CZU: 343.1

THE EFFICIENTISATION OF THE MECHANISM FOR THE APPLICATION OF THE INSTITUTION OF MEDIATION IN CRIMINAL PROCEEDINGS

Vasilica-Leontina TUDOR,
Mediator, PhD ULIM

SUMMARY

The study proposed to present comparatively of the similarities between the institution of reconciliation and that of the mediation agreement, both based on the consent of the parties, respectively of the perpetrator (the suspect, the defendant) and of the victim, although the two institutions differ through the legal effects deriving from them, thus ensuring the efficiency of the mediation enforcement mechanism.

Key-word: *criminal law, criminal procedure, mediation, mediator, offender, victim, violence.*

EFICIENTIZAREA MECANISMULUI DE APLICARE A INSTITUȚIEI MEDIERII ÎN PROCEDURA PENALĂ

SUMAR

Studiul și-a propus prezentarea comparativă a asemănărilor dintre instituția împăcării și cea a înțelegerii din cadrul medierii, ambele având la bază acordul de voință al părților, respectiv al făptuitorului (suspectul, inculpatul), cât și al victimei, deși cele două instituții diferă prin efectele juridice care decurg din ele, asigurând astfel eficientizarea mecanismului de aplicare a medierii.

***Cuvinte-cheie**: lege penală, procedură penală, mediere, mediator, infractor, victimă, violență.*

The criminal law, in the opinion of V. Pella, must come out of the cold sphere of the objectivity of the other juridical branches approaching as much possible to the souls of those who defend or punish them, because it has in his hands the life and honor of men [14, p.45].

Remarkable Professor M. Vidal Since 1904, considered that the crimes by imprudence contain a criminal fault, are modern and by actuality dangers [17, apud 16, p.8]; the rules of law and the institutions have a purpose and a spirit that should be guided in their interpretation and application [16, p.185], an idea that was appreciated by J.C. Schmidt adding that for to resolve in a healthy way the problem of duality of the facts, should not be overlooked the purpose of the civil reparation and that of the punishment [16, p.185].

The Convention for the Protection of the Human Rights and of the Fundamental Freedoms, from Rome, 4.XI.1950, by art. 7, paragraph 1, establishes the principle of no punishment without law, so: „No one can be condemned for an act or omission who, at the time of the commission, was not an offense national or international law. Also, no punishment can be applied more severe than that applicable at the time when the offense was committed" [9, art.7 §1].

There is a diversity of opinions between the application of intrajudicial justice or extrajudicial justice, but, as Plato pointed out: „Yet, if any of us, in search of truth and perfection, finds something to criticize in our laws, not to feel us offended, but to receive the criticism with gentleness" [15, p.51].

For the delimitation the nature of the laws, it is essential to quote Plato too, which brings some explanations about the laws: „Among the laws, there are some made for the good people and they have no purpose but to teach them the art of living in union and peace with their fellow citizens; others are meant for evil people, which a good education has failed to correct them, endowed with a stiffly nature and not persuaded by any means, for to prevent them from to indulge to all wickedness. The following laws are for this latter; they are somewhat their authors, for only forced by their deeds the legislator legislate on them, and wishes it to be unnecessary to ever serve them" [15, p.289-290].

Prof. C. Duncan's opinion on the law refers to the fact that there is no freedom without limit where it is law, because an individual has no freedom to do what he wants, because its quality of life is determined by others inevitably, his freedom ceasing where the other's freedom begins, and to eliminate the freedom of an individual to whom we find ourselves dependent in invisible threads, signifies the cancellation of one's own freedom, so we can not manifest freely than within the limits set by the law [8, p.402-403].

Mobility of laws is based on changes from inside of a society, being revealed by Napoleon too, which said that laws were born and changed according to needs and circumstances [12, p.237], aspect that proves its actuality in any period of the time, but sometimes the changing of laws are so often that it creates unpredictability and incertitude.

Regarding to the law mobility, in doctrine, one opinion believes that indifferent of the type of society from which it appears, the authority of the law is the only institution that enjoys the same respect, the law could be modified when the society think it fit to do this thing [1, p.5], and according to other opinions, the protection of social values is not only achieved through the legal sphere, but also through extrajudicial procedures, respectively through extrapenal legal rules. In this sense, the criminal law accuses, and the criminal procedural law identifies in time and the perpetrators for to call in justice to account, just about facts and people, which it is considered that harmful or jeopardise the social values of the social group, indifferent of the importance and magnitude of the social value the law protects [2, p.22].

The scientific issue of eficientisation of the mechanism of application of mediation institution is highlighted by the exigence for to creat an efficient system the implementation of the mediation institution in the field of criminal law in accordance with the rules of criminal procedure and of the Law of Specialty, taking into account the legislative area at national and international level in the field of mediation, analyzed too from the perspective of the legislation of other states.

There was identified and researched orientations and developments in the progress of criminal proceedings, typical for different countries, which have the possibility to be implemented.

Mediation is considered the easiest way to resolve a dispute. However, until encompassed the mediation within a legal framework, there was the institution of peace judges, which was designed and implemented with the French Revolution of 1789. This institution of peace judges proved to be a necessity to assessing conflicts and solving them within the new legal institutions emerged as new achievements of the light age.

According to the analysis realised by C. Botez, in France, „the peace judges as judicial police officers, may be delegated either by the prosecutor or by the investigative judge, when they are hampered, to proceed to certain acts of judicial justice or instruction. In Romanian law, the legislator of 1908 has also innovated at this point, because, through art. 55, L.J. Ocoale provided that rural district judges may be delegated by other authorities to do research not only for the purpose of the preliminary instruction, but also any preparatory acts that would be deemed necessary by the courts of law, for the prosecution of the criminal offense" [6, p.154].

The attributions of the peace judiciary as a judicial police officer were very extensive in France under the laws of 16-29 Sept. 1791 and 3 November Year IX, and have in point of view the return to peace and quiet; but they were narrowed by the Law of 7 Feb. year IX because they were accused of being independent of the government, not having a common direction, imputing their inertness which they have proven in the exercise of the attributions assigned to them. C. Botez considers that the inertia which is imputed to the peace judges from France of the beginning of the century of lights was explicable and excusable, considering that they could not be guilty because there was „an excusable hindrance to exercise them, in the many attributions, which have been conferred to him, incompatible with the duties of a judicial police officer". The Criminal Investigation Code allowed them back into a tighter circle [6, p.154].

As regards the jurisdiction of countrychief or single judgments (the peace judges) in Austrian criminal law, it was established that „This competence after the law on the introduction of the criminal procedure of May 23, 1873 includes: a) the criminal proceedings regarding all contraventions which are assigned to the trial; b) cooperation on all preliminary findings and instruction of the crimes and crimes proceedings, in accordance with the criminal procedure" [6, p. 154].

The jurisdiction of the peace court in Hungarian law was governed by Law V of 1878 with the 1908 novel, and Law VII of 1913, which constitutes the criminal code of contravention contained in Law XL of 1879. Both of these laws, harmonized with previous criminal laws, were enforced by law XXXVII, applied on 1 September 1880. By art. 40 of this law there are listed the offenses gived under the jurisdiction of the peace courts (*járásbiroságok*).

The criminal jurisdiction of peace judges, in Russian law, was provided by the Russian Penal Procedure Code and the General Code of Russian Penalties and in other special laws. After Art. 33 of the Russian Criminal Procedure Code (existing in 1922), appertained to their jurisdiction the offenses listed in those laws which provided: „1. Prevention, observation, reprimand; 2. Penalty and fine till 1000 rubles; 3. Police arrest; 4. The correctional imprisonment not accompanied by the loss of all or some of the special rights and privileges or only of some of the personal ones or conferred by the estate. Codes of t. XV, ed. 1914, with the last changes made until 1 July 1915, contain both rules of criminal procedure, as well as the offenses subject to the judgment of the peace court, as: offenses against the administrative order, against goodwill, order and tranquility in general, non-observance of police rules concerning the sale of alcohol, offenses against the public organization, violation of passport status, of building regulations and communication paths, the rules on fire protection, violation of telegraph-postal rules, crimes against the health of the people, against personal security, the insult, threats and violence, offenses against foreign property, the despotic use of foreign property and the harm of this, theft in foreign forests, the theft in generally, the swindle, cheating and appropriation of foreign wealth" [6, p. 154].

In the Belgian Judicial Code, we find the institution of peace judges in Part II, Chapter I, entitled „Peace Judge and Police Tribunal", in which it is stated that there is a justice of peace on every judicial canton, where one or more judges perform their duties within the established territorial limits. A peace judge may, among other things, be appointed a judge at the Tribunal of police [7, p. 194].

Chapter III of the Belgian Judicial Code, entitled „The Judge of Peace", through art. 590, modified by art. 2) of the Law of 29 November 1979, states that to the Peace Judge is addressed all applications whose value does not exceed 1860€. The range of requests that the peace judge deals with includes a wide palette of actions from the civil law related to the rights of property, family and commercial [7, p.318-320].

The Peace Judge's institution was the promoter step which has impel the initiation of realisation some laws on the use of mediation, what, implicitly, has led to the search the levers for implementation of mediation, because it has a wider range of skills, with reference to mediation in various social sectors, dividing into several sectors: mediation in field of family, commercial, civil, criminal, etc.

In order to understand the application of mediation in the criminal field, it is necessary to remember a few notions about offense and offender, for to understand the limits that could allow the application of mediation in the criminal domain.

By explaining the content of the offense and the notion of offender, George Antony said that „about crimes can be spoke when only then when we refer to the most serious violations of criminal law, and the offender becomes only the person who has committed a truly dangerous act for society" [3, p. 20].

According to R. Garraud, the criminal offense can give place at two ways of responsability: the criminal responsibility, which is obliged to respond to social accusations, and in this case the sentenced person to endure a punishment, action which is exercise by the public action; civil responsibility, which is the obligation to respond with a repair which is required to meet the demand for to compensation of the damage caused and to compensate the person who was the victim, action exercised by the civil action [10, p. 273].

Beaconing the analysis of a crime, „The determines of the offense are: a) the conditions of the social environment, under the unfavorable influence of which occurs disharmony and deformity of needs, of the interests and system of values of the concrete person, which become a premise of criminogenic motivation; b) criminogenic motivation; c) the concrete situation of life who, interacting with the peculiarities of personality, determines the intention to commit the offense. At the level of unfavorable conditions of denatured personality training the premises are conceived as possibilities for committing the offense by a concrete individual. At the level of the concrete situation, the criminogenic motivation of the person it is accomplished by the criminal fact" [5, p. 222].

Also, G. Antoniu points out that one of the citizens obligation is respect for the rules of social cohabitation: „every citizen must permanently self-control, to verify their conduct in relationships with others, to respect a set of prescriptions or rules designed to ensure the orderly conduct of the activities taking place in society, the possibility of normal relations between all its members. Each of us has, for example, the duty to observe numerous rules of conduct, the freedom of every person it must conciliated with the freedom of all. This means that each individual must consent to a restriction of his or her liberty, so that his free behavior does not embarrass the other members of society, equally entitled to behave freely" [3, p.24-25].

In the situation where there are crimes in which the perpetrator where the punishment of the perpetrator is made only on the basis of the prior complaint by the injured party, the mediation procedure can be successfully applied.

According to opinion of N. Volonciu [18, p. 66], „the institution of the prior complaint is encountered only in relation to certain offenses, usually with less social danger, to which the legislator has agreed to condition to which the legislator understood to condition all the criminal repression by the injured party's attitude". Also, „the extinction of the criminal action is usually in the power of the owner of the action who may dispose by it" [18, p.107].

On the other hand, „the parties' reconciliation has independent character, in relation to the withdrawal of the prior complaint. By conciling the parties, it is extinguished and the civil action" [18, p.111].

„When an act provided by criminal law lacks an essential feature, it loses the criminal character and can not constitute an offense; on the contrary, when the act lacks a constituent element of a crime, that act may possibly constitute another offense, keeping the criminal character (for example, instead of robbery, theft; instead of outrage, insult; instead of stealing or embezzling, abuse of trust, etc.) [4, p. 96].

Of course, it is known that with regard to the consequences of concluding a mediation agreement, it differs from the consequences of reconciliation. The agreement within the mediation agreement does not extinguish the obligation of material liability of the perpetrator, this being forced to pay the material and/or moral damages established with the victim in the mediation procedure, not affecting the criminal process, this may continue, but reconciliation is conditioned both by the extinction of the criminal action and the extinguishment of the civil action, the reconciliation must be total and unconditional, so the victim loses the right to claim compensation under any criminal or legal proceedings for the deed he has forgiven.

At the level of each state there was the question of domestic violence, which involves a whole series of aspects of criminality [13, p.104-105]. The offences of family violence have been the subject of great concern of the legislators from many countries in which the rights of the person are respected.

As regards the mediation of domestic violence, this is proving to be a supportive tool for resolving conflicts, because in the case of hits and other violences, the offender may be criminally liable under the law. However, except for murder cases, usually the victim does not want the perpetrator to be locked in the penitentiary, but just wants to straighten it, not to repeat violence within the family.

According to the provisions of the Belgian Criminal Procedure Code, when, after conducting a mediation mission between the author and the victim, new violences are executed by the same perpetrator, no new mediation mission can be made. In this case, unless there are special circumstances, the prosecutor enforces a criminal law. In the case of a crime against either spouse, partner or concubine, either against his/her children or that of his spouse, partner or concubine, the offender is ordered to live outside the domicile or residence of the couple and, if necessary, to refrain from coming to or near this place of residence or in its immediate vicinity, and, if necessary, to be the subject of medical, social or psychological assistance; these provisions also apply if the offense is committed by a former spouse or partner of the victim, or by

the person with whom he was bound by a covenant of civil solidarity.

The foundation of the concept of mediation, restorative justice and reparatory justice is an act of skill, consideration and understanding of the conflict, offering a modern and comprehensive approach to resolving criminal law conflicts, investigating the objectives, goals and principles of implementing mediation tools. In this regard, the mediation procedure in criminal law has been implemented, as an alternative way of resolving the conflicts.

For the judiciary system, the use of mediation involves a reduction by the state of expenditure with legal institutions or, perhaps, their more judicious allocation for the remaining files. For society as a whole, mediation could over time increase the degree of tolerance of inconvenient behaviors and to another level of resolution of litigations [11, p.18].

There are a number of features of mediation in criminal conflicts, being necessary to identify the principles of mediation in the field of public law, the relationship of mediation with traditional criminal justice institutions, as well as the possibility of its implementation in systems that have not yet implemented mediation in their internal law. In this respect, there is a possible influence of the concept of mediation as a restorative justice in criminal proceedings, being examinating the practical experience of unfurl the mediation procedures in the case of low or medium-grade crimes of social danger, in this sense, it is necessary to study the criminal legislation and the practice of applying mediation to resolve disputes in criminal conflicts existing in Romania, the Republic of Moldova and in other states.

In this respect, it has been found that there is an inseparable connection between of filing the act of notice of the criminal justice bodies and the principles underlying the criminal procedure. The act of notice the judicial bodies is a procedural act which is conferred on any person who is granted free access to justice, giving it the right and the opportunity to address the judicial bodies in the criminal field, which are considered to have the competence to resolve the situation which is manifested after realising the act of a criminal nature, or a the preparing for to commit such a deed, being invested with their resolution.

We can consider that the mediation is a bilateral and consensual legal act, which removes the criminal liability of the perpetrator, being materialized by an agreement on the basis of which the mediation agreement is concluded, resolving the report of the criminal legal relationship, but mediation is realised personally by the parties in conflict, or, in special cases characterized by the perpetrator's impossibility to move to the mediator, mediation can be done through a mandate contract.

Analyzing the civil legal relationship of mediation in the criminal proceedings of the judicial process, it can be seen that it is characterized by the social, patrimonial or non-patrimonial relationship, governed by the rule of civil law, as a volitional social report, placing the parties in a position of legal equality, mediation having a private character, find possible in cases provided by law, and having a consensual character.

The mediation contract resulting from the mediation agreement that contains an agreement or transaction can also be made in the criminal proceedings, but only with regard to civil action in criminal proceedings. Mediation can be terminated in the following ways: total understanding, partial understanding, mediator's finding of the failure of mediation, renouncement of the parties to mediation by denouncing the mediation contract. The duration of the mediation procedure is of maximum three months, indifferently of whether it takes place in a civil proceeding or criminal proceedings.

In Romanian criminal proceedings, it is provided the suspendation of the court proceedings for three months, during which an agreement between the parties can be reached and a mediation agreement can be concluded.

Mediation can generally be made for offenses for which a prior complaint is required for the offense committed. The period for bringing the prior complaint to the offense is three months and flows from the moment when the injured party took notice of the offense. At the same time, the period of suspension of the deadline for submitting a prior complaint is three months, calculating too and the period elapsed before the commencement of mediation.

In Romania, the mediation agreement produces legal effects in the criminal area if it is carried out only until the court document has been read, but in the Republic of Moldova the mediation agreement produce its effects until the of judges retires for deliberation.

In the Romanian procedure, the introduction of the institution of the preliminary chamber within the criminal law, is a procedure that allows the case to be referred to the court for judgment, or to return the file for completion.

Mediation can also take place outside of the procedural framework, producing effects only between the parties, having no effect on the court's decision, however, the court may take into account the existence of the will of the perpetrator to repair the consequences of his deed, which can be considered as an attenuating circumstance, the court may reduce the amount of punishment or may apply of a lighter punishment. Taking these aspects into account, we propose by *law ferenda*, completing art. 75 (Attenuating Circumstances) paragraph (2) (It can constitute attenuating judicial circumstances), with letter c) of the Romanian Criminal Code, with the following content: „(*c) realisation of an agreement for to reparation of the damage sustained by the victim, during the mediation procedure*", so that the mediation to be aligned with the other attenuating circumstances laid down in the Criminal Code.

Considering the same reasons to mention of the mediation among mitigating circumstances that can reduce the punishment applied on the perpetrator, it is can also take into account and the fact that in the case of crimes with a reduced social danger, by making a settlement in the frame of a mediation agreement, mediation can be regarded as a cause that removes the criminal liability. In this sense, we propose by *law ferenda*, amending and completing Title VII of the Romanian Criminal Code on „Causes that remove criminal liability" with an additional article containing references to mediation, adding a new

article 159[1] paragraph (1), as follows: *„Mediation is a cause of the removal of criminal liability for the offense committed, if it has been concluded with an agreement agreed by both parties, conducted through the mediation procedure under the conditions established by the Criminal Code and the Code of Criminal Procedure".*

By introducing articles on mediation in the Criminal Procedure Code of Romania and the Code of Criminal Procedure of the Republic of Moldova, it was moved towards a modern stage of the justice, in consensus with social changes and of the democracy carried out in compliance with the rights and freedoms of citizens, which are perfectibily.

However, it is noted the insufficient approach of the legislator toward the mediation institution, feeling the need to complete with a definition of mediation in the criminal field, too. As such, we consider it useful to introduce Article 159[1] in the Criminal Code of Romania and Article 109[1] in the Criminal Code of the Republic of Moldova entitled „Mediation", which to contain detailing about mediation.

Conclusion

The similarity between the institution of reconciliation and that of the institution of agreement from the frame of mediation it is represent the fact that for realisation of any of these, it is necessary the accord of the will of the both parties, both the will of the perpetrator and the will of the victim, instead, the two institutions differ in their legal effects which ensue from them, the efficiency of mediation being proved by the results achieved and realized by the settlement in the normal requirements of the relationship between the two parties and by the compensation the offender commits to pay to the victim for material and / or moral damages suffered, in the way in which was agreeded in common agree by the two sides of the conflict, but reconciliation occurs unconditionally, according to the law, the victim not being able to recover the damage suffered as a result of the offense, the victim being unable to recover the damage by another action in court case.

Mediation can be considered as a supple procedure for resolving the conflicts, having the objective of ending the conflict through an amicable settlement of the parties, in a time that can only take up to three months, the parties may still be in good understanding after having jointly decided what is useful and legal for both parties.

Bibliographical references:

1. Alecu Gh. *Criminalistică*. Ediţia a II-a. Constanţa: EX PONTO, 2009. 465 p.
2. Alecu Gh., Alecu C. Interdependenţa cauzală dintre politica penală şi legea penală. Consideraţii teoretice şi juridice despre ordinea constituţională şi ordinea de drept. În: *Revista „Legea şi viaţa"*, 2010, nr.1, p. 22-25.
3. Antoniu G., Popa M., Daneş Şt. *Codul penal pe înţelesul tuturor*. Bucureşti: Editura Politică, 1970. 403 p.
4. Bică Gh. ş.a. *Drept Penal. Partea generală,* Ediţia a II-a. Bucureşti: Fundaţia România de Mâine, 2008. 340 p.
5. Boroiu-Dragomir C. Încadrări conceptuale şi teoretiice privind cauzalitatea criminalităţii feminine. B: *Правовые реформы в постсоветских странах: достижения и проблемы: Международная Научно - Практическая Конференция*, 28-29.03.2014. Chişinău: Cetatea de Sus, 2014. 350 p.
6. Botez C. *Noul Codice de Şedinţă al Judecătorului de Ocol adnotat şi comentat, Competenţa penală. Procedura înaintea judecătoriilor de Ocoale şi a instanţelor superioare III. Doctrina şi soluţiunile jurisprudenţei (1900-1921) în comparaţie cu legislaţia ungară, austriacă şi rusă. Decrete-Legi. Decrete. Ordonanţe şi Circulare Ministeriale.* Bucureşti: Viaţa Românească, 1922. 608 p.
7. Code Judiciaire du Belge, Titre IV, septiéme partie, dans Les Codes Larcier Tome I, Edition mise à jour d'après les textes publiés au Moniteur belge jusqu'au 1er janvier 2008. Bruxelles: Editure Groupe De Boeck, 2008. 1738 p.
8. Constantin-Dulcan D. *Inteligenţa materiei*, Ed. a 3-a, rev. şi adăug. Cluj-Napoca: Eikon, 2009. 474 p.
9. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, art.7 §1. http://www.echr.coe.int/Documents/Convention_RON.pdf (viseted 04.05.2019)
10. Garraud R. *Traité Théorique et Pratique du Droit Pénal Français*. Tome Deuxième. Deuxième Edition. Paris: Ancienne Maison L. LAROSE & FONCEL, 1898. 748 p.
11. Ghidul de mediere pentru magistraţi. http://www.medierenet.ro/wp-content/uploads/2012/06/ghid_mediere_magistrati.pdf (vizitat 09.05.2019)
12. Hanga V. *Mari legiuitori ai lumii*. Bucureşti: Editura Ştiinţifică şi Enciclopedică, 1977. 290 p.
13. Johnston H. *Crime in England 1815-1880: experiencing the criminal justice system*. Great Britain, 2015. 182 p.
14. Pella V. *Sudii de Dret penal. Delicte îngăduite*. Bucureşti: Cartea Românească, tipărită la Institutul de Arte Grafice Görl-Rasidescu, Paris, 1919. 520 p.
15. Platon. *Legi*. București: Univers Enciclopedic Gold, 2010. 397 p.
16. Schmidt J.-Ch. *Faute civile et faute pénale*, Etablissements André Brulliard. Paris: Librairie du Recueil Sirey, 1928. 197 p.
17. Vidal M. *Considèration sur l'ètat actuel de la criminalité en France et les caractères de la criminalité moderne.* Paris, 1904. 926 p.
18. Volonciu N. *Drept procesual penal*. Bucureşti: Editura Didactică şi Pedagogică, 1972. 541 p.