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The constitutional paradigm of restorative justice in Mexico and its link with international law through conventionality control

Abstract

The present work aims to analyze the constitutional paradigm of restorative justice in Mexico in relation to the international instruments that are binding on it. The main international instruments to which Mexico is a signatory through the conventionality control that address mediation and restorative justice methodologies are glossed through the comparative method, to understand through a systematic analysis the international context in which the Mexican constitutional system he is immersed in relation to the topic of alternative justice.

Keywords: Restorative justice, constitutional paradigm, international instruments, alternative mechanisms, control of conventionality

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Gabriel de Jesus Gorjon Gomez,[1] Eduardo Barajas Languren,[2] Saul Adolfo Lamas Meza[3]
[1]Autonomous University of Nuevo León, MASC PhD, Mexico
[2]University of Guadalajara, Mexico
[3]Technological University of Guadalajara, Mexico

Correspondence: Gabriel de Jesus Gorjon Gomez, Autonomous University of Nuevo Leon, MASC PhD, Mexico, Email ggorjon@hotmail.com

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Preamble

Historically, our country has been characterized by its fraternity, solidarity and openness towards the international community. Its eclectic and conciliatory diplomacy has distinguished it in the world as a reliable country in multiple aspects. Its bilateral and multilateral relations give certainty to those who enter into agreements, treaties, conventions or international instruments with it. Even in war conflicts, Mexico has always assumed a neutral position, it has never been recalcitrantly polarized in an armed conflict, eventually it has only assumed diplomatic biases, but with moderation and for circumstantial events.

The Political Constitution of the United Mexican States is by antonomasia a guarantor, which has given our country the reputation of being -in theory- a country that has been concerned with consolidating a Rule of Law where unrestricted respect for Human Rights permeates. Since its independence, Mexico has entered into multiple international instruments and treaties of a commercial, diplomatic, cooperation, etc. nature with countries around the world, with the primary objective of axiologically and legally promoting the *pro homine* philosophy and the culture of peace. In 1981, Mexico took a very important step in the consolidation of its guarantee system by ratifying three international treaties of supreme importance and prestige:

The International Covenant on Civil and Political Rights.

*The International Covenant on Economic, Social and Cultural Rights. American Convention on Human Rights. *(Among others of lesser popularity).*

In 2011, the constitutional reform on Human Rights generated a new way of approaching the understanding of our Mexican legal system, since international treaties dealing with human rights were elevated to binding status, assuming the same hierarchical rank as that of our Political Constitution of the United Mexican States. This provision is clearly regulated in the following two paragraphs of the Constitution:

In the United Mexican States all persons shall enjoy the human rights recognized in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which may not be restricted or suspended, except in the cases and under the conditions established by this Constitution. The norms relating to human rights shall be interpreted in accordance with this Constitution and the relevant international treaties, favoring at all times the broadest protection[1] for individuals.

Article 133 This Constitution, the laws of the Congress of the Union emanating therefrom and all treaties in accordance therewith, concluded and to be concluded by the President of the Republic, with the approval of the Senate, shall be the supreme law of the entire Union. The judges of each State shall abide by said Constitution, laws and treaties, notwithstanding any provisions to the contrary that may exist in the Constitutions or laws of the State.[2]

The control of conventionality has already become a legal and factual reality, a topic that has become an obligatory subject of study for any operator and scholar of legal science, since from this change of paradigm it is no longer only imperative to analyze the domestic constitutional system, but now it is indispensable to study the international instruments that are binding for Mexico.

In this document we will make an analysis, as a gloss of some international treaties that Mexico has signed since it became an autonomous democratic State and that allude to restorative justice schemes. After analyzing the international treaties that allude to some form of mediation, we will make a systematic conclusion of the impact that our Mexican legal system has had by signing and ratifying them.

International instruments referring to mediation and peaceful dispute resolution schemes charter of the United Nations[3]

The Charter of the United Nations was signed on June 26, 1945, at San Francisco, at the close of the United Nations Conference on

[1]Political Constitution of the United Mexican States. Text in force. Amended paragraph. 2011

[2]Political Constitution of the United Mexican States. Text in force. Article amended .2011.

[3]UN. Charter of the United Nations. San Francisco. 1945.

International Organization, and entered into force on October 24 of the same year. The Statute of the International Court of Justice is an integral part of the Charter".[4]

This international document is undoubtedly one of the most important that Mexico has signed in its history as a sovereign and independent nation, the fame of this international instrument lies in the large number of countries that have signed and ratified this treaty, which has the task, according to the wording of the document itself:

I To preserve succeeding generations from the scourge of war, which twice in our lifetime has inflicted untold suffering on mankind.

II To reaffirm faith in fundamental human rights, in the dignity and value of the human person, in the equal rights of men and women and of nations large and small.

III To create conditions under which justice and respect for treaty obligations and other sources of international law can be maintained.

IV Promote social progress and raise the standard of living within a broader concept of freedom.

V To practice tolerance and live together in peace as good neighbors.

VI Unite our forces for the maintenance of international peace and security.

VII To ensure, by acceptance of principles and adoption of methods, that armed force shall not be used except in the common interest; and

VIII To employ an international mechanism to promote the economic and social progress of all peoples.[5]

This International Treaty refers in several articles to the importance of creating conflict resolution mechanisms, among which the following stand out:

Article 1 The purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace; and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breaches of the peace.

It can be clearly seen in this paragraph that the main raison d'être of this treaty is to preserve peace in the world, after the terror brought about by the Second World War, which is why this international document was created under this historical context, which has been relatively successful, because although it is true that armed conflicts have not been eradicated from the world, at least we have not had a world war on the catastrophic scale of the first two preceding international armed conflicts.

Thus, since the creation of this international instrument, the culture of peace in the world and the promotion of comprehensive restorative justice have been promoted.

Article 2 (Section III). The Members of the Organization shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The creation of dispute resolution mechanisms per se, in order to encourage the culture of peace, through the creation of mediation, conciliation, arbitration and restorative circles, which will have the teleology of healing the social fabric that may have been eroded by an international conflict, is clearly specified here. The terrible world wars that have scourged humanity became a great lesson for mankind, their ominous impact is so marked in the collective social subconscious, that in no way a similar devastating phenomenon can be replicated. The culture of peace and restorative justice must permeate as an ontological value and universal philosophy of life.

Article 33

I. The parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

II. The Security Council shall, if it deems it necessary, urge the parties to settle their disputes by such means.

This paragraph specifies exhaustively the dispute settlement mechanisms that are considered the most optimal, relevant and appropriate for the settlement of disputes between signatory countries. The UN makes an enunciative proposal of these suggested mechanisms, but it is not a limitative list, since the principle of progressiveness is followed. Dispute resolution methodologies follow an epistemological scheme, however, alternative dispute resolution mechanisms follow the principle of flexibility, i.e. the result is prioritized more than the process itself, formality often only hinders the restorative processes, it has been noticed in practice, that in friendly meetings, -without the protocol tension-, better results of compromise are obtained.

Article 36

I. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or a situation of a similar nature, recommend such procedures or methods of adjustment as may be appropriate.

II. The Security Council shall take into consideration any procedures adopted by the parties for the settlement of the dispute.

It is precisely in this article that the possibility is considered that any signatory country may use or propose any mechanism (formal or emergent) for the resolution of disputes, as mentioned in the preceding article, and thus propose restorative systems according to its internal methodologies and systems. Any signatory country should feel free to propose amicable solutions, genuinely and without political bias; which of course can never be considered an attitude of interference, since one of the most important principles that permeates international alternative justice is that of the self-determination of peoples.

Article 52

I The Members of the United Nations which are parties to such agreements or which constitute such agencies shall make every effort to bring about the peaceful settlementof disputes of a local character through such agreements or regional agencies before submitting them to the Security Council.

II The Security Council shall promote the development of the peaceful settlement of local disputes through such regional

[4]Preamble of the Document retrieved from the official UN.

[5]Idem

agreements or agencies, either on the initiative of the States concerned or at the request of the Security Council.

It is here where restorative justice follows an epistemological method, which could well be called fractal, since it seeks to transfer these dynamics to the micro-social and not only remain in the macro-social, with which the UN tries that these mechanisms are not only generated between nations, but that they influence and inspire the internal communities of these States. It should be remembered that every international instrument is a guideline for the signatory countries, and those who subscribe to such treaties, signing and ratifying them, assume the moral commitment to extrapolate their postulates to their domestic legislation.

Charter of the organization of american states (OAS)[6]

This international instrument was born into legal life a few years after the Second World War (1948) and although it deals only briefly with Alternative Dispute Resolution, it inspired the creation of the famous Pact of Bogotá. The purpose of this instrument is undoubtedly to strengthen the Organization of American States, strengthening the culture of peace, in order to guarantee justice and promote solidarity and fraternity among the peoples of the Americas.

Chapter V of this instrument includes a section entitled Peaceful Settlement of Disputes, which establishes the following theoretical postulates:

Chapter V Peaceful Settlement of Disputes.

Article 24 International disputes between Member States shall be submitted to the peaceful settlement procedures set forth in this Charter.

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial proceedings, arbitration and those specially agreed upon at any time by the Parties. When a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled by the usual diplomatic means, the Parties shall agree on any other peaceful procedure which will enable them to reach a solution.

Article 27 A special treaty shall establish the appropriate means of settling disputes and shall determine the procedures pertinent to each of the peaceful means, so as not to allow any dispute between the American States to remain without final settlement within a reasonable period of time.

As we can see from the articles transcribed above, the information on this topic in this instrument is very vague, limiting itself to pointing out some alternative practices to resolve disputes in the signatory countries, such as good offices, mediation and conciliation and, in a formal judicial manner, arbitration as a hetero-compositive scheme. However, something of supreme importance is that in this same Convention the American Treaty on Peaceful Settlement was concluded, which will be described below.

American treaty of peaceful settlement. pact of bogota[7]

Also known as the Pact of Bogotá, signed on April 30, 1948 and ratified by Mexico on November 23, 1948. This treaty abrogated other previous international instruments that had been concluded in a dispersed manner and was ratified without reservations by Mexico, Costa Rica, Brazil, Haiti, Honduras, Dominican Republic, Panama and Uruguay. Twenty-one countries are currently signatories to the treaty and it is considered a model international instrument of alternative-restorative justice in the Americas. Some of the main numerals that address the topic of mediation are the following: The High Contracting Parties recognize the obligation to settle international disputes by peaceful regional procedures before bringing them before the Security Council of the United Nations. Accordingly, in the event that a dispute arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic means, the parties undertake to make use of the procedures set forth in this Treaty in the manner and under the conditions provided for in the following Articles, or of such special procedures as, in their opinion, will enable them to reach a solution.

This article of the Treaty is prophylactic, that is to say, it marks a principle that could well be called definitive, since it requires the States in conflict to first exhaust the mediation mechanisms closest to their jurisdiction before mobilizing the judicial machinery of the International Court of Justice.

Article 4 Once one of the peaceful procedures has been initiated, either by agreement of the parties, or in compliance with the present Treaty, or with a previous agreement, no other procedure may be initiated before the end of that one.

This paragraph follows the universal principle of non bis in idem, which establishes that two trials cannot be carried out simultaneously and that it is an indispensable condition that in order to resort to an instance of higher hierarchical priority, the previous instances must be exhausted beforehand. The principle of definitiveness has always been contemplated in international tribunals. The commissions receiving these cases will have the task of making sure that before a case is admitted in an international court, the instances to which the parties could have recourse in advance have been previously exhausted.

Article 8 Recourse to peaceful means of settling disputes, or the recommendation of their use, shall not be a reason, in the event of armed attack, to delay the exercise of the legitimate right of individual or collective self-defense provided for in the Charter of the United Nations.

This numeral establishes a valid exceptional principle in the sense that when any country feels its sovereignty is violated by any war intervention, terrorist attack or event of similar nature, it may of course make use of self-defense to repel a real, actual and imminent attack, regardless of whether there is a mediation agreement with the nation that initiates the hostility. We must understand that this treaty was concluded in the context of the post world war, hence the establishment of these provisions that obey common sense.

The Good Offices procedure consists in the action of one or more American Governments or of one or more eminent citizens of any American State, who are not involved in the dispute, in order to bring the parties closer together and enable them to find a suitable solution directly.

This alternative justice scheme is comparable to what is doctrinally known as restorative circles, in which, in a joint manner and promoting the spirit of cooperation to achieve a culture of peace, any signatory in good faith can present an initiative, project or proposal so that the countries in conflict can mitigate or resolve their disagreement. The

[6]Organization of American States, *Charter of the Organization of American States*. 1948.

[7]Organization of American States, *American Treaty on Peaceful Settlement. Pact of Bogotá. Colombia.* 1948.

methodology of good offices is one of the most used by the appellants when seeking to reach a compromise between two states in conflict.

The mediation procedure consists of submitting the dispute to one or more American governments, or to one or more eminent citizens of any American State who are strangers to the dispute. In either case the mediator or mediators shall be chosen by mutual agreement of the parties. This is a hetero-compositive mechanism, in which although it is true that the countries in conflict have the autonomy to enter into a restorative agreement, they voluntarily submit to this mechanism where an independent and neutral entity will moderate the debate in order to reach an optimal, peaceful and resolutive resolution of the conflict. The interesting thing about this paragraph is that the parties are empowered to choose who will act as mediator, thus guaranteeing that whoever performs this function will be someone highly qualified.

The functions of the mediator or mediators shall consist of assisting the parties in the settlement of the controversies in the simplest and most direct manner, avoiding formalities and trying to find an acceptable solution. The mediator will abstain from making any report and, as far as it concerns him, the procedures will be absolutely confidential.

Here we can see two ontological principles that have historically governed the principle of simplicity and the principle of privacy. The former seeks to avoid unnecessary protocol formalities that only hinder the negotiation. In the second, it is foreseen that the information provided during the process will be totally confidential, since in no way can this information be used in a subsequent legal process.

When the conciliation procedure previously established in accordance with this Treaty or by the will of the parties fails to arrive at a solution and the said parties have not agreed to arbitration proceedings, any of them shall have the right to resort to the International Court of Justice.

When the mediation model does not achieve its objective of reaching a conciliatory agreement between the parties, they will naturally have access to the formal justice of the OAS, which in this case will be the International Court of Justice. It is very rare that the recurrent parties who voluntarily submitted themselves to a mediation mechanism do not reach a settlement, since their intention was precisely to resolve the conflict through a restorative justice scheme. However, this does not preclude their legitimate right to go to an international legal instance. His right to go to an international court is saved, as long as an agreement has not materialized through alternative justice.

When more than two States are involved in the same dispute, the States defending equal interests shall be considered as a single party. If they have opposing interests, they shall have the right to increase the number of arbitrators so that all parties are equally represented.

This is what is known in the doctrine as joinder and relatedness of the case, i.e., if several countries share the same interests, they should adhere jointly to the shared conciliation scheme, so that all interested parties can benefit from the joint mediation model. This has given rise to multilateral restorative schemes.

Basic principles for the use of restorative justice programs in criminal matters[8]

The Basic Principles for the Use of Restorative Justice Programs in Criminal Matters were born to the legal life in the year 2002, whose document was elaborated by the Economic and Social Council of the United Nations Organization, for its signatory members. Its purpose was to encourage Member States to adopt and standardize restorative justice methodologies in the context of their legal systems, but not as a binding imposition, but as an inspirational parameter with universal principles, to serve as a model to be replicated.

The core epistemology of the Basic Principles is intended to set out generalized schemes for the use and application of restorative justice, suggesting erga omnes standards that could be incorporated by Member States, with the aim of guaranteeing genuine alternative justice models with effective and humane restorative processes that complement their legal systems.

The following is a summary of this international instrument, comparing its postulates with those adopted by our legislation:

1. *The Restorative Justice Program seeks to achieve restorative outcomes.*

2. Restorative process is any process in which the victim and the offender, and where appropriate any other individual or members of the community affected by a crime, together actively participate in the resolution of issues arising from the crime, usually with the assistance of a facilitator. ''Restorative processes may include mediation, conciliation, conferencing, and sentencing circles.

This is the first time that the term restorative justice is used in an international instrument, since in the instruments that preceded this one, the concepts of alternative justice and dispute resolution mechanisms were only alluded to; this concept is more comprehensive and humanitarian, since its teleology not only seeks to resolve the conflict between the participants, but to really restore the social fabric that was damaged by it. Unfortunately, our Mexican legislation does not use this term either in the Constitution or in the special law, in this case the National Code of Criminal Procedures, limiting itself exclusively to talk about alternative solutions to the conflict, which confirms the idea that in our country this philosophy does not yet permeate fully. The National Law on Alternative Dispute Resolution Mechanisms in Criminal Matters, enacted in 2016, only refers to axiological principles, but does not delve into the restorative epistemology referred to in this international instrument.

3. Restorative outcome is an agreement reached as a result of a restorative process. Restorative outcomes include responses and programs such as reparation, restitution and community service, with the goal of meeting the individual and collective needs and responsibilities of the parties and to achieve the reintegration of the victim and offender.

In this numeral the idea of community service stands out, which inspired many legislations in many countries to create schemes of conditional suspensions of the process, where the accused of a crime is given the opportunity to transmute the sentence (in case of petty crimes), for other forms of restorative punishment such as painting walls, distributing goods, setting up a course, doing community work, etc. These practices have been successful, especially in juvenile restorative justice, with flattering results. Our comprehensive criminal justice system for adolescents incorporates these practices and programs, precisely in response to this UN proposal.

4. The victim, the offender and any other individual or member of the community affected by a crime may be involved in a restorative process.

[8]Economic and Social Council of the United Nations. *Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.* Vienna. Austria. 2002.

This paragraph establishes that each of the parties involved in the conflict will have pro-active participation. It is well known that in the traditional criminal system, the victim has always been the forgotten party, suffering not only indifference, but also revictimization. With the General Law of Victims that was issued in 2013 and with the expansion of prerogatives that were added for the victims in Article 20, section C of the Constitution, the figure of the victim is empowered; also in the new adversarial adversarial criminal system, figures such as the victim's legal advisor are incorporated, in addition additional rights were granted to the victim, expanding its range of prerogatives.

1. *Facilitator is the person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.*

The term facilitator was adopted by the National Law on Alternative Dispute Resolution Mechanisms in Criminal Matters, and is used in a generalized manner to refer to the operator who moderates the alternative process, whether it is a mediator, a conciliator or a moderator of a restorative board. This all-encompassing term is the most neutral and certainly the most appropriate, as it does not carry any semantic bias.

2. *Restorative justice programs may be used at any stage of the criminal justice system, subject to national laws.*

This is what would be considered as pre-procedural alternative justice, developed from the ministerial headquarters when the crime is investigated and the investigation file is integrated; procedural, already in the stage of the process per se, either through referrals to an institute of alternative justice or through a conditional suspension of the process; and the post-procedural stage, already when a sentence has been issued and it is sought to create models of post-penitentiary mediation, the latter less popular in our country, although they are contemplated in the National Law of Penal Execution.

3. *Restorative processes may be used only when there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and offender may withdraw their consent at any time during the process. Agreements should be entered into voluntarily and should contain only reasonable and proportionate obligations.*

The principles of voluntariness and proportionality are contemplated, which have been written about at length in previous sections, in which it is established that in no way can the use of an alternative mechanism be imposed by operation of law and much less coercively on those involved in the criminal drama, since these must be freely accepted by the intervening parties. Here the classic principle materializes: the will of the parties is the supreme law. The will, as a specific concept, should not be understood as a physical cause, but as a directive guideline of our conscience, consisting in the choice of the means, for the achievement of the ends''.[9]

The victim and the offender should normally agree on the basic facts of the case as the basis for their participation in the restorative process. The offender's participation should not be used as evidence of admission of guilt in subsequent legal proceedings.

This provision is also contemplated in our Mexican legislation, both in the National Code of Criminal Procedures[10] and in the National Law of Alternative Dispute Resolution Mechanisms in Criminal Matters.[11] where it is established that the information that is evoked in a mediation process, in case it fails and no agreement is reached, may not be used in the formal process when it is resumed.

9. *Differences that cause power imbalances as well as cultural differences between the parties should be taken into consideration in referral to a case.*

Our Mexican legislation establishes that in each early attention module in prosecutors' offices or in local alternative justice institutes, there will be translators and interpreters of the most representative indigenous languages of our country, in order to provide specialized attention to these vulnerable groups, allowing them fluid access to formal justice.

10. *The safety of the parties should be ensured in any case of a restorative process.*

11. *Where restorative processes are not appropriate or possible, the case should be referred to the criminal justice authorities and a decision should be made on how to proceed without delay. In such cases, criminal justice officials should endeavor to encourage the offender to take responsibility vis-à-vis the victim and affected communities and support the reintegration of the victim and offender into the community.*

As far as our Mexican legislation is concerned, serious crimes are excluded; these criminal acts cannot participate in mediation schemes for the time being, as is the case in other countries, such as Spain, where it is admitted that crimes severely damaging to the social fabric can be mediated after a long restorative process. Although it is true that these restorative schemes were originally designed for petty crimes, the expectation is that their scope of application will be progressively extended to crimes of greater social impact.

Member States should consider establishing guidelines and standards, with legislative authority where necessary, governing the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set out in this document and should address, inter alia: (a) The conditions for referral of cases to restorative justice programs; (b) The handling of cases following a restorative process;

(c) The qualifications, training and evaluation of facilitators; (d) The administration of restorative justice programs; (e) Standards of competence and rules of conduct governing the operation of restorative justice programs.

This section encourages each State to systematize its own local regulatory framework according to its own internal needs, but with a solid institutional structure. In Mexico, Alternative Justice Institutes have been created in different states and are increasingly permeating society, since the State itself provides the legal institutional[12] backing. What is sought is to create a national organization chart of supra-coordination, where good practices are shared and a network is established to give impulse to the institutionalization of restorative justice throughout the country; and that it does not remain only in isolated efforts.

12. *Fundamental procedural safeguards guaranteeing justice to the offender and the victim should apply to restorative*

[9]Stammler Rudolf. *Tratado de Filosofía del Derecho*, Coyoacán, Mexico. 2008:71–72.

[10]National Code of Criminal Procedures arts 189 and 196. Published in the Official Gazette of the Federation. 2014.

[11]National Law on Alternative Dispute Resolution Mechanisms in Criminal Matters. Art. 4° (section III). Published in the Official Gazette of the Federation. 2014.

[12]https://conatrib.org.mx/estatutos/

justice programmes and in particular to restorative processes: (a) Subject to national law, the victim and the offender should have the right to consult with legal counsel related to the restorative process and, where necessary, to translation and/or interpretation. (b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision; (c) Neither the victim nor the offender should be forced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.

In this numeral multiple guarantees are established. But the one that stands out for being the one that has had the most concern in our country, is the hyper-protection of minors, through the philosophy of protection of the best interest of the child,[13] since this group is considered vulnerable and must be given a focal treatment. When a minor is involved in a restorative process, a specialist should always accompany the child, so that he/she does not suffer any psychological stress during the development of the session. Naturally, their parents or guardians should be present, who will provide support to the intervening minor.

13. Discussions in restorative processes that are not conducted in public should be confidential and should not be subsequently disclosed except with the agreement of the parties and as required by national law.

14. The results of agreements derived from restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or trials. Where this occurs, the outcome should have the same status as any other judicial decision or judgment and should prohibit prosecution in respect of the same facts.

Extrapolated to our Mexican legislation, we can say that both the reparatory agreements and the conditional suspensions of the process are endorsed by the Public Prosecutor's Office in ministerial headquarters, or in judicial headquarters by the judge of[14] criminal control; all this depending on the stage in which the process is. Any alternative dispute resolution mechanism that is approved by a specialist facilitator in an Alternative Justice Institute must be endorsed by a jurisdictional authority who will elevate it to the category of res judicata.[15]

15. Where no agreement is reached between the parties, the case should be returned to the established criminal justice process and a decision on how to proceed should not be delayed.

The information provided in an alternative mechanism that fails should not be used in subsequent criminal justice proceedings. In our Mexican legislation, the CNPP, establishes that once the investigation file has been judicialized, the parties may request a term of thirty days so that the parties involved may opt for an alternative solution; If the agreement is not reached, the process will continue normally in the procedural stage in which the process was suspended, but this does not imply that in the future, the parties cannot access again to a mediation scheme, because our legislation establishes that this right is precluded until the issuance of the order of opening the oral trial issued by the criminal judge of control.

Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision should be made as to how to proceed without delay. Failure to implement an agreement, other than a court decision or trial, should not be used as justification for a harsher sentence in subsequent criminal justice proceedings.

All information provided during the mediation process must be excluded from the investigation file in such a way that this information does not influence the sentence issued by the judge in the event that the mediation has not been successful.

16. Facilitators should perform their duties in an impartial manner, with due respect for the dignity of the parties. In such a capacity, facilitators should ensure that the parties act with respect for one another and enable the parties to find a relevant solution among themselves.

17. Facilitators should have a good understanding of local cultures and communities and, where necessary, receive initial training before undertaking facilitation tasks.

The bodies of alternative justice, whether installed in the prosecutor's office or in the courts, such as the independent institutes of alternative justice, must have personnel with expert knowledge of the uses, conventions and indigenous traditions, so that any person, regardless of their indigenous roots, can have access to these mechanisms without any obstacle whatsoever. The importance of the facilitator being knowledgeable of the indigenous culture of the community or state where the dispute arises is paramount. Understanding the idiosyncrasy and worldview of the people is fundamental to generate empathy and understand the ideological motives of their actions. Mediation schemes must be sensitive to these cultural aspects.

18. Member States should consider formulating national strategies and policies with goals on the development of restorative justice and the promotion of a culture favorable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

In Mexico since the reform of 2008, the constitution in its numeral 17, erects and promotes the establishment of alternative justice, a great effort has been made to consolidate this scheme. Seventy percent of the states have their own regional institutes of alternative justice and in a more homologated and systematized way, since the National Law of Alternative Dispute Resolution Mechanisms in Criminal Matters came to unify the criteria of applicability throughout the country.

There should be regular consultations between criminal justice authorities and administrators of restorative justice programs to develop a common understanding and improve the effectiveness of restorative processes and outcomes to increase the extent to which restorative programs are used and to explore ways in which restorative methodologies can be incorporated into criminal justice practices.

Member States, in cooperation with civil society where appropriate, should promote research and evaluation of restorative justice programs to assess the resulting degree of restorative outcomes, so that they serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo concrete changes over time. Member

[13]Ley Nacional del Sistema Integral de Justicia Penal Para Adolescentes. Chamber of Deputies of the H. Congress of the Union, Mexico. 2020.

[14]Benavente Chorres, Hesbert. National Code of Criminal Procedures commented, practical guide, comments and jurisprudence.Criminal Procedural Practice of the Accusatory System. Editorial Flores. Fourth edn, Mexico, 2020:513.

[15]Law of Alternative Dispute Resolution Mechanisms for the State of Nuevo Leon. Last amendment published in the official state newspaper dated December 30, 2020.

States should therefore encourage regular evaluation and modification of such programs. The results of research and evaluation should guide further policy and program development.

In Mexico a great impulse is being given to alternative justice, with joint efforts being made by NGOs, civil associations, private institutes of alternative justice, governmental organizations and the universities themselves. Some states have made praiseworthy efforts to promote and disseminate the restorative philosophy and the culture of compromise. In some states, some Alternative Justice Institutes have been institutionally strengthened, promoting courses, diploma courses, workshops, and training at various universities, as is the case of the Universidad Autónoma de Nuevo León, This is the case of the Universidad Autónoma de Nuevo León, which through an agreement is providing training in this area to the Universidad de las Ciencias de la Seguridad,[16] in order to bring the ideology of the culture of peace closer to its citizens, as well as to the police themselves through police mediation, which is making this ideology permeate more and more among those subject to justice.

Final conclusions

The control of conventionality that was established in Mexico in 2011 with the constitutional reform on human rights came to create a new paradigm in Mexico, which represented a historic challenge for all judges in particular and for all legal scholars in general.

A historic reform in criminal matters, unparalleled and a superlative challenge that our country has taken on with gallantry, consolidating itself as a guarantor state par excellence, firmly committed to the unrestricted respect for the human rights of all those who are subject to its justice system.

As for the budding restorative criminal model, the control of conventionality came to give a strong impulse to alternative justice in Mexico, since it will not only have constitutional support, but also all international treaties that have contemplated the figure of mediation, conciliation, good offices, restorative boards and other variants of dispute resolution mechanisms that have been signed and ratified by our country, would now be binding in our legislation. Likewise, all international treaties, protocols and instruments on penitentiary policy to which our country is a signatory would permeate our legislation and their application would have to be mandatory, with erga omnes effects and in systematic congruence with the pro homine[17] philosophy.

In this paper we have reviewed the main instruments that deal with alternative justice and to which Mexico is a party. And a systematic analysis of all of them, we can conclude that the concern for promoting restorative criminal justice in the world has become a priority. History has shown that the punitive dynamics of retribution that have been implemented over time have not been efficient and have only led to a vicious circle where the feeling of impunity prevails. The traditional punitive schemes have failed, so their formal organic restructuring is a categorical imperative for all countries that boast of having a constitutional democratic state.

As a result of the Second World War and due to the indescribable devastation that resulted from it, there was an urgent need to promote a culture of peace through international conventions that would standardize criteria for the application of alternative criminal justice and penitentiary treatment as inspiring models that countries could replicate and adopt in their local legislation based on their own sovereignty, autonomy and intrinsic idiosyncrasies.

To this day, there is still a tendency in the world towards retributive justice and the punitive burden refuses to disappear from international legislation, although in the last two decades there has been a renewed and strong impulse to promote alternative practices, both procedural and penitentiary, that are more humane and under a more holistic model of conciliation and genuine restorative justice.

In Latin America, alternative justice has had a progressive consolidation since the year 2000, when it began a transforming wave that gave way to the adversarial system, prompting countries that had reformed their procedural system to naturally incorporate alternative mechanisms for the solution of criminal disputes in order to attenuate the workload that could occur through oral trials and that would lead to their imminent collapse.

Since the beginning of this reform movement in Latin America two decades ago, practically all Latin American countries have gradually abandoned their former inquisitorial systems to experiment with adversarial models. Mexico was the penultimate country to carry out the reform; heavy burdens prevented it from getting rid of the old system, but finally, irremediably -perhaps more due to international pressure than to a genuine desire for change-, starting in 2008 it began its reform process, which was consolidated until 2016, after the long period of eight years that the constitutional transitory articles stipulated to launch the adversarial procedural adversarial machinery throughout the country. It can be said that it has been a period of trial and error, updating and practice.

In order to be able to make a diagnosis on the success or failure of this system, perhaps more time is needed, what is certain is that the Mexican legislation is in an evolutionary legal juncture. Tomas Kunh[18] states that at least 10 years must elapse to determine whether a paradigm is consistent or failed. Turning to Latin American countries that have been more successful in their adversarial systems, such as Chile and Colombia, should be a mandatory reference. Restorative justice also implies the purification of the penitentiary subsystem, the reality shows that there has not been an integral renovation, but only isolated attempts to purify it, since there has been little political will. As a result of the Nelson Mandela Rules published by the UN in 2015 and the impulse of local institutions, such as the National Human Rights Commission in Mexico, for example, the impulse to transform prison systems and eradicate their perennial problems of overcrowding, overcrowding, lack of social readaptation of inmates and widespread institutional crisis is renewed.

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Conflicts of interest

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[16]El Portal de Monterrey. Firman convenio de colaboración FACDYC y Universidad de Ciencias de la Seguridad. 2021.

[17]Gonzalez Pérez Luis Raúl In Guerrero Agripino, Luis Felipe as Coordinator of the Political Constitution of the United Mexican States. Annotated. University of Guanajuato, C.N.D.H and Editorial Porrúa. Mexico. 1:16.

[18]KUNH T. La estructura de las revoluciones científicas, Mexico: Breviarios del Fondo de Cultura Económica. 1986:213.