

MEDIATION AND EUROPEAN PUBLIC POLICIES

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ABSTRACT:

"Conflict is never a static phenomenon. ... It is constantly changed through continuous human interaction and continuously changes even the people who give it life and the social environment in which it is born, evolves and may end." (Lederach, John Paul)¹

KEYWORDS: *mediation, European, public, policies.*

INTRODUCTION

Mediation is one of the most widely used methods of alternative court solutions. As a process, mediation provides a generous dialogue on possible solutions to a conflict. In the last two decades, mediation has gained considerable momentum in Europe and Romania, amid social development, amid the agglomeration of courts with a considerable volume of cases for a judge, amid the development of a new concept of proper conflict management².

1. The premises for the emergence of the field of mediation

From a historical point of view, we could say that mediation pre-existed the judicial systems, this is because the judicial systems existed only after a certain communal / state / imperial organization. Before these forms of organization, patriarchy or tribal organization were the ways of coexistence of the people. People have been involved in conflicts since ancient times. Since there is no and still cannot be a judicial system, the leaders of groups or tribes, or the elders of a community were considered those who held the principles of equity and based on them resolved conflicts. We can say that they practiced mediation as soon as there was no trial in the sense understood today, there were no principles of law, but the person or persons entitled to resolve such conflicts, they resolved them by presenting their views on the conflict. and after this stage, looking for and analyzing the causes and effects of the facts, they presented a fair solution, taking into account the previous solutions.

Subsequently, with the appearance of the commune, the state or the empire, due to the increase of conflicts, it was necessary to create a system of judging and solving them. Thus, law appeared, as a whole system that was perfected in time, a system that materialized and consolidated the most in the Roman Empire, a system of law that is the essence and root of current legal systems.

¹ Lederach, John Paul. (1997) Building Peace: Sustainable Reconciliation in Divided Societies. United States Institute of Peace, p.64

² <https://www.juridice.ro/318007/politicile-europene-in-domeniul-medierii-ca-solutie-alternativa-la-instantele-de-judecata.html>

The problems of the classical law system, which made the methods of amicable dispute resolution seem non-existent, began to arise with the technical and technological development, when social relations took a special scale, the judicial systems began to crowd with us and us. problems or conflicts whose number was growing rapidly. The courts could no longer cope with the large number of disputes, the quality of the act of justice was questioned, the judicial time to resolve a case was very long, the work done by each judge was overburdening.

Under these conditions, there was a need for alternative methods of resolving conflicts. Although conciliation, mediation existed as methods in traditional forms, there was no procedural and material framework necessary to activate these methods. In the twentieth century, mediation in particular gained the attention of US judges and lawyers, who equally made the necessary efforts and diligence to strengthen a mediation framework, regulatory and procedural framework, to implement a method that is most effective in resolving disputes / litigations.

Such a method, mediation, appeared in the 1970s when the first such mediation processes took place, organized by lawyers³. Many disputes that entered the mediation process were resolved by this method. According to some, almost 60-80% of mediated conflicts were resolved by finding a solution agreed by the parties to the conflict⁴.

In Europe, mediation makes its presence felt mainly after the 1990s, also as a remedy to the classic judicial systems that were becoming increasingly suffocated by the large number of cases that affected the quality of justice⁵. At the same time, we already have the US example in which mediation not only reflects the resolution and settlement of conflicts⁶, but there was also a side effect of mediation, namely the openness of people to dialogue and the remediation of social relations.

With the opening of communication channels between the parties, "mediation establishes future behaviors and maintains relations between them"⁷. Goodwill and good faith between people took root again precisely because of the dialogue in the mediation process, a dialogue in which the mediator generates discussions with the parties on strict conflict analysis (causes, history, effects, solutions), and exclusively for an extinct solution to the conflict. "Communication is an instrument of human action, people use it to act on peers and situations"⁸.

Thus, the mediation procedure is also imported into European countries, especially the United Kingdom, where it is beginning to be active and very prolific. The promotion of mediation by states and judicial actors (lawyers, judges, prosecutors, jurists) and the establishment of mediation as a method of resolving a conflict situation has led to increased trust in mediation, but especially in mediators, as persons able to intervene effectively in the conflict.

2. European mediation policies

European policies in the field of mediation are evolving, but the steps taken are not as fast as the judiciary and social reality require.

³ Anches Diana-Ionela, *Medierea în viața social-politică*, Editura Universitară, București 2010, pp. 103-104

⁴ Alina Gorghiu, "La nivel mondial medierea are o șansă de 60-80% de reușită", in rubrica Piața de Capital, <http://www.bursa.ro/piata-de-capital/la-nivel-mondial-medierea-are-o-sansa-de-reusita-de-60-procente-80-procente-198416&articol=198416.html>

⁵ Anches Diana – Ionela, *Idem*, pag. 113

⁶ Dorin Ilie, *Efectele medierii în SUA*, <http://www.juridice.ro/280558/efectele-medierii-in-sua.html>

⁷ Stoica Constantin Anca, *Conflictul interpersonal*, Editura Polirom 2004, pag 278

⁸ Alex Muchielli, *Arta de a Comunica*, Editura Polirom 2005, pag 246

In Romania, every year the number of conflicts is increasing, a fact shown by the Supreme Court of Justice report ⁹; the problem is one at the level of every European state. Given that mediation has the ability to capture and filter a certain type and number of conflicts, promoting mediation and facilitating litigants' access to this method by providing financial incentives, appear as important and necessary things for the strategies of the judiciary targeting the period 2014- 2020.

Providing financial incentives will continue to be the best and most attractive incentive for litigants to appeal to this alternative. Either in the form of exemption from stamp duties upon the approval of Mediation Agreements, or in the form of non-judicial public aid (initiatives in this sense currently existing in Romania)¹⁰, settlement of mediation fees when mediation does not result in an extinct solution to the conflict may be forms of financial assistance for the parties seeking to resolve the conflict through mediation. Sanctioning parties who unreasonably refuse mediation (existing practice in Hong Kong) could also be an element in planning a mandatory mediation framework.

Most European countries have adopted regulations in the field of mediation in recent years. Mediation legislation applicable in Europe is mainly inspired by the American model, which has proven its effectiveness over time. This is also the European Parliament's legislative resolution of 29 March 2007 on the proposal for a directive on certain aspects of mediation in civil and commercial matters, as well as the obligation to establish alternative extrajudicial procedures aimed at ensuring greater access. good to justice.

It is worth mentioning that the foundations of negotiation and mediation were laid in England, but it was later developed and refined in the United States.

As an alternative to conflict resolution, mediation has been used in the United States since the 1970s. Today, in many countries around the world, mediation plays an important role in alternative dispute resolution¹¹. This subject was considered as one of the most important by the Council of Europe and the European Union (being adopted numerous Resolutions, Regulations, Decisions, etc. for the implementation and development of this institution - mediation).

Since 1980, the Council of Europe has been closely interested in alternative justice modalities and has adopted a number of normative acts¹²:

1. Recommendation R (81) 7 of the Committee of Ministers on access to justice aims to encourage procedures that simplify such access, including "conciliation of parties and settlement of disputes amicably, before any judicial proceedings or in the course of proceedings".

2. Recommendation R (86) 12 of the Committee of Ministers on the reduction of the burden of the courts provides for "the amicable settlement of disputes, either out of court or before or after the judicial procedure".

3. Recommendation R (93) 1 of the Committee of Ministers on access to international relations. Plus the Institute of International Relations of Moldova 96 effective law and justice, for people in extreme poverty, suggests effective access to "extrajudicial ways of resolving

⁹ Curierul Judiciar, Revista română de actualitate juridică, <http://curieruljudiciar.ro/2012/04/03/csm-a-publicat-raportul-privind-starea-justitiei/>

¹⁰ Alina Gorghiu, Ordonanța privind ajutorul public judiciar, <http://www.medierenet.ro/2013/10/31/alina-gorghiu-ajutorul-public-judiciar-ar-trebui-sa-prevada-si-beneficierea-de-asistenta-cadrul-procedurii-de-mediere/#.Uu6QSj2Szpw>

¹¹ Bobaru Daniela. Mediarea – alternativă la procesele lungi și costisitoare, Universitatea Constantin Brâncuși, Târgu Jiu, 2009, pag.89

¹² Constantin Lazari Dreptul Național și legislația Internațională. Mediarea în spațiul European, p.96 <http://irim.md/wp-content/uploads/2018/02/8-Lazari.pdf>

conflicts, such as mediation, which means the benefit of legal aid or any other form of assistance to these ways of resolving conflicts”.

4. Recommendation R (94) 12 of the Committee of Ministers on the independence, effectiveness and role of judges enshrines, as a real judicial obligation: “encouraging the parties to obtain an amicable settlement” (principle V -3, e).

5. Recommendation R (95) 5, on improving the functioning of civil and commercial redress systems and procedures, expressly calls on the judge to watch over the "encouragement of amicable settlement" (Article 6g).

Regarding the evolution of mediation within the European Union, it should be noted that in 2002, the European Commission issued the so-called Green Paper - in which Alternative Dispute Resolution (SAD) is considered a political priority for all EU institutions tasked with, among others, the promotion of these alternative techniques. Moreover, the document initiated a wide-ranging consultation with Member States and stakeholders on possible measures to promote the use of mediation. As a result of the positive responses, the European Commission issued a proposal in October 2004 for a directive on mediation in civil and commercial matters.

Directive 2008/52 / EC focuses on cross - border disputes, with the aim of increasing access to justice by making a dispute settlement mechanism available to the parties.

From October 1, 2012, mediation has become a mandatory preliminary procedure in Romania as well. According to Law no. 192/2006 on mediation “the court will reject the request for summons as inadmissible in case of non-fulfillment by the plaintiff of the obligation to participate in the information session on mediation, before the introduction of the request for summons or after the trial by the court for this purpose ”, for some litigations¹³.

Thus, from August 1, 2013, the courts are obliged, before judging the case, to ask the parties to resolve the conflict through mediation.

Following the research and analysis of the collected data, it resulted that in Romania the resolution of disputes in court is the most frequently used method, although the same cannot be said about the trust of Romanians in justice. Mediation is one of the best known alternative dispute resolution methods.¹⁴

CONCLUSIONS

The European Union has realized the benefits of mediation for society in general and for people in particular. Mediation proposes the amicable settlement of conflicts through the method of structured dialogue. Promoting mediation only means promoting dialogue and peaceful discussions towards finding an amicable solution. The benefits for the society consist in building a more pacifist climate between the members of the society, the promotion of an amicable framework; also increasing the quality of justice by reducing the number of cases per judge was a primary indicator in European mediation policy. For every citizen in conflict, mediation brings considerable savings of money and time, creates the conditions for reconciliation, a social harmony.

The European Union promotes mediation and alternative dispute resolution methods, but it remains the duty of each state to adopt internal policies in the field, what incentives for litigants, what quality of mediation services it guarantees.

¹³Bobaru Daniela Op.cit. pag. 101

¹⁴ Manuela Sirbu, “Metodele alternative de soluționare a conflictelor în procedurile de preinsolvență și insolvență”, Conferință Internațională “Uniformizarea dreptului, efecte juridice și implicații sociale, politice și administrative”, Iași 2014, pag.78

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