

BRIEF CONSIDERATIONS REGARDING MEDIATION IN CRIMINAL MATTERS

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Abstract

Mediation is an alternative means of conflict resolution, is designed as a flexible procedure whose utility was observed in contrast to the deficiencies of the judiciary system. In the field of criminal law, mediation is part of the larger concept of the restorative justice whose aim is restoring the main victim in its rights. From this perspective, to the criminal process is intended, in principal, repairing of the victim's prejudice and, subsequently, to encourage the delinquent in taking responsibility and to acknowledge his guilt, and also to determine him to actively participate in repairing the damage caused. The ultimate goal of the process is giving back the delinquent to society and consequently, reducing the relapse.

Romanian legislator has not taken this concept, and how it is regulated mediation in criminal matters is hesitant, cautious and ultimately ineffective. Specifically, in situations that will actually occur, victim-delinquent mediation will only take the form of "assisted reconciliation."

Keywords: *mediation in criminal matters, restorative justice, optional procedure.*

1. INTRODUCTION

Mediation as an alternative dispute resolution stems in the American legal system, where over the years has proved effective and, along with other methods of alternative conflict (arbitration, conciliation, negotiation), has an extensive media promotion and support of the judicial bodies, but also from administrative institutions. Usefulness and success of this system has led the implementation of similar forms of conflict resolution in most legal systems of modern states. In Europe, the institution of mediation is assimilated by imitation, but the process was a remarkable success in countries such as England, Austria, Germany, Sweden, Spain, Italy or Portugal, but unlike the American model where mediation is binding, the European model is mainly optional.

Institution mediation is conceived as a flexible procedure, accessible and from a pecuniary point of view, able to provide to the parties the opportunity to resolve conflicts without resorting to judicial organs, avoiding the drawbacks of probation order, formalism, time and psychic consumption specific to the court procedure.

Moreover, the usefulness of this procedure was observed in contrast to the deficiencies of the judiciary system. Judiciary process qualifies trial parts as being adversaries, which creates a visible psychological barrier between the parts involved in the conflict. By pronouncing a judge decision, only one part is successful, the dispute between them is getting deeper. The court will grant a compensation of a party, but often the parties' actual interests and needs are ignored. This way of treating the conflict is, on a long term, harmful in parties relationships, the decision of the judiciary is one absolute, and psychologically creates frustration and damage one of the parties, deteriorating relations between participants in an irremediable manner.

The purpose of this scientific approach is to emphasize that aspect of restorative justice represented by mediation, to highlight the usefulness of mediation in criminal matters and to support the reform process in the sense of civil society, as we believe that the Romanian public is not sufficiently responsive to this new way of dealing with conflicts. The lack of responsiveness is due to how inefficient the mediation in criminal matters, and not only is publicized in local media.

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Romanian legal system, following the directions of principle established in the European Union has adopted legislation that enshrines the possibility and conditions of settlement in civil, commercial, and a narrow category of criminal cases through mediation.

But, the way in which the legislature has regulated mediation in criminal matters is evidence for lack of understanding of the institution itself and its disinterest in the matter of adopting an effective and viable private implementation of this institution.

Therefore, mediation in criminal matters is a relatively new in Romanian legal system, this prompting some interest much later than in other European countries².

2. THE CONCEPT OF RESTORATIVE JUSTICE

In criminal law, mediation is part of the broader concept of restorative justice³.

Restorative justice is modern civil society response to punitive criminal justice system and the main purpose of this new concept is the restoration of the victim - and often ignored secondary participant in the criminal - in his rights. In light of this new trend, the main purpose is not criminal punishment but repairing the prejudice caused to the victim. Subsequently, wishes and aims to encourage the offender to take responsibility, to plead guilty and to determinate him to actively participate in recovery of damages caused. The ultimate goal of this process is reintegration of the offender in community, society, and consequently reducing of recidivism.

The main purpose of restorative justice is balancing the concerns of the victim and the community with the need to reintegrate the offender into society⁴. Restorative justice aims to assist the victim in the recovery process and to enable all parties directly affected by judicial proceedings to participate effectively and fruitful at its development.

Restorative process means any process in which victim, offender and other persons or members of society affected by a crime participate together to solve problems caused by crime, often with an impartial third party. This may include victim-offender mediation, conferencing, circles, victim assistance, assistance convicted, compensation, community service.

Mediation between victim and offender is the most used way of solving conflicts in European legal systems. In this process, an independent and qualified third party assists the parties to discuss the circumstances of committing the crime and the effects and to reach an agreement whereby they agree on how to repair the damage caused to the victim.

Mediation can manifest directly, in which case all parties are present, or indirectly, a situation supposing that the third party mediator will discuss separately with each party and will transmit the intentions and requirements to each other help them in this way to establish an agreement. In this procedure, the focus is primarily on the material interests of the parties and less side affective component, which involves discovering the causes of conflict and mutual understanding of needs and wishes of each party⁵.

The conference assumes a wider group of people involved in restorative processes, people both directly and indirectly affected by crime committed - victim and perpetrator, their family members, other close persons, representatives of judicial bodies or other authorities, social workers, representatives of non-governmental organizations, teachers, and other representatives of affected communities. The role of discussion is to discover the causes, effects and accountability act, to agree an effective way to repair the injury and prevent possible relapses.

² Only in 2006 has been adopted the Law no. 192/2006 regarding mediation and the profession of mediator, published in the Official Gazette, Part I, no. 441/22.05.2006, and they were devoted several articles on mediation in criminal cases.

³ Restorative justice (engl.).

⁴ United Nations Economic and Social Council (2002), *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*, <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>

⁵ Dagne L., A. Tranca, *Mediation in Criminal Matters*, Pro Universitaria Ed, Bucharest, 2011, pp.13-14.

Circle model best reflects the democratic principles and requires, at the discussion, the presence of the more significant number of community members affected by the illegal act. The victim, offender, people who support them, community members and representatives of the criminal judicial bodies shall meet in the same circle and determine who belongs with responsibility, identifies the negative consequences of the crime and agree on a method of repair, as well as ways to prevent a repetition of the conflict situation⁶.

Community service programs support the victims, community councils are secondary forms of realizing the restorative process and put less emphasis on direct communication between the victim and offender.

Restorative outcome may result in the agreement of the parties, which in turn may consist of damage, performing services on behalf of the victim or the community, and any other programs or commitments to provide cover for injury to the victim and community and reintegration into society the victim and offender.

3. SOME ASPECTS OF CRIMINAL MEDIATION ROMANIAN LEGAL SYSTEM

Mediation in criminal matters, as regulated in the state of the Romanian national legislation, adopts only one of the forms in concept application of restorative justice: mediation between victim and offender that the criminal aspect that may result in the removal of criminal responsibility.

Romanian Mediation Legislator has chosen to regulate only a limited number of crimes, namely those for which the law⁷, withdrawal or prior criminal complaint reconciliation removes the criminal responsibility: crimes of impact, injuries caused by negligence, entering the home without permission, etc.

We believe that the reason for which the legislator has limited the mediation procedure in these crimes is the fact that, in these cases, the parts, even in the absence of mediation, can reach to an agreement on the offense committed and its consequences, the will of the parties being an essential element both in starting and in finalizing criminal trial proceedings, the principle of penalty process officially is clearly limited by the will of the parties.

Parties can use mediation both before - extrajudicial mediation - and after initiation of criminal proceedings - judicial mediation.

Extrajudicial mediation takes place at the initiative of one or both parties before the injured party to make prior complaint.

The legislator is only concerned with extrajudicial mediation result: if the mediation procedure is completed through reconciliation, the injured party could not refer to the same act on criminal investigation or court. We point out the inaccuracy of the term used in the sense that reconciliation can take place only after making a complaint, situation in which we are not in extrajudicial mediation, which is why the terms of agreement or arrangement would have been more appropriate. Another observation concerns the hypothesis of referral to the court by prior complaint, this last sentence was repealed⁸ and, although the Law no. 192/2006 on mediation and the profession of mediator has been amended on two occasions, there was a legislative proposal to make this provision consistent with the new version of the Code of Criminal Procedure.

⁶ *European best practices of restorative justice in the criminal procedure*, Conference publication, 2010, European Crime Prevention Network, www.eucpn.org/download/?file=RJ_ENG.pdf&type=8

⁷ By The Decision - European Union Council Framework from 15 March 2001 on the standing of victims in criminal proceedings, it was established for the Member States of the European Union to promote mediation in criminal cases for offenses it considers appropriate for this type of measure, each member will ensure that any agreement made between the victim and the offender will be taken into account during the mediation in criminal cases.

⁸ Provision repealed by Law no. 356/2006 amending and supplementing the Criminal Procedure Code and to amend other laws, published in the Official Gazette, Part I, nr.677/07.08.2006.

Successful completion of the mediation process acts as a cause to prevent the entry into the penalty action.

If mediation is not completed by agreement, the injured party may submit the prior complaint. A useful provision is contained in Art. 69, para. 2 of the Act, which enshrines the only case for suspending the deadline for lodging the prior complaint. If the parties require mediation during the deadline for lodging the prior complaint of two months, this period shall be suspended during the procedure, and it resumes its course after considering the duration elapsed before mediation. Suspension period will therefore be included between the date of signing and the conclusion of the mediation process - closing minutes of the mediation.

Judicial Mediation takes place after notification of penalty investigation authorities with prior complaint. In this case the parties may request mediation or to their recommendation from the court or prosecuting authority. The consequence for judicial mediation is suspending prosecution or trial (where the parties have turned to mediation by the prosecution), the measures taken in the mediation agreement presented by the parties.

The suspension lasts until the closure of mediation in any manner provided by law, but no more than 3 months after signing the contract of mediation.

Criminal proceedings are officially resumed immediately after receipt of the report stating that the parties were not reconciled, or if it does not communicate the deadline of 3 months.

Unlike the American model, the Romanian legal system, criminal, and not only has a voluntary mediation.

Unfortunately, experience shows that without proper information on this new alternative dispute resolution and the benefits of mediation, the practice is almost non-existent in this area, not far signed no agreement in criminal matters.

4. USEFULNESS OF MEDIATION

Mediation would be, theoretically, a major evolution in criminal proceedings. Through this institution, the victim has a greater role in the conduct of proceedings and quickly finds satisfaction through its faster ongoing and prejudice recuperation, and the perpetrator can realize the wrong done and accept repairing it, society allowing his reintegration by other means than isolation in a place of detention.

Possibility of mediation procedure initiation between offender and the injured person will depend almost entirely on the will of the former. In the couple victim - offender, victim is the most sensitive position, it is affected by the criminal act, and in most cases, willingness to communicate with the other party is a prerequisite condition for initiation of proceedings.

If, from this point of view, the position of the victim conditions the procedure of mediation, the offender will to participate in the proceeding should not be neglected. In turn, he must show voluntary consent in starting the procedure, only a sincere willingness of the perpetrator being a part in the process of reconciliation can give mediation a chance of success, otherwise there is the possibility that the conclusion of the mediation to be regarded by perpetrator only as a simple way to avoid criminal liability, which would remove the mediation of its purpose.

According to the definition given by the EC Recommendation, no. R (99) 19 on mediation in penal matters⁹, criminal mediation is a process by which victim and offender are enabled, if the free consent to participate actively in solving problems arising from infringement by third parties impartial (the mediator).

⁹ Recommendation no. R (99) 19 on mediation in criminal matters was adopted by the Council of Europe Committee of Ministers on 15 September 1999.

The mediator cannot impose a solution on parties to conflict mediation as subject to its role in this process is that of a facilitator of communication between the parties, helping them to identify key issues of their conflict and to identify possible solutions and remedies.

In our view, mediator's mission is not that of a single witness, but an active, contributing to the reconciliation process by carefully listening to their stories, intervening only in cases where the dialogue degenerates, and helping parties to highlight the problems that even these they have brought into question.

From such a perspective, the focus is not on the needs and interests of the parties but on their emotions and feelings. Conflict is de-structured narrative discourse and the direction is changed towards identifying key issues and their resolution.

In mediation, effective solution is determined solely on the wishes, needs and interests of the parties, without constraining the scope of the rules of procedure. The parties may choose the solution that satisfies their interests, giving mediation a more practical nature in restoring the situation of the parties.

In addition, the confidentiality of the proceedings, a principle which guarantees that nothing will be said or used outside the room where the mediation takes place, is that mediation is particularly attractive in particular for certain subjects, as it allows parties to maintain confidentiality of information concerning their personal lives or their property.

5. BRIEF CONCLUSIONS

Generally, mediation allows finding creative remedies and, away from the solemn hearings and rigid rules of procedure, is likely to provide proper conditions to a real and effective communication between the parties. Also is a quicker procedure and involves far less cost than a trial.

We can say that mediation is a complete success when the agreement between the parties resolves their material interests and, what are more important, their emotional needs, as this effect guarantees the stability agreement between the parties.

However, shortcomings of the Romanian law legislative regulatory of this institution are evident especially in terms of mediation in criminal matters. As is known in this moment, mediation victim - offender is clearly inefficient and unable to produce concrete results.

Legislative approach to mediation victim - offender is already criticized in the literature¹⁰ and we join these criticisms. Institution mediation victim - offender is part of a much broader concept, not represent only a particular aspect of manifestation of the concept of restorative justice, originally developed in the United States.

Our law has not taken this concept and how it is regulated mediation in criminal matters is hesitant, cautious, unimaginative, and ultimately, ineffective. Specifically, in situations that will actually occur, mediation victim - offender will only take the form of "assisted reconciliation."

At this point we want to highlight just two of the major shortcomings of how the legislative regulation of mediation in criminal matters. First, unlike most European countries, Romanian legislator sought not to regulate ways to control judicial authorities on how they are fulfilled obligations under the mediation agreement. In many European countries - England, Austria, Poland, Germany, Italy, etc. - an agreement to mediate does not automatically affect the termination of criminal proceedings, but his suspension for a variable period of time that the judiciary oversees how obligations undertaken by the agreement are complied with, the termination of criminal proceedings is conditional upon the offender who committed the obligations in the mediation. In some cases (Austria, mediation of rape offenses) that supervisory role is given to the mediator.

¹⁰ Gh Mateut, *Mediation in Criminal Law Review* no. 7/2007, C. Ignat, Z. Sustac, C. Danilet, *Mediation Guide*, University Publishing House, Bucharest, 2009.

A second major shortcoming of mediation is given by the impossibility of judicial authorities to send, themselves, the cause to a mediator. In states that have adopted this system, mediation remains voluntary, but the invitation is sent to the parties to mediation by the mediator appointed by the court or prosecutor, when the file is already in its possession. The parties may accept or not mediation, but the impact of this particular trigger mediation is much higher in the availability of the parties to resolve the dispute through mediation. In such a system, in addition, mediation is free, which is a real incentive for participants in conflict.

In conclusion, the institution of legal mediation as currently regulated has no practical use. But can acquire such utility by sustaining the reformatting process of the civil society, but only in a constant media support, real and effective, combined of course with the active involvement of judicial authorities.

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