THE MARKET AS A MECHANISM FOR CONFLICT RESOLUTION: THE CASE OF ECUADOR

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1. **Introduction**

Efficacy, efficiency, and effectiveness are pillars in the field of law primarily referred to when the discussion focuses on access and the service of providing justice. As discussed by Landero (2014)[1], conflict resolutions by means of alternative mechanisms, such as mediation, under the institutional framework, constitute guarantees to be respected in processes for which the provision may affect the rights of individuals. This has been well pointed out in Article 8 of the American Convention on Human Rights (2001)[2], which regulates judicial guarantees and Article 14 of the International Covenant on Civil and Political Rights. Also, as intrinsic values of the legal system, the efficacy, efficiency and effectiveness have

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[1] Landero, Cornelio. (2014). *Mechanisms Alternative Dispute Resolution as a Human Right* Castilian-Manchego Journal of Social Sciences Universidad Juarez Autonoma de Tabasco, 17, pp. 81-95.

[2] Inter-American Court of Rights. (2001). *Humans*. Judgment Baena Ricardo et al, series C. No. 72, paragraph 129.

been extensively studied by doctrine contributions from Calsamiglia (1987)[3], Paz-Ares and Valencia (1995)[4], Mercuro and Medema (1998)[5], Zywicki and Stringham (2010)[6]. However, presenting them operatively in a way that is related to how the evaluation mechanism is applied in order to have a better picture of the resolution of conflicts outside of court such as those confined within the field of childhood and adolescence through the market represents a novel contribution. In other words, it is a contribution that will assess the regressive performance (judged) compared to what is obtained by private instruments (mediation centers).

The evaluation of alternative justice, specifically mediation for a diagnosis of the performance of this justice, and to contrast it with the trial, allows for mistakes and successes in the development of service justice in relation to the mechanisms for the resolution of conflicts outside of court in cases of childhood and adolescence as a starting point for subsequent evaluations. The guidelines state, specifically with regard to effective mediation, mediation initiatives that are improvised and uncoordinated by states but are launched with the best of intentions, do not contribute to the objective of raising institutional barriers that limit the spontaneous appearance of a culture of peace and non-aggression for which the processes must have strong technical and financial support. In light of this, Marquez (2012)[7] evaluated mediation in court, employing the "criteria" that he called; Efficacy, Efficiency and Effectiveness. Although the methodology that was introduced was similar to that of this document, Marquez (2012) defends the role of the state by arguing that it does not conceptualize the criteria, and definitions given for the right to mediation should not focus on the issues of resolving conflicts outside of court in cases of childhood and adolescence.

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[3] Calsamiglia, A. (1987). *Efficiency and Law*, Doxa, 4, pp. 267-287.

[4] Paz-Ares, J and Valencia, J. (1995). Efficiency Principle and Private Law, Commercial Law Studies in tribute to Professor Manuel Broseta Pont, III, pp. 28-43.

[5] Mercuro, N. and Mederna, S. (1998). *Economics and the Law,* New Jersey, USA.

[6] Zywicki, T. J. and Stringham, P. (2010). *Common Law and Economic eficiency*, September 8.

[7] Marquez, M. (2012). *Evaluation of Alternative Justice*, Editorial Porrua, Mexico.

In this exploratory investigation, a critical approach is chosen regarding the resolution of conflicts outside of court in cases of childhood and adolescence captured by the state, i.e. in scenarios where the state has limited private provision. In this instance access to justice as a service arises, which must resolve conflicts adequately, fairly, effectively, in a timely manner and according to the remedies provided for this approach.

The judiciary represents criticisms of the state. The alternative proposal consists of private initiative and needs to be strengthened (deepened) through the market process. It is represented by mediation centers attached to foundations and / or universities. As for the methodological aspect, the systematic method is applied. This complements them through the review and analysis of literature, current legislation in Ecuador and the use of interviews applied to mediators and judges. There is statistical data from the Judicial Council regarding the resolution of conflicts in childhood and adolescence, in 2014 and 2015 (judicial and mediation route) and those obtained from private mediation centers (via mediation). This is all with a view to discussing the situation regarding the resolution of conflicts outside of court in cases that involve children and adolescents with an emphasis on public policies adopted by the Ecuadorian state. The aim would be to generate alternative strategies that limit the resolution of conflicts outside of court in cases of childhood and adolescence.

In the first chapter, the Ius-economic approach is employed in order to answer the question: How are Efficacy, Efficiency and Effectiveness defined in a legal context? In the second chapter, we will focus the discussion on the question: What access to justice mediation is an efficacious, efficient and effective method for resolving conflicts outside of court in cases of childhood and adolescence? Thus, the evaluation mechanism called the test of the three E (efficacy, efficiency, and effectiveness) occurs, which conceptualizes the following: 1) For North (1990)[8], efficiency is understood as the capacity of the formal rule to allow the transfer of rights (goods and services) to their most valuable uses. It involves

[8] North, D. C. (1990). *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press.

the ability to achieve a goal using the best possible means. 2) On the other hand, the effectiveness refers to the ability of law to achieve the desired or expected effect. In addition, the rules must be considered effective when it can be confirmed that the individuals to whom the prescription is directed develop behaviors described in the standard. This is a factor closely linked to validity, described by the General Theory of Law with the contribution of authors such as Kelsen (1956)[9] and Hart (1980)[10]. 3) Finally, Efficacy, is conceptualized as being focused on aspects related to Social Legitimacy. These are understood as the recognition of individuals and they constitute a factor related to compliance with the standard by social actors as Elster (1991)[11] and Mendez (2014) [12] maintain.

If the state holds a legal monopoly over the provision of justice services, which in fact it has tried in a general way, lacking competition, this state by definition has no incentives to work efficiently. However,[13] private agents can operate the mediation service provision without incurring monopolistic practices. In this sense, the service provided by the state will not be indisputably necessary and will allow mechanisms such as cementing the competition which would be reflected in turn in a more responsible management Mendez (2013)[14]. Therefore, from the state's perspective, with a view to achieving greater penetration or at least a market mechanism as second best, it would be more advantageous to promote payment service through the introduction of a demand subsidy (not the offer to eliminate perverse incentives) and temporal

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[9] Kelsen, H. (1956). *Introduction to the Pure Theory of Law,* Mexico, Autonomous University of Mexico.

[10] Hart, H. (1980). *The Concept of Law,* Mexico, National Publishing.

[11] Elster, J. (1991). *The Cement Company*, Barcelona, Editorial Ariel.

[12] Mendez, Reategui, R. (2014). "Unemployment insurance in Peru: a preliminary through legal theory retrospection, Neo Institutional Economics and the Austrian Law and Economics", *UNED Law Journal*, No 14, pp. 375-422.

[13] However, this proposal does not stop levanter suspicions in terms of results and costs transferred to civil society.

[14] Mendez Reategui, R. (2013). "An Introduction to Institutional Coordination as an Alternate model for Neo Institutional Economic Analysis", *Market Processes European Journal of Political Economy*, Vol. X, 2, pp. 151-200.

character. This would operate similarly to the "voucher" system[15] for education in the countries of the Organisation for Economic Co-operation and Development (OECD).

However, there is no perfect mechanism and development; the factor that will affect the service's viability will be the way in which it is technically provided. If mediation cannot be provided at a low cost from the private sector, in the medium term, a barrier or institutional constraint to strengthen the justice system and strengthen the institutional framework as described Mendez (2014)[16] will be generated. This can create disastrous consequences and the Ecuadorian mediation can happen (in a good account) as well as the extrajudicial conciliation in Peru. Finally, considering that the cultural matrix has much to do with this, if the beliefs of an Ecuadorian lead him to understand that it is the state that must always provide the "justice" service this causes a problem, whether the efficient provision is from the state, the private sector or a blend of the two, as Mendez (2014) states.

2. **Effectiveness, efficiency and effectiveness**

The terms Efficacy, Efficiency, and Effectiveness, known as the three E, have been applied in the field of general theory by Jeammaud (1985)[17] in administrative law by authors such as Norman (2006) [18] and Gardais (2002)[19]; in labor law by Posner (1987)[20], García

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[15] It refers to a certificate of government funding for a student at a school chosen by the student or the student's parents. This mechanism was first developed by Thomas Paine in 1791. However, professor Milton Friedman is considered to be the first to introduce and apply the label of education voucher and voucher system.

[16] Mendez ReateguI, R. (2014). "A Legal-Economic and Institutional Reflection Civil Justice System in Peru", *Magazine of the Colombian Institute of Procedural Law,* pp. 121-156.

[17] Jeammaud, A. (1985). "Around the problem of realization of the right", *Journal of Critical Legal*, pp. 5-15.

[18] Norman, M. (2006). "Social Equity in Public Administration?", *Journal of Public Affairs Education*, 17, pp. 233-252.

[19] Gardais Ondarza, G. (2002). "The legality and efficiency and effectiveness as fiscalizables legal principles", *Journal of Law of the Catholic University of Valparaiso,* pp. 323-341.

[20] Posner, R. (1987). "Eciency and the Ecacy of Title VII", *University of Pennsylvania Law Review,* 136, pp. 513-522.

et al (2010)[21] and it was later transferred to the public sphere to evaluate the administrative management by Flay et al (2005)[22] and finally legislative management related to the generation of goods and services through the use of the term "substantive quality" introduced by Aitken (2013)[23].

Based on the general definition given by the Royal Spanish Academy (2015)[24], the terms efficacy and effectiveness are synonymous and are defined as the "ability to achieve the desired or expected effect". We can also accept that the term efficiency is quasi-synonymous as it is defined as the "ability to have someone or something to achieve a certain effect." The terms efficacy, efficiency and effectiveness all consist of the notion of 'taking effect', however, Garner (2001)[25] currently provides conceptual differences accepted on a general legal level, in governmental policy design and other aspects related to life in society. For the purpose of this document efficacy will be conceptualized as the fulfillment of goals and objectives or needs, efficiency as compliance at the lowest possible cost and effectiveness as the difference between objectives and results obtained.

3. **How are the terms efficacy, efficiency and effectiveness understood in law?**

In the legal field, when referring to the terms of efficacy, efficiency, and effectiveness (the three E), we must consider that they are applied in relation to the legal standard. This can be from a general theory of

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[21] García Villaluenga, L., Bolaños Cartujo, I., Iron Requena, M., Garrigós Tembleque, S., Pit Martínez, P., Dorado Barbé, A., and Merino Ortiz, C. (2010) *The family talks and reach agreements: family mediation. Re- conflict resolution*, Madrid, Complutense Institute for Mediation and Conflict Management (UCM).

[22] Flay Biglan, R., Boruch Robert, F., Gonzales Castro, F., Fredson Gottlieb, D., Sheppard, K. Moscicki, E., Schinke, S., Jeffrey C. Valentine, and Peter Ji. (2005). Prevention Science DOI: 10.1007 / s11121-005-5553, pp. 202-225.

[23] Aitken, V. (2013). "An exposition of legislative quality and Its relevance for effective development", *ProLaw Student Journal*, Volume 2, pp. 1-43.

[24] Royal Academy of Language. (2015). *Dictionary of the Spanish language* edition of the Tercentenary.

[25] Garner, A. B. (2001). *Oxford Dictionary of Modern Legal Usage*, Oxford University Press, 3 Edition.

law approach (regarding the process of creating them and their subsequent application); or from the perspective of economic law (based on the ideas of obedience, enforcement and compliance goals).

In addition to this work and from the general theory of law, the term efficacy is closely linked to the theory of legal norms. From the perspective of this author, Effectiveness has been established as representing a condition of validity of the rules, i.e. that in order to be valid a standard should follow the procedure established for its creation, which suggests that such a rule should be obeyed and applied; in other words, it should be validated by the social fabric.

Similarly, the Efficacy of the norm regarding law will be established at the time that it is implemented and therefore obeyed by the people and applied by the judges. With respect to Huerta (2008)[26], it argues that legal rules must maintain a convergence between validity and efficacy and not just limited to comply with the procedures established for their training but prevail in the application when faced with other legal standards. In short, the efficacy implies that standards must acquire strength through its binding and interacting in turn with the application and compliance of the rules established for their creation. Equally elaborate rules must be obeyed, in the absence of this one would have to resort to a judge, the norm does not necessarily have to be applied by the courts to be considered effective.

These terms are not without controversial meanings and require that part of the ongoing debate be considered in relation to the "ambiguous and misleading subject of obedience to the law" as Hart (1980)[27] states. He also described Efficacy as a principle meaning that the organization and administrative functions must be designed to ensure the achievement of the objectives, goals and targets proposed and assigned by the own legal order, which should be linked to the planning and evaluation or accountability as Jinesta (2000)[28] says.

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[26] Huerta Ochoa, C. (2008). *Theory of Law*. Relevant issues, Mexico, Legal Research Institute.

[27] Hart, op. cit, p. 49.

[28] Jinesta, E. (2000). *Evaluation of results and accountability in public administration*. The amendment to article 11 of the Constitution. Iustitia Magazine, pp. 166-167.

It can be said that Efficiency, from its conception in a Ius-economic context, obtains the best results with the greatest cost savings. In this regard, Vaquer (2011)[29] points out that this criterion has been extensively developed by public and administrative law in order to "value rationality in the allocation of resources and income." Moreover, according to Menendez (2011)[30], its manifestation transcends the general operational nature of public authorities and administration, since it is inserted in its constitutive moment and as an essential objective, therefore representing a reality that must therefore be assumed and is not merely conceited. In this sense, efficiency as assumed criterion was defined by the Constitution of the Republic of Ecuador (2008)[31] when it was established in Article 66, paragraph 25 that "the right to access goods and public and private services of a high standard, with efficiency, efficacy and good treatment is to receive adequate and truthful information on its content and features." It should be noted that the science in the Ecuadorian legal system is also often understood as an optimization criterion (as is approached by the doctrine in administrative law), which was asserted by Parejo (1989)[32] as a "relative character in terms of relating to media with legal objectives".

For the Austrian professor Jeammaud, both concepts refer to the implicit feature in a legal rule that "where specific situations and behaviors that seek to regulate have a completely determined relationship." Despite this preliminary disquisition, we must differentiate between efficacy and effectiveness in the legal sphere. In line with Diez-Picazo (1999)[33], Effectiveness focuses on two specific aspects: a) Recognition of a standard as a guideline rector by those to whom it is addressed (spontaneous absorption by the

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[29] Varquer Cavalry, M. (2011). Effectiveness and Efficiency of the Right to housing in Spain, Madrid, Editorial Iustel.

[30] Menendez, A. (2011). La lucha por una administracion Eficiente, en Homenaje al professor D. Juan Luis Iglesias Prada, pp. 54-49.

[31] Constitution of the Republic of Ecuador. (2008). Official Register 449 of October 20.

[32] Parejo. A. (1989). "La eficacia como principio jurídico de la actuación de la Administración Pública", *Revista de Documentación Administrativa*, 218, pp. 16-65.

[33] Díez Picazo, L. (1999). *Experiences Law and Theory of Law,* Third ed., Barcelona, Editorial Ariel S. A.

social fabric); b) concerning their application in the real world (in the key role they acquire legal practitioners and judges and even those who give life to the alternative dispute resolution system, as in the case of arbitrators, mediators and conciliators). Therefore, as Capella (1968)[34] establishes, effectiveness must be associated with the success of the observance of legal rules based on its objectives and targets.

4. For access to justice, is mediation an efficacious, efficient and effective method for resolving conflicts outside of court in cases of childhood and adolescence?

From conflict to access to justice

This section is devoted to the study of the three E, applied to the resolution of conflicts outside of the court in cases that involve children and adolescents, where access to justice depends on the service (of courts or mediation centers) provided from the field (public, mixed and private) for conflict resolution.

Historically, according to Dominguez and Dauder (2002) [35], the idea of conflict has had a negative conception; hence humans have long perceived conflict as something negative to be avoided due to its disastrous consequences, which implies the emergence of the same resolution without further reflection being made on how to achieve it. Ritzer (1993)[36] claims that two theories have developed: a) The functionalist theory or consensus, which explains social change generated as a result of a tacit agreement slowly and orderly b) The theory of conflict, which arises to challenge a supposedly stable and consensual society, generating changes the fighting of various groups as a result. These theories were present among the ancient Greeks, a) in the theory of consensus with Plato, and later found in relation to St. Thomas Aquinas, Hobbes and Rousseau, b)

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[34] Capella, J. (1968). *Law as Language*, Barcelona, Editorial Ariel.

[35] Bilbao Dominguez, R. and Dauder García, S. (2002). *Introduction to the Theory of Conflict in Organizations*, Madrid, publications Service Rey Juan Carlos University.

[36] Ritzer, G. (1993). *Contemporary Sociological Theory*, Madrid, McGraw Hill.

in the case of conflict theory Aristotle as a thinker of the conflict, St. Augustine, Machiavelli and Locke.

Later in the theory of conflict there have been other contributions, developed in recent years, specifically since the 60s, being as an antecedent of the same left-wing thinkers such as Karl Marx, speaking of the class struggle and change as sources of human progress. Such approaches are criticized for the violent manner of their practical application, which has led to failure, according to Zimmermann (2012)[37].

Also, Ritzer (1993)[38] argues that Marx Wright, more than the class struggle, theorizes about other types of conflicts between different groups that make up society, where the sociological imagination can capture the history and biography of the individual, and the relationship of both in society, i.e. understanding the context. So, conflict theory is considered not as a critical theory of society, but as a reaction to structural functionalism.

According to Poole (2009)[39], the notion of justice has been treated based on legal and political philosophy, mainly seen as a moral virtue. Ulpiano conceived it as giving everyone his due; however, Aristotle developed this idea centuries ago; then with St. Thomas Aquinas it was diffused by the Christian world. For Plato, however, it formed the moral integrity and balance between the powers of the soul and the social balance simultaneously. Ockham meanwhile developed the concept of justice as a quality characteristic of the debtor, so the righteous person was the one who paid his debts in time and form. Furthermore, the orientation of justice was reversed and no longer went from one person towards others, but from others to the person itself, not as a quality but as an organizing principle of the division of property and the protection of the autonomy of subjects. Hobbes emphasizes the law as target to achieve justice. Kant develops it as a collective ideal of peaceful coexistence between free people, while Kelsen questions the idea

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[37] Zimmermann, A. (2012). "Marxism, communism and right: how Marxism led to disorder and genocide in the former Soviet Union", *Journal of Economics and Law*, Vol 9, 34, pp. 97-144.

[38] Ritzer, op. cit., p. 77.

[39] Poole, D. (2009). *Philosophy of Law*, Avila, UCAV.

of morally prosecuting the law and considers the rational and public debate relevant, which is still working on the conception of justice.

Faced with conflict, the state as an instrument that in theory should be responsible for administering order and peaceful coexistence, implanted access to justice for the resolution of disputes, primarily in the courts. However, for this purpose now, and given the ineffectiveness of the ordinary system implemented exclusively by the state, according to Bustelo (2009)[40], alternative methods of dispute resolution arise in response, MARC; which have several denominations of Alternative Methods for Conflict Resolution and also Alternative Dispute Resolution denominations or known by its English acronym ADR (Alternative Dispute Resolution). In the 70s, a process of revaluation of these methods started from the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice, issued by Burger (1976)[41], president of the Supreme Court, as a concern with the administration of Justice, so that it did not become overwhelmed by a marked increase in litigation affecting its effectiveness. Since 2000, there have been initiatives dedicated to promoting the use of mediation and other alternative methods that promote the culture of peace, such as the declaration of the International Year for the Culture of Peace, the Declaration and Programme of Action for the Culture of Peace and the promotion by Nobel peace prize winners of the International Decade for a culture of peace and non-violence for the children of the world (2001-2010). According to Muñoz and Molina (2009)[42], the United Nations, within its Sustainable Development Goals (2015), establishes in Objective 16 that it seeks to "promote peaceful and inclusive societies for sustainable development for all and to create effective institutions that are responsible and inclusive on all levels ". In Ecuador, Alternative Methods they

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[40] Bustelo Eliçabe-Urriol, D. (2009). *Mediation Keys for Understanding and Practice*, Madrid, Hara-Tritoma Press.

[41] Burger, W. (1976). *A need for Systematic Anticipation, The Pound Conference Perspectives on Justice in the Future*, L. Levin & R. Wheeler Eds.

[42] Muñoz, A. F., and Molina Rueda, B. A. (2009). "Culture of Peace complex and conflicted. The search for dynamic equilibrium". *Peace and Conflict magazine*. Granada, 3, pp. 44-61.

have been recognized since the Constitution of 1998 and remain in the current 2008 Constitution.

5. THE THREE E, FOR THE RESOLUTION OF CONFLICTS OUTSIDE THE COURT IN CASES RELATED TO CHILDHOOD AND ADOLESCENCE

Effectiveness

Parejo (1989)[43] argues "to serve the general interests one must use the most appropriate methods, which means meeting a legal precept, which can be controlled jurisdictionally, namely Efficacy." Therefore, efficacy is related to the recognition by individuals of the remedies provided for the resolution of conflicts, in the present case, trial or mediation. In this sense, legal sanction conflicts easily double the number of cases submitted to the route of mediation, i.e. people prefer to go to trial.

In relation to the above, Ecuador's supreme law is guaranteed to its residents as a positive law Sartori (1998)[44] and the right to a culture of peace. Muñoz and Molina (2009)[45] mention that the culture of peace is "an idea that can be understood quite easily thanks to the collective imagination in which it rests and the need for a culture capable of guiding and implementing a more peaceful world ". In this regard, Article 190 of the Constitution of the Republic of Ecuador caters for the recognition of mediation, arbitration and other dispute resolution mechanisms in matters where a compromise can be reached. The procedural system is a means for the realization of justice. The procedural rules enshrine the principles of simplification, uniformity and efficiency (Art. 169). In the case of conflicts of childhood and adolescence, the Ecuadorian legislation refers to the Organic Code of Children and Adolescents (2003), in accordance with the Civil Code (2005). In this sense, the possibility

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[43] Parejo, A. (1989): «La eficacia como principio jurídico de la actuación de la Administración Pública», *Revista de Documentación Administrativa*, 218, pp. 16-65.

[44] Sartori, G. (1998). *Comparative constitutional engineering.* Mexico: FCE.

[45] Muñoz and Molina Rueda, Op. Cit., P. Four. Five.

of compromise matters in that the parties may have provided no waiving of rights, i.e. conflicts alimony, custody and visitation. The pathways for the management of these conflicts are: the courts (from the public) or mediation centers (from the public, private or mixed) for which we must also consider the Law on Arbitration and Mediation established in 1997. Mediation is a complementary strategy within the so-called ordinary system that can be considered and promoted as an integral part of the justice system. Through a non-jurisdictional, voluntary and confidential process communication between the parties is possible, in order to try and transform the common interests into a stable and viable agreement that is satisfactory to both of the family parties, and to also tend to the household needs, especially those of minors and the disabled. This facilitator is a mediator who is an impartial, neutral, trained professional without any decision-making power.

Regarding the development of policies, there is the Restructuring Program of the judiciary, for which the creation of a new direction for access to justice services has been proposed and as part of these the Sub- Mediation and Justice of the Peace has been suggested. Three strategies were established that were implemented in August 2013: information strategies, which consist of the dissemination of the principles of alternative mechanisms and a culture of peace through media; positioning strategies to provide the benefits and scope of mediation in everyday conflicts in a practical way in order to avoid their prosecution; and impact strategies whose purpose is to offer activities, messages and proposals to modify the behavior of citizens in the way they respond and resolve their own conflicts.

During 2013, an inter-institutional agreement was reached in the Mediation and Culture of Peace for the training of 99 mediators; conducting 15 days of referral for 8 weeks, in 12 centers in 8 provinces. A total of 1929 cases derived, 597 audiences and 398 agreements reached. A sub-management aspect of Mediation Peace and Justice was created; Instructions were issued to establish a new registry for public and private centers for Mediation nationwide. To facilitate this, there was the restructuring of judicial mediation centers throughout the country; with the aim of expanding service coverage nationwide.

Among the main inter-agency agreements, we find the following: 1) The Ministry of Education made a commitment to work on the issue of hotbeds of coexistence and a culture of peace in educational institutions; 2) The Secretariat of Good Living seeks to strengthen the commitment to build spaces for the peaceful settlement of conflicts in communities as an option for an improvement of the quality of life and good living; and 3) The Public Defender's Office and the Ombudsman will develop the mechanism of mediation in all areas corresponding to these institutions.

Despite the presence of a pro-mediation legal framework for 18 years in Ecuador, the country has maintained the operation of mediation centers as being exclusively private. After the adoption of the Constitution of the Republic in 2008, a series of changes came about for the transformation of justice in the country. So in accordance with the provisions of the Constitution and the matter of free access to justice, the program of Restructuring the judiciary was founded according to the Axis Business Model (2011), which has sought to address the concerns regarding the conflicts of childhood and adolescence, through the division of competence in unique, multi-competent courts and the units of Family, Women, Children and Adolescents. Regarding mediation centers within the foundations of the program, it is stated that the service in relation to the territorial coverage is poor, these centers are mostly private, their services are based on the interest of those who believe in them and they are not free. For this reason, they are considered as inaccessible to the public and therefore do not comply with the principle of access to justice, established by Ecuadorian law. According to the National Judicial Council of mediation centers, officially there are 63 in operation of which, after analyzing the information, 25.40% are public schools and 74.60% are private centers, of which 25% are in universities. In the province of Tungurahua, three centers of mediation are registered, of which two remain in operation: The Judicial Center and the Center for Arbitration and Mediation Chambers of Commerce and Industry of Tungurahua. (Vargas 2010)[46] notes, "the free

[46] Vargas, E. (2010). *The Public Investment Management Seminar VII Judicial-CEJA*, the Justice Studies Center of the Americas-CEJA, p. 24.

justice judicial process leads to cases whose costs outweigh the likely benefits."

For Clavijo (2011)[47], the analysis of efficiency means knowing the *inputs* (structure of judicial proceedings) and the *results* (speed of legal decisions made by judges or other competent authorities or individuals).

With regards to efficiency and considering the advantages of mediation such as; speed, lower costs, and care for the relationship to name a few, compared to the disadvantages of the trial and aspects such as; congestion, cost, emotional wear and corruption, the question arises: Why do the Mediation centers never manage to achieve the affluence of the courts? When analyzing the conflict and its various ways of being managed, Franciscovik and Torres (2013)[48] came to the conclusion that the litigation culture in which we live is predominant, although mediation has greater advantages, where as judgment has less demand. Clavijo (2011)[49] states that: "(…) the Judicial Branch has enjoyed a dual status to date. In a sense, the bulk of the population recognized the Branch as a 'majesty' that manifested itself when facing the great issues of the state, at the level of the High Courts. "

The National Secretary of Planning and Development states:

> "For a true access to justice, it is important to establish a system characterized by its accessibility, opportunity, independence, honesty, transparency, impartiality and efficiency."

The state should ensure that the market meets the demands of spaces for conflict resolution, i.e. that these are provided "prima facie" from the private sector in a satisfactory manner. Referring in this way to the Program Restructuring of the judiciary, Axis Business Model (2011), the nationwide investment implementation is

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[47] Clavijo, S. (2011). *Costs and efficiency of the judicial branch policy operating shock* Colombia, Bogota, National Association of Financial Institutions –CEE.

[48] Franciscovik Ingunza, B., and Torres Angulo. C. (2013). "The efficiency of alternative means or appropriate dispute resolution proce-salt versus civil". *Journal of the Faculty of Law and Political Science Ricardo Palma*, 2, pp system. 231-260.

Ibid, p. 17.

[49] Clavijo, Op. Cit, p. 47.

relaxed in the case of the courts according to the division by competition: a) Six courts only (6 judges); b) Twenty-four multi-competent courts (24 judges); c) Fifty-six units of Family, Women, Children and Adolescents (222 judges).

For mediation, one hundred and seventy nine centers have been recognized nationwide. From the data presented, it appears that at a national level, regarding the conflict on children and adolescents, there are a projected total of eighty-six courts and units (comprised of more than one court). These represent just 17.52% of the national total.

When analyzing the investment of material resources and human talent contributed by the public sphere and then regarding the private sector, which must render the service of conflict resolution profitable, we may think that we are facing unfair competition as this monopolizes service provision. It also results in competition being an economic phenomenon whose configuration presents certain difficulties because of the wide variety of mechanisms and modus operandi presented within the complex world of trade relations. According to Benavente (2012)[50], it is important to note that there are companies with parameters within which economic relations exist such as; prices, quality, advertising, innovations, technology and others that thrive in all markets.

In this paper Efficiency is a term that refers to both courts and mediation centers that are under the supervision and control of the National Council of the Judiciary (state agency). [51]This is because access to justice is a constitutional right, whose administration has been delegated to the state, which must be provided under established principles, to which the test of the three Es is essential. Therefore, the Ecuadorian Constitution states that the Judiciary should ensure the transparency and efficiency of the judiciary (Art. 181). In the case of mediation centers, the Judiciary has granted a registration number of operation, subject to compliance with

[50] Benavente, H. (2012). *Tutela Legal Consumer and Competition*, Lima, Editorial San Marcos.

[51] For an extensive review on the definition of the efficiency concept from an economic viewpoint, professor Huerta de Soto's book *Theory of Dynamic Efficiency* (2009) plays a key role.

requirements, so it is necessary to prove: a) List of mediators; b) Regulation; C) Code of Ethics; d) Implementation Plan; e) Fee to be approved for the collection of services; and f) The necessary infrastructure for the operation.

In the National Survey of Employment, Unemployment and Underemployment, conducted in December 2014 by the National Institute of Statistics and Census (INEC), a module on the perception of justice services was included in citizenship. Instruments were elaborated based on the perception of various age groups from 16 years upwards, from 31,092 families nationwide, with a coverage of 347,814 people. What was derived from their responses was used to comprise a percentage related to the acceptance of the performance and the service received. Acceptance percentages may not necessarily be related to the service received as such; they can be better linked with how the state projects, so that people can associate the improvement of justice with greater economic investment.

RATING THE FUNCTIONING OF THE NATIONAL COUNCIL OF THE JUDICIARY (2015)

Judicial Council	*Porcentaje*
Excelent grade	9,5 %
Positive grade	5,2 %

Source: National Institute of Statistics and Census (INEC) module on perception of justice services in citizenship.

USER SATISFACTION OF JUDICIAL UNITS IN ECUADOR (2015)

People who have visited the country Judicial Units	*Porcentaje*
Fully satisfied	16,9 %
Very satisfied.	40,2 %
Satisfied averagely	18,8 %

Source: National Institute of Statistics and Census (INEC) module on perception of justice services in citizenship.

With respect to user satisfaction in the Mediation Centers (within the judiciary), within the Ecuadorian Institute of Statistics and Census INEC (2014), infrastructure and the operation of judicial units were rated as excellent by 12.6% of citizens and as good by 51.5%.

It also indicates that for reasons of professional culture, attorneys resist leaving the comfort zone, tending to look at the past using the law, and so one of the riskiest actions occurs when we look aside, to verify our interpretation of the criteria by comparative law. However, legal professionals do not look forward as there is no standard, which is a deficiency in the system, where the application of MARC is seen as a loss of income. According to Clavijo (2011)[52] "Perhaps one of the most useful indicators at the aggregate level of cost-efficiency in the area of justice comes to relate public spending in the sector with the backlog of evacuation processes."

Meanwhile the judges who understand justice as the distribution of sentences consider a role to which they do not want to renounce themselves, because recognizing the work of the judiciary in resolving delicate conflicts where the parties have been limited is not permitted and its generalization is questioned.

Similarly, Clavijo (2011)[53] notes that "the ordinary citizen rebukes the Judicial Branch (as a whole), and rightly so, as his tardiness and lack of effectiveness in day-to-day life is a justice that is not granted to the common man." In terms of litigants, it is emphasized in the myth in which litigants assume a priori that they are right and therefore the judge must be stripped of authority and this is coupled with the lack of the alternative methods that still have a marked impact on the prevalence of the courts. Finally, he points out that any policy that addresses the best means to resolve conflicts must take into account not only the general framework but also resistance to change.

5.1 *Effectiveness*

Muñoz and Molina (2009) [54] argue that "Aspiring to manage the complexity of the Culture of Peace is not easy; individual and

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[52] Clavijo, Op. Cit, p. 47.
[53] Clavijo, Op. Cit, p. 47.
[54] Muñoz and Molina Rueda, Op. Cit., P. Four. Five.

institutional, academic and scientific, supportive and cooperative efforts are all necessary components."

In Ecuador, as is the case in general, the trend is to create specialized courts in mediation centers, which deal with issues of children and adolescents as well as civil, tenancy, compensation, commercial, transit, public and labor contracts (when mediation is requested by the employer). However, as Vargas (2010)[55] established, the work in the VII Seminar on Judicial Management consists of "Investing in Justice" (2010) and beyond investment in infrastructure "it is essential that those who assume administrative tasks are really people with management skills and not with skills in other subjects. In this light, when the conflicts that are to be resolved involve children and adolescents, as supreme law indicates, the administration of specialized justice and operators must be appropriately trained in order to implement the principles of the doctrine of comprehensive protection (article. 3 no. 3, 169, 175, 190).

For example, in the province of Chaco in Argentina, mediators must have specific training to mediate in such complex and momentous situations in people's lives, as they are more committed than those purely working on economic issues. This is even more essential if you consider that the family is the protagonist of the development of human relations, mutual love, providing company, the care of basic social needs and socialization. Therefore, according to Garayo (2013)[56], not only does this involve addressing the conflict in a non-violent manner, it also involves improving the quality of life of our fellow human beings. In Ecuador, it is not obligatory to have a specialty as a mediator in family matters in the province of Tungurahua; there are no mediators with specific training in family mediation in any of the two centers providing the service (Center for Judicial and Center Chambers of Commerce and Industry of Tungurahua).

In terms of the cost of the service, whether the school is public or private in matters of childhood and adolescence, it is important to take into account; tenure, visits and food. Usually the service is

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[55] Vargas, E. (2010). *The Public Investment Management Seminar VII Judicial-CEJA*, the Justice Studies Center of the Americas-CEJA, p. 24.

[56] Garayo, B. A. (2013). "Civil action as a consequence of the Criminal Action", *Magazine Agreement*, 18, p. 91.

free but it is charged in the private sector depending on the sponsor institution. However, considering that "there is no free lunch", an alternative involving a demand subsidy through mechanism vouchers could efficiently replace subsidy initiatives that have prevailed in all sectors in Ecuador.

Despite everything mentioned above, Redorta concludes that after 10 years of litigation remaining as the only system of conflict resolution, based on experience in the practice of the profession and in relation to the crisis of the classical judicial systems, people related to the management of the resolution are frustrated or dissatisfied when conflict increases. However, conflict is multidisciplinary and this approach comes from a single-minded discipline, so that conflicts are resolved from the confrontation but the concern is, does this really resolve these conflicts? It is most effective to go to the root of the problem, i.e. working with the causes (mediation) and not from the consequences as is the case at trial. The question that then must be asked is: is it really effective to use confrontation for conflict resolution? Doubt grows if we take into account that the trend is the increasing of laws and thus the contradictions of formal justice, the author suggests reviewing the response mechanisms, i.e. the model of justice.

The guidelines for Efficacy, Efficiency and Effectiveness constitute guiding principles for the service and common good. Legal mandates are violated if public service is not established, if it is carried out with inappropriate or disproportionate means or if the process is not legally suitable for efficacious, efficient and effective management in the general interest.

6. **Conclusions**

The right of access to justice conceived by current legislation as a public service for conflict resolution can be provided from the public, private or mixed environment. It therefore requires the observance of principles and the introduction of indicators of management for which the test of the three E can be extremely important in providing conceptual guidelines that would allow better dialogue between lawyers and those in charge of the administration of the system. In

this sense, authors like Guinart (2004) [57] defend the need to develop indicators that address issues such as efficacy, efficiency and effectiveness and contribute to the proper discharge of responsibility and legality that characterize the direct and indirect public performance.

In public policies that have been implemented for improving access to justice in tenure conflicts, food and visits via courts and mediation centers, the state has opted to increase spending on infrastructure deployment and the recruitment of staff for judicial units and public mediation centers, without setting a level that is correspondent to the required results.

In Ecuador, as is the case in the province of Tungurahua, where the resolution of conflicts outside of court involves children and adolescents (holding food and views), 80.09% of all reported conflict is apparent; while the pathway mediating 19.91% of a total of 4414 cases filed is resolved. It is evident that mediation is not a mechanism recognized by the conflicting parties, so they mostly prefer to go before the judge, so that the rule applies to the settlement of conflicts outside the courtroom in cases of childhood and adolescence, and so that it is not applied by the justiciable, even if mediation has greater advantages over litigation primarily for family law, i.e. conflict resolution via mediation is not efficacious, efficient and effective.

A culture of peace which could establish a demand subsidy is required using a system that could well be the voucher or vouchers to avoid creating a state monopoly of the service, and thus would ensure efficacy, efficiency and effectiveness when conflicts that involve children and adolescents are settled outside the courtroom.

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