MEDIATION AND ACCESS TO JUSTICE IN CHILE: THE CASE OF HEALTH. NOT ALL THAT GLITTERS IS GOLD

MEDIACIÓN Y ACCESO A LA JUSTICIA EN CHILE: EL CASO EN SALUD. NO TODO LO QUE BRILLA ES ORO

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Abstract[3/4/5]

This article critically examines the regulation of mandatory health-care mediation in Chile and its impact on the right of access to justice. The objective is to assess whether the Chilean framework—which requires mediation as a compulsory pre-trial step before filing claims against public healthcare providers—is compatible with the structural principles of civil procedure and with effective judicial protection. The hypothesis suggests that this model is incompatible, or at least produces significant tensions, with the principles of impartiality, equality of arms, and voluntariness that should guide consensual dispute-resolution mechanisms. Methodologically, the study relies on a dogmatic analysis combined with a critical review of the applicable legislation, supported by doctrinal and comparative sources. The results indicate that mandatory mediation exhibits important deficits regarding impartiality, limits immediate access to the courts, and weakens the judiciary's protective function. The article concludes that, given the absence of sufficient legal grounds to justify restrictions on access to justice, the mechanism should be redesigned by reaffirming the voluntary nature of mediation and preserving the central role of judicial proceedings in the protection of rights.

Keywords: *Mediation, Access to justice, Impartiality, Due process, Health-care disputes.*

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Remarks: Civil Procedure Reform and the Need to Redefine the Role of Alternative Dispute Resolution and Mediation.

1 THE JUDICIAL FUNCTION AND THE JUDICIAL PROCESS AS SAFEGUARDS

One of the most controversial issues arising from moving beyond a proceduralist approach and undertaking an in-depth analysis of the fundamental institutions of procedural law concerns the function attributed to jurisdiction, which is exercised through the judicial process as its instrument.

Indeed, the legal scholarship has been prolific on this subject[6], giving rise to an ongoing debate regarding the function of jurisdiction. This debate has revolved around different conceptions of the nature of the State's power and duty to administer justice, echoing the classic formulation that introduces the most widely cited definitions of jurisdiction. On the one hand, those who maintain that jurisdiction and the judicial function are directed towards the resolution of disputes; on the other hand, others attribute to them the function of applying and giving effect to objective law in specific cases, a distinction that has significant implications for the function assigned to the judicial process as an instrument[7].

It is agreed, as a starting point, that the protection and enforcement of objective law constitute the core of the jurisdictional function[8]. However, it should not be overlooked that, in most cases of civil jurisdiction—which is the focus of this article—that function is exercised precisely in the context of a dispute between parties. In this respect, jurisdiction seeks not only to protect and give effect to objective law, but also to resolve disputes between the parties, with the ultimate aim of achieving social peace.

This means that the jurisdictional function is exercised in specific situations for safeguarding the law, with a view to ensuring that each person receives what is rightfully due to them. Accordingly, disputes cannot be resolved based on just any decision-making criterion, but must be decided strictly in accordance with the applicable legal rules[9]. Consequently, a proper understanding of the jurisdictional

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6 By way of illustration, reference may be made to the following works: MONROY GÁLVEZ, Juan, *Teoría general del proceso*, 3rd ed., Lima, Communitas, 2009, pp. 383–413. MARINONI, Luiz, *Teoria geral do processo*, 3rd ed., São Paulo, Revista dos Tribunais, 2008, pp. 93–135. VÉSCONI, Enrique, *Teoría general del proceso*, 2nd ed., Bogotá, Temis, 2006, pp. 99–110. MARINONI, Luiz; PÉREZ, Álvaro; NÚÑEZ, Raúl, *Fundamentos del proceso civil: hacia una teoría de la adjudicación*, Santiago, Abeledo Perrot, 2010, pp. 90–136.

7 See: DAMAŠKA, Mirjan, *Las caras de la justicia y el poder del Estado*, Santiago, Editorial Jurídica de Chile, 2000, p. 430.

8 As noted by: DE LA OLIVA SANTOS, Andrés; DÍEZ-PICAZO GIMÉNEZ, Ignacio; VEGAS TORRES, Jaime, *Derecho procesal: Introducción*, 3rd ed., Madrid, Universidad Ramón Areces, 2005, p. 22.

9 As observed by: ORTELLS RAMOS, Manuel, *Derecho procesal: Introducción*, 2nd ed., Valencia, Punto y Coma, 2002, p. 32.

function requires that both dimensions be considered together, rather than as mutually exclusive.

Regardless of the position adopted regarding the function of jurisdiction and the judicial process, it is essential—particularly in light of the discussion that follows—to consider the fundamental reasons underlying the jurisdictional function exercised by the courts through the judicial process. In our view, those reasons are primarily the guarantee of impartiality and the authority of res judicata. This is particularly significant if it is understood that the objective of protecting and giving effect to objective law does not justify depriving the instruments made available by the legislature to litigants of their essential content or the safeguards governing their use.

It is often overlooked, particularly in the context of discussions concerning the crisis of the justice system and proposals for reform, that the judicial process, as an instrument of jurisdiction, is—and will always remain—an artificial construct of the legislature[10]. The legislature's role in designing this framework is of paramount importance, as it must assemble its various components so that the resulting mechanism comes as close as possible to achieving both justice and effectiveness in the resolution of disputes between the parties.

Indeed, in carrying out this task of procedural design, the legislature does not enjoy unfettered discretion but is constrained by the obligation to respect certain fundamental principles, which constitute the basic postulates of justice. Without these principles, it would not be possible properly to speak of a judicial process, but only of what legal scholarship recognizes as due process of law[11].

There is broad scholarly consensus as to the fundamental postulates of justice[12], with the principles of bipartite proceedings, equality of arms, and the right to be heard consistently identified as their core elements. These principles not only govern every form of judicial process but are also inherent in the very concept of judicial proceedings, since they define the procedural positions of the parties and establish an indispensable starting point. Without that foundation, everything that follows becomes little more than a mere façade. At the heart of judicial adjudication lies the principle of judicial impartiality[13], which is widely recognized as the true cornerstone of the judicial function and of the procedural guarantees afforded to the parties.

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10 We follow the approach advanced by De la Oliva and Carreras: DE LA OLIVA SANTOS, Andrés, DÍEZ-PICAZO GIMÉNEZ, Ignacio, and VEGAS TORRES, Jaime, op. cit., pp. 44–45.

11 BORDALÍ SALAMANCA, Andrés, "El debido proceso civil", in FERRADA BÓRQUEZ, Juan Carlos (ed.), *La constitucionalización del Derecho chileno*, Santiago, Editorial Jurídica de Chile, 2003, pp. 251 ff.

12 Among others: BERZOSA, Victoria, "Principios del proceso", *Revista Justicia*, No. 2, 1992, pp. 553 ff.; ALVARADO VELLOSO, Adolfo, *Lecciones de Derecho procesal civil*, Santiago, Punto Lex/Thomson Reuters, 2011, p. 191.

13 RICCI, Gian Franco, *Principi di Diritto Processuale generale*, Turin, G. Giappichelli Editore, 1998, p. 9.

The notion of the judicial process as a guarantee thus emerges, emphasizing that the recognition of individuals' substantive rights through the exercise of jurisdiction is no more important than the procedure that must be followed to achieve that outcome. This highlights the importance of the procedural instrument established to attain[14] that end, beginning with the guarantee of impartiality, without which the role entrusted to the courts cannot be understood, and from which they take cognizance of the parties' submissions before ultimately resolving[15] the dispute. It is in this regard that leading legal scholarship has identified three principal manifestations of this guarantee: the objective disinterestedness of jurisdiction in the protection and enforcement of objective law in the specific case[16], impartiality[17], and independence[18].

The foregoing outlines a framework in which the courts exercise the jurisdictional function through an instrument—the judicial process—which, both in its design and in its application, must satisfy a limited number of fundamental yet indispensable requirements of justice. This necessarily entails a series of defining features and safeguards that must characterize the exercise of the jurisdictional function, ensuring that its principal product, the judgment, possesses the well-established attributes traditionally associated with res judicata.

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[14] MONTERO AROCA, Juan, *Proceso y garantía: el proceso como garantía de libertad y de responsabilidad*, Valencia, Tirant lo Blanch, 2006, p. 694.

[15] For a particularly insightful discussion of this issue, see: MONTERO AROCA, Juan, *Proceso y garantía: el proceso como garantía de libertad y de responsabilidad*, Valencia, Tirant lo Blanch, 2006, p. 694. MONTERO AROCA, Juan, *Sobre la imparcialidad del juez y la incompatibilidad de funciones procesales*, Valencia, Tirant lo Blanch, 1999, p. 334.

[16] This, according to De la Oliva, explains the distinction between administration and adjudication: *"It may be said that the Administration also protects the legal order and gives effect to objective law. That is true, but this is not its essential purpose. The Administration protects and gives effect to the law by enforcing legal rules or sanctioning their breach, insofar as those rules govern administrative activity itself. Jurisdiction, by contrast, protects and gives effect to the law precisely because that is its fundamental mission. It enforces legal rules or sanctions their infringement where those rules ultimately regulate or relate to the conduct of others. Judicial activity is therefore always directed towards matters external to the adjudicating body itself. This characteristic, referred to by Chiovenda as alienità and which, avoiding the awkward expression 'otherness', may more accurately be described as objective disinterestedness, is a defining feature of the judicial function." "Jurisdiction, by contrast, applies and gives effect to the law because that task has been entrusted to it, the subject matter upon which it ultimately acts always remaining external to the judicial body itself.*" DE LA OLIVA SANTOS, Andrés; DÍEZ-PICAZO GIMÉNEZ, Ignacio; VEGAS TORRES, Jaime, *op. cit.*, p. 26.

[17] "The principle of impartiality requires that, alongside the ordinary existence of legal subjects occupying opposing procedural positions, the judicial bodies themselves remain in a separate and neutral position." DE LA OLIVA SANTOS, Andrés, DÍEZ-PICAZO GIMÉNEZ, Ignacio, and VEGAS TORRES, Jaime, *op. cit.*, p. 26.

[18] "Judicial independence consists in the absence of relationships of dependence or, stated positively, in the complete autonomy of each judicial body in the exercise of its judicial function of applying the law. In exercising jurisdiction, judicial bodies are subordinate to no one and are subject exclusively to the law itself." DE LA OLIVA SANTOS, Andrés, DÍEZ-PICAZO GIMÉNEZ, Ignacio, and VEGAS TORRES, Jaime, op. cit., p. 27.

2 CRISIS OF CIVIL JUSTICE AND THE ALTERNATIVE MECHANISM OF CONFLICT RESOLUTION

Notwithstanding the foregoing, it has become commonplace in recent years to refer to the crisis affecting civil justice in various countries[19], including Chile[20]. According to this view, the state system of civil justice exhibits shortcomings that warrant a much more serious commitment to improving its efficiency, particularly given the situation faced by litigants who must wait several years to obtain a judicial determination. The delays affecting the administration of justice[21] are therefore a matter of considerable concern.

Indeed, the pursuit of efficiency in civil justice has become closely associated with reducing the length of judicial proceedings[22]. A clear example in Chile is that the principal slogan underlying the proposed civil justice reform[23]—as was also the case with the family and labor justice reforms—has focused, through the adoption of oral proceedings, on achieving greater efficiency in time management. This seeks to overcome the limitations of a predominantly written procedural model, which rejects procedural concentration and largely forfeits the possibility of shortening the time required to obtain an effective judicial determination.

Nevertheless, as noted above, the pursuit of greater efficiency in civil justice should not be confined to improving time-related indicators or statistical measures. In many cases, the drive for speed may conceal shortcomings in another aspect that must never be overlooked: the quality of both the judicial service and the decisions it produces[24].

Alongside efforts to improve the efficiency of the judicial process as the essential instrument of jurisdiction, attention has also been directed towards alternative mechanisms considered more suitable than judicial proceedings[25], which,

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19 TROCKER, Nicoló; VARANO, Vincenzo (eds.), *The Reforms of Civil Procedure in Comparative Perspective*, Turin, Giappichelli, 2005, p. 275.

20 PALOMO VÉLEZ, Diego, *Reforma procesal civil: oralidad y poderes del juez*, Santiago, Abeledo Perrot, 2010, p. 394.

21 We previously made this point in: PALOMO VÉLEZ, Diego, "Las marcas del proceso oral y escrito diseñado en el Anteproyecto de nuevo CPC chileno", *Revista Chilena de Derecho*, Vol. 36, No. 3, 2009, p. 623.

22 CARPI, Federico; ORTELLS RAMOS, Manuel (eds.), *Oralidad y escritura en un proceso civil eficiente*, Vols. I–II, Valencia, Universitat de València, 2008.

23 Suffice it to read the Explanatory Memorandum Accompanying the Bill introducing the proposed new Code of Civil Procedure (Bill No. 432-359), dated 12 March 2012.

24 According to Ortells, the quality of the outcome of civil proceedings consists of: "a) the accuracy of the findings of fact, which requires adequate opportunities to present relevant facts and evidence in support of them; and (b) the correctness of the legal determination, which depends on the judge's legal training and on adequate opportunities for debate concerning the legal issues." ORTELLS RAMOS, Manuel, "Formas del procedimiento y garantías fundamentales del proceso civil", *Revista Ius et Praxis*, Year 16, No. 1, 2010, p. 426.

25 DE LA OLIVA SANTOS, Andrés; DÍEZ-PICAZO GIMÉNEZ, Ignacio; VEGAS TORRES, Jaime, *op. cit.*, p. 59.

under the current framework, may prove excessively complex, slow, or costly, thereby promoting a trend towards dejudicialisation[26].

New forms of extrajudicial dispute resolution have emerged, and existing ones have been further strengthened. In English, these are collectively referred to as Alternative Dispute Resolution (ADR)[27]. From the outset, these mechanisms have attracted considerable attention. Negotiation, mediation, conciliation and, to some extent, arbitration—which nevertheless shares many characteristics and procedural safeguards with judicial proceedings—have assumed a more prominent role, particularly in the field of civil justice[28]. The underlying premise has been to promote a shift from a culture of litigation to one of consensual dispute resolution, reserving the courts for more specific functions and for disputes that cannot be resolved through other means[29], a trend that Cappelletti associated with a broader movement to promote access to justice[30].

It should be noted that many of these mechanisms—and certainly mediation in our jurisdiction, which will be the focus of our particular attention— have traditionally been classified as "jurisdictional equivalents," understood to mean any act that, without having originated from state jurisdiction, is equivalent in its effects to a judgment insofar as it resolves the legal dispute[31].

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[26] PALOMO VÉLEZ, Diego; DELGADO CASTRO, Jordi, "Justicia civil pública y privada: términos para un adecuado entendimiento. Una mirada desde Chile y sus procesos de reforma", *Civil Procedure Review*, Vol. 7, No. 2, 2016, p. 90.

[27] The term refers to a range of heterogeneous mechanisms through which dispute resolution is promoted without a decision on the merits by the ordinary courts, whether such procedures are entrusted to the ordinary judge or to third parties. Their common objective is to prevent litigation or to address disputes through simplified procedures involving less time and lower costs: ALPA, Guido, "Riti alternativi e tecniche di risoluzione stragiudiziale delle controversie in diritto civile", *Rivista Politica del Diritto*, No. 3, 1997, pp. 403–404.

[28] For further discussion of this topic, see: BARONA VILAR, Silvia, *Solución extrajudicial de conflictos: Alternative Dispute Resolution (ADR) y Derecho procesal*, Valencia, Tirant lo Blanch, 1999, p. 309. BARONA VILAR, Silvia, "Los ADR en la justicia del siglo XXI, en especial la mediación", *Revista de Derecho de la Universidad Católica del Norte*, No. 1, 2011, pp. 185–211. HINOJOSA SEGOVIA, Rafael (ed.), *Sistemas de solución extrajudicial de conflictos*, Madrid, Universidad Ramón Areces, 2006, p. 212. NÚÑEZ OJEDA, Raúl, *Negociación, mediación y conciliación como métodos alternativos de solución de controversias*, Santiago, Jurídicas de Santiago, 2009, p. 220. See also: BORDALÍ SALAMANCA, Andrés, "Justicia privada", *Revista de Derecho de la Universidad Austral de Chile*, Vol. 16, 2004, pp. 165–186. LAGARDE, Xavier, "Droit processuel et modes alternatifs de règlement des litiges", *Revue de l'Arbitrage*, No. 3, 2001, pp. 423–449.

[29] VÉSCOVI, Enrique, "La búsqueda de soluciones alternativas para el mejoramiento de la Justicia. El arbitraje en los Códigos modelos de Derecho unificado", *Revista Peruana de Derecho Procesal*, Vol. IV, 2001, pp. 530–531.

[30] CAPPELLETTI, Mauro; GARTH, Bryant, *El acceso a la Justicia: la tendencia en el movimiento mundial para hacer efectivos los derechos*, Mexico City, Fondo de Cultura Económica, 1996, pp. 52 ff. FUENTES MAUREIRA, Claudio; VARGAS PÁVEZ, Macarena, *Introducción al Derecho Procesal. Nuevas aproximaciones*, 2nd ed., Santiago, DerEdiciones, 2024, p. 19.

[31] PEREIRA ANABALÓN, Hugo, *Curso de Derecho Procesal*, Santiago, Jurídica Cono Sur, 1993, pp. 104 ff. Although the concept of jurisdictional equivalents has gradually been superseded by that of alternative dispute resolution (ADR) mechanisms.

Nevertheless, the "idyllic picture" of co-existential, non-conflictual justice advocated does not appear immune to various problems[32], even though some may fail to recognize this[33].

Criticism has come from different quarters and have focused on different aspects. One line of criticism concerns the ideology perceived to underlie the emergence or strengthening of these mechanisms, which "encourage" individuals to accept a settlement, whatever its terms may be. According to this view, the State appears to have relinquished its monopoly over the administration of justice and creating avenues for an exodus from state jurisdiction and from the authority of res judicata[34].

Closely related to this observation is a second line of criticism, which focuses not on the potential impact on the system of state jurisdiction, but rather on the position of citizens who are effectively channeled into a second-tier[35] system of justice, where it is difficult to ensure the independence, neutrality, and impartiality of those responsible for conducting the alternative dispute resolution mechanism, as well as the adversarial principle and equality of arms between the parties[36]—elementary requirements of justice that, by constitutional mandate, characterize both jurisdiction and its essential instrument, the judicial process. Indeed, it has been argued that the unifying concept underlying these requirements, namely due process, is absent from—and even unnecessary in—ADR[37]. Consequently, the notion of "jurisdictional equivalent" becomes blurred, as these mechanisms reproduce only the effects of res judicata, without providing the minimum guarantees that protect the path leading to those effects.

Taruffo is particularly clear on this point, position that is endorsed in the present analysis: "Alternative methods may be very useful and even indispensable, but they must ensure impartiality, adversarial proceedings, and equality in the treatment of the interests of all parties to the dispute.[38]" Indeed, ADR raises

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32 DIDONE, Antonio, "Las prioridades en la Justicia civil", *Revista Peruana de Derecho Procesal*, Vol. V, 2002, pp. 109 ff.

33 Calling for a departure from the prevailing skepticism and distrust surrounding ADR: VÉSCOVI, Enrique, *op. cit.*, pp. 531–532.

34 The more critical commentators argue that the development and promotion of these alternative mechanisms are underpinned by an ideological premise that goes beyond the well-intentioned discourse advocating a coexistential, cooperative and horizontal model of justice: CHIARLONI, Sergio, "La justicia civil y sus paradojas", *Revista Peruana de Derecho Procesal*, Vol. V, 2002, p. 101. See also: BORDALÍ SALAMANCA, Andrés, *op. cit.*, pp. 165 ff. TARUFFO, Michele, "Una alternativa a las alternativas: modelos de resolución de conflictos", in TARUFFO, Michele (ed.), *Páginas sobre Justicia civil*, Madrid, Marcial Pons, 2009, p. 115

35 PÉREZ, Álvaro and COPANI, Juan, "The So-Called Alternative Dispute Resolution Mechanisms from the Perspective of Civil Procedure: The Proper Enforcement of Substantive Law vs. Dispute Resolution?", *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* (*Pontifical Catholic University of Valparaíso Law Review*), Vol. XXVII, First Semester, 2006, pp. 168–169.

36 DIDONE, Antonio, *op. cit.*, p. 111.

37 PEREZ, Álvaro, COPANI, Juan, ob. cit., p. 169.

38 TARUFFO, Michele, *op. cit.*, p. 791. See also: COMOGLIO, Luigi, "*Mezzi alternative di tutela e garanzie costituzionali*", *Rivista di Diritto Processuale*, 2000, pp. 318 ff.

significant concerns regarding procedural guarantees, concerns that are exacerbated by the "limited visibility"[39] of such proceedings. Therefore, notwithstanding the enthusiasm surrounding these mechanisms, the legislature must take particular care not to disregard or undermine those guarantees, lest ADR gradually lose credibility among legal practitioners and become incompatible with fundamental principles that cannot be compromised[40]. In other words, although these alternative mechanisms are often praised for promoting speed, simplicity, informality, and cost-effectiveness, the price to be paid may ultimately be too high in terms of justice[41].

A third set of critical considerations concerns whether the alternative mechanism in question is established on a voluntary or mandatory basis. For some, the key to its success appears to lie in making prior recourse to the mechanism compulsory, despite the unfounded and mistaken nature of that assumption. As the rightly been observed, parties do not settle simply because one of them —or the law—requires them to attempt one beforehand[42]. Indeed, mandatory recourse to such mechanisms often proves ineffective, resulting in unnecessary delays and other practical difficulties. It is frequently impossible to distinguish between attempts genuinely motivated by a willingness to settle and those undertaken solely to comply with a legal requirement that makes prior recourse to the mechanism[43] mandatory.

If one further considers that the development and promotion of these mechanisms often respond less to the stated objective of changing a country's adversarial legal culture than to the largely unacknowledged purpose of relieving the courts of cases regarded as being of limited economic value or of little significance for the development of legal scholarship[44], the mechanism risks becoming nothing more than an additional procedural step preceding the exercise of jurisdiction. There are, therefore, sound reasons not to subscribe uncritically to the favorable comments—and even praise—that frequently surround this subject.

Nevertheless, alternative dispute resolution mechanisms, together with both their declared and undeclared objectives, appear to have influenced our legislature, which has increasingly regarded them as a means to be employed by establishing a mandatory extrajudicial stage as a procedural prerequisite for the admissibility of judicial proceedings. It is precisely in this context that, within our legal system,

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39 TARUFFO, Michele, "Observaciones sobre los métodos alternativos de resolución de controversias", in TARUFFO, Michele (ed.), *Páginas sobre Justicia civil*, Madrid, Marcial Pons, 2009, p. 135.

40 At the very least, these alternative procedures should guarantee each party the right to appear and participate, the right to be heard and to be represented, the right to present evidence, together with the other procedural guarantees identified in the legal scholarship: ALPA, Guido, *op. cit.*, p. 407.

41 COMOGLIO, Luigi, *op. cit.*, p. 371. BORDALÍ, Andrés; CORTÉZ, Gonzalo; DELGADO, Jordi; PALOMO, Diego, *Proceso Civil. El juicio ordinario de mayor cuantía, procedimiento sumario y tutela cautelar*, 3rd ed., Santiago, Legal Publishing, 2024, p. 639.

42 TARUFFO, Michele, *op. cit.*, p. 784.

43 CHIARLONI, Sergio, "Estado actual y perspectivas de la conciliación extrajudicial", *Revista Peruana de Derecho Procesal*, Vol. VII, 2004, p. 174

44 DIDONE, Antonio, *op. cit.*, p. 111.

mediation configured as a mandatory pre-trial requirement in certain cases, a model that warrants particular critical examination.

Consistent with this progressive[45] approach, the legislature has also introduced a provision applicable to all judicial proceedings, establishing a duty on lawyers, court officials, and judges to promote the use of consensual methods of dispute resolution, including conciliation and mediation, among others[46]. Although this may be regarded as merely a programmatic declaration, it could be mistakenly invoked to revive practices incompatible with judicial impartiality[47].

3 MEDIATION, PARTICULARLY IN HEALTH —CRITICAL PERSPECTIVES

Mediation is one of the mechanisms recognized as an integral part of the ADR framework outlined above (as affirmed by Article 3 bis of the Code of Civil Procedure), and its should be noted from the outset that one of its most important characteristics is that the mediator does not decide the dispute, but rather, by employing various techniques and participating in the negotiations with guidance and advice, seeks to facilitate an agreement by helping the parties reach it.

As can be seen —and as legal scholarship has rightly emphasized— mediation is closely linked to negotiation, representing a more advanced stage of it, precisely because of the intervention of a third party who facilitates this process[48]; some authors highlight that it is an exercise in tolerance that fosters better understanding among people, thereby enhancing the value of dialogue[49]. This, of course, is based on an "idyllic" view of the mechanism, without delving into the approach and aspects that are open to question.

In Chile, mediation has become particularly widespread and well-known in connection with the reform of family court procedures, first through Law No. 19,968, which established a new procedural system for family cases, and later through Law No. 20,286, which was intended to address a series of amendments, corrections and additions to the original design —which soon proved to be deficient

45 BORDALÍ, Andrés; CORTÉZ, Gonzalo; DELGADO, Jordi; PALOMO, Diego, *op. cit.*, p. 637.

46 Article 3 bis of the Code of Civil Procedure, introduced by Law No. 21,394 of 30 November 2021. For a detailed analysis, see: FUENTES MAUREIRA, Claudio; GARCÍA ODGERS, Ramón; ROMERO RODRÍGUEZ, Sophía, "La conciliación en la práctica judicial chilena: elementos para una reflexión acerca de su evolución y potencial impacto en los procedimientos chilenos", *Revista de Ciencias Sociales*, No. 82, 2023, pp. 55–118.

47 See: PALOMO VÉLEZ, Diego; MATAMALA SOUPER, Pedro, "Los problemas de los poderes *ex officio* del juez laboral. Ahora a propósito de la potestad conciliatoria", *Revista Ius et Praxis*, año 18, No. 1, 2012, pp. 439–456. BORDALÍ, Andrés; CORTÉZ, Gonzalo; DELGADO, Jordi; PALOMO, Diego, *op. cit.*, p. 649.

48 Indeed, some authors even refer to "negotiation within mediation": BARONA VILAR, Silvia, "Los ADR en la justicia del siglo XXI...", *op. cit.*, p. 206.

49 VARGAS PÁVEZ, Macarena, "Mediar: un ejercicio de tolerancia práctica", *Revista CREA de la Universidad Católica de Temuco*, Vol. I, No. 1, 2000, p. 38.

in its operation, leading to a breakdown that necessitated a reform of the reform. Nonetheless, this is not the only area in which mediation is applied in our country.

Regarding the health care field, Law No. 19.966 on the Health Care Guarantee System (the AUGE Law), dated September 3, 2004[50], incorporated mandatory pre-litigation mediation, largely following certain examples from comparative law that have promoted amicable resolutions and the diversion of cases from the courts, even in the case of "medical" disputes arising from harm to health[51]. Its status as a judicial equivalent is also reflected in the law itself, which equates it with the effects of a settlement agreement[52].

In these matters, the statutory requirement also made access to the courts and the proceedings contingent —in a move of dubious constitutionality[5354]—on the prior submission of the respective claim to a mediation procedure, which is consequently considered mandatory.

As an initial critical note, it should be pointed out that, with regard to this type of matter, the reasons traditionally cited to justify a stronger commitment to alternative dispute resolution mechanisms[55] do not seem to apply (as is the case in family or labor justice). Indeed, it is unclear from what perspective one establishes —as is ultimately done— a model of co-existential justice that accounts for the need to establish a "culture of agreements[56]"—which, in this context, may in many cases prove more harmful than beneficial, not only from the standpoint of the effective

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50 Reference should also be made to the Regulation on Mediation of Claims against Public Institutional Healthcare Providers, their Officials, and Private Healthcare Providers (Supreme Decree No. 47 of 2005 of the Ministry of Health), with particular reference to the mediation procedure set out from Article 22 onwards.

51 RODRÍGUEZ PEÑA, Pilar, "La experiencia francesa en la búsqueda de una solución amigable con los conflictos médicos", *Revista de Derecho del Consejo de Defensa del Estado*, No. 19, 2008, pp. 44–46.

52 Article 53 of Law No. 19,966 provides that, where an agreement is reached, a record shall be drawn up and shall have the legal effect of a settlement agreement. Article 34 of the Regulation contains an equivalent provision.

53 We do not share the view adopted by the majority of the Constitutional Court in its judgment of 10 July 2012 (Case No. 2042-11-INA). In that decision, issued in proceedings concerning an application for a declaration of inapplicability on grounds of unconstitutionality brought in the context of pending judicial proceedings relating to alleged medical negligence, the Court upheld the constitutionality of the mandatory pre-litigation mediation mechanism established by Law No. 19,966. The dissenting opinion delivered by Justices Vodanovic, Navarro and Aróstica, however, reflects what we consider to be the correct approach to assessing the constitutionality of this mechanism.

54 PRIORI POSADA, Giovanni, *El proceso y la tutela de los derechos*, Lima, Fondo Editorial PUCP, 2019, pp. 89–90.

55 A contrary position is adopted by those who argue that alternative dispute resolution mechanisms in general, and mediation in particular, fulfil a highly desirable role in addressing the shortcomings of state adjudication and judicial proceedings: GUTIÉRREZ ARAQUE, María José, "La mediación en salud y el acceso a la justicia", *Revista de Derecho del Consejo de Defensa del Estado*, No. 20, 2008, pp. 133 ff.

56 As the brochure published by the Chilean State Defense Council promoting healthcare mediation puts it: "People understand each other by talking."

and full protection of the litigant rights, but also from the perspective of the legal system as a whole.

It is considered that the obstacle to access to jurisdiction represented by the unjustified imposition of a mandatory prior mediation procedure is neither reasonable nor compatible with a central feature of mediation[57], namely its voluntary nature. Some scholars, as well as certain legislative frameworks, add a closely related principle in order to reinforce the underlying rationale of this alternative dispute resolution mechanism: the principle of the "free decision of the parties", according to which parties resorting to mediation must genuinely intend to address the resolution of their disputes[58] through that process.

"Mandatory mediation"[59] constitutes a contradiction in terms when measured against the very concept of voluntariness. It distances mediation from the foundations and proper purpose of the mechanism, notwithstanding the fact that in some Latin American countries, including Chile, this principle has effectively been "redefined" in a diminished form in order to preserve the appearance of consistency once prior mandatory recourse[60] to mediation was introduced. Nor is such a requirement compatible with the right to effective judicial protection, understood as the right of free access to the courts in order to obtain a reasoned judgment grounded in law which, with all the effects of res judicata, brings the dispute[61] to an end. In Chile, this right is recognized in Article 19(3), first paragraph, of the Political Constitution of the Republic[62]. It is appropriate to recall the point made at the outset

[57] "No one should be compelled to resort to mediation, to conclude an agreement, or to remain in mediation proceedings against their will. This reflects the very core of mediation. Making mediation compulsory merely reinforces its likelihood of failure and transforms it into a form of State-controlled dispute resolution, directed by the State itself and stripped of the element of freedom that gave rise to and has sustained mediation": BARONA VILAR, Silvia, "Los ADR en la justicia del siglo XXI...", *op. cit.*, p. 208.

[58] LASHERAS HERRERO, Pilar, *op. cit.*, p. 440.

[59] LASHERAS HERRERO, Pilar, *op. cit.*, p. 440.

[60] Under the current framework, the principle of voluntariness no longer means that individuals are free to decide whether to resort to mediation. Rather, it refers solely to the parties' ability to withdraw from the mediation proceedings at any time. This follows from Article 47(2) of Law No. 19,966, which provides: "The parties may, at any stage of the mediation, express their intention not to continue with the proceedings, which shall then be terminated by means of a record signed by the parties and the mediator." The same limited understanding of voluntariness is also reflected in Article 49.

[61] VALLESPÍN PÉREZ, David, *El modelo constitucional del juicio justo en el ámbito procesal civil*, Barcelona, Atelier, 2002, p. 69. See also: PICÓ I JUNOY, Joan, *Las garantías constitucionales del proceso*, Barcelona, Bosch, 1997, p. 40.

[62] This requirement of mandatory pre-litigation mediation appears to be at odds with Article 262 of the Code of Civil Procedure, which governs another well-known ADR mechanism, namely conciliation. That provision establishes the mandatory conciliation hearing to be convened by the civil judge once the pleadings stage has concluded. Paradoxically, however, the same provision excludes this procedural step from the proceedings governed by Title XVI of Book III of the Code, relating to actions involving the Treasury (juicios de hacienda), that is, proceedings in which the Chilean Treasury has an interest, including the classic example of medical liability claims brought against public healthcare providers. The inconsistency lies in the fact that, on the one hand, the legislature

regarding the importance of the function assigned to jurisdiction, namely the realization and protection of objective law by seeking to give each person what is rightfully due to them. It has been particularly emphasized that the composition of the dispute must not be carried out by jurisdiction through just any decision-making criterion, but precisely in accordance with legal rules. This task of jurisdiction is fundamental when the focus is placed on the realization and protection of rights, a consideration that, in the case of mediation, is largely set aside in favor of the possibility of reaching an agreement. Indeed, as legal scholarship has observed, proponents of alternative dispute resolution mechanisms maintain that the law should remain "outside the door", since mediation is not intended to protect rights but rather to facilitate an agreement between interests that have not been legally characterized[63]. This delicate observation has been dangerously minimized, generally through reliance on statistical data[64], which is nevertheless insufficient to avoid a basic issue: although mediation is a technique for resolving conflict and may produce a positive outcome, it "*does not achieve the objective of effectively protecting the rights that underlie the dispute*.[65]"

Furthermore, the importance of jurisdiction and the judicial process, as a complement to the legislative function, is often overlooked. Courts do not simply apply existing law to the specific case before them; their decisions also influence the resolution of future cases[66]. Recent procedural reforms have strengthened the role of case law in the legal system, giving greater prominence to precedent to promote consistency and coherence in the application of the law[67]. Mediation, by contrast, neither results in a judicial determination nor requires any statement of reasons. Although its advantages may serve more limited objectives, it cannot fulfil these broader institutional functions, which remain entrusted to jurisdiction and the judicial process. This underscores the seriousness of establishing a mandatory pre-trial mediation regime[68], particularly in disputes arising from healthcare-related harm, where immediate access to jurisdiction should be guaranteed, without

compels the parties to resort to ADR before judicial proceedings may commence, while, on the other hand, it regards conciliation as unnecessary once proceedings have been initiated, since the mandatory conciliation hearing is not considered an essential procedural step in actions involving the Treasury.

63 TARUFFO, Michele, "Una alternativa a las alternativas...", *op. cit.*, p. 117.

64 According to statistics published by the Mediation Unit of the Chilean State Defence Council, during the first half of 2024, 1,276 mediation requests were filed. Of the cases concluded by decision of the parties (87.9%), only 21.9% resulted in a settlement, whereas 78.1% ended without an agreement. Available at: *https://www.cde.cl/gestion_institucional/wp-content/uploads/sites/11/2024/07/EstadisticaMediacionenSaludaJunio2024_Final.pdf*

65 TARUFFO, Michele, "Una alternativa a las alternativas...", *op. cit.*, p. 117.

66 PÉREZ, Álvaro; COPANI, Juan, *op. cit.*, pp. 173–174.

67 TARUFFO, Michele, "La motivación de la sentencia", in TARUFFO, Michele (ed.), *Páginas sobre Justicia civil*, Madrid, Marcial Pons, 2009, p. 519.

68 Before bringing an action, the claimant must first complete this mandatory preliminary procedure and obtain a certificate confirming its completion. Where no settlement is reached, a Certificate of Termination of Mediation is issued.

prejudice to the parties' freedom to resort voluntarily to alternative dispute resolution mechanisms instead of judicial proceedings or a judicial determination.

This initial criticism is followed by another, equally significant, which highlights the shortcomings of the mediation procedure when compared with the judicial process. As noted earlier, the notion of the judicial process as a guarantee has become firmly established, as reflected in the constitutional provisions of many countries, including Chile, which recognize the right to due process (described in our constitutional terminology as a "rational and fair procedure"). Under this conception, both the legislature, in designing procedural rules, and the courts, in applying them, must observe fundamental requirements of justice, without which it is not even possible to speak of a judicial process.

Even though the statutory framework governing mediation formally declares its adherence to principles such as impartiality and equality, it should not be overlooked that, as legal scholarship has observed, the notion of due process is unnecessary within the logic underlying ADR—and, therefore, mediation—where the only objective that ultimately matters is reaching a settlement. This logic, in which the end (the settlement) often justifies the means, has also come to characterize mediation. As has rightly been observed, it precludes the assertion that mediation offers safeguards comparable to those of judicial proceedings, particularly where the dispute resolution mechanism imposed on the litigant operates outside judicial oversight. Moreover, although lawyers are not excluded from mediation, they often appear to be regarded as unwelcome participants. Indeed, it is a widely held view among those who serve, or have served, as mediators that lawyers' involvement may "complicate" or "jeopardize" the prospects of reaching a settlement[69].

It is therefore unsurprising that the notion of a "second-tier system of justice", or similar expressions conveying the same idea, has gained currency. This criticism becomes even more compelling when the already weakened principle of voluntariness is coupled with the legislature's diluted understanding of what a procedure designed in genuine compliance with those fundamental requirements of justice identified at the outset of this article ought to entail. Among those requirements are the independence, neutrality, and impartiality of the third party responsible for facilitating the resolution of the dispute, which constitute the true safeguards of the parties' rights, particularly where one party occupies a weaker position and is therefore more vulnerable to violations of those rights[70]. This issue is

[69] The complaint form completed by individuals to initiate mediation proceedings before the Chilean State Defense Council expressly states that the procedure is both mandatory and a precondition to litigation, while also informing claimants that legal representation is not required.

[70] It should also be noted that experience to date shows that mediation has, in some cases, resulted in agreements that do not provide for monetary compensation or compensation capable of pecuniary valuation, but instead consist of an apology, assurances that similar incidents will not recur, or an explanation of the claimant's medical records (9.5% of cases during the first half of 2024). It is evident, however, that such cost-free outcomes are unlikely to constitute an adequate remedy where significant harm has been suffered. Rather, they appear more consistent with the functions of an Information, Complaints and Suggestions Office (OIRS) than with those of a mandatory, pre-litigation mediation procedure.

especially significant because a hasty, ill-informed, or simply misguided decision by the person who has lodged the complaint may, if a settlement is reached, amount to waiver of all legal claims arising from the facts giving rising to the complaint, while granting the complaint may, if a settlement is reached, amount to waiver of all legal claims arising from the facts giving rise to the compliment, while granting the institution or public official a full and final release from liability. In the case of actions brought against public institutional healthcare providers or their officials seeking compensation for damage caused in the performance of their healthcare functions, Law No. 19.966 requires the claimant, as a prior procedural prerequisite, to submit the claim to a mediation procedure before the Chilean State Defense Council (*Consejo de Defensa del Estado*), which may appoint one of its own officials[71] to act as mediator, which has in fact become the prevailing practice in most of its regional offices. In our view, this seriously compromises the *principles of neutrality and impartiality*[72], which legal scholarship, including that most supportive of alternative dispute resolution mechanisms, has consistently regarded as essential pillars of the mediation process, requiring the mediators *"have no connection whatsoever either with the subject matter of the dispute or with the parties involved.*[73]*"*

The incompatibility is, our view, evident. Little can be done to reconcile this institutional arrangement with the requirement s of independence, neutrality, and impartiality when the very institution responsible for defending the State in any subsequent action brought by a citizen seeking redress for healthcare-related harm caused by a public institutional provider is also entrusted-typically through one of its own officials, with conducting the mediation. There is not even any physical separation between the mediator and the council's other officials, they work in the same offices, an arrangement that fails to preserve even the appearance of impartiality. A principle such as impartiality, expressly recognized in the legislation governing mediation, is therefore placed in serious doubt when one considers that, in practice, one of the Council's principal functions is to reduce the amounts that the Treasury must pay pursuant to judgments rendered against the State. From this perspective, having regard to both the statutory role of the Chilean State Defense Council and the practical reality of it functions, it is evident that the primary

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71 Article 2 of the aforementioned Regulations provides that where a complaint is brought against public institutional healthcare providers or their officials, mediation shall be conducted before the Chilean State Defence Council, which may appoint one of its own officials, another official on secondment, or a professional meeting the requirements for inclusion in the Register of Mediators established under Article 10 of the same Regulations. By contrast, where the complaint concerns private healthcare providers, Article 43 of the Act requires the parties to undergo mediation before mediators accredited by the Health Superintendency, a requirement reaffirmed by Article 2 of the Regulations.

72 From the perspective of judicial proceedings, it has been observed that an impartial court is one that has no interest in the outcome of the dispute and is entirely independent of the parties, such that it is not influenced by any consideration favouring one party over the other: CAROCCA PÉREZ, Alex, *Derechos humanos y Derecho civil: perspectiva procesal*, Santiago, Centro de Desarrollo Jurídico Judicial, Corporación de Promoción Universitaria, Estudios Series, 1997, p. 55.

73 BARONA VILAR, Silvia, "Los ADR en la justicia del siglo XXI…", *op. cit.*, p. 209.

objective of a mediation mechanism administered by that institution will be to maximize the State's ability to limit the compensation it must pay in respect of harm caused by public healthcare providers of their officials[74].

Furthermore, to illustrate the evident risks inherent in this arrangement, Law No.19.996 provides that only claims arising from harm caused in connection with healthcare services delivered by public healthcare institutions are subject to mediation before the Chilean State defense Council (*Consejo de Defensa del Estado*). Consequently, it precisely those members system who are required, as a mandatory pre-trial step, to submit their claims to mediation before a mediation before a mediator appointed by the Council, usually without legal representation. In such circumstances, a variety of factors, including the claimant's educational and cultural background, may influence the acceptance of a settlement that is detrimental to the claimant's rights to interests while benefiting the Treasury. This difficult to reconcile with the conception of ADR as a mechanism intended to facilitate access to justice or persons of limited financial means, since it inevitable raises the question of what kind of justice they are actually being given access to.

The model adopted for healthcare mediation represents, if one may put it this way, a particularly expansive interpretation of the "flexibility" traditionally associated with alternative dispute resolution mechanisms. Once again, the legislation reflects upon which every mediation procedure should be founded, revealing a significant divergence between the position consistently adopted in legal scholarship and the approach ultimately embraced by the Chilean Legislature[75].

Indeed, where public institutional healthcare providers are concerned settlement agreements resulting from mediation must be approved by the Chilean State Defense Council whenever the agreed compensation exceeds one thousand development units (UF), notwithstanding the statutory declaration that the parties remain free and autonomous to resolve the dispute by agreeing upon monetary compensation or compensation capable of pecuniary valuation. This clearly exposes the difficulties posed by the principle of the mediator's impartiality and independence from the subject matter of the dispute, ultimately transforming the mediator into an interested party[76]. As can readily be seen, this form of review

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74 MUSSO ARRATIA, Benjamín, "De las mediaciones por daños en salud", *Actualidad Jurídica*, No. 37, January 2018, p. 320.

75 The legislature itself appears to recognize the unease generated by this arrangement. Otherwise, it is difficult to explain the provision contained in Article 50, which, in addition to the requirements set out in Article 49, provides that the mediator must observe the principle of administrative probity in order to guarantee his or her impartiality. This amounts to an appeal to self-regulation that is plainly insufficient where such a fundamental principle is at stake. This is without prejudice to the parties' right to request the mediator's disqualification and the appointment of "another mediator from the Chilean State Defence Council", an issue further addressed in Articles 6 and 7 of the Regulations.

76 Mediators operate under a schedule establishing maximum compensation amounts according to the type of harm suffered. Thus, the maximum compensation is 3,500 UF in cases of death; 3,300 UF for permanent and total disability requiring constant assistance; 2,500 UF for total permanent disability; 2,000 UF for partial permanent disability; and 1,000 UF for "other types of harm" (temporary incapacity). In addition, any amount agreed upon must be objectively justified, making it particularly

appears to reflect greater concern with limiting the amount payable than ensuring full and adequate compensation for the harm suffered. Yet this concern appears to attract little attention from some commentators, who instead emphasize that medical malpractice claims brought before the courts often arise *"simply from an inability to accept the bitter side of life, leading individuals to seek someone to blame for the death of a loved one*[77]*."*

Finally, healthcare mediation gives rise to a further criticism, namely the questionable decision of the legislature to "divert the protection of fundamental rights away from jurisdiction,[78]" in this case the right to health. Such an approach may represent a step backwards from the objective of contemporary constitutionalism to confer genuine normative force upon the rights and freedoms recognized in constitutional texts.[79] This concern is all the more compelling given the broad scholarly consensus that the substantive content of rights is frequently shaped by the jurisdictional dimension, through which judicial decisions progressively define and refine those rights through their protection and enforcement.[80]

In other words, the enhanced protection required by fundamental rights should also be reflected in "removing those rights from the free disposition of their holders, ensuring that they remain protected to the fullest extent possible", rather than reducing them "to the status of mere negotiable interests for the purpose of reaching a settlement (...)[81]". This, in turn, should mean that "jurisdiction is, in essence, the primary and fundamental guarantee of legality and justice[82]", a proposition which, in our view, imposes upon the legislature the duty to design an efficient procedural instrument capable of meeting that standard, rather than resorting to the simplistic solution of attempting to improve the protection of rights

difficult to give adequate consideration to non-pecuniary damage. It should also be noted that settlements exceeding 3,000 UF require approval by resolution of the Ministry of Finance, thereby introducing a further layer of administrative control over the agreement. These limits have proved decisive in preventing settlements during mandatory pre-litigation mediation in several high-profile cases, such as the widely publicized *switched babies'* case, arising from the negligent conduct of staff at the Talca Regional Hospital.

77 This would lead to the "excessive judicialization" of medical practice: RODRÍGUEZ PEÑA, Pilar, *op. cit.*, p. 45

78 BORDALÍ SALAMANCA, Andrés, *op. cit.*, p. 178.

79 CARRILLO, Marc, *La tutela de los derechos fundamentales por los tribunales ordinarios*, Madrid, Boletín Oficial del Estado, Centro de Estudios constitucionales, 1995, p. 22.

80 JIMÉNEZ CAMPO, Javier, *Derechos fundamentales: concepto y garantías*, Madrid, Trotta, 1999, p. 91. See also: FERRAJOLI, Luigi, *Derechos y garantías: la ley del más débil*, Madrid, Trotta, 1999, p. 59.

81 TARUFFO, Michele, "Observaciones sobre los métodos alternativos", *op. cit.*, p. 137. "It is difficult to regard the right to life or the right to health as 'negotiable' (...). Likewise, it is not easy to suggest that disputes concerning such rights should be addressed and resolved through mediation techniques if—as has been argued—mediation is understood essentially as a method of achieving conciliatory settlements": TARUFFO, Michele, "Consideraciones dispersas sobre mediación y derechos", in TARUFFO, Michele (ed.), *Páginas sobre Justicia civil*, Madrid, Marcial Pons, 2009, p. 140.

82 TARUFFO, Michele, "Consideraciones dispersas...", *op. cit.*, p. 145.

by overstretching the role of alternative dispute resolution mechanisms at no institutional cost.

4 CONCLUDING REMARKS: CIVIL PROCEDURE REFORM AND THE NEED TO REDEFINE THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION

Our position regarding so-called alternative dispute resolution mechanisms has been made clear throughout this article. The approach adopted here departs from the prevailing tendency to strengthen such mechanisms at the expense of jurisdiction and the judicial process. In our view, there are compelling reasons to resist the temptation to embrace a discourse, however well intentioned, advocating a new form of cooperative, horizontal, and co-existential justice while relegating to the background efforts to strengthen the judicial protection of rights.

Such an approach overlooks the shortcomings and structural problems of this "new justice", which, as previously noted, stem from deficiencies in the fundamental requirements of justice that are safeguarded within the framework of jurisdiction and the judicial process. Moreover, it promotes an unduly one-dimensional conception of efficiency, according to which the only objective appears to be the rapid disposal of disputes, with insufficient regard for the manner in which that result is achieved. In doing so, it loses sight of the purposes served by jurisdiction and ignores the fact that efficiency must also be measured by the quality of the judicial response, which is intrinsically linked to the function entrusted to jurisdiction.

Healthcare mediation illustrates this concern both from a general perspective and, more specifically, in the form adopted by the Chilean legislature. Particular attention should be drawn to its mandatory pre-trial character and to the deficiencies in basic procedural safeguards that arise under the statutory framework governing disputes involving public institutional healthcare providers.

It would seem that the time has come to place limits on arrangements capable of producing favorable statistical outcomes while raising serious concerns from the perspective of the rule of law by depriving fundamental requirements of justice of their substantive content—requirements that can only be effectively safeguarded within the framework of jurisdiction and its principal instrument, the judicial process. The concern is even greater where the legislature compels recourse to an "alternative" mechanism in the absence of sufficient justification for diverting disputes away from jurisdiction.

As noted at the outset of this article, the realization and protection of objective law constitute the core of the jurisdictional function and that the protection of rights is therefore one of its essential dimensions. As previously discussed, mediation as an "alternative" necessarily proceeds from the premise of relinquishing the task of protecting rights, since any settlement reached "will invariably entail some degree of renunciation of the full vindication of one's rights".[83]

[83] TARUFFO, Michele, "Una alternativa a las alternativas…", *op. cit.*, p. 117.

That observation alone should suffice to prompt a reconsideration of which mechanism ought to assume the primary role and which should remain complementary[84], particularly in light of the ongoing civil procedure reform, whose objective is to enhance the efficiency of civil justice through the establishment of a more rational procedural model. Central to that model is the restoration of the judge's role, ensuring judicial involvement from an early stage of the proceedings and thereby reshaping a system of civil justice that is often perceived by litigants as remote and inaccessible, with the aim of restoring public confidence[85] in its administration.

The proposed new Code of Civil Procedure embraces oral proceedings and their associated principles—judicial immediacy, concentration, and publicity—as defining features of the new procedural model. These principles are intended not merely to improve the speed of proceedings and statistical indicators but, above all, to promote better justice by ensuring that judicial decisions are of higher quality and greater reliability through enhanced judicial responsibility and stronger procedural safeguards within a more coherent and carefully structured procedural framework[86]. Naturally, alongside the enactment of this procedural reform, corresponding institutional reforms will be required, including an increase in the number of judges capable of assuming the greater responsibilities envisaged by the new legislation, together with sustained investment in judicial training, which remains essential to the successful operation of the proposed model.

Does this proposal disregard the contribution of alternative dispute resolution mechanisms? According to the Explanatory Memorandum to the Bill, it does not.

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84 PÉREZ, Álvaro and COPANI, Juan, *op. cit.*, pp. 167 ff.

85 Such distrust is a common feature across much of Latin America: OTEÍZA, Eduardo, "Punto de vista: MARC/ADR y diversidad de culturas: el ejemplo Latinoamericano", *Ibero-American Journal of Procedural Law*, Año V, No 8, p. 202.

86 We have said this before, but it is worth reiterating so that it becomes better understood in the Chilean legal context: a hearing-based procedural model founded upon the characteristics described above is fundamentally aimed at restoring the objective integrity of the exercise of the judicial function. Among its defining features is a judge who is genuinely engaged from an early stage of the proceedings, together with participants who, through the adversarial process, contribute to ensuring that the information introduced into the proceedings is as reliable as possible, thereby enabling the delivery of a higher-quality judgment. Such a model restores the central importance of the evidentiary stage—the most significant phase of any judicial proceeding—which has been largely sidelined under the current written system, characterised by fragmented proceedings and a civil judge who is, in most cases, effectively "absent" and "invisible" throughout almost the entire course of the litigation. Naturally, as we have also previously argued, the new model should take full advantage of the features associated with oral proceedings—particularly their capacity to produce judicial decisions of higher quality within a more reasonable timeframe and, consequently, a more efficient system of justice. At the same time, however, it must avoid the familiar excesses of purely doctrinal approaches that fail to engage with practical realities. It is essential that the next stages of procedural reform proceed with a clear understanding that designing procedurally perfect models in the abstract, however attractive from a doctrinal perspective, is not sufficient. Rather, efforts must be guided by pragmatism and realism towards developing a procedural model that is genuinely workable in practice, rather than one that quickly reveals a significant gap between the legislative framework and its implementation by those participating in the proceedings.

On the contrary, while reaffirming the importance of *"heteronomous adjudication as an instrument through which the State exercises its jurisdictional function"*, the proposed model seeks to incorporate the contribution of all methods of dispute resolution. As the Explanatory Memorandum states, *"it is important for the legislature to regulate not only adjudicative proceedings but also alternative dispute resolution mechanisms, so that citizens may have access to other means of preventing or resolving disputes by mutual agreement, both within and outside judicial proceedings, provided that the rights concerned are rights capable of disposition (...)*.[87]

The real issue, nonetheless, lies in the respective roles that should be assigned to jurisdiction, the judicial process, and alternative dispute resolution mechanisms. If the legislative approach continues to impose mandatory pre-trial recourse to ADR, often driven more by unacknowledged institutional considerations than by any genuine aspiration to establish a form of "co-existential justice", such an approach will continue to warrant criticism. If, however, the point of departure is to guarantee every citizen effective access to jurisdiction and the judicial process, without imposing unjustified barriers of doubtful constitutionality, while preserving the possibility of voluntary recourse to ADR for those who freely choose it, then the balance will have been properly struck. In that context, it is entirely correct to affirm that *"such mechanisms cannot be regarded as substitutes for jurisdiction or as a justification for the State to provide justice of a lower quality"*.[88]

Following Taruffo, the time has come to restore to jurisdiction and the judicial process the central role of which they have been deprived in cases where no convincing justification exists for preferring an alternative mechanism, at least not in the manner currently imposed by the legislature. The judicial process should once again be conceived as the "alternative to the alternatives"[89], thereby restoring everything that jurisdiction and the judicial process can offer litigants in terms of the effective protection of objective law and the observance of those fundamental requirements of justice that are not genuinely secured within the alternative system examined in this article.

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87 The reference to alternative dispute resolution mechanisms contained in the Explanatory Memorandum must, however, be understood without prejudice to the role of judicial conciliation within the proposed procedural model. Under the new framework, at an early stage of the proceedings, during the preliminary hearing, and having considered the parties' submissions, the judge will invite the parties to attempt conciliation whenever the dispute concerns rights capable of settlement.

88 Message No. 432-359 of 12 March 2012 accompanying the Bill establishing the new Code of Civil Procedure.

89 According to Taruffo—a view with which we agree—the primary avenue for the resolution of disputes should continue to be adjudication by the courts. Naturally, he observes that this requires jurisdiction to be exercised through an efficient procedural framework. Nevertheless, even where such conditions are absent (Italy being the example he refers to), the solution cannot be to compel citizens to resort to alternative dispute resolution mechanisms in order to obtain a resolution of their disputes. Rather, the appropriate response lies in the implementation of meaningful reforms to the civil justice system and to the organization of the courts, as has occurred in countries such as Spain, Germany, and England. TARUFFO, Michele, "Una alternativa a las alternativas...", *op. cit.*, p. 119.

For these reasons, the proposed reform of the procedural framework provides an appropriate opportunity to initiate a broader debate on the proper role of alternative dispute resolution mechanisms, including a reconsideration of the mandatory and pre-trial character assigned to some of them, such as healthcare mediation. Even if that model is defended as a means of encouraging extrajudicial settlement, it ultimately creates a privilege that is difficult to justify and even harder to reconcile with the constitutional conception of jurisdiction and the judicial process as guarantees and fundamental rights of the litigant[90].

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[90] Dinamarco emphatically underscores the importance of what is at stake, arguing, first, that access to justice is, more than a mere principle, "the synthesis of all the principles and guarantees of procedural law". The guarantee of access to the courts requires that individuals be afforded the opportunity to bring their claims and defences before the judiciary, within a framework in which any exceptions to this rule must be clearly defined and properly justified by the legislature. In his view, this reflects the principle of the universality of judicial process and jurisdiction, which constitutes the primary meaning of the constitutional guarantee of judicial protection.This guarantee, however, is not an end in itself and cannot be understood independently of the guarantee of due process of law. According to Dinamarco, due process constitutes a system of limits on the exercise of judicial power, imposing duties upon the judge towards the parties while establishing, through law, procedural opportunities enabling each party to participate effectively in the proceedings. Compliance with these requirements is inherent in the rule of law. Consequently, the parties possess a genuine right to judicial process, embodied in the formal rules of the procedural system and constitutionally safeguarded through the guarantee of due process of law. In other words, the author's analysis focuses both on the State's duty to provide judicial protection through its courts and on the constitutional limitations governing the exercise of judicial power under the doctrine of due process of law. DINAMARCO, Cândido, *La instrumentalidad del proceso*, Lima, Communitas, 2009, pp. 525–527.

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