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Perception of Civil Society on Mediation in Criminal Matters

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Abstract

Problem Statement: This paper examines whether new changes in the Romanian mediation law can affect the criminal liability of persons charged with committing certain crimes.

Purpose of Study: The purpose of this study is to analyse the new regulations regarding the mediation between victims and offenders, considering the mandatory mediation informative meeting.

Methods: In order to achieve the goal of the study, I will analyse the new framework considering experts, such as lawyers and judges, the stakeholders’ interpretation and reactions caused by the occurrence of these changes.

Findings and Results: Criminal mediation is possible in certain situations, but not mandatory, taking into account that the new legislative changes are only to decrease the number of cases lacking legal support registered in the courts of law.

The victim is neither forced to sign an agreement with the offender, nor to have a new confrontation with their offenders during the mediation informative meetings, especially if the high level of emotional involvement is considered.

As human nature often makes citizens to oppose resistance to changes, the media has an important role as an opinion trendsetter.

Conclusions and Recommendations: For a better understanding of the new situation arising, it is recommended that the legislator express more clearly the purpose of the law they draft, leaving no room for misinterpretation. Equally, the recipients of the law should not rush in criticising, not before having determined the real aspects of the situation based on reliable and valid sources.

Keywords: criminal mediation, Romania, mandatory, offender, victim.

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1. Introduction

Mediation is a way to resolve conflicts amicably by means of a trained third party, as the mediator, an alternative to the traditional state-run courts. By means of mediation, the judicial act is improved, a private and confidential environment is ensured where the parties are not overwhelmed by the burden of formality of a court of law, and the result always satisfies both parties, as opposed to the trial in court where there is a winning party and a losing one whose claims have been dismissed (Gorghiu, 2012, p. 257-279). From the parties’ viewpoint, disputes may involve states, organisations, communities, individuals.

Mediators use appropriate methods to facilitate dialogue between the conflicting parties, helping to execute an agreement covering the common points reached on the matter at hand. The mediator, in exercising of their profession, should be unbiased and neutral, and discussions conducted should be subject to confidentiality.

Individuals and businesses alike, having a dispute of a civil, labour, and consumer nature, or involved in family disputes, disputes between professionals, neighbourhood-related disputes, as well as criminal matters in certain cases, can resort to mediation.

As mediation in criminal matters is relatively new to the legal system in Romania, the interest thereon has appeared later than in other European countries. This is due to the acute lack of information and to the traditional mentality and human nature as well that tends to resist to novelty.

The Romanian legislation regarding mediation has recently undergone significant changes. Law No 115/2012 brought a new lease of life in the field, implementing the obligation for the parties to a dispute to appear in an information meeting on mediation before resorting to court. It only concerns certain types of litigation, expressly provided under article 601 of Law No 192/2006, of little value or deemed capable of being resolved in a mediation process, where the parties are assisted by an expert called a mediator, who may be a legal advisor or can come from another profession or trade. Criminal cases are among such types of disputes, where the informative meeting is mandatory “in cases of offences for which the withdrawal of the initial claim or the reconciliation of the parties removes criminal liability, after the claim was filed, if the offender is known or was identified and the victim consents to attending the informative meeting together with the offender; if the victim refuses to attend such meeting together with the offender, the informative meeting shall be conducted separately” (Article 601 letter g) of Law No 192/2006).

The text of law has generated controversy in the civil society and among the actors in the justice system due to its being misinterpreted, especially by people with little or no legal knowledge.

This paper aims at analysing the problems encountered in the field of criminal mediation, which became the topic of great interest both of the legal professionals and of the other recipients of the law in question.

2. Issues concerning criminal-case mediation

2.1. The purpose of the informative meeting

The informative meeting on mediation is a new procedure introduced in the Romanian law, which requires that the recipient of the law appears before an authorised mediator, at the latter’s office, in order to be presented, by the mediator, with the advantages, disadvantages, and effects of mediation. The informative meeting is free of charge and does not restrict in any way the citizen’s right of free access to justice. Since 2012, the informative meeting has become mandatory in certain matters provided by the law.

2.2. Sanction

Since August 2013, sanction non-compliance with this obligation shall be sanctioned by the non-admissibility of the action in court for disputes referred to under article 601 of the Mediation Law, bar the criminal
matters. Consequently, for criminal disputes, inadmissibility is not provided as sanction therefore it is unenforceable.

In criminal matters, the victim is the party required to undergo the informative meeting procedure. They may choose to attend the meeting together with the offender or to attend such meeting alone. This measure is an obligation imposed only for offences for which the legislator has considered that the claim filed could be withdrawn or that the parties may reconcile, which would result in the criminal liability to be removed, on condition that the offender is either known or has been identified.

2.3. Disputes

The impact of this provision has been controversial and triggered a strong reaction on behalf of social factors. However, at the same time, there have been people who looked at it favourably, considering it to be a step forward in the evolution of the Romanian law.

The legal professionals’ opinion has generally been favourable as they embraced the idea of the prior procedure of informative meeting on mediation. On the other hand, there have been recipients of the law and certain associations, centres, NGOs that have voiced their strong objection to the new regulations deemed abusive and unlawful. Thus, there were other voices claiming that for mediation to operate, it requires a substantial impetus, and the obligation of the parties to attend an informative procedure before addressing the court is such an impetus that aims at allowing the parties to be acquainted with the advantages of mediation and persuading them to remain in mediation.

On the other hand, it has been said that the sanction of inadmissibility is drastic and contrary to the right of access to court and that the act adopted is contrary to the Fundamental Law and that it signals the recurrence of dictatorship (Comment of Andrei Oprea, 2013). One would argue that, as proof that the legal provision was misunderstood and misconstrued, it has been repeatedly represented that it is unconstitutional to create new obligations on the recipients of the law before addressing the court. They should be allowed to decide for themselves whether they resort to mediation, as they know best whether they stand any chances in this endeavour. The mandatory mediation may prolong the duration of the dispute, incurs costs, is time consuming, etc. (Comment of Florin Bornea, 2013).

2.4. The prior procedure character of the informative meeting

From a judicial point of view, the law of mediation is not a hindrance of the free access to justice, as it has been wrongly misconstrued (Comment of Florin Bornea, 2013). Preliminary procedures are not an impediment to justice, but they come to relieve courts, proposing to the recipients of the law that, before resorting to the coercive power of the state, to try to solve the conflict amicably.

Nothing prevents the citizen to address a court of law. However, before addressing the court, members of the public should resort to a mediator who will explain, free of charge, what mediation is (Comment of Cristi Dănileț, 2013). Here comes the role of mediator, who by means of their professionalism and the convincing manner in which the mediation method is represented, may or may not turn a recipient of the law into their client. It can be considered that the procedure is similar to the initial claim in administrative contentious matters (Comment of Cristi Dănileț, 2013). The preliminary informative procedure may take place before or after filing the action, in which case, the judge will grant a term for the procedure to be completed. Thus, there are three possible situations.

In the first case, if, after having been informed, the recipient of the law is not persuaded to settle the conflict via mediation, they return to the court and the trial continues. A second situation assumes that the recipient of the law accepts mediation of the dispute, but does not attend the mediation meetings, in which case a penalty fine shall be applied according to the Civil Proceedings Code. The third case, where the recipient of the
law fails to observe their obligation to attend the mediation informative meeting, considers that the action is rejected as inadmissible.

This procedure has been thought to resemble the one of the necessity of paying judicial stamp fees in the trial the process (Coment of Cristi Dănileț, 2013).

2.5. The optional character of mediation in criminal matters

What the opponents of this law have not understood is that mediation, which by its nature is optional, does not become mandatory; it is only the informative meeting on mediation that becomes mandatory for the recipients of the law.

The announcement that it is mandatory to visit a mediator before filing a suit has created panic among many organisations, especially after the release of the information that rape victims would be forced to face their assailants for a possible reconciliation (Huiu, 2013). Protests organised in several cities, arguing that the state becomes an accomplice to offenders and discourages victims to seek justice (Romanii panici de legea mediatorii?, 2013). Moreover, protesters have called for the removal of rape from the Mediation Law and for the State to deliver a zero-tolerance signal regarding rape and sexual assault (2013: Protest impotriva includerii violului in Legea Medierii, 2013).

2.6. Advantages of mediation in criminal matters

Although, according to feminist NGOs, which objected to the introduction of mandatory informative meeting on rape, the mediation will only perpetuate the mentality that these offences are not serious ones, that one may reach an understanding with the assailant, that the offender can buy their freedom and continue to assault undisturbed, the experience of mediation programmes in the specific area of sexual assaults has brought light the fact that, in many cases, the offender is the key to restoring the victim’s emotional balance; the offender is the only person present at the time of the offence, except for the victim, and the only person able to confirm the ‘story’ of the latter, the offender is the one who has the answers to the victim’s questions (Mitan, 2013). If the offender admits, during the mediation procedure, having committed the crime, such an attitude means, even if it is unable to remove the evil caused, at least accountability and, consequently, eliminating the feeling of blaming the victim, a feeling frequently experienced with such crimes (Dragne & Tranca, 2011).

The mediation procedure allows victims to express completely and blame directly their pain and embarrassment caused by the offence, manifestations that are not possible in court of law. Victims have the opportunity to present their uncensored side of the story beyond issues strictly of interest for the criminal trial. By means of such manifestation, it is possible to restore the balance of forces between the victim and their offender; we should not overlook that a successful mediation procedure may have as an effect the victim’s restoring their emotional balance, an effect that cannot be reached in a criminal trial (Dragne & Tranca, 2011). This is only one of the benefits of mediation in criminal matters, especially in case of sexual assault.

The fact that the judicial bodies are obliged under the law to ask the injured party whether they make claims as a civil party in the criminal proceedings can often be regarded as a humiliating and traumatic experience. The victim of a crime of rape primarily seeks to make their assailant liable and this goal can be more easily achieved via mediation as the offender, by attending the mediation meetings, admits their guilt and show willingness to correct the antisocial crime committed. Thus, the offender represents that they take responsibility and the victim leaves the mediation with the feeling that the offender has been held accountable, the mediator, playing an important role, has to act with sympathy and professionalism.
3. Conclusion

Solving disputes in court, and accepting the resolution thereon, does not represent the only way of settling a conflict. During the informative meeting on mediation, the citizens involved in various disputes will be able to be acquainted with and understand the mediation procedure and, hopefully, to look upon it as a viable and satisfying solution they could resort to confidently.

Adopting a legal text such as the one under analysis means that there are a number of factors in the judicial field involved. Such factors will not allow the violation of the fundamental rights of the citizens, nor will they allow abuses. When drafting the law, the legislator considers all risks such text may pose, as the purpose of the law is to support the citizens and not to allow for restrictions to their rights.

The media has an important role in influencing citizens, and in this case, the arising disputes have been generated both by wrong or incomplete information offered to the public and by the legislator who, while drafting the law, did not express their purpose clearly enough.

Conversely, however, the opponents to the new provisions have displayed hasty reaction which also lack grounds, by unreasonably criticising the law, without having consulted opinions of the experts, who would have provided the necessary clarifications and would have answered their questions. Therefore, it is mandatory that both the legislator, while drafting the law, and the members of the public, when receiving and interpreting the law, to pay a closer attention and to seek for information from the most reliable and certified sources.

To quote Barbu Florian, a psychologist, thinks that "once this legal provision is enforced, mediators will succeed in convincing many people to try mediation, owing to the advantages of such conflict resolution method. Nevertheless, mediation is in its infancy and resorting to this conflict resolution method involves overcoming a psychological threshold by the parties to such disputes" (Sisea, 2012).

I share this opinion and I trust that the latest amendments to the Mediation Law means that the field has evolved and that this is a big step forward for the judicial system in Romania.

References

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