

## Mediation in criminal matters

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**Abstract:** *The conflicts... confrontations, discussions, public outcry, taunts, fleeting annoyances or that we never forget, high or low intensity quarrels and finally .... revenge! A simple word told at random and who knows what can happen! From word to deed can be a very short way for certain individuals, for those of us who severely taxes any dissatisfaction, for those of us for whom revenge is the only way to resolve a conflict, for those of us who do thereon justice. Whether we like it or not, we live in a world full of conflicts. Not so the conflict is in fact the problem, as well as the way in which we perceive and manage it. Conflict resolution is one of the great challenges of humanity, given that violence and disagreements are now encountered from an early age, and the boxing ring seems to have moved into schools and colleges. After 2006, when it was adopted Law no. 192 on mediation and organization of the profession of mediator; the way to amicably resolve conflicts, used in all civilized countries, began to also take shape in Romania. This study addressed equally, specialists, theoreticians and practitioners, graduate students, and other groups of people who want to know this form of mediation.*

**Key words:** *conflict; offences; prior complaint; mediation; mediator.*

### Introduction

Mediation is an alternative method to trial, so necessary today in order to solve various types of conflicts in society. It is the only option to relieve the judges of the stifling burden of solving the many and complex causes with which they enter in the courtroom, as the austerity budgets of the institutions of the State do not create the actual premise of enhancing personal schemes within the courts.

This "justice" made by a third party - the mediator, in the conflict between parties, in the forms and under the conditions provided for by law, is seen as an alternative justice to the classical justice made by the judge.

The path of an alternative justice, of mediation, also seen through the much lower cost borne by people in conflict and by the State to which they belong, was initiated and promoted, especially in recent decades, both in Europe and on other continents.

Also, from this point of view Europe has found the alternative pathway to judicial conflict resolution, namely mediation by combining the concessive and balanced interests of the citizen and the State, of a judiciary that serves both the State and the person, not only through significantly lower costs, but also through the elimination of preoccupation of the conflict state as soon as possible, imperative requirement of the traditional justice, currently marked by the long duration of procedures [1].

Mediation in criminal matters is a relatively new field in the Romanian legal system; it aroused an interest much later than in other European countries. Not the same thing can be said about this alternative means of dispute resolution in the United States of America, where mediation has proven its efficiency and, along with other alternative methods of conflict resolution (negotiation, conciliation, arbitration), has an extensive media promotion and support of the judicial bodies and administrative institutions.

The Romanian legal system, following the directions of the principle laid down at EU level, adopted the legislative rules that enshrine the possibility and conditions of solving civil, commercial and a narrow class of criminal processes, through mediation.

In a broad sense, mediation is an alternative means of conflict resolution, the institution was conceived as a flexible procedure, accessible from a financial point of view, fit to give the parties the opportunity to resolve conflicts without resorting to the judicial bodies, while avoiding the shortcomings of an evidentiary order, the formalism as well as the psychic and time consumption of specific court proceedings [2].

## 1. General considerations concerning mediation in criminal matters. The concept of restorative justice

In the criminal law, mediation is part of the broader concept of restorative justice. (English - restorative justice).

The term restorative justice was used for the first time by the American psychologist Albert Eglash in 1977 to describe the guidelines in the field of criminal justice. On this occasion, Eglash has identified three different paradigms of Justice: *distributive, retributive and restorative paradigm*. Unlike the retributive paradigm that emphasizes punishment for the offender and the distributive paradigm that focuses on the rehabilitation of the offender, *restorative justice is based on the idea of remedying the victim's product* [3].

Although initially Eglash limited the restorative justice by identifying it with reparation, at present this concept was redefined and developed, the concept extends through the inclusion of new forms. Restorative justice is today one of the concepts that enjoy a special interest on the part of specialists, especially given the fact that an increasing number of them have drawn attention to shortcomings in the criminal system. The majority of authors interested in restorative justice issues have linked the evolution of restorative justice ideas from the following events: "Grievances manifested toward traditional criminal system by the victims or expert staff; Failure of sanctions with repressive character and penalties involving deprivation of liberty; Increase the influence of the movement in support of victims; Cost of legal management of delinquency; Congestion with cases of the courts" [4].

On the other hand, over the past 20 years, at the level of the judicial practices of the world two contradictory trends have been identified:

- *increase in the number of criminal cases*, while multiplying the number of people sanctioned and incarcerated;

- *use of alternative practices*, involving the victim and offender participation in decision making - restorative practices;

The analysis carried out by Jeff Latimer and his collaborators on the restorative justice model revealed that some concepts of restorative justice have its origins in traditional practices of conflict resolution specific to indigenous cultures, while others take the religious precepts (forgiveness and repair) shared by some religious and denominational groups that have developed among the first restorative justice programs.

The same authors argue that, unlike the classical justice system according to which any offence causes prejudice to the State, the restorative justice model suggests a different definition of criminal behavior: "an offence is, first of all, a conflict between people who produce injury to the victim, community and offender" [5].

In the opinion of the authors of the study mentioned above, this definition has as its immediate consequences: "*the location of the victim on an active position in the process of conflict settlement, in obtaining the repair and in preventing recidivism of criminal behavior*". For the assailant, restorative justice proposes a new role, that of "*willingness to assume responsibility for his acts, and the repair of damages made*". At the same time, "*restorative justice allows the community to express themselves within the criminal justice system and to manifest a sense of fear towards crime, greatly diminished in intensity*".

Other authors consider that "restorative justice is based on a simple idea: an effective way to respond to a conflict by repairing damage caused by the shameful act. The measures of reparation, material and symbolic, are the starting point, but the broad overhaul is not limited to compensation of the victim". Also, the restorative model manages "to give a response to the immediate conflict and foster the development of relationships based on respect between delinquent, persons who have suffered injury and community members [6].

In turn, Tony Marshall defined restorative justice as a "process in which the parties to an offence shall determine together how to deal with the consequences of the offence and its implications for the future" [7].

In the opinion of the author above mentioned, restorative justice has as main objectives: 1. "to meet the needs of victims - material, financial, emotional and social (including the needs of those close to the victim, which may be affected as well); 2. prevention of recidivism through reintegration of offenders into the community; 3. to enable criminals to take active responsibility for their acts; 4. to recreate a community that will support the rehabilitation of criminals and victims and that will be active in crime prevention; 5. the provision of means for avoiding lodging the criminal system as well as the costs and delays".

From the perspective of Howard Zehr and Harry Mika, "*the restorative justice seeks to heal and to rectify the harm made*" [8]. Crime is seen as *a prejudice which affects persons and personal relationships, [...] prejudice which gives rise to obligations and responsibilities.*

The offender is required to mend the damage caused to the victims (direct and indirect), and the community has the obligation to assist the victims of crime and offenders in order to socially reintegrate them. The justice process is geared towards meeting the needs of the victim without neglecting the needs of offenders who are supported throughout the process. The dialogue between the victim, offender and community members is encouraged and makes it possible to meet the responsibilities arising from committing the offence and the involvement of community members in the process of Justice.

*Therefore, restorative justice works on the basis of principles*, under which the activities carried out in the case of offences are geared toward:

- creating the conditions necessary for the personal participation of those affected in the greatest extent, especially the offender and the victim, but also their families and the community;
- consideration of the social context in which the offence occurred;
- orientation towards resolving the problems in a preventive way;
- flexibility of practices (creativity);

The restorative process represents any process in which the victim, the offender and other persons or members of society, affected by a crime participate together in order to resolve problems caused by the crime, often with the help of an impartial third party. This procedure may include victim-offender mediation, conferences, circles, victims' assistance, assistance of former convicts, compensation for damages, community service.

*Mediation between victim and offender*, is the most used way of conflict resolution in the European legal systems. In this process, an independent and qualified third party helps the parties to discuss the circumstances of committing the deed and effects made and to reach an agreement under which they will agree on the modalities of reparation of the injury caused to the victim.

Mediation can be:

- *direct mediation*, in which case all parties are present;
- *indirect mediation*, situation which means that a third party mediator will discuss separately with each party and will convey the intentions and requirements of the parties, helping them to enter into an agreement;

In this procedure, the focus is primarily on the material interests of the parties and less on the affective, emotional side, involving the discovery of the causes of conflict and the mutual understanding of the needs and wishes of each of the parties.

## **2. Restorative justice traits**

In the conception of the United Nations, the restorative justice is characterized by the following features [9]:

- *it is a flexible response* to the specific circumstances in which the crime was committed, the personal circumstances of the offender and the victim, allowing each case to be assessed individually;
- *it is a reaction to the offence* which complies with the dignity and equality of each of the persons involved, favors understanding and promotes social harmony by "healing" the victim as well as the offender and the community;
- *in many cases it represents a viable alternative* to the formal system and the criminal justice sanctions;
- is a great way of approach that can be used in conjunction with criminal trial and traditional criminal sanctions;
- constitutes a way of approach that includes both problem solving and highlighting the conflict's causes;
- is a great way of approach that encourages the offender to really understand the causes and effects of their behavior and to take responsibility in an effective way;
- represents a variable and flexible approach that can be adapted according to the consequences, legal tradition, legal principles and philosophy of various systems of national law;
- it is an approach that is suitable in resolving many types of crimes, including a series of crimes with increased severity;
- it constitutes a proper way to respond to crimes committed by juveniles, in this case the goal of the restorative process being to teach juvenile offenders new skills and values;

- it constitutes a response that recognizes the role of the community as a prime environment for prevention and response to crime and antisocial behavior in general;

### **3. The principles of restorative justice**

In this conception, *the mediation programs are based on the following principles:*

- social reaction in the case of an offence must be mainly aimed at repairing the damage as far as possible, of evil suffered by the victim;
- offenders shall be determined to understand that this unlawful behavior is unacceptable and has concrete consequences for both the victim and the community;
- criminals can and must accept the responsibility of their actions;
- victims must be given the opportunity to express their needs and participate in an effective way to determine the most appropriate ways in which the offender will repair the damage suffered;
- the community has the obligation to participate in this repair process;

In order to achieve such kind of restorative process, four conditions must be satisfied, namely:

- a. an identified victim;
- b. unconstrained desire of the victim to participate in resolving of this conflict;
- c. an offender accepts responsibility for its illicit behavior;
- d. the voluntary participation of the offender to this restorative purposed process;

Mediation in criminal matters as regulated in the present state of the national legislation, adopts only one of the forms for the application of the concept of restorative justice: *mediation between victim and offender*, under which the criminal procedure law may result in relief of criminal liability.

### **4. Criminal mediation in the romanian legal system**

In the Romanian legal system, mediation in criminal matters aroused an interest much later than in the European countries. As late as 2006, through Law no. 192 on mediation and organization of the mediator profession a few articles on mediation in criminal cases were introduced. The Romanian legislature regulates this alternative means of conflict resolution only for those crimes for which, according to the law, the withdrawal of the prior criminal complaint or criminal reconciliation of parties removes criminal liability.

At the same time, through the new Code of Criminal Procedure, in order to meet the demands of a modern judiciary, but also to transpose into national law the rules adopted at European Union level, many provisions which refer to mediation were introduced. Thus, it was established the possibility of concluding an agreement on mediation and it was consecrated the right of the injured person or the right of the accused to call in a mediator, in certain cases provided by law, but also the possibility of capitalizing claims through mediation.

Also, pending the entry into force of the new mentioned Code (February 1, 2014), modifications and additions [10] were brought to the former Code of criminal procedure. They concern the mediation agreement that may be concluded in accordance with the law in the case of offences for which the withdrawal of the complaint or the reconciliation of the parties eliminates criminal liability or on civil claims, during the criminal trial [11].

#### **4.1. The object of criminal mediation**

Law no. 192/2006 includes in section 2 of the special provisions concerning mediation in criminal cases. It should be noted that as of February 01, 2014 two new codes entered into force - the Criminal code and the Code of criminal procedure, whose contents make this time clear references to the mediation procedure.

Unlike the old codes, this time a very strong emphasis is put on the idea of restoration of the perpetrator, his education, the main aim being the elimination of criminal behavior and prevention of new criminal offences' recurrence. Mediation gives the offender the opportunity to express his point of view on the action or inaction that he is accused of, the ability to become aware of the seriousness of his negative action, the damage produced to the victim and, implicitly, the chance to fix it.

The restorative policies in the criminal law include mediation as dispute resolution, under two aspects:

a. *as a partial solution* - by solving civil aspects of crime. The partial solution contained in a mediation agreement constitutes an important element to the individualization of punishment by the judge who investigates the case in question. Mediation will take place according to the usual rules found in civil matters, the Court pronouncing a expedient decision. The civil side of a criminal trial may be the object of a Mediation Agreement regardless of the nature of the crime;

b. *as a total solution* - just for some offences, where the reconciliation of parties or the withdrawal of prior complaint eliminates criminal liability;

In both cases, the agreement includes the elements related to the settlement of civil claims of the victim. Basically, there is the satisfaction of covering the damage in a relatively short time and in a concrete way. *The agreement concluded between the parties*, on the civil side of the criminal process, will lead to the settlement of civil action according to the will of the parties, and on the criminal side of the process, will constitute an item for the judge to order: the renunciation of the penalty, the delay of the penalty application, conditional suspension of the execution of criminal sentences, or to retain extenuating circumstances which have as effect reducing the sentence by one-third and even ordering the conditional release of the imprisoned before the execution of the penalty in hole.

Mediation in criminal cases should be carried out so as to be guaranteed the right of each party to legal assistance and, where appropriate, the services of an interpreter. The official report which closes the mediation procedure must show if the parties have benefited from legal assistance of a lawyer and of the services of an interpreter (if applicable) and to indicate whether they have expressly renounced such rights (article 68, paragraph 1, Law no. 192/2006).

The mediator must take into account when mediating criminal cases of the provisions contained in the New Code of criminal procedure entered into force on February 01, 2014, respectively:

a. article 16. Cases that prevent the initiation and pursuit of criminal proceedings. (1) *The criminal proceedings may not be brought into motion, and if they were put in motion they can no longer be exercised if:* g) the prior complaint was withdrawn, in offences for which its withdrawal removes criminal liability, the reconciliation of the parties took place, *or a mediation agreement has been concluded*, in accordance with the law;

b. article 23. Transaction, mediation and recognition of civil claims. (1) *During the criminal trial, with regard to the civil claims, the defendant, the civil party and the party civilly responsible may conclude a transaction or an agreement for mediation*, according to the law.

c. article 81. Injured person's rights. (1) i) - *the right to call in a mediator* in cases permitted by law;

d. article 83. Rights of the defendant. During the criminal trial, the defendant shall have the following rights: g) *the right of recourse to a mediator*, in the cases permitted by law; g<sup>1</sup>) *the right to be informed of his rights*;

e. article 108. Notification of rights and obligations. (4) *The Judicial body must bring to the attention of the accused the possibility of concluding an agreement, during the criminal prosecution, as a result of acknowledging his guilt and during the trial the opportunity to benefit from reducing the penalty provided by law, as a result of the accusations*;

f. article 111. The hearing modes of the injured person. (1) b) - *the right to call in a mediator* in cases permitted by law;

g. article 313. Cases of suspension. (3) *The suspension of the criminal prosecution can be ordered during the mediation procedure*, according to the law;

h. article 318. Waiving criminal prosecution. (4) If the Prosecutor orders that the suspect or the defendant to comply with the obligations laid down in paragraph (3), established by Ordinance the time by which they are to be met, which may not be longer than six months or nine months for summate obligations through the mediation agreement concluded with the civil part which flows from the communication of the Ordinance.

i. article 483, paragraph (3). If the dispositions of article 23 paragraph (1) are incidental, the prosecutor shall submit to the Court, the agreement on the recognition of guilt accompanied by settlement or mediation agreement;

- article 486. Settlement of civil action. (1) Where the Court admits the recognition of guilt agreement and between the parties a mediation agreement or transaction was concluded with respect to the civil proceedings, the Court takes note of that through a sentence. (2) where the Court admits the recognition of

guilt agreement and between the parties it was not concluded a mediation agreement or transaction with respect to the civil action, the Court leaves the civil action unsolved;

#### ***4.2. The offences where the mediation procedure may be applied, under the New Criminal Code***

According the New Criminal Code, the mediation procedure can be applied in case of committing the following crimes: Hitting or other violence (art. 193); Bodily injuries through negligence (art. 196); Family violence (art. 199); Threat (art. 206); Harassment (art. 208); Rape (article 218 paragraph (1) and paragraph (2)); Sexual assault (art. 219); Sexual harassment (art. 223); Violation of domicile (art. 224); Violation of professional office (art. 225); Private live violation (art. 226); Disclosure of professional secrecy (art. 227); The punishment of thefts at the prior complaint (art. 231); Theft (art. 228); Qualified Theft (art. 229 paragraphs 1 and 2, letters b and c); Theft for the purpose of service (art. 230); abuse of confidence (art. 238); Abuse of confidence in defrauding creditors (art. 239); Simple Bankruptcy (article 240); Fraudulent Bankruptcy (art. 241); Fraudulent Management (article 242); The appropriation of the property found or obtained by error by the offender (art. 243); Deception (art. 244); Deception regarding insurance (art. 245); Destruction (art. 253 paragraph (1) and paragraph (2)); The disturbance of possession (art. 256); Support and unfair representation (art. 284); Violation of correspondence secrecy (article 302); Family Abandonment (art. 378); Failure to comply with measures for the custody of minors (art. 379); Hindering the exercise of religious freedom (art. 381).

#### ***4.3. Some aspects of the process of mediation***

The parties may seek mediation in four distinct phases: 1. *before starting the criminal process*; 2. *within the period provided by law for the introduction of prior criminal complaint*; 3. *during the prosecution phase*; 4. *during the trial*.

**1. *Before the start of the criminal process, mediation process is as follows:*** If the injured party has reconciled with the perpetrator, he can no longer refer for the same Act, the criminal prosecution body or, if necessary, the courts. Mediation can be terminated through reconciliation (total or partial of the parties) or through their non-reconciliation.

**2. *Within the deadline set by law for the introduction of prior criminal complaint, mediation process is as follows:*** Under the New Criminal Code, a prior complaint may be formulated in a period of 3 months from the date of the offence. In the old Criminal Code, the prior complaint was submitted within the period of two months from the date on which the victim knew the offender. In this case, the prescription of the right to file prior criminal complaint or to submit the action to the competent court shall be suspended during mediation, but no longer than 30 days. If the parties found in conflict could not be reconciled, the aggrieved person may bring a prior complaint while at the same time prior, which will resume its course from the date the official report of the procedure of mediation is concluded, as well as the time elapsed before the suspension.

**3. *During the phase of criminal prosecution, mediation process is as follows:*** In the phase of criminal prosecution – a mediation agreement between offender and victim will prevent the commencement or conduct of the criminal process (at crimes traceable due to prior complaints and at the ones traceable ex officio but for which the reconciliation of the parties is possible - article 159 NCC). The mediation agreement may constitute an important element for the public prosecutor to drop the criminal prosecution and to give the offender a nine month period in which to fulfill the obligations arising out of that agreement (article 318 paragraph 1 and paragraph 2 NCPC). If the obligations assumed by the parties through the mediation agreement will not be met, the Prosecutor may apply the sanction of revocation of the measure ordered, respectively the renunciation of criminal prosecution (article 318 paragraph 3 and paragraph 4 NCPC).

**4. *During the criminal trial, mediation process is as follows:*** In the trial phase - the defendant will be acquitted, and it will be taken note of the mediation agreement concluded by the parties that can thus be put into execution. The mediation agreement will be subject for approval by the competent court or authentication by a notary. If the parties choose mediation, the suspension of the process is optional and if it is accepted it may not exceed 3 months.

Criminal mediation is a form of restorative justice and is mainly based on the dialogue between victim and perpetrator. The parties cannot be constrained to seek mediation, are not required to go through the procedure of information and will not be subject to any penalties if they do not wish to resort to this procedure. Criminal mediation is possible in the case of offences for which, according to the law, the withdrawal of prior complaint or the reconciliation of the parties removes criminal liability (article 67 paragraph 2 NCPC).

Mediation in criminal cases must be conducted so as to ensure the right of each party to legal assistance and, where appropriate, to the services of an interpreter. The official report drawn up through which the mediation procedure closes must state whether the parties have benefited from the assistance of a lawyer and an interpreter's services or, as appropriate, indicates that they have waived it expressly.

The limitation of the right to action or referral of the criminal complaint shall be suspended during the mediation process and is calculated from the date of signing the mediation until closure of the mediation process, no matter how it ended (Article 49, Law no. 192/2006) [12].

Accepting the participation to the information or signing of the pre-mediation contract does not suspend the limitation period.

## Conclusions

In the Romanian criminal procedure the institution of mediation is regulated in accordance with the international standards. In this respect, the European Council through the Committee of Ministers has adopted several recommendations on mediation which enunciate the principles and directions for action for the Member States, including Recommendation no. 99 (19) on mediation in criminal matters [13].

Criminal mediation agreement is an agreement between the parties with respect to mutual claims and obligations, which does not concern modes of criminal responsibility (which is the exclusive competence of the judicial bodies) and which is not reduced to a common understanding regarding demands that constitute the object of civil action in the criminal trial. The terms of a mediation agreement may regard practically any rights that the parties may have, including those not connected with the proper criminal proceedings; it is essential for them to have as their purpose the total and permanent termination of the conflict between the parties, aspect which must result in an unequivocal manner from the mediation agreement [14].

The number of cases in which the parties will resort to mediation in criminal matters, depends to a large extent on the manner in which the criminal investigation organs will notify the parties about the possibility of resorting to this alternative means of criminal conflict settlement and will present the parties the advantages of mediation proceedings compared to participation in a criminal trial.

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