MEDIATION IN PENAL MATTERS IN ROMANIA

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Abstract

In Romania, the field of restorative justice is still an unknown one, and it is still a dilemma if this kind of judicial activity (successful in other jurisdictions around the world) will be a success in our county. In this context, becomes even more difficult to find the correct answer to the question if the mediation, as a form of restorative justice, is a viable solution, in Romanian system, and even more difficult to see the future of mediation in criminal matters. This possibility legally exits since 2006.

Keywords*: restorative justice, criminal liability, mediation, criminal trial, crimes*

INTRODUCTION

1. This study focuses on the problem of the incidence of mediation in solving criminal law conflicts.

It is well known that the mediation has proved its utility in this field from during the last years, in different jurisdictions all over the world, even in criminal matters, but this possibility exists only from 2006 in Romanian Legislation. The Law no. 192 on mediation and the mediator profession[2] was put into force in this year and created a new instrument to solve the conflicts, including the conflicts which may occur in criminal law area.

2. From our point of view it is very important for all the actors involved in Criminal Law enforcement effort to have a correct a clear image on the utility, on the rules and on the particularities of the mediation in this sensitive field. That is why the present study has the aim to observe some special aspects of the mediation in criminal law: is it easy for the state authority to renounce to its so called "right to punish" and to accept the elements of restorative justice, including the mediation; which are the specific elements of Romanian legislation in the criminal law mediation area; is this instrument only a theoretical one for the Romanian judicial authorities nowadays, or it already has a practical utility in particular cases brought in front of judges; which is the future of this instrument in the New Romanian Penal Procedural Code.

3. In our study we will analyze the Romanian legal provisions on mediation in criminal matters, with all the particularities determined by the national specific. In order to realize a better understanding of this domain, we will put it in a larger framework – the one of the restorative justice. In this part, we will observe the general principles of this criminal policy, and will stress the differences from the traditional approaches.

Also, we will illustrate the future of the mediation in criminal matters according to the New Penal Procedural Code which is already adopted and about to enter into force in Romania.

4. In terms of the Romanian doctrine in the field of interest, the present study has the merit to be among the first studies ever published on this topic. The study will observe the legislative framework into force in the special law and in the Criminal Procedural Code (after the modifications operated by Law 202/2010).

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"THE RIGHT TO PUNISH" – JUST A TRADITIONAL APPROACH

It has been historically accepted that the state authority has a so called "right to punish" a person who committed a crime and perturbed the social equilibrium, only the fundament of this right has been different during the time.

Although, the first theories in this field allowed the punishment as a form of private revenge – the relatives of the victim had the right to cause harm directly to the offender, even an exaggerated one. That is why, when the Talion Law appeared it was considered an important form of progress, just because it imposed the proportionality limits.

Another age in the evolution scale was the "retributivism". In this theory the punishment is the harm the offender has to suffer to compensate the harm he or she produced to the victim – *poena est malum passionis guod infligitur ob malum actionis*. In some variations of this theory it was stated that the punishment is a right of the offender, an act of his or hers own will because he or she consider the law infringement as their right. A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as a negation. It is something negative, so that its punishment is only a negation of a negation[3].

As a general characteristic, this theory reduces the aim of the punishment to a simple equivalent of the harm cause by crime, in order to reach the equilibrium between *malum passionis* and *malum actionis*. In this way, the repressive function of the state is reduced to put the offender in the position to expiate guilt by through suffering, to give the own right.

The Theory of utility is the one according to which the aim of the punishment is not to repress the harm caused by the crime, but to prevent the citizens to commit other offences. In this way, the punishment is an instrument for the future, an instrument which prevents the recurrence of the criminal behavior – *punitur ut ne peccetur*.

The state has even a more privileged position in the Social Contract Theory, because it is only an arbitrator between the society and the individuals. According to this theory, when the state applies a sanction it is only because it has a contractual obligation to fulfill, without having an interest in that case[4].

The adepts of The Social Defense Theory negated even the validity of a right to punish of the state. Instead of such a right, the state should have the possibility to take based on human rights legal, moral and social measures. A person who committed a crime is an ill person, who needs treatment no punishment. In this way, it is not needed a Penal Code, but only social defense measures, especially medical measures[5].

This was the first step in the direction of changing the perception over the punishment and the so called "right to punish" of the state. The person who committed a crime must be treated not punished.

Nowadays, the Restorative Justice Theory is the one which makes itself more and more present in the Romanian legislative realities.

FROM RETRIBUTION TO RESTORATION

The Restorative justice theory is a new movement in the fields of victimology and criminology. This theory, acknowledging that crime causes injury to people and communities; it insists that justice must repair those injuries and that the parties be permitted to participate in that process.

So, the restorative justice programs, therefore, enable the victim, the offender and affected members of the community to be directly involved in responding to the crime. It aims to the

[3] G. W. F. Hegel, Grundlinien der Philosopfie des Rechts, Berlin, 1821, p. 541.
[4] Hugo Grotius, On the Laws of War and Peace, Stiintifica Publishing House, Bucharest, 1968, p. 478.
[5] Chronique de defense sociale, Revue de science criminelle et de droit pénal comparé, p. 3/1964, p. 652.

objective of ending the conflict relations in criminal law by the mediation of that conflict with all the involved parties.

Among the general principles of this kind of justice we can indicate: the crime is seen as a prejudice; the restorative effort is concentrated more on the prejudice than on the rule infringement; it pays equal interest to the victim and to the offender, as active actors of the justice; stresses the importance of victims' rehabilitation by support them the way they fill the need to be helped; gives attention to the offenders and tries to determines them to realize that they have to fulfill the obligation to the victim and to the society; the victims' point of view on the most appropriate way to repair the harm is very important; the communication between the victim and the offender is a key factor to realize the cooperation of all the implied parties; the results of the justice act are quantified by the proportion the harm caused by crime was repaired and not by the severity of the punishment.

COUNCIL OF EUROPE AND THE MEDIATION IN CRIMINAL MATTERS

The Council of Europe adopted in 1999 one important legal instrument in order to stress the utility of the mediation in criminal matters[6]. In this legal instrument, the European organism observed that in member States are some strong developments in the use of mediation in penal matters. This instrument is seen as ”a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings”.

The interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation is considered to be legitimate. Also, the indicated legal instrument recognizes that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes.

The mediation in penal matters is defined as any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

Some general principles are stated by this legal instrument: 1. Mediation in penal matters should only take place if the parties freely consent. Also, the parties should be able to withdraw such consent at any time during the mediation; 2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties; 3. Mediation in penal matters should be a generally available service; 4. Mediation in penal matters should be available at all stages of the criminal justice process; 5. Mediation services should be given sufficient autonomy within the criminal justice system.

So, at the Council of Europe the mediation it is seen as a solution to better solve the penal law conflicts.

THE ROMANIAN SPECIAL REGULATION INTO FORCE IN MEDIATION IN PENAL MATTERS

Under these, and others, influence, the Romanian legislator adopted in 2006 the Law no. 192 as the first regulation dedicated to the mediation field. According to the first article of this law, the mediation represents a form of solving the conflicts consensually, with the help of a third person specialized as a mediator, with respect or neutrality, impartiality, confidentiality and with the free will of the involved parties.

In this law, the Chapter VI includes special provisions on conflict mediation, and, in its second section, the special rules on mediation in penal cases.

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[6] Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters *(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies), https://wcd.coe.int/ViewDoc.jsp?id=420059&Site=DC*

The incidence area is restricted by the article 67 from the Law no. 192/2006 to the penal cases which regards crimes for which, according to the law, the withdrawal of the preliminary complaint or the reconciliation of the parties removes the criminal liability.

Neither the victim nor the perpetrator can be constrained to accept the mediation in their conflict and even they accept it, all the human rights guaranties must be respected. During this procedure, the parties must benefit of juridical assistance, interpret (in case the situation imposes) and the minutes signed on the mediation final must provide information in this field.

If the mediation procedure takes place before the trial start and it has as a result the reconciliation of the parties, the mediation contract has *res judicata* power. That is because the victim may not notify any judicial authority on the same fact. The mediation procedure has also a suspensive effect for the term established by the law for the prealabile complains to be introduced (2 months starting from the day the adult victim knew who the offender is, according to article 284 par. 1 from The Romanian Procedural Penal Code). But, if the parties did not come to reconciliation, the victim may introduce the complaint in the same term, which will continue from the day the mediation document will be written.

If the mediation takes places after the penal trial started, the prosecution or the judgment will be suspended when any party presents the mediation contract. The suspension should be as long as the mediation lasts, but no longer than 3 months starting with the day the contract was signed. The mediator has the obligation to communicate to the judicial authority a copy of the document signed in the end of the mediation procedure.

The penal trial resumes at the judicial authority initiative immediately after it receives the document according to which the parties have not reached a consensus or when the 3 months term expires.

THE MEDIATION IN THE ROMANIAN GENERAL LEGAL RULES

Although the special regulation from the Law no. 192/2006 was into force for a while, the Penal Procedural Code has not been amended in order to be put in accordance with new institution till 2010. In this year, the Law no. 202, so called "The Little Reform", amended the Penal Procedural Code (PPC) into force since 1969 and, among other interventions, included in this important legal instrument some provisions related to the mediation. First, it is about the article 10 PPC which establishes the cases the prosecution cannot start or cannot continue. The point h) from this article was completed with a new impediment – which exists when a mediation accord was signed for the offences indicated by law as being pursuable only after a special complaint was formulated.

In the same way, the transaction and the mediation are indicated as methods to end the civil action in the penal trial. According to article 16^1 PPC, during the penal trial, the parties involved in it may sign a transaction or a mediation accord on the civil aspects of the case. In this situation, if all the legal provisions were respected, the court must take in consideration the transaction or the mediation accord and must record them in the decision. If the mediation on the civil aspects of the case is realized during the prosecution, the prosecutor has to record it in the indictment.

Even these provisions are into force since 2010, respectively since 2006, the practical activity demonstrates that they are rarely applied.

THE FUTURE IN REGULATION OF THE MEDIATION IN PENAL MATTERS

In the future Romanian Penal Procedural Code (FPPC) there are even more mediation elements.

First, the articles 16 and 23 are the correspondents of the previous analyzed articles 10 and 16^1 form the Romanian Penal Procedural Code into force since 1969. These two legal texts states that the prosecution cannot start or cannot continue if the parties signed a mediation accord, respectively, that the transaction and the mediation are the methods to extinguish the civil action in penal trial. In essence, these texts were put into force earlier by their inclusion in the actual legislation.

But, the new penal procedural code gives a more important role to mediation because it states that the victim (article 81 New Romanian Procedural Penal Code), the offender (article 83 New Romanian Procedural Penal Code), the civil part (article 112 New Romanian Procedural Penal Code), and the civil responsible part (article 112 New Romanian Procedural Penal Code) all have a *right to address to a mediator*. Moreover, the article 111 New Romanian Procedural Penal Code stipulates that all these parties must be informed on the possibility to exercise the right at the first hearing.

In the article 275 paragraph 2 New Romanian Procedural Penal Code it is stipulated that when there are some judicial expenses advanced by the state, these expenses are supported by a different part, depending on the solution. In case of the penal trial stopped, the expenses are supported by the offender (when this part benefits by a unpunishment cause), by the victim (in case this part withdraws the complaint, or when this complaint was tardily introduced) or by the part established during the penal mediation procedure and indicated in the mediation accord. So, after this new penal procedural code will enter into force, through the penal mediation will be possible to make an exception from the general rules in the field of judicial expenses. It will be possible to determine explicitly that these expenses to be let in the duty of the other part that the one indicated by the general rules.

In the article 312 New Romanian Procedural Penal Code, the legislator settled the prosecution suspension cases. Among these cases, near a serious disease and a legal impediment, it is also indicated the mediation procedure duration. As long as a mediation procedure will be developing, the previous started prosecution must be suspended. But, in order to produce this effect, it is required that the procedure respects all legal provisions imposed by the Law 192/2006, by the Penal Procedural Code, or by any legal instrument into force.

At the same time, the article 367 New Romanian Procedural Penal Code indicates the judgment suspension reasons. The legal provision states that these causes are: the serious illness (established by a medical expertize), the suspension of the cause for another offender in the same case, but also the mediation duration, but only when this procedure respects all legal provisions imposed by the law. The penal trial officially resumes at the end of the mediation procedure. Also, during the suspension of the judgment, the court has to verify periodically the subsistence of the suspension causes. These investigations of the court must be developed at interval at less than 3 months. In this way, it will be impossible as a mediation procedure to have duration longer than 3 months, and to cause unjustified prolongations of the penal trial.

It is obvious that after this New Romanian Procedural Penal Code will enter into force the penal mediation will get a more important role and a better visibility at the same time. In this new legal instrument there are more consistent legal provisions which create the possibility for the penal mediation as a new procedure in the penal law field to gain in effectiveness and to become a more practical instrument.

CONCLUSIONS

1. The present paper started the investigation from the so called “right to punish” the states have assumed during the ages and observed the evolution from the retributivism to a present and modern theory – the restorative justice. Under the influence of some European legal instruments as The Committee of Ministers to the Council of Europe member States no. R (99) 19, elements of this theory were included in The Romanian Penal Procedural Code into force since 1969, only from 2010 and completed the legal framework created by the Law 192/2006. Among these elements there is the penal mediation and this institution is included in the New Romanian Procedural Penal Code which is about to enter into force in short time.

2. This study represents a documentation source for every person interested in criminal law field, both theorists and practitioners. The impact on the doctrine will be an important one because there are only a few such studies published in Romania, which reveal the mediation as a restorative

justice instrument and which points the legislative framework into force in present. Also, the paper has the merit to include an analysis of the future regulation included into the future Romanian Procedural Penal Code, published in the Official Monitor and which is about to enter into force in a relative short term.

3. This study opens the perspective for future researches related to this topic. It is about a new domain for the Romanian penal law and that is why such future studies should concern some particular aspects of mediation in penal matters, as for instance, the relationship between the mediation accord and the unconditioned withdrawal of the complaint. A subject like this is interesting from the both perspective as well – theoretical and practical.

References

- Law no. 192/2006, published in The Romanian Official Monitor, Part I, no. 441 from 22th May 2006.
- L. Dragne, A. Trancă, Mediation in Criminal Matters, Universul Juridic Publishing House, Bucharest, 2011.
- G. W. F. Hegel, Grundlinien der Philosopfie des Rechts, Berlin, 1821, p. 541.
- Hugo Grotius, On the Laws of War and Peace, Ştiinţifică Publishing House, Bucharest, 1968, p. 478.
- Chronique de defense sociale, Revue de science criminelle et de droit pénal comparé, p. 3/1964, p. 652.
- Recommendation no. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters *(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies), https://wcd.coe.int/ViewDoc.jsp?id=420059&Site=DC*