addition to this, the legislature limited the scenarios which may use the AC outlet to criminal prosecution called compensation agreements specifying the times and the circumstances in which we use it, however, does not mention in what stages process, or in which offenses can make use of mediation to resolve the conflict, since it is silent when it comes to legislating on the issue.

This certainly leaves us in a state of helplessness when wanting to apply mediation or conciliation in criminal matters, since they think that compensation agreements and mediation and / or conciliation are synonymous, is to be in error. This is because these legal entities have features and elements that distinguish them from one another, also if we consider the preamble own national procedural penal code, we can see that the compensation agreements are nothing but the result of use mediation and / or conciliation in criminal matters, ie, compensation agreements are the consequence of having used the alternate mechanisms in criminal matters, and not an alternative mechanism for conflict resolution, as will be reflected in the standard.

Along these trips, correcting-quoted standards, in order to achieve genuine complementarity and coadyuvancia in the field, it is required ie you must remove the figure of compensation agreements that includes the National Code of Criminal Procedure and refer the issue and the chapter on alternative solutions to criminal proceedings, the National Law Mechanisms of Alternate Dispute Resolution Criminal Matters, where it must meet established there, which is the use of mediation and conciliation in criminal, adding that law procedural times and offenses likely to be subject to an alternative process such as the mediation and conciliation.

CONCLUSION

From the foregoing, we conclude that the inclusion of alternative mechanisms for conflict resolution to the legal reality of the regulatory framework of our country, is a process that will take time, where you have to emphasize principle of accountability in training managers to spread this new paradigm of conflict resolution, ensuring that both the concepts, principles and purposes thereof, are approved, in order to have a homogenized approach in users of these mechanisms.

Likewise, it is possible to note that the homogenization of criteria to help the authorities responsible for the administration and enforcement in our country do not have differing views, and run the risk of falling into the contradiction of criteria above apply only may be possible if we cooperate civil society, authorities, researchers and all those with an interest in the subject because it is a problem that should behoove us all, each in his own trench. If we do so, unless we work together and bringing our expertise to the successful implementation and operation of this new system and its most important foundation, alternative dispute resolution mechanisms, can hardly aspire to have a truly functional system that meets the needs of society regarding the administration of justice.

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