

**ANALELE ȘTIINȚIFICE
ALE
UNIVERSITĂȚII „ALEXANDRU IOAN CUZA” DIN IAȘI
(SERIE NOUĂ)**

**SCIENTIFICAL ANNALS
OF
„ALEXANDRU IOAN CUZA” UNIVERSITY OF IAȘI
(NEW SERIES)**

**SOCIOLOGIE
ȘI ASISTENȚĂ SOCIALĂ
SOCIOLOGY AND SOCIAL WORK**

TOM XII / Nr. 2

December 2019



Editura Universității „Alexandru Ioan Cuza” din Iași

**ANALELE ȘTIINȚIFICE ALE UNIVERSITĂȚII „ALEXANDRU IOAN CUZA” DIN IAȘI
(SERIE NOUĂ) SOCIOLOGIE ȘI ASISTENȚĂ SOCIALĂ**

ISSN: 2065-3131 (print); **ISSN:** 2066-8961 (online); **ISSN-L:** 2065-3131

The journal is edited by the Department of Sociology and Social Work, Faculty of Philosophy and Social-Political Sciences and is published by the Publishing House of „Alexandru Ioan Cuza” University, Iași.

Editor in Chief:

Daniela Șoitu, Universitatea „Alexandru Ioan Cuza” din Iași, România

Guest Editors:

Sorina Poledna, Babeș Bolyai University, Cluj-Napoca

Maria Sandu, Alexandru Ioan Cuza University of Iași

Members:

Gabriela Irimescu, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Mihaela Rădoi**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Romeo Asiminei**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Cristina Gavriluță**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Camelia Medeleanu**, Universitatea „Alexandru Ioan Cuza” din Iași, România

Scientific and Editorial Board:

Asunción Llana Berñe, University of Barcelona, Spain; **Michèle Baumann**, Université du Luxembourg, Luxembourg; **Doru Buzducea**, Universitatea București, România; **Teresa Careira**, Universidade do Algarve, Portugal; **Michael Cernea**, The George Washington University, USA; **Liviu Chelcea**, University of Bucharest; **Dan Chiribucă**, Universitatea Babeș Bolyai, Cluj-Napoca, România; **Ayça Ergun**, Middle East University, Turkey; **Gilles Ferreol**, Université de Poitiers, France; **Nicu Gavriluță**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Patrick Gibbons**, University College Dublin, Ireland; **Moshe Idel**, Hebrew University of Jerusalem, Israel; **Ion Ionescu**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Emmanuel Jovelin**, Université Catholique de Lille, France; **Sana Loue**, Case Western Reserve University, USA; **Sofia Koukouli**, TEI Creta, Greece; **Antonio Maturo**, University `Gabriele D`Annunzio` Chieti-Pescara, Italy; **André Moisan**, Conservatoire National des Arts et Métiers, France; **Aine Ni Leime**, National University of Ireland, Galway; **Liam O`Dowd**, Queen`s University Belfast, UK; **Marian Preda**, University of Bucharest; **Marius Proftoroiu**, Academy of Economic Sciences, Bucharest; **Nadji Rahmania**, l`Université de Lille I, France; **Maria Roth**: Universitatea Babeș Bolyai, Cluj-Napoca, România; **Dumitru Stan**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Conțiu Șoitu**, Universitatea „Alexandru Ioan Cuza” din Iași, România; **Alain Vilbrod**, L`Université de Bretagne Occidentale, Brest, France.

Editorial Contact Information /

Address for submissions:

Universitatea „Alexandru Ioan Cuza”, Iași
Facultatea de Filosofie și Științe Social-Politice
Redacția Analelor UAIC de Sociologie și Asistență socială
Bd. Carol I nr. 11, Iași, România, 700506
Phone: 00 40 0232 201280; Fax.: 00 40 232 201154
Web address: anale.fssp.uaic.ro
Email: an-soc-as@uaic.ro
Contact person: Prof.Ph.D. Daniela Șoitu

Publisher Contact Information

Universitatea „Alexandru Ioan Cuza”, Iași
Adress: Str. Pinului nr. 1A, Iași,
România, 700109
Phone: 00 40 0232 314947
Fax.: 00 40 232 314 947
Web address: www.editura.uaic.ro
Email: editura@uaic.ro
Contact person: ing. Lucian Leonte

All submissions will undergo a peer-group review process.

The journal is published bi-annually. Number of copies / issue : 200 copies.

Web page: <http://anale.fssp.uaic.ro/index.php/asas>

Aims: *Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași. (Seria nouă). Sociologie și Asistență Socială* aims to promote the remarkable results of scientific and empiric researches of professorates, researchers, students, and practitioners in the field of humanist sciences in order to stimulate the optimal functioning of academic and social fields. Analyses and theoretical-methodological sociological explanations as well as the exemplification of their values at the political and social work strategies and interventions level are welcome.

Abstracting and indexing services: *Scientific Annals of the “Alexandru Ioan Cuza” University, Iasi (New Series). Sociology and Social Work Section* are covered by several major indexing services including: **EBSCO**, **PROQUEST CSA-Sociological Abstract**, **PROQUEST-Social Services Abstracts**, **PROQUEST-Worldwide Political Science Abstracts**, **CEEOL**, **Ulrich**, **IBSS**, **INDEX COPERNICUS**, **SCIOPIO** and **CNCIS** (2008-2011: **B+** category).

Any views expressed in this publication are the views of the authors and are not the views of the editors or publishing house.

Considerations on an Aspect of the Restorative Justice Concept: the Conclusion of a Mediation Agreement in Criminal Trials in the Romanian Legislation

Mihai DUNEA¹, Maria-Ioana MĂRCULESCU-MICHINICI²

Abstract

This article analyzes the transformations, the legislative and jurisprudential evolution (regarding the compulsory national jurisprudence) as well as the problems caused by the regulation of the institution of mediation in the criminal cases, as a cause that eliminates the criminal liability. This institution, which can be included within the broader concept of restorative justice, represents a relatively new regulation in the Romanian legislative landscape, which has registered an evolution that can be characterized as lacking in linearity and consistency. Initially, it was imagined as a simple factual way of achieving the withdrawal of the preliminary complaint, respectively of reconciliation in criminal cases (with regard to the offenses who allow the removal of the criminal liability through these institutions). With the entry into force of the current Romanian Criminal Code, it appeared the problem of maintaining this legal nature of the mediation in criminal cases, or of regarding it as a sui generis cause for the removal of criminal liability. Following the rendering of a compulsory decision of the Romanian supreme court, in this sense, followed by a compulsory decision of the Constitutional Court, in the opposite direction, the legislator himself modified the special law that regulates the institution in question, by overdoing the solution given by the constitutional court and reducing, thus, profoundly, the practical impact that mediation on the criminal side of the case can generate (by limiting the final date until which it can operate, during the criminal trial, with the effect of removing the criminal liability of the offender).

Keywords: mediation in criminal cases; (sui-generis) cause of dismissal of criminal liability; compulsory national case law; inconsistent legislative changes.

Résumé

L'article analyse les transformations, l'évolution législative et jurisprudentielle (au niveau de la jurisprudence nationale obligatoire) ainsi que les problèmes posés par

¹ PhD, Lecturer, Department of Public Law (Collective of Criminal Sciences), Faculty of Law, „Alexandru Ioan Cuza” University of Iași, Carol I 11, 700506, Iași, Romania; e-mail: mihai.dunea@uaic.ro

² PhD Associate Professor, Department of Public Law (Collective of Criminal Sciences), Faculty of Law, „Alexandru Ioan Cuza” University of Iași, Carol I 11, 700506, Iași, Romania; e-mail: mmich@uaic.ro

la régulation de l'institution de la médiation dans le volet pénal de l'affaire, comme une cause qui élimine la responsabilité pénale. Cette institution, qui peut être incluse dans le concept plus large du concept générique de justice réparatrice, représente une réglementation relativement nouvelle dans le paysage législatif roumain, qui a enregistré une évolution qui peut être caractérisée comme manquant de linéarité et de cohérence. Initialement imaginé comme un moyen factuel simple de retirer la plainte préliminaire, respectivement de réconciliation, dans le cas d'infractions pour lesquelles ces institutions retirent la responsabilité pénale, avec l'entrée en vigueur du Code pénal actuel, le problème du maintien de cette nature juridique de réconciliation ou de considération a été soulevé comme une cause *sui-generis* pour la suppression de la responsabilité pénale. Après avoir rendu une décision obligatoire, en ce sens, de la Cour suprême, puis une décision contraignante en sens inverse, de la Cour constitutionnelle, le législateur lui-même a modifié la loi spéciale régissant l'institution en question, mais en annulant la solution donnée par la juridiction contentieuse constitutionnelle et donc de réduire profondément l'impact pratique que la médiation pénale peut générer, en limitant la date limite à laquelle elle peut fonctionner, au cours de la procédure pénale, avec pour effet de supprimer la responsabilité pénale du contrevenant.

Mots-clés: médiation dans le volet pénal de l'affaire; cause (*sui-generis*) de rejet de la responsabilité pénale; jurisprudence nationale obligatoire; modifications législatives incohérentes.

Rezumat

Articolul analizează transformările, evoluția legislativă și jurisprudențială (la nivel de jurisprudență națională obligatorie) precum și problemele ocazionate de reglementarea instituției medierii în latura penală a cauzei, drept cauză care înlătură răspunderea penală. Această instituție, care poate fi încadrată în cadrul mai larg al conceptului generic de *justiție restaurativă*, reprezintă o reglementare relativ nouă în peisajul legislativ românesc, care a înregistrat o evoluție ce poate fi caracterizată ca lipsită de liniaritate și de consecvență. Imaginată inițial ca o simplă modalitate faptică de realizare a retragerii plângerii prealabile, respectiv a împăcării, în cazul infracțiunilor pentru care aceste instituții înlătură răspunderea penală, odată cu intrarea în vigoare a Codului penal actual s-a ridicat problema menținerii acestei naturi juridice a împăcării sau a considerării acesteia drept cauză *sui-generis* de înlăturare a răspunderii penale. În urma pronunțării unei decizii obligatorii, în acest sens, de către instanța supremă, urmată de o decizie obligatorie în sens contrar, de către Curtea Constituțională, legiuitorul a modificat însăși legea specială care reglementează instituția în cauză, supralicitând însă soluția pronunțată de instanța de contencios constituțional și reducând, astfel, profund, impactul practic pe care medierea în latura penală a cauzei îl poate genera, prin limitarea datei finale până la care poate opera aceasta, pe parcursul procesului penal, cu efectul înlăturării răspunderii penale a infractorului.

Cuvinte-cheie: medierea în latura penală a cauzei; cauză (*sui-generis*) de înlăturare a răspunderii penale; jurisprudență națională obligatorie; modificări legislative inconsecvente.

Introduction to the rule and exception in the deployment of the criminal trial in Romanian judicial system: the principles of officiality and disponibility in criminal cases

Before approaching *per se* the topic of interest, a brief introduction is necessary: in the criminal trial, under the prescriptions of the Romanian law (the current one³, as well as the former one⁴), the rule resides in the officiality of the procedure (*the principle of officiality*), and the exception is represented by those cases in which a private entity can decide the fate of the procedure (the so-called, in a *mot-a-mot* translation, *principle of disponibility*).

The principle of officiality states that in order for a criminal to be prosecuted and his criminal liability activated, no particular/special authorization is needed for the proper institutions of the state; through those institutions (police, prosecutors, criminal courts), the state will automatically (*ex officio*, by its own initiative) unroll all the procedures needed in order to punish the trespasser of a criminal set of conduct, no matter how the state found out about the offense (complaint, denouncement etc.) and regardless of the victim's attitude (even if the victim does not ask for the state to punish the delinquent, and even if the victim is against punishing the perpetrator).

Secondary to this rule (which applies in the great majority of criminal cases), there are some infractions (usually - less serious offenses) that correlate to the principle of disponibility. This means that the state either cannot carry on the procedure needed in order to establish the criminal liability of the perpetrator without the special request of the victim (or against the victim's wishes), either the victim has a legal right to put an end to those procedures (until a certain point in time – legally prescribed), if it so pleases. The instruments through which this principle functions (in some criminal cases – namely: a minority) are (and have been, traditionally) the institutions called: the *preliminary (prior) complaint* (more exactly: the absence or the withdrawal of the prior/preliminary complaint, only in those cases regarding infractions for whom the law imposes the request of formulating such a complaint), respectively the *reconciliation* between the offender (the indicted person) and the victim, also, only in those criminal cases regarding infractions for whom the law specifically allows the reconciliation procedure). Those institutions were regulated by the previous Romanian Criminal Code, and are still regulated by the current Criminal Code, and they function only in connection with certain infractions, expressly provided by law as cases in which either the absence or withdrawal of a preliminary complaint, either the reconciliation can remove the criminal liability of the offender. Those infractions are either less serious offenses (e.g.: threat, harassment, simple battery or other

³ The current Romanian Criminal Code is represented by the Law no. 286/2009, published in the Official Bulletin no. 510/2009, active (into force) since the 1st of February 2014.

⁴ The former (previous) Romanian Criminal Code was represented by the Law no. 15/1968, published in the Official Bulletin no. 79/1969 (republished the last time in the Official Bulletin no. 65/1997), active (into force) since the 1st of January 1969.

acts of violence), either offenses which are connected to a very intimate / private part of the victims life (e.g.: rape, in its basic form). That is why the procedural principle regarding these offenses it's called the *principle of disponibility* (in a *mot-a-mot* translation), because the criminal action is (in a certain way/between certain limits and observing some conditions regulated by law) at the disposal of the victim.

The regulation, by the Romanian law, of criminal cases in which the disponibility principle is able to function as indicated above, represent a veritable faced of the concept of restorative justice and of the recognition of its importance in the Romanian justice system.

It is to be noted that under the previous Criminal Code (so, until the 1st of February 2014), the Romanian legislator used to regulate the institutions of absence or withdrawal of the prior/preliminary complaint and that of reconciliation mainly as alternative causes of removal of criminal liability of an offender. Thus, the infractions for whom the law permitted the procedure of reconciliation where (as a rule, with few exceptions) the same infractions for whom the law prescribed that a prior/preliminary complaint is needed in order to punish the offender (meaning that the absence or withdrawal of the prior/preliminary complaint would have lead to the removal of the criminal liability of that person). Moreover, the final procedural moment until the reconciliation or the withdrawal of the prior/preliminary complaint was permitted was the same, namely: the moment in which the court's decision became final (definitive); that meant that both these causes of removal of criminal liability could have occurred at any time during the trial, until it's very end.⁵

In contrast, the new criminal legislation in Romania (active since the 1st of February 2014) separates the regime of infractions for whom the law requires a prior/preliminary complaint (offenses for whom the absence or the withdrawal of the prior/preliminary complaint represents a cause of removal of criminal liability), from the regime of the infractions for whom the procedure of reconciliation is permitted. Thus, the institution of reconciliation is allowed only in regard to those offences for whom the criminal action of the state is set in motion *ex officio* (according to the principle of officiality), and only if the law specifically prescribes that for that particular infraction the reconciliation is possible.⁶ By comparison, the withdrawal of the prior / preliminary complaint is

⁵ Despite their similarities, there where, of course, some differences between those two institutions; among others, we can indicate the following: the withdrawal of the prior / preliminary complaint was a unilateral act of the victim, while the reconciliation was a bilateral procedure; the law regulated specifically that the reconciliation procedure removed the criminal liability and also the civil (private law) liability, while such a disposition did not exist in regard to the withdrawal of the prior / preliminary complaint etc.

⁶ The provisions of art. 159 of the Romanian Criminal Code, regarding the institution of reconciliation, are as such: "(1) Reconciliation may occur if the criminal action is initiated *ex officio*, if expressly provided by law. (2) Reconciliation removes criminal

only possible in those cases in which the trial regards infractions for which the law specifically prescribes that the initiation of criminal action is conditioned on filing a prior/preliminary complaint (cases that function under the principle of disponibility, as indicated above).⁷ In addition, the differences between those two institutions grow furthermore, in the regulation of the current Romanian Criminal Code, in regard to the final procedural moment until they are permitted to occur. Thus, while the withdrawal of the prior/preliminary complaint is permitted until the end of the trial, the procedure of reconciliation can only occur until before the moment of the legal reading of the indictment document, in front of the judge (a moment situated, as a rule, at the beginning of the trial, in the judicial phase of the trial).

Short history of the institution of mediation in criminal cases in Romanian law: legislative beginnings and regulation under the previous Criminal Code

Firstly, it is notable that, in the former criminal legislation of Romania (in force since 1969), the mediation wasn't initially regulated. Only in 2006, by means of a special law (a law with separate regulation from the Criminal Code), namely Law no. 192/2006 regarding the mediation and the organization of the mediator

liability and cancels the civil action. (3) Reconciliation is effective only with respect to the persons who agree to such reconciliation and if it takes place before the legal action document is read. (4) In case of persons with no mental competence, reconciliation may be agreed only by the legal representatives of the same, whereas in case of persons with limited mental competence, reconciliation is possible only if authorized by the persons provided by law. (5) With respect to legal entities, reconciliation is reached by the legal or conventional representative of the same or by the person appointed to replace the representative. Reconciliation between the legal entity perpetrating the offense and the legal entity harmed by such offense has no impact on the individuals who participated in the commission of the same offense. (6) If the offense is committed by the representative of the legal entity harmed by such offense, the stipulations under Art. 158 par. (4) shall apply accordingly” – the Romanian Criminal Code translated in English can be found at the following internet address (accessed at the 5th of September 2019): <https://www.juridice.ro/wp-content/uploads/2014/12/Noul-cod-penal-EN.doc> .

⁷ The provisions of art. 158 of the Romanian Criminal Code, regarding the institution of withdrawal of the prior / preliminary complaint, are as such: “(1) Withdrawal of a prior complaint is possible before a final decision is returned, in case of offenses for which initiation of criminal action is conditioned on filing a prior complaint, ruled. (2) Withdrawal of a prior complaint removes criminal liability from the person with respect to the person of the withdrawn complaint. (3) In case of persons with no mental competence, the prior complaint may be withdrawn only by the legal representatives of the same. In case of persons with limited mental competence, the withdrawal shall be authorized by the persons provided by law. (4) In case of offenses for which the criminal liability is conditioned on filing a prior complaint and the criminal action was initiated *ex officio*, according to law withdrawal of the complaint causes effects only if acknowledged by the prosecuting attorney”.

profession (which is not a criminal law per se, but a law who also contains some provisions regarding the criminal law), the Romanian legislator regulated the institution of mediation (in the private law, but also in the criminal law cases). According to article 67 from this law, the mediation procedure was permitted (also) in the criminal cases, but not as a rule; the mediation in criminal trials was possible only in regard to those infractions for whom the law prescribed as causes of removal of criminal liability either the absence or the withdrawal of the prior / preliminary complaint, either the reconciliation.

In the absence of other clear normative provisions in the legislation, the theory and practice of criminal law regarded the new institution of mediation in criminal cases as merely a factual way for the victim and the perpetrator of a certain offense to reach an understanding, being assisted by a mediator (formally/apparently: a professional). From the legal point of view, this understanding, once reached, was to take either the shape of the absence/withdrawal of the prior/preliminary complaint, either the form of the reconciliation. In other words, in general, the mediation in criminal cases was regarded, at the moment of its implementation in the Romanian justice system, as an institution lacking autonomy. It was considered a simple way for the victim and the offender to get to the point in which either the absence/withdrawal of the prior/preliminary complaint, either the reconciliation between them would have removed the criminal liability of the perpetrator, but with the aid of a private “specialist”: the (paid) mediator⁸. To sum up, the mediation in criminal cases was considered, at the beginning, not a specific institution of removal (on its own) the criminal liability, but as an alternative way - to that of direct dialogue and understanding - for the parties involved in the commission of a certain infraction, to activate the real causes of removal of criminal liability prescribed by the law for that offense: either the absence or the withdrawal of the prior/preliminary complaint, either the reconciliation!

Dilemmas regarding the mediation in some criminal trials after the entry into force of the new / current Criminal Code of Romania

Subsequently, on the 1st of February 2014, the new Criminal Code of Romania has entered into force, modifying the previous normative link between the institutions represented by the absence or the withdrawal of the prior/preliminary complaint (on one side), and the reconciliation (on the other side). Thus, from the new perspective of the criminal lawmaker, the reconciliation is only possible in the case of certain offenses subjected to the rule of officiality (those for whom the law expressly regulated that the reconciliation was possible), and only if it occurs until the moment of the legal reading of the indictment document, in front of the judge (a moment situated at the beginning of the judicial phase of the trial). In contrast, the absence or the withdrawal of the prior/preliminary complaint

⁸ Thus encouraging the emergency of a new profession in the Romanian official list of professions.

continues to apply to offenses subjected to the rule of disponibility, and the withdrawal of the prior/preliminary complaint is possible until the end of the trial. The cases in which the two institutions are applicable are not the same (as a rule) anymore, but different: reconciliation is not possible (as a rule) in cases regarding offenses for whom the absence or the withdrawal of the prior/preliminary complaint can remove the criminal liability!

On the other hand, the provisions of the special law no. 192/2006 regarding mediation in criminal trials have not been entirely modified accordingly to the changes that have taken place in the Criminal Code. It was further provided that the mediation in criminal cases is able to occur if the offense is either one for whom the withdrawal of the prior/preliminary complaint is possible, either one for whom the reconciliation was permitted.

Consequently, two viewpoints appeared in the theory and practice of criminal law, regarding this situation. One opinion was in the sense that nothing had changed regarding the mediation in criminal cases, that it was still a simple *de facto* way to obtain either the reconciliation, either the absence or (especially) the withdrawal of the prior/preliminary complaint (depending on each particular case). On the other hand, a second opinion emerged, namely, that mediation in criminal cases became an autonomous cause of removing the criminal liability, apart from the reconciliation and the absence or (especially) the withdrawal of the prior / preliminary complaint. This latter point of view was mainly supported on the following ideas:

- The special provisions that regulated the mediation in criminal cases only indicated the types of infractions that make the mediation possible; the fact that these offenses were the same that made also possible either the reconciliation, or the absence / withdrawal of the prior/preliminary complaint was regarded as merely a coincidence.

- The special provisions that regulated the mediation in criminal cases did not expressly indicate the last possible moment when the mediation was able to occur during the criminal trial; thus, regarding this institution as an independent one (a *sui generis* cause of removing the criminal liability) meant that in those cases where reconciliation was possible it was not limited by the deadline established by the Criminal Code for the reconciliation (the reading of the indictment act in front of the court), being able to occur anytime during the procedure, until the very final end of the trial. This was, in fact, the main objective of this trend; upon this opinion, the mediator could have successfully removed the criminal liability of the offender during the criminal trial of an infraction that permitted the reconciliation, even after the moment of the reading of the indictment document in front of the judge. Of course, he would have done so by billing the parties, who would have not had, at that moment, any other way of obtaining the removal of the criminal liability of the offender. Obviously, this would have strongly promoted the profession of mediator in Romania, giving it a tremendous advantage.

- A provision from the Criminal Procedure Code⁹ of Romania listed the mediation in the criminal trials in the same category of cases with the absence or the withdrawal of the prior/preliminary complaint and the reconciliation (namely: causes for removal of criminal liability, circumstances preventing the initiation and/or the exercise of criminal action of the state against the offender), but indicated them distinctly, as they would have been three separated institutions.¹⁰

As a result, the danger of forming a non-unitary judiciary practice appeared in the Romanian criminal justice system, the main question being if the mediation in criminal cases was a *sui generis* cause of removal of criminal liability, autonomous from the reconciliation and the absence or (especially) the withdrawal of the prior/preliminary complaint, or if it was only a simple *de facto* way of reaching one of those two last indicated institutions that could have removed (in some cases) the criminal liability. The main objective of this theoretical dilemma was extremely practical, namely: if the mediation in criminal cases regarding an infraction for which the reconciliation was permitted, was able to occur (or not) during the trial beyond the moment when it was no longer possible for the offender to reconcile with the victim.

The conflicting internal mandatory jurisprudence in Romania regarding the mediation in criminal trials after the entry into force of the new / current Criminal Code

Before approaching the main subject of this part of the article, it is (once more) necessary to present some basic notions, this time regarding the concept of mandatory internal jurisprudence in the Romanian justice system. It is well-known that Romania's justice system is mainly part of the continental justice system (the Romano – Germanic type of law system), not being traditionally a common law type of state. Thus, in Romania, the jurisprudence (meaning: the judiciary precedent) is not, as a main rule, a source of law, as it is in the common-law states. However, at the present time, the Romanian justice system has legally

⁹ The current Romanian Criminal Procedure Code is represented by the Law no. 135/2010, published in the Official Bulletin no. 486/2010, active (into force) since the 1st of February 2014.

¹⁰ We refer to art. 16 par. 1 letters e) and – mainly – g) from the Romanian Criminal Procedure Code; the provisions indicated are as such: “Criminal action may not be initiated, and when it has already been initiated, may not be used if: (...) e) a prior complaint, an authorization or seizure of the body of competent jurisdiction or other requirement set by the law, required for the initiation of criminal action, is missing ; (...) g) a prior complaint was withdrawn, for offenses in relation to which its withdrawal removes criminal liability, reconciliation took place or a mediation agreement was concluded under the law” – the Romanian Criminal Procedure Code translated in English can be found at the following internet address (accessed at the 12th of September 2019): <https://www.juridice.ro/wp-content/uploads/2014/12/Noul-cod-procedura-penala-EN.doc>.

evolved to recognize some jurisprudence as a sort of secondary type of source of law, in the sense that some precisely indicated types of courts decisions are mandatory, for future, for all the courts.¹¹ These mandatory judgments are as follows:

- Some decisions (rulings) of the Constitutional Court of Romania (those through which the Constitutional Court declares the unconstitutionality / lack of constitutionality of a certain normative text and those of mandatory interpretation of the constitutional sense of a certain normative text);

- Some decisions (rulings) of the High Court of Cassation and Justice of Romania (the supreme court of justice), namely: the decisions made by the panel of judges empowered to rule in the procedure of the appeal in the interest of the law; the decisions made by the panel of judges empowered to rule in the procedure of the preliminary ruling to settle legal issues.

One of the most important differences between those types of mandatory decisions is that the rulings of the Constitutional Court are generally compulsory (*erga omnes*, for the courts and as well for the lawmaker), while the mandatory rulings of the Supreme Court are compulsory only for the judicial power (other courts), not for the legislative power as well.

These being established, it must be specified from the beginning that regarding the institution of mediation in the criminal trials in Romania, they were pronounced both a mandatory decision by the Supreme Court and (afterwards) a mandatory decision by the Constitutional Court.

Firstly, the panel of judges from the High Court of Cassation and Justice of Romania empowered to decide in the procedure of the preliminary ruling to settle legal issues in matters of criminal law, was legally notified (in January 2015) with a request (from the Bucharest Court of Appeal) in order to decide in the following matter: 1) if the provisions of the special law regarding the institution of mediation in the criminal trials (art. 67 of Law no. 192/2006) are to be interpreted in the sense that the mediation is a *sui generis* cause of removal of the criminal liability, or that the mediation is simply a modality of another institution – as cause of removing the criminal liability (namely the reconciliation, regulated by art. 159 of the Criminal Code)¹²; 2) if the mediation procedure in criminal cases may occur only until the moment of the reading of the indictment act in front of

¹¹ More on this subject can be found on our article: M. Dunea, „About the formal sources of the current Romanian criminal law”, <http://revista.universuljuridic.ro/supliment/formal-sources-current-romanian-criminal-law/>

¹² In fact, though the court did not formulate as such the notification, in reality, the problem was in an equal measure if the mediation in criminal cases is or is not a form of the reconciliation, in those cases regarding infractions for which the law allowed the reconciliation, or a form of absence or (especially) withdrawal of the prior / preliminary complaint, in those cases regarding infractions for which the law demanded a prior / preliminary complaint in order for the offender to be prosecuted and convicted (as an alternative to the mediation being a autonomous institution of removal of criminal liability).

the judge (the final moment for reconciliation), or may occur anytime during the trial. After debate of this theoretical dilemma (caused by conflicting or insufficiently well correlated law provisions), with important practical consequences, the panel of judges pronounced (on the 17th of April 2015) a mandatory decision for the courts (Decision no. 9/2015 of the panel of judges from the High Court of Cassation and Justice of Romania empowered to decide in the procedure of the preliminary ruling to settle legal issues in matters of criminal law, in force / active from the 9th of June 2015)¹³ as follows: 1) the conclusion of a mediation agreement in a criminal case (trial) represents a *sui generis* cause of removal of criminal liability, apart from the reconciliation¹⁴; 2) the mediation can occur at any moment during the criminal trial, until a final criminal judgment is passed. This final solution was already implicitly admitted in respect of offenses for which the law imposed the formulation of a prior / preliminary complaint (cases in which the removal of criminal liability by means of withdrawal of the prior / preliminary complaint was legally permitted until the end of the court procedure). Thus, this ruling especially regarded only those cases concerning infractions for which the law admitted the possibility of reconciliation!

The *status quo* thus established was, from a certain point of view, particularly unnatural. Practically, the problem had reached the aberrant situation in which the mediator had a greater power in removing the criminal liability of an offender (in regard to certain infractions) than the judge! The absurdity of the solution was enhanced by the fact that the profession of mediator was not restricted to professionals of law, in the sense of graduates of legal studies. While the judge is necessarily a law graduate, the mediator may be a graduate of any kind of higher education, no matter the profile (regardless of specialization) – e.g.: priest, agronomist, engineer etc. – as long as it graduated a short course of initiation in mediation (for a fee!). Basically, the situation ended up in this type of incredible scenario: if X committed against Y an offense for which the law allowed the reconciliation, and if such a reconciliation had not been reached until the moment of the reading of the indictment act in front of the judge, then the

¹³ The decision may be consulted online (in Romanian), at the following internet address (accessed at the 12th of September 2019): <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=120645>. In order to rule by this decision, the panel of judges followed the procedure, including the request and analyzing of the optional opinion of the judges from the inferior courts of justice in the Romanian system, as well as the opinion of the theoretical specialist (professors of criminal law from the main Law Schools in Romania). Although the decision was pronounced in April 2015, it only became mandatory – officially – for the courts since June 2015, because it was only then that it was published in the Official Bulletin no. 510/2009 no. 406/2015.

¹⁴ Implicitly, the Supreme Court thus ruled that the mediation in criminal trials was an independent institution of removal of criminal liability also in rapport to the absence or (especially) withdrawal of the prior / preliminary complaint.

criminal liability of X could not have been removed after this moment, by a formal declaration in front of the judge that the parties have reconciled (have reached an agreement); the judge (a trained professional, law graduate and representative of the state's power) did not have the authority to personally observe and formally state (for free!) that the conflict has ended; but, if the two individuals (X and Y) went to a mediator (a private individual, not necessarily a law professional), and a mediation agreement was concluded between them (for a fee, in the benefit of the mediator), in front of the mediator, then, the judge became obliged on the basis of this mediation agreement to put an end of the criminal trial, noting that the criminal liability of the offender was removed as a result of the mediation agreement! To sum up: in a certain way, in certain criminal cases, the mediator was recognized a greater power than that of the judge itself, regarding a criminal aspect of the case – the removal of criminal liability of the perpetrator. In our opinion, this was an intolerable situation!¹⁵

Fortunately, soon after (on the 18th of May 2015), the Constitutional Court of Romania was also legally notified with a request (made by the Bucharest Court of Appeal as well) to determine the conformity or the lack of the conformity between the Constitution of Romania and certain legal provisions that regulated the same institution: mediation in criminal cases. Thus, the Constitutional Court was empowered to determine if the provisions in the final thesis of art. 16 par. (1)-g) from the Romanian Criminal Procedure Code, and those of art. 67 from Law no. 192/2006 (that we already previously indicated in this article) are in accordance with Romania's fundamental law, or not. Debating a series of aspects in connection with this institution and the legal text's in question, the judges of the Constitutional Court also made (indirectly) appreciations regarding the mandatory interpretation of the law, for the judiciary, pronounced by the Supreme Court in Decision no. 9/2015.¹⁶ By decision no. 397/2016¹⁷, the Romanian Constitutional Court decided that the provisions of art. 67 from Law no. 192/2006 regarding mediation and the organization of the mediator profession, in its mandatory interpretation (for the judiciary) given by Decision no. 9/2015 of the

¹⁵ We already expressed this opinion in the article: „Despre cum o interpretare corectă a legii poate fi absurdă: medierea privind latura penală – cauză *sui generis* de înlăturare a răspunderii penale (sau: interpretarea în litera legii vs. interpretarea în spiritul legii)” [translation: „About how a correct legal interpretation of the law may be absurd: the mediation agreement regarding the criminal aspect of the some cases as a *sui generis* reason for removal of criminal liability (or: literal interpretation of the law vs. interpreting the law in its spirit)“], in the Annals of „Alexandru Ioan Cuza” University (Iasi), Juridical Sciences Series, no. 1/2015, p. 77-108 (http://pub.law.uaic.ro/files/articole/2015/voli/2.3.2015_dunea.pdf).

¹⁶ As a rule, the Constitutional Court may not pronounce itself directly upon the mandatory decisions of the Supreme Court, but it may indirectly rule in regard to this type of compulsory jurisprudence, by pronouncing itself on the legal text, as this appears in the mandatory interpretation (for the judiciary) given by the Supreme Court!

¹⁷ Pronounced on the 15th of June 2016, published in the Official Bulletin no. 532/2016, active (into force) since its publication, on the 15th of July 2016.

Romanian High Court of Cassation and Justice (the panel of judges empowered to pronounce rulings in order to solve some questions of criminal law) were in accordance with the constitution only if the conclusion of a mediation agreement (as cause of removing criminal liability) regarding the infractions for whom the law recognizes the possibility of reconciliation, is limited to the moment of reading of the indictment act in front of the judge! Thus, the constitutional judges basically denied the main solution previously pronounced by the Supreme Court on the matter of mediation in some criminal trials, invalidating the mandatory force of Decision no. 9/2015.

More precisely, we can observe that, formally, only one of two mandatory rulings in Decision no. 9/2015 of the Supreme Court was (per se) invalidated through Decision no. 397/2016 of the Constitutional Court. The first point ruled by the Supreme Court in that decision, namely, that mediation in some criminal trials is to be regarded as a *sui-generis* cause of removal of criminal liability, autonomous from the reconciliation and the absence or (especially) the withdrawal of the prior / preliminary complaint, was not formally affected. However, it's extremely important follow up, point no. 2 from Decision no. 9/2015, stating the last possible moment of the procedure in which the conclusion of a mediation agreement still had the legally recognized power to remove the criminal liability of the offender, in trials regarding infractions for whom reconciliation was allowed (this being the most important aspect, from a practical / pragmatic point of view – the real main reason for the entire stirring of things in regard to this institution, from the beginning), was invalidated and lost its binding power towards the judiciary from then on.

In Romania, the power of a mandatory ruling from the Constitutional Court is greater, from a juridical point of view, in comparison to that of a mandatory ruling from the Supreme Court (the High Court of Cassation and Justice), its effect being mandatory *erga omnes*, for all, including for the judiciary and, as well, even for the infra-constitutional legislator itself (as we already pointed out before). Therefore, it remained that, from the 15th of July 2016, no mediation agreement concluded in those criminal cases where the reconciliation was allowed, after the moment of reading of the indictment act, could remove the criminal liability of the offender. From then on, only in those criminal cases where it was necessary for the victim to formulate a prior / preliminary complaint (cases where the absence or the withdrawal of the prior / preliminary complaint removed the criminal liability) the conclusion of a mediation agreement would have removed the criminal liability no matter when, on the entire development of the trial (because, according to the law, the withdrawal of the prior / preliminary complaint is also possible until the final moment of the procedure). This reinstated a normal balance regarding the powers of the judge, in comparison to the powers of the mediator, in aspects linked to the existence or the removal of criminal liability, that, in Romanians justice system, represent a matter of public interest, and not a private matter (in Romania, the criminal law is

considered to be a part of the public law, and not of the private law, in the main and most general form of classification of the principle branches of law).

The current state of the legislation regulating the mediation in criminal trials in Romania, after all the mandatory decisions ruling upon this institution

By Law no. 97 from 27 of April 2018¹⁸, some modifications were made to the law of mediation (Law no. 192/2006), the aim of the legislator being (among others) to correlate this piece of legislation with the mandatory rulings made by the Constitutional Court. Thus, article 67 was modified and some new paragraphs were introduced; among them, par. 2², stating that “The conclusion of a mediation agreement regarding the criminal action (...) represents a *sui generis* cause of removing the criminal liability. The conclusion of a mediation agreement regarding the criminal action (...) may only be reached until the reading of the indictment act”.¹⁹

It is easily observable that the legislator did more than a simple correlation of the legal text with the Decision no. 397/2016 pronounced by the Constitutional Court. In fact, with regard to the statement that the mediation in criminal trials is a *sui generis* cause of removal of criminal liability, the lawmaker actually correlated the law with the first point from Decision no. 9/2015 of the panel of empowered to pronounce rulings in order to solve some questions of criminal law of the Supreme Court. This action is somewhat questionable, because, as we stated before, the second point of the Supreme Court’s decision was invalidated by the ruling of the Constitutional Court, while the first point was only the necessary base for stating the solution in the second question, which was, for practitioners, the principle issue. By reference to the substance of the problem, we can question ourselves what is the point of considering the mediation in criminal trials as an autonomous cause of removal of criminal liability, if it is limited to occur before than the moment of reading of the indictment act (as it is also the case with the reconciliation)...

Apart from this, we observe that the legislature outbided the ruling of the Constitutional Court when it modified, in 2018, art. 67 from Law no. 192/2006. By stating, in general, that mediation in criminal trials must occur before the reading of the indictment act, with no particular reference to the particular case of the criminal trials in which the judgment concerns an infraction for which the law allows the reconciliation, it follows (according to the principle: *ubi lex non distinguit, nec nos distinguere debemus*) that this provision is equally incidental in those cases, as well as in the cases where the judgment concerns an infraction for which the law requires a prior/preliminary complaint! Such a solution was not required by theoreticians or practitioners, neither by the Supreme Court or the

¹⁸ Law no. 97/2018 was published in the Official Bulletin no. 376 from the 2nd of May 2018.

¹⁹ The translation of the text is not an official one, but it belongs to the author of this article (free translation).

Constitutional Court ... It is even somewhat illogical ... In those criminal trials where the absence or the withdrawal of the prior / preliminary complaint can remove the criminal liability, and the withdrawal of this complaint is possible until the ending of the procedure, it is at least odd for the mediation not to be permitted beyond the moment of reading of the indictment act. The legislator failed to observe that the solution pronounced by the Constitutional Court (Decision no. 397/2016) stated about the final moment when a mediation agreement could occur in criminal trials only in regard to those cases where reconciliation was also admitted, and not about mediation in those criminal trials where the absence or withdrawal of the prior/preliminary complaint is also a cause of removal of the criminal liability!

But, beyond all these considerations, the legal solution thus indicated is currently in force in the Romanian legal system and must be applied as such, separately from the criticisms that can be brought to it from a scientific perspective on the analyzed issue. We can only hope, for the future, for greater coherence and clarity of the legislator, when regulating institutions as important as the causes of removal of criminal liability, as well as (in general) restorative justice solutions, which acquire an increasing share in the baggage of modern solutions to the perpetual problem of crime.

References

- Dunea M. (2015). About how a correct legal interpretation of the law may be absurd: the mediation agreement regarding the criminal aspect of the some cases as a *sui generis* reason for removal of criminal liability (or: literal interpretation of the law vs. interpreting the law in its spirit). *The Annals of „Alexandru Ioan Cuza” University (Iasi), Juridical Sciences Series*, 1 (2015), 77-108.
- Dunea M. (2016). *About the formal sources of the current Romanian criminal law*, <http://revista.universuljuridic.ro/supliment/formal-sources-current-romanian-criminal>.
- Law no. 286/2009, published in the Official Bulletin no. 510/2009.
- Law no. 97/2018, published in the Official Bulletin no. 376 from the 2nd of May 2018.
- Law no. 192/2006 regarding the mediation and the organization of the mediator profession.
- Decision no. 397/2016 of the Romanian Constitutional Court regarding the provisions of art. 67 from Law no. 192/2006 regarding mediation and the organization of the mediator profession.
- Decision no. 9/2015 of the panel of judges from the High Court of Cassation and Justice of Romania, published in the Official Bulletin no. 510/2009 no. 406/2015.
- Romanian Criminal Code is represented by the Law no. 286/2009, published in the Official Bulletin no. 510/2009, active (into force) since the 1st of February 2014.
- Romanian Criminal Procedure Code is represented by the Law no. 135/2010, published in the Official Bulletin no. 486/2010, active (into force) since the 1st of February 2014.
- Romanian Criminal Code was represented by the Law no. 15/1968, published in the Official Bulletin no. 79/1969 (republished the last time in the Official Bulletin no. 65/1997), active (into force) since the 1st of January 1969.