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Mediation in Penal Cases on the Offence of Simple Destruction

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Abstract: Mediation is applied in the penal cases referring to offences for which, according to the law, the withdrawal of the beforehand complaint or the reconciliation of the parties obviate the penal responsibility. The destruction offence, provided in article 217 of the Penal Code, is included in the category of such offences. Mediation is possible only in the cases described in paragraph (1) of the above mentioned article: destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine. The mediation activities shall take place in conformity with the legal regulations on mediation, in conformity with the norms regarding the organization and functioning of the Code of Ethics and with other documents containing data about the rules to be respected. At the national level there are a series of documents describing the procedures of mediation.

Keywords: offence; injured party; offender/ doer; mediation; Penal Code

1. Introduction

The offence of destruction - article 217 of the Penal Code - is included among the offences against patrimony, as provided in title III. The patrimonial social relations are considered to be an important domain of the social structure, as having an essential role in the complex process in the evolution of all types of social orders (Bulai; Filipas; Mitrache; Bulai & Mitrache, 2008). Patrimony is defined as being the total amount of economical rights and duties/obligations that belong to a person; yet, mention shall be made that, in as far the offence of destruction is concerned, patrimony is, first, considered to refer to all material goods of the holder and which enable him/her to fulfill all economical duties. From a penal point of view, mediation is extremely useful and necessary in the case of less important conflicts that start from the amiable neighborhood or from inter-conflicting situations and to which, the very law-maker granted the parties the possibility of lodging a beforehand complaint necessary for a penal lawsuit, as well as the possibility of reconciliation that may make a penal lawsuit stop. This is the reason why mediation cannot be used in those conflicts in which, if the parties reconciled, they cannot avoid the penal responsibility, but only as a modality to recover emotionally - this aspect is called restorative justice. At the same time, mediation is meant find out the reasons standing at the basis of the offence and to try to heal the possible psychic trauma left behind.

2. Analysis of the Offence of Destruction

2.1. Definition and Characteristics of the Offence

Destruction is the deed that causes material damages to goods or to a person. This deed is incriminated by the Penal Code of Romania (Law no 15 of June 2, 1968, republished, with further amendments) in article 217 and considered to be an independent offence as:

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Destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine (paragraph 1).

If the respective good has a special artistic, scientific, historical, archival value or another type of value, the prison punishment increases from 1-10 years (paragraph 2). The destruction, degradation or making an oil or gas pipe dysfunctional, or of the high tension cables, equipment's of telecommunication installations, or equipment's for radio and television broadcasting, or of the systems of water supply or of water main lines, are punished with 1-10 years (paragraph 3). In case the destruction, degradation or bringing the goods belonging to another person to a state of non-use is committing by arson, blast or any other similar method and, if the result is a public damage, the prison punishment is from 3-15 years (paragraph 4). If the orders stipulated by paragraphs 2, 3, 4 are to be applied even if the goods belong to the offender himself (paragraph 5). If the goods belong to a private property, with the exception when partially or totally belong to the state, the penal action for the deed mentioned in paragraph 1 starts the moment the injured person lodged a beforehand complaint (paragraph 6).

Mediation is possible only for paragraph (1) of article 217 of the Penal Code. Article 218 of the Penal Code stipulates the offence for qualified destruction and article 219 of the same Code stipulates the offence by fault. In these above mentioned cases mediation is not admitted. The New Penal Code that will come into force in 2014 (Law no 286 of July 2009 on the Penal Code) provides the offence of destruction in article 253 as follows:

Destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine (paragraph 1).

Destruction of a document under a private signature that belongs totally or partially to another person and helps in proving a patrimonial right, if that was the object of the damage, is punished with prison from 6 months to three years or with a fine (paragraph 2). If the deed mentioned in paragraph (1) concerns goods belonging to the cultural patrimony, the prison punishment is from 1-5 years (paragraph 3). Destruction, degradation or bringing the goods belonging to non-use committed by arson, blast or in other similar way and if it injures other people or goods, is punished with prison from 2-7 years (paragraph 4).

The provisions of articles (3) and (4) are applied even if the goods belong to the offender/doer (paragraph 5). For the deeds committed in paragraphs (1) and (2) the penal action starts after the injured person has lodged a complaint (paragraph 6).

The attempt of committing the deeds provided by paragraphs (3) and (4) is punished (paragraph 7).

It is obvious that the offence of destruction is based, in the New Penal Code, on the same grounds as the Penal Code in force, yet mention shall be made that a new aggravating version in article 251 paragraph (2). This new amendment incriminates "the destruction of a document under a private signature that belong to another person and that helps in proving a patrimonial right, if that was the object of the damage" but, from the point of view of the mediation is not important. The other aggravating variants of the offence of destruction provided by the Penal Code have been maintained by the new Code; only a few reformulations were necessary to make them agree with the judicial doctrine and practice. In the case of these aggravating variants mediation is not possible.

For the offence of destruction both the standard variant and the aggravating variant (that includes a new incrimination) to start the penal action it is necessary for a beforehand complaint to be lodged by the injured person. Consequently, mediation will not be possible.

2.2. The Juridical Object and the Material Object of the Offence of Destruction

The *juridical object* of an offence of destruction is the patrimony and the social relationships referring to the protection, possession or detention of the patrimony.

The *material object* consists of:

- corporeal movable animate or inanimate goods that have a minimum economic value;
- immovable goods;
- documents with an economic value or those having a special significance for the injured person, with the exception of those documents kept by an authority, by a state institution or by a unit mentioned in article 145 of the Penal Code and of those issued by a penal pursuing authority, by an instance or by any other jurisdiction authority, or addressed to them.

The essential requirement: the goods shall belong to a natural or legal person or to another entity, other than the offender's.

2.3. The Subjects of the Offence of Destruction

In case of simple offence the *active subject* can be any person, with the exception of the owner of the goods (he can be an active subject in the case of any aggravating variants where mediation is not possible). The offence of destruction might be committed in all the forms of participation: co-authorship, instigation, complicity).

A *passive subject* can be natural or legal person whose goods have been destroyed, degraded or brought to a state of non-use.

2.4. The Constitutive Content of an Offence of Destruction

The objective side can be done in five alternative modalities: destruction, degradation, bringing to a state of non-use, hindering the measures of protection and preservation the goods, removing the measures of conservation or rescuing goods.

1. *Destruction* presumes that the physical goods cease to exist. This aspect can take place into a large variety of actions, but not through modalities meant to create a public danger or risks. The main characteristic of this hypothesis of the material element is the fact that it leads to the impossibility of restoring the entity of the goods.

2. *Degradation* presumes the deterioration of the goods whose consequence is the alteration of its substance or aesthetics. In order to use or evaluate the respective goods they need to be repaired first. The deed exists even if the goods are given another destination.

3. *Bringing the goods in the state of non-use* means the impossibility of using the goods for the purpose they have been created. It is not compulsorily necessary that the goods had to be destroyed or degraded. They could simply be made useless or made to diminish their specific utility.

The permanent or temporary character of these consequences is irrelevant from the point of view of the penal responsibility (Bulai; Filipas; Mitrache; Bulai & Mitrache, 2008).

4. *Hindering the measures of protection and preservation the goods* presumes any act by which a person is encumbered to take all necessary measures as to avoid the destruction or deterioration of the goods.

5. *Removing the measures of conservation or rescuing goods* means any act that remove the already taken measures by another person to save the goods, aiming, at the same time, to destroying it.

The *immediate consequence* is the destruction, bringing the goods to the state of non-use or the creation of a dangerous state by removing the measures of protecting and preservation of the goods. The causality connection results *ex re* that is out of the material aspect of the deed, not compulsorily necessary to be demonstrated.

The subjective aspect. The deed is committed with a deliberate intention - should it be direct or indirect.

It is necessary that the offender to have intended or at least to have accepted the destruction or the deterioration of the good that belonged to another person. The aim or the reason why the deed had been committed is not important. As mentioned above, mediation is not possible in the case of aggravating variants of the offence, such as:

1. if the respective good has a special artistic, scientific, historical, archival value or another type of value, the prison punishment increases from 1-10 years (paragraph 2) Penal Code;
2. the destruction, degradation or making an oil or gas pipe dysfunctional, or of the high tension cables, equipment's of telecommunication installations, or equipment's for radio and television broadcasting, or of the systems of water supply or of water main lines, (article 217 paragraph (3) Penal Code;
3. in case the destruction, degradation or bringing the goods belonging to another person to a state of non-use is committing by arson, blast or any other similar method and, if the result is a public damage, (article 217, paragraph (4) Penal Code.

2.5. Forms, Sanctions and Specific Procedural Aspects of the Offence of Destruction

Preparatory documents are possible but are not incriminatory. Because of their specificity the moral deeds can appear in any type of offence, while the preparatory documents are not compatible with any type of offence (Radu, 2013).

The *attempt* is possible and punishable. An attempt can appear then when material deeds have been committed in one of the five modalities described above, and the result in view - destruction, degradation or bringing the goods to a non-use state - were not attained because of reasons beyond the offender's will.

Consumption appears in all the five variants of the material element provided in paragraph (1) of article 217 of the Penal Code, the moment of committing the infringing activity. The deed shall be really demonstrated; otherwise one cannot speak about a consumed destruction, but about an attempt. The offence can have a continued form/aspect; so, the deed is *exhausted* after the last deed was committed.

Sanction. In the simple variant the deed is punished with prison from one month to three years or with a fine. In conformity with paragraph (6) of article 217 of the Penal Code, the action can start when the beforehand complaint of the injured person was lodged.

The penal responsibility is removed by both the withdrawal of the beforehand complaint and by the reconciliation of the parties. The offence of destruction, in any of its forms, can compete with such offences as: theft, robbery, outrage against the good morals and manners and disturbance of the public order. In case of theft the destruction can be a modality of committing it because then, it will be a single one offence: aggravated theft (Bulai; Filipaş; Mitrache; Bulai; Mitrache, 2008).

3. Mediation

From the penal point of view the system of amiably solving the ADR - Alternative Dispute Resolution - can rather hardly find an application because the special character of the penal deeds which, due to their gravity and to the social danger they produce are judged by the instances as a result of very sound investigations made by the organs/bodies of penal pursuit (Radulescu, 2012).

Law no 192/2006 on mediation and establishing the role of the mediator, published in the Official Gazette of May 22, 2006 with further amendments, stipulates - in Chapter VI, section 2 - special orders with regard to mediation in the case of penal causes. Thus, the injured person cannot be compelled to accept mediation; accordingly, neither the offender can. In case the two parties consent to accept mediation, it has to take place in such a way that the right of each party to juridical assistance should be guaranteed and, if necessary, the right to have an interpreter. This guarantee is offered to the persons whose penal pursuit has already started, so that if mediation started before informing the organs of penal pursuit or before the beginning of the penal pursuit, the dispositions of the Code of the Penal Procedure with regard to the juridical assistance are not applicable. (Dragne & Tranca, 2011).

The representation of the parties as stipulated by the procedure of mediation can be legal or conventional. The legal representation becomes a point of law then when the persons put under interdiction or infants under 14 years lack the capacity of decision. The conventional representation can take place under the conditions of article 52 of Law no 192/2006 that stipulates that all through the procedure of mediation the parties can be represented by other persons who can sign dispositions under legal conditions. The conventional representative can be an attorney, a kin, a friend in full authority to take decisions.

The written report concluding the procedure of mediation shall mention that the parties profited by the guaranties provided to them (Popescu, 2011). The parties can also mention that they have deliberately renounced mediation. In penal cases the parties involved in a mediation contract are, in principle, the injured person/party and the offender, that is the defendant. As the law refers to a mutual agreement over the conditions in which other persons can be present in a mediation procedure, the respective parties shall compulsorily agree with the other persons' participation (Dragne & Tranca, 2011). Mediation is based on the cooperation of the parties. The mediator shall use specific methods and techniques based on communication and negotiation as to exclusively serve the legitimate interests and aims of the parties and can impose them a solution referring the conflict under mediation.

The procedure of mediation - in the case of the offence of destruction - can start before the beginning or after the penal/criminal trial (see article 68 and 69 of Law 192/2006 on mediation and establishment of the mediator profession, published in the Official Gazette no 441 of May 22, 2006 with further amendments).

1. If the procedure of mediation starts before the beginning of the criminal trial which ends with the reconciliation of the parties, the injured party can no longer inform the organs of penal pursuit about the destruction or, if necessary, the court of instance.
2. If the procedure of mediation started within the term fixed by the law for the introduction of a beforehand complaint, the term is suspended all through the period of the mediation.
If the conflicting parties have not reconciled after the mediation, the injured person can introduce the penal beforehand complaint at the same term/date; it will continue from the date of concluding the written report of the procedure of mediation, including, also, the time the period before suspension.
3. If mediation takes place after the beginning of the penal trial, the penal pursuit or according to the case, the trial is suspended if the parties present the mediation contract.

The suspension lasts until the procedure of mediation is concluded, irrespective of the modalities provided in article 56 paragraph (1) of Law 192/2006 that is: concluding and agreement between the parties mentioning that the parties solved the conflict; establishing the failure of mediation or presenting the mediation contract by one of the parties. No more than three months shall pass since the conclusion of the contract of mediation.

The penal trial is taken again *ex officio* immediately after the reception of the written record that mentions that the parties were reconciled or, if this is not mentioned, at the expiry of the term provided in paragraph (2) of article 70 that is no more than three months since the conclusion of the contract of mediation. In order to solve the penal case in the basis of the agreement concluded as a result of mediation, the mediator shall send the judiciary authority the mediation agreement and the concluding report about mediation - in both original and electronic format - in case the parties reached an agreement or, the report on the conclusion of the mediation as provided in article 56, paragraph (1) letter b) and c).

In agreement with article 57 of Law 192/2006 for the conclusion of a procedure of mediation, in any of the cases provided in article 56 (1), the mediator will write a report to be signed by the parties in person or by their representatives, and by the mediator himself. Both parties receive an original copy of the report. When the conflicting parties reached an understanding, a written agreement can be issued; it has to include all the clauses agreed upon by the parties, and will have the value of a document under a private signature. In general, the agreement is drafted by the mediator, with the exception when the mediator and the parties consent differently (article 58 of Law no 192/2006).

The agreement of mediation can also include the modalities meant to repair the prejudice such as: moral repair, repair in kind and repair in equivalence. The moral repair means that the offender shall recognize the produced damage, the assumption of the responsibility for the committed prejudice and the expression of sincere regrets for the committed deed. Repair in kind - if it is possible at the moment the agreement is concluded and if it is in conformity with the interests and wishes of the parties. The modalities in which the repair in kind is to be made shall be conform with article 14 paragraph (1) of the Code of Penal Procedure: restitution of the object(s), restoring the state as before committing the offence and total or partial annulling of a document - these modalities are enumerated in the Code as possible examples.

Repair in equivalence means the payment of an equivalent sum of money. The parties can agree for a money payment as a modality of repairing the moral non-patrimonial prejudice caused to the injured party. The agreement of mediation shall be the result of both parties' will. The Law does not offer the possibility to the mediator to supervise the way the obligations assumed by the agreement are turned to account by the parties. At the same time, there is no legal disposition to forbid the parties to fix post-

mediation meetings. During these meetings the parties will analyze the way in which the agreement was carried out.

4. Conclusions

The Council for Mediation has not collected - from 2006 up to now - statistical data regarding the number of conflicts subjected to mediation, neither before nor after the beginning of the procedure in the instance. Yet, the first data referring to the number of mediation agreements approved by the instances have been included in the 2010 Report of Activity of the High Council of Magistrature. In conformity with this report, "out of the data obtained up to now, a certain reserve was noticed from the part of the litigants as to resort to the procedure of mediation as an alternative method in solving litigations".

The specific aspect of the penal conflicts makes mediation be different from all the other domains. The emotional charge of the parties brought together in a penal conflict is hard to be overrun, as the first instance session starts after a long period in which the parties removed stress after an active hearing and after the other mediation techniques the mediator have to apply.

Very often, the facts offer the parties a state of guiltiness that turns into a barrier in communication which the mediator has to overrun with tact and naturalness and with an adequate psychological training. So, to conclude, mediation - in the case of disputes between the victim and offender - for an offence of destruction provided in article 217 paragraph (1) of the Penal Code offers each party the possibility to describe the way he/she faced and experienced the offence (events and feelings), to agree over the idea that an injustice has been committed and to make efforts to restore normality again.

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