

Balancing Romanian Criminal Justice: Penal Mediation—An Approach to Empower Victims or Undermine Traditional Justice?

Stefania Gabriela Borhan*

ABSTRACT

Restorative justice, an increasingly popular process endorsed by the Council of Europe, is built on philosophical principles with practical applications in various societal conflicts. This approach emphasizes the importance of the victim and offers a holistic perspective on justice. Restorative justice aims to repair harm, enhance the offenders' accountability, and help victims find closure. Mediation as a limb of restorative justice, rejects indifference and promotes active involvement, solution-finding, and community-based administration of justice. It shifts the focus from societal- harm to individual victim harm, treating the latter as a significant social actor. The victims' direct involvement in mediation is a poignant reminder of the system's empathy and concern for their well-being. However, there is a concern that restorative justice, particularly victim-offender mediation, may deviate from its core principles and become a cost-effective but inappropriate alternative to traditional criminal justice. The Council of Europe has strongly recommended that member states adopt mediation in criminal matters, as an essential part of modern justice systems. Criminal mediation is seen as a convenient tool to save time and cut costs, but there concerns about its efficacy to hold offenders accountable.

Keywords: *Victim, offender, restorative justice, criminal justice, mediation*

* Lecturer, Bahçeşehir Cyprus University, sborhan@baucyprus.edu.tr

I. INTRODUCTION

Restorative justice encompasses a wide range of alternative dispute resolution processes, including mediation and other alternative resolution techniques. Shadd Maruna contended that Albert Eglash in his several articles published in 1950s, made reference for the first time to the concept of restorative justice in relation to criminal justice. Although his articles and essays are not well known, he influenced Howard Zehr, who, however, is considered the father of restorative justice.¹ Much earlier than Zehr, Eglash identified retributive, distributive and restorative approaches to justice. In contrast to the first two, which are centred on punishing or rehabilitating the offenders, restorative justice is focused on restoring the harm that victims had suffered.²

Luminita Dragne and Anamaria Tranica contend that comparing with other European countries and particularly the United States, the mediation concept recently intersected with the criminal justice. They argue that the integration and efficacy of mediation, together with arbitration, reconciliation, negotiation, notably in the US, gained recognition and have been supported through media and judicial bodies recommendations.³

Dragne argued that Romania, like other Council of Europe member states, had to integrate the mediation principles into its criminal legislative framework. Mediation is, at least in theory, a flexible method for resolving disagreements. Recently, mediation has been promoted as a more economical and expedient alternative to the excessively rigorous and protracted judicial processes. However, fairness encompasses more than only gaining time and reducing expenses. Can apologies or monetary compensation truly facilitate the healing of victims?

¹ Shadd Maruna, 'The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash' (2014) 2 *Restorative Justice* 9.

² Luminita Dragne, 'Criminal Mediation in the Romanian Law System' (2013) 2 *Agora International Journal of Juridical Science* 91.

³ Ibid; Luminita Dragne and Anamaria Tranca, *Medierea in Materie Penală* (Universul Juridic 2011).

II. RESTORATIVE JUSTICE

a. General Considerations

What is restorative justice? This question sparked so many debates among scholars in the field. In an essay, John Braithwaite contended that restorative justice is a model of a more victim-centred approach intended to restore the relations between victims, offenders, and the broader community. The objective is to restore the harm, recover losses, or address personal injuries, therefore compensating for damages. This approach will provide the aggrieved parties and the community with security feelings that the traditional approach does not offer. Retributive justice systems have often failed to achieve desired outcomes by administering only just and proportionate corrections and punishments to deter crime. In practice, the existing problems are often exacerbated rather than solved and administered.⁴ Restorative justice approach prioritizes dialogue, reconciliation, and remediation of harm resulting from criminal behaviour.⁵

Marian Liebmann contends that restorative justice, although recently gaining attention in some continental states, is actually an approach used “in Ancient Rome and Greece, by the indigenous populations from Australia, and Native American justice system”.⁶

Howard Zehr argues that “restorative justice must prioritise the remediation of harm inflicted by crime” and the needs of victim offenders and the community.⁷ Zehr believes that giving victims, offenders, and community members a voice leads to more meaningful resolutions that align with restorative justice principles. One of Zehr’s central tenets is repairing relationships damaged by crime. He posits that criminal mediation facilitates reconciliation and healing, something the traditional criminal justice system fails to adequately provide.⁸

In the same vein, Theo Gavrielides notes that the conventional criminal justice system frequently neglects these elements, prioritising punishment instead of accountability among criminals, enabling them to comprehend the repercussions of their wrongdoings. The traditional approach to justice, which may occasionally let offenders evade personal responsibility, differs from the restorative philosophy, which is centred on bringing together

⁴ John Braithwaite, *Restorative Justice* (2002).

⁵ Ibid; Estelle Zinsstag and Marie Keenan, ‘Restorative Responses to Sexual Violence’ [2018] Restorative Responses to Sexual Violence 1.

⁶ Marian Liebmann, *Restorative Justice. How It Works* (Jessica Kingsley Publishers London and Philadelphia 2007).

⁷ H Zehr, *The Little Book of Restorative Justice* (Simon and Schuster 2015).

⁸ Howard Zehr, *Changing Lenses* (25th edn, 2018).

all the parties and giving them an active role.⁹

Sercan Tokdemir argues that it is essential for the victim to have an explanation from the perpetrator regarding the harm inflicted. The perpetrator's acceptance of responsibility and sincere apologies will facilitate the victim's healing process, reducing the feelings of anger and revenge to controllable limits. Tokdemir contends that mediation has positive aspects for the perpetrator's reintegration into society and rehabilitation. Thus, the perpetrator whose freedom is not restricted will have a chance to withdraw from the toxic environment, distancing themselves from unlawful conduct that may restrict their freedom. Attaining this objective will be feasible within a framework that prioritises harm compensation and regards punishments that limit freedom as a last measure. This condition will favourably impact society, since a rehabilitated offender is less likely to reoffend, resulting in reduced crime rates and diminished victimization. The victims may have a sense of security, and society will, in a tangible manner, gain from the realisation of justice.¹⁰

Uludağ reiterates Tokdemir's argument, stating that "the application of restorative justice expedited damage repair and eradicated hostility".¹¹ Moreover, Uludağ contends that in a state governed by the rule of law, safeguarding individual rights and liberties is paramount. In this context, the justice administered by judicial authority is the most commonly employed mechanism to safeguard individuals' rights. Tokdemir's argument is reiterated by Uludağ: "With the application of restorative justice, the damage was repaired faster, and the hostility was eliminated." The victims can feel safe, and society will, in a real sense, benefit from "the manifestation of justice".¹²

Since the end of the 20th century, a revolutionary concept for addressing conflicts in criminal matters has emerged. In contrast to traditional approaches to criminality, consensual models become a dynamic alternative to the classic criminal system. This innovative approach to legal conflict resolution is not confined to a certain area of law. It has the potential to permeate any field of law and flourish in any legal system,

⁹ Theo Gavrielides, *The Psychology of Restorative Justice* (1st edn, Routledge 2016).

¹⁰ Sercan Tokdemir, 'Ceza Adaleti Sistemine Yeni Bir Yaklaşım; Tamamlayıcı Bir Sistem " Onarıcı Adalet" Mekanizması A' (2017) 21 75 <<http://www.anayasa.gov.tr>>.

¹¹ Sener Uludağ, 'Onarıcı ve Cezalandırıcı Adalet: Paradigma Değişikliğini Tetikleyen Şartlar' (2011) 13 *Polis Bilimleri Dergisi* 127.

¹² Ibid.

particularly in democratic nations, offering a promise for a more equitable society.¹³

Models of consensual conflict resolution include community justice, restorative justice, and informal justice; nevertheless, they are predominantly recognised in practice as mediation. Nonetheless, one may perceive a synonymous relationship of synonymity between mediation and restorative justice; however, restorative justice encompasses a far broader concept. Mediation, as an emerging paradigm in contemporary criminal justice, serves as the primary mechanism for achieving restorative justice.¹⁴

Avziu and Osmani argue that some European states adopted community service as an alternative to traditional justice, aimed to find solutions juvenile offenders, which can be translated as a societal reaction to the delinquent behaviour instead of a punishment.¹⁵

Restorative justice entails not just about bringing the offender and victim back to their prior condition, but also reinstating the relationships that existed before the dispute, thereby reassuring the community of its commitment to their well-being.¹⁶

Restorative justice redefines the concept of crime: it is primarily an act of violence against a human being, an insult to his/her/their human dignity, and lastly, an attack against the interests of the state. Crime inflicts harm on an individual or a particular social group, hence creating a duty to rectify the damage to that person. The scope of restorative justice is not to penalise the perpetrator but to facilitate reconciliation, remedy harm, ensure accountability, and restore the social relationships that existed before the commission of the crime. Restoration is not only a formal legal concept wherein punishment functions to reinstate the infringed right; rather, it acts as a mechanism to guarantee equitable results. The main subjects of this approach are the conflict participants—the offender and the victim—since the fundamental premise of restorative justice is to enable the parties to settle the problem.¹⁷

A fundamental aspect of the restorative approach to resolving criminal law disputes is the principle of accountability, though forgiveness and being free from vengeance.

¹³ Kieran Mcevoy, 'Criminology, Conflict Resolution and Restorative Justice' (2003) <<https://www.researchgate.net/publication/30527279>>.

¹⁴ Recommendation R (99) 19 2000 34.

¹⁵ Qebir Avziu and Afrim Osmani, 'Restorative Justice in the Republic of Macedonia and the Possibility of Its Application in Juvenile Delinquency with Special Emphasis on the Work of the Mediator, as a European Tendency' [2015] *Academic Journal of Interdisciplinary Studies*.

¹⁶ Brenda Morrison and Eliza Ahmed, 'Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence' (2006) 62 *Journal of Social Issues* 209.

¹⁷ D Cooley, 'Restorative Justice in Canada: Lessons Learned'.

Reconciliation occurs only if the offender acknowledges his culpability and consents to rectify harm. The offender who acknowledges his culpability ceases to be a passive subject of governmental compulsion and transforms into an active agent of accountability. Repressive justice segregates offenders from society.¹⁸ The fundamental tenet of restorative justice is to rectify the harm inflicted by the crime and, to the greatest extent feasible, reinstate both the offender and the victim to their prior condition.¹⁹

Restorative justice should not be seen as only an alternative to conventional criminal procedures²⁰ but as a genuine effort that actively engages the community and the involved parties, aiming to restore harm and advance healing for victims while the society will acknowledge that justice is being done.²¹ The aim of restorative justice is to resolve the conflict among the victim, the delinquent, and society,²² addressing needs and mitigating guilt rather than the repressive reaction of the state.²³ In the implementation of restorative justice measures, it is particularly important to ensure the appropriate balance between the needs and interests of the victim and the rights of the offender.²⁴ Restorative justice, particularly mediation, requires the offender's voluntary compensation for the harm inflicted on the victim in return for alleviating culpability, which may include exemption from criminal responsibility or penalty.

b. Mediation and Criminal Justice

The restorative justice concept, endorsed by the Council of Europe, aims to repair harm through effective communication, enhance offender accountability, and facilitate victim healing. However, the acceptance and application of these practices in Romania remain constrained by some hurdles that seem to hinder progress.²⁵

¹⁸ TF Marshall, *Restorative Justice: An Overview* (Center of Restorative Justice & Mediation 1999).

¹⁹ Simona Ciresica Oprisan, 'The Person Deprived of Liberty and the Restorative Justice' <<http://data.europa.eu/eli/dir/2012/29/oj>>.

²⁰ Gerry Johnstone and Daniel W Van Ness, *Handbook of Restorative Justice* (2011).

²¹ Fernanda Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (Taylor and Francis Inc 2015).

²² Alessandra Lanciotti and Maria M Pisani, 'Restorative Justice, Mediation and Protection of EU Financial Interests', *Proceedings of the DRAMP Conference* (2022).

²³ Larry Ferlazzo, 'Restorative Justice Is Not Just an Alternative to Discipline' (*Larry Ferlazzo's Website of the Day*, 2023) <<https://larryferlazzo.edublogs.org/2023/12/08/restorative-justice-is-not-just-an-alternative-to-discipline/>> accessed 25 May 2024; Hendrik Kaptein and Marijke Malsch, 'Crime, Victims and Justice: Essays on Principles and Practice' [2017] *Crime, Victims and Justice: Essays on Principles and Practice* 1 <<https://www.taylorfrancis.com/books/mono/10.4324/9781315258935/crime-victims-justice-hendrik-kaptein-marijke-malsch>> accessed 8 January 2025.

²⁴ Yvon Dandurand, 'Handbook on Restorative Justice Programmes' (2020) <<https://www.researchgate.net/publication/341611367>>.

²⁵ Luminița Dragne and Anamaria Tranica, *Medierea în Materie Penală* (Universul Juridic 2011).

Petronela Stogrin asserts that mediation functions as an alternative to conventional court proceedings, proving crucial for the resolution of various societal disputes. She emphasises the benefits of mediation in alleviating judges from the overwhelming responsibility of adjudicating numerous intricate cases presented in court. It proves to be cost-efficient, reducing the need for increased court staffing levels.²⁶

Mediation as a form of alternative justice has gained traction in recent decades, particularly in Europe and other continents, thanks to the reduced costs to both the parties involved in a dispute and their respective states.²⁷ Some scholars argue that through mediation both individuals and the state benefit.²⁸

Despite Romania's adoption of the Mediation Law in 2006,²⁹ the practical implementation of restorative justice approaches has been negligible. A fundamental problem in implementing restorative justice practices is the balance between victim empowerment and traditional punitive approaches. Restorative justice seeks to actively engage victims and fulfil their needs; nonetheless, there is apprehension that it may weaken traditional justice by offering a cost-efficient alternative to conventional punitive procedures.³⁰

A further factor affecting the mediation's efficacy in Romania is the cultural resistance and institutional inertia obstructing the integration of restorative justice practices, notably the insufficient comprehension and endorsement for restorative justice among legal practitioners, the judiciary, and the general populace.³¹

Romania's distinctive approach to restorative justice, which markedly contrasts with more effective implementation in other European countries, reveals the specific obstacles encountered in the successful adoption of these practices.³²

c. Victims and their Role in Criminal Justice

Concern for the welfare of victims is a relatively recent development. The authorities

²⁶ Petronela Stogrin, 'Petronela STOGRIN, Mediator, Formator În Mediere Medierea În Cauzele Penale' (2014) 3 <<http://juridica.ugb.ro/->>.

²⁷ Ibid.

²⁸ Giovanni Matteucci, 'Mandatory Mediation, The Italian Experience' (2015) 16 *Revista Eletrônica de Direito Processual*; Petronela Stogrin, 'Petronela STOGRIN, Mediator, Formator În Mediere Medierea În Cauzele Penale' (2014) 3 <<http://juridica.ugb.ro/->>.

²⁹ Legea Medierii Romania 2006 (<https://legislatie.just.ro/Public/DetaliiDocument/71928>).

³⁰ Dragne and Tranica (n 25).

³¹ Monica Ciobanu, 'Recent Restorative Justice Measures in Romania (2006-2010)' (2013) 60 *Problems of Post-Communism*. 45

³² Marion T Doss, Stephen R Bowers and Cristina Hanganu, 'The Transformation of the Romanian Criminal Justice System' (2001) 3 *International Journal of Police Science & Management* 226.

prioritised case resolution and efficiency, evidenced by the volume of arrests and convictions. In Europe, as in the United States, there is a punitive system that does not always result in a reduction of recidivism rates or an overall decline in crime rates.³³

Nonetheless, the victim's status evolution has undergone many stages. In Ancient Greece and Rome, relatives of deceased victims were awarded a prize. In Great Britain, there was a time when criminals were required to compensate both the victim and the sovereign for disturbing the peace of the kingdom. There was even a golden period for the victims, in which they and their families took the measures they deemed appropriate against the offender. However, due to the exaggerated proportions of this policy, the state was compelled to act and assume responsibility for addressing the criminal cases.

Consequently, the victim's role diminished, being perceived just as a witness without further significance. The reward disappears from the victim's rights, and the state becomes the only one entitled to compensation, becoming the primary victim in any criminogenic situation. The state now absorbs all the obligations that the victim once assumed. The prosecutor defends the victim's interests by collecting evidence pertaining to the defendant's culpability; the victim's participation is restricted throughout the complaint process, legal questioning, and, in some instances, during the identification of the perpetrator. Consequently, the victim assumes a passive role, and the activity that once appeared therapeutic now looks detrimental to the authorities, resulting in the victim's isolation. Consequently, the victim assumes a passive role, and the activity that once appeared therapeutic now looks detrimental to the authorities, resulting in the victim's isolation.

The need for tangible outcomes directed the whole system's attention towards the offender. Constructing jails or levying fines for legal non-compliance is far simpler than establishing a really effective system aimed at avoiding crime and, by extension, recurrent victimisation or the occurrence of victims becoming perpetrators.

The emergence of victimology and advocacy for victims' rights altered the victim's position in this context. Compensation was among the earliest acknowledged rights.

³³ Tapio Lappi-Seppälä and Michael Tonry, 'Crime, Criminal Justice, and Criminology in the Nordic Countries' (2011) 40 *Crime and Justice*; Devah Pager, 'The Mark of a Criminal Record' (2003) 108 *American Journal of Sociology* 937.

California was the first American state to enact such a program.³⁴ Wisconsin was the inaugural state to establish a Victims' Bill of Rights in 1979. Ronald Reagan was the first American president to advocate for the establishment of support for victims' rights and a constitutional amendment to protect these parties during criminal proceedings. Contradictory debates have emerged over this amendment, which aims to equilibrate the positions of the accused and the victim. Some scholars found that it led to regression at a time when the victim was doing justice for herself. Such consideration would produce a total rebalancing of justice. The shift towards prioritising the victim poses difficulties for a system historically focused solely on the perpetrator's outcome.

Block and Behrens argue that the risk to being revictimized is much more acute when the legal system focuses on the state as the main character in the crimes, the only victim, and on punishing the offender. The actual victims' feelings or anguishes do not matter.³⁵

Victimisation is regarded as a complex of behaviours that yields distinctly defined outcomes within a certain timeframe.³⁶ This "false assumption" results in the damaged individual encountering a moment when they will again become a victim, with the moral perpetrator being a system founded on misguided assumptions.³⁷ Considering only the perpetrators, prioritising their viewpoint on the occurrence, favouring minimal punitive measures, dismissing major charges, and retaining just the least severe allegations constitute a revictimization of the victims.³⁸

Restorative justice facilitates the perpetrator's recognition of the victim and fosters a true comprehension of the impact of their actions on another human being. The conventional system conceals the offender, preventing him from fully recognising the consequences of his actions reflected on the victims. The traditional system hides the criminal, and he does not become very aware of the effects of his acts. The dialogue between the two parties possesses a healing effect. Victims are often inclined to see anyone as a possible criminal. This paranoia also works in the sense of the total "demonisation" of the world and the

³⁴ SG Shoham, P Knepper and M Kett, *International Handbook of Victimology* (1st edn, Routledge 2010).

³⁵ R Block, 'Victim-Offender Dynamics in Violent Crime' (1981) 72 *Journal of Criminal Law and Criminology* 743; Juliet Behrens, 'Meeting the Needs of Victims of Domestic Violence with Family Law Issues: The Dangers and Possibilities in Restorative Justice' (2005) 1 *International Journal of Law in Context* 215.

³⁶ Sherry Hamby and John Grych, 'The Complex Dynamics of Victimization' [2016] *The Wiley Handbook on the Psychology of Violence* 66

³⁷ Andrew, K. (2007). *Crime Victims - An Introduction to Victimology*. Thomson Wadsworth

³⁸ Martin Wright, 'The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research. Mark S. Umbreit. Jossey-Bass, San Francisco, 2001 - Book Review' (2001) 11 *Criminal Behaviour and Mental Health* 200.

villain, taken in particular.³⁹ The victim is overcome by anxiety, fear, and vulnerability. However, these voluntary mediation sessions, which enable the victim to pose the question “why?,” have a healing effect for the victim.

The restorative system illustrates the Durkheimian concept of healthy community self-regulation. Mediation meetings require solid psychological preparation for both victims and offenders. To achieve successful outcomes, notably in violent crimes where the actors, both parties and the mediators, must be very well engaged and dedicated to the purpose of the procedure. However, mediation looks like a utopia for the victims of violent crimes, whose repercussions might endure for a lifetime. Monetary compensation or apologies from the perpetrator will never adequately restore the severely compromised sense of personal safety.⁴⁰ For certain victims, it is agonising to realise that this system is not orientated towards punishment. People who have suffered significant psychological trauma due to a criminal act first go through a phase focused only on retribution and punishment they wish to inflict upon the perpetrator. This attitude may lead the victims to believe their situation is not considered seriously.

An essential moment in the legislative evolution of victim status perception occurred on November 11, 1985, when the United Nations General Assembly ratified the United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power.⁴¹ This is the sole international instrument that guides member states regarding the protection and reparations for victims of crime and abuse of power. However, it does not create binding commitments for states. Article 1 of the declaration defines crime victims as

“persons who, individually or collectively, have suffered damages, including physical or mental injuries, emotional suffering, economic losses or substantial reductions of fundamental rights, through acts or omissions, which represent violations of the criminal legislation that is in force within the member states, including those laws that prohibit the criminal abuse of power.”⁴²

Article 2 of the same declaration stipulates that a person can be considered a victim,

³⁹ K Andrew, *Crime Victims - An Introduction to Victimology* (Thomson Wadsworth 2007).

⁴⁰ Wright (n 37).

⁴¹ Yael Danieli, Nigel S Rodley and Lars Weisaeth, ‘International Responses to Traumatic Stress: Humanitarian, Human Rights, Justice, Peace and Development Contributions, Collaborative Actions and Future Initiatives’ [2018] *International Responses to Traumatic Stress: Humanitarian, Human Rights, Justice, Peace and Development Contributions, Collaborative Actions and Future Initiatives* 1.

⁴² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

regardless of whether the perpetrator is identified, arrested, prosecuted, or convicted and regardless of the relationship between the perpetrator and the victim. It also enshrines rights to access to justice and treatment, reparation, fair compensation, and care, all delivered with compassion and respect.⁴³

The interaction between police and other institutions and victims is governed by Recommendation R(85)11 of the Committee of Ministers, which advocates for police officers training to engage with victims in an empathetic way, in a constructive and reassuring manner. Law enforcement is obligated to inform the victim about the possibility of obtaining assistance, legal assistance, and compensation from either the perpetrator or the government. The prosecutor must contemplate the victim's compensation and the victims' right to request an evaluation of the case by another competent authority or to start a private procedure if the accusations are found unfounded. The victims' interviewing must be conducted with meticulous attention to their specific circumstances, rights, and dignity. All judicial proceedings must consider the individual's right to privacy, particularly where the nature of the offence, the victim's position, or the victim's safety necessitates such consideration. Scholars contend on the manner in which justice addresses revictimization; victims are considered only when law enforcement or attorneys need information.

Wenzel posits that punishment is regarded as a necessary evil. Punishment is considered to have exemplary power and a general deterrent effect. The victims would choose this option to the extent that they want a reward, revenge for those who disturbed the harmony of their lives, thus applying the law of retribution. This revenge is executed within the legal boundaries and is commensurate with the severity of the criminal act.⁴⁴

In some cases, the treatment or rehabilitation of the offenders, which implies helping them to become decent, productive, law-abiding citizens, is a strategy employed when the offenders and victims are closely related, and the victims are more likely to advocate for rescuing the offenders. Similar situations occur in domestic abuse, where spouses maintain faith in their partners' potential for change with appropriate assistance. Usually domestic abuse is exacerbated by the consumption of alcohol or illegal drugs, which victims identify as the catalysts for their victimization. In this case, victims would likely opt for counselling, therapy for behavioural changes, psychotherapy, detoxification, medical treatment, education, professional qualifications, and social reintegration activities, rather than

⁴³ Ibid.

⁴⁴ Michael Wenzel et al, 'Retributive and Restorative Justice' (2008) 32 *Law and Human Behavior* 375.

punishment.⁴⁵

The emphasis on victim-centred justice emerged with the subsequent recommendations: R(87) 21 on victim assistance and victimisation prevention, R(99) 19 concerning mediation within the criminal system, and the Framework Decision of the Council of the European Union, which underscores the significance of considering the victim's role in criminal proceedings.⁴⁶

Support for victims, in light of the recent ruling, is attained by addressing their needs in a “comprehensive, coordinated manner to prevent partial or inconsistent solutions.”⁴⁷ The victim must be informed not only of their rights, services, processes, and penalties but also about the conviction or release of the perpetrator. This step is enacted, particularly if there are grounds to suspect the victim may be at risk.⁴⁸

While victims are frequently depicted as aggrieved citizens seeking retribution through the imposition of more severe penalties on offenders, they traditionally occupy a passive role, with the state solely authorised to determine the offender's fate. Recently, with the integration of restorative justice, offences are increasingly perceived as crimes against individuals rather than the state; thus, victims assume an active role in the justice process. Mark S. Umbreit argues that the general public, including the victims, is far less looking for revenge and punishment of offenders and more concentrated on the rehabilitation of the later.⁴⁹

III. PENAL MEDIATION

Alternative dispute settlement strategies are significant in modern criminal justice discussions. Criminal mediation has evolved as a significant method for aiding conflict resolution and promoting reconciliation between parties involved in criminal issues. Criminal mediation is a promising adjunct to traditional legal procedures, since it has the ability to alleviate court congestion, improve access to justice, and facilitate conversation between

⁴⁵ Jin Jung Choi, Diane L. Green and Stephen A. Kapp, ‘A Qualitative Study of Victim Offender Mediation: Implications for Social Work’ (2010) 20 *Journal of Human Behavior in the Social Environment* 857.

⁴⁶ ‘EUR-Lex - 32001F0220 - EN - EUR-Lex’ <https://eur-lex.europa.eu/eli/dec_framw/2001/220/oj/eng> accessed 8 January 2025.

⁴⁷ Inge Vanfraechem, Daniela Bolívar Fernandez and Ivo Aertsen, *Victims and Restorative Justice* (Taylor and Francis 2015).

⁴⁸ European Committee on crime Problems; Council for Penological Co-operation, ‘Commentary to Recommendation CM/Rec (2018) XX of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters’ (2018).

⁴⁹ M. Umbreit, *The Handbook of Victim Offender Mediation* (Jossey-Bass INC 2001).

victims and offenders.⁵⁰ However, the realisation of criminal mediation's potential varies across jurisdictions and is affected by a myriad of factors encompassing legal, cultural, and institutional dimensions.

The mediation process must be guided by fundamental principles. The mediator's impartiality is an essential component of mediation philosophy. Consequently, it is not only an issue of neutrality but also a dedication from the mediator, who is motivated by the belief that a disagreement may be handled without resorting to force. Neutrality does not negate the mediator's obligation and accountability, since the mediator remains impartial solely to the parties involved, not to interpersonal dynamics, as conflict resolution via mediation is a voluntarily agreed-upon decision. Should the mediator determine that he is unable to uphold his impartiality toward the parties, it is advisable for another mediator to assume responsibility for the case. The identical idea is included in the ethical rules of each profession that entails interaction with others (social worker, physician). The mediator can communicate his limitations to the parties, and this acknowledgement may be strategically advantageous as it might stimulate the opposing parties' drive to facilitate his assistance more effectively.⁵¹

The traditional settlement of conflicts entails delegating them to judicial authorities and addressing the dispute based on “a win-lose paradigm.”⁵² This strategy fails to address the diverse problems present in contemporary society, mostly owing to the diversification of social and economic ties. Engaging a third party to mediate discussions between the conflicting parties might encourage the acceptance of concessions that may otherwise appear unattainable.

Mediation is an adaptable method for resolving conflicts that may be effectively used in a range of situations, including familial matters, divorces, collective labour disagreements, and contractual concerns. Mediation addresses the interests at risk, providing a more suitable solution for the parties involved in the disagreement. In contrast to traditional conflict resolution methods that primarily emphasise legal considerations, mediation seeks, under current legislation, to provide a practical and mutually acceptable settlement for both disputing parties. In contrast to traditional conflict resolution methods that primarily emphasise legal considerations, mediation seeks, under current legislation, to achieve a practical and mutually

⁵⁰ ‘Mediation in Criminal Cases - Criminal Justice - IResearchNet’ <<https://criminal-justice.iresearchnet.com/criminal-justice-process/alternative-dispute-resolution/mediation-in-criminal-cases/>> accessed 24 May 2024.

⁵¹ Laurence Boulle and Alan Rycroft, ‘Book Review: Mediation: Principles Process Practice’ (1997) 12 *South African Periodic Review* 565.

⁵² Zehr (n 7).

acceptable resolution for both disputing parties.⁵³

Furthermore, unlike the traditional legal system, mediation is a voluntary undertaking. The mediator, without decision-making authority, respects the parties' autonomy by giving procedural information, generating debate, allowing the exchange of perspectives and information, and assisting the parties in clarifying their needs and interests. This technique aids in the removal of communication obstacles and the resolution of misconceptions, resulting in mutually beneficial outcomes. The mediator also helps the parties prepare the final mediation agreement, which outlines each party's commitment to resolving the problem. Although many states now use some sort of restorative justice, such as mediation or community service, there are variances based on the type of offence, the categories of delinquent eligible for the program, and the institution that administers it.

Even though Romania is still at the beginning of this journey, it has a small tradition based on the principles of mediation; in the Romanian legal system, there are procedures such as arbitration or conciliation, which arose from the need to separate cases that must be judged in court from those that can be resolved without incurring significant costs. Even though Romania is still at the beginning of this journey, it has a small tradition based on the principles of mediation; in the Romanian legal system, there are procedures such as arbitration or conciliation, which arose from the need to separate cases that must be judged in court from those that can be resolved without incurring significant costs.⁵⁴

On the contrary, in states that adopted the principles of restorative justice decades ago, such as the US and Australia, various reconciliation procedures and processes are regularly used in the victim/offender debate: reparation, sentencing circles, family group conferencing, victim impact panels, and the Community Reparative Board.⁵⁵

Mediation, as a key practice of restorative justice, offers an alternative pathway that can transform how we address and resolve criminal behaviour. Unlike the punitive nature of retributive justice, mediation focuses on healing, accountability, and restoring relationships. It provides a platform where victims and offenders can actively participate in resolving the

⁵³ J J Durham, 'The Differences and Similarities of Restorative Justice and Mediation — Pathways to Restorative Communities' (2024) <<https://www.pathways2rc.com/news/2018/10/24/the-differences-and-similarities-of-restorative-justice-and-mediation>> accessed 24 October 2024.

⁵⁴ Dragne and Tranica (n 25).

⁵⁵ Gwynn Davis, 'Mediation and Reparation in Criminal Justice' in Gwynn Davis and others (eds), *Making Amends* (Routledge 1992).

conflict, leading to more meaningful and lasting resolutions. It provides a platform where victims and offenders can actively participate in resolving the conflict, leading to more meaningful and lasting resolutions.

The benefits of mediation in criminal cases are many. It gives a more compassionate and individualised approach to justice, alleviates the strain on the judicial system, and facilitates economical and prompt remedies. As several nations, particularly in Europe and notably Romania, investigate the adoption of restorative justice techniques, mediation emerges as a viable alternative that corresponds with contemporary cultural values and requirements. The word mediation broadly refers to the process of settling conflicts with the involvement of a neutral third party, aimed at facilitating an agreement reached by the voluntary consent of the parties involved. A neutral mediator aids the mediation process by helping the parties articulate their emotions, requirements, and perspectives. This technique addresses the immediate suffering inflicted by the crime while also seeking to prevent future offences via the promotion of understanding and reconciliation. Mediation provides a holistic approach to justice that advantages all parties by including the community and focusing on the broader implications of criminal behaviour.⁵⁶

Mediation may occur directly when the parties convene with a mediator present or indirectly when each party engages with the mediator individually. The mediation participants may include the victim and the perpetrator, together with their families, community leaders, or local authority officials. In every instance, it is imperative that the mediator remain impartial and that the parties engage voluntarily.⁵⁷

At the international level, among the specialists concerned with the institution of mediation, the opinion is that this alternative form of conflict resolution can be far more effective than the retributive justice approach, enhancing the active roles of the parties, community, and society.⁵⁸

The advantages of restorative justice for the victim are multiple: it has an increased role in conducting mediation sessions, and the problem can be solved quickly with a clear procedure related to the act itself, not chronologically separated from it. The family and the

⁵⁶ Mamdouh Hasan Mana Al-Awan, 'The Role of Mediation in Resolving Criminal Disputes' (2021) 9 *Global Jural of Politics and Law Research* 1.

⁵⁷ Igor Doles and Veronica Mihailov-Moraru, 'Ghid Pentru Medierea Penală' (2001).

⁵⁸ Rosalie R Young, 'Book Review Images of Restorative Justice Theory, cited by Robert Mackay, Marko Bošnjak, Johan Deklerck, Christa Pelikan, Bas van Stokkom, and Martin Wright' (2009) 43 *Law & Society Review* 447.

community can be involved in the solution, and the contact between the victim and the perpetrator of the crime can be beneficial: the criminal can directly apologise to the victim and repair the damage. As a result, through the speed of the mediation process between the two parties involved, the satisfaction is closer to the moment of committing the crime.

The advantages of restorative justice in the case of the offender are also not to be neglected: he is involved in the decision regarding the sanction or compensation, he assumes responsibility for his illegal acts and bears the consequences, and he accepts the reparation of the moral and/or material damage. Since deprivation of liberty is not resorted to either before the hearing or after (pretrial detention or detention), contact with the judicial system and its involvement are avoided, directly reducing the risk of recidivism.

Mediation's objective is to provide the parties with the opportunity to resolve the dispute in the way they want through good understanding and to the benefit of both. Achieving this goal implies a constructive and active role on their part, sometimes even innovative. Conversely, some scholars argue that criminal mediation may not always be effective or fair, particularly in cases involving severe crimes, a view that I consider valid, as without the deterrent effect of stricter criminal responsibility, offenders might not be adequately discouraged from repeating offences, leading to potential safety risks for society.⁵⁹ While proponents,⁶⁰ targeting the courts' cases overload problems and the impressive number of cases for the right to fair trial violations due to prolonged pre-trial conditions and trials or detention, argue that criminal mediation helps heal relationships, critics contend that not all crimes suit this approach. For instance, heinous crimes like murder or child abuse may not have suitable grounds for mediation, and trying to resolve them this way may undermine justice.⁶¹

A fundamental aspect of transplanting the criminal mediation institution from one jurisdiction to another is assessing its applicability and appropriateness in the context of different cultural norms and values. Some scholars suggest that imposing this model universally on all jurisdictions could lead to adverse outcomes in cultures that do not align

⁵⁹ Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique* (1994).

⁶⁰ Marshall (n 18).

⁶¹ Rathna N Koman and Rathna N Koman, 'Balancing the Force in Criminal Mediation' (2016) 7 *Beijing Law Review* 171.

with the principles of restorative justice.⁶²

Mediation, in contrast to retributive justice, aims for compromise solutions that are more comfortable and mutually acceptable for both parties, focusing on their underlying interests and requirements rather than formal factors. Mediation offers more appropriate solutions to modern issues, enhancing adaptability in social and commercial interactions while redirecting cases away from the judiciary. Mediation facilitates a more straightforward and adaptable approach that promotes the unimpeded articulation of emotions and sentiments of all parties impacted by the crime, either directly or indirectly.⁶³ An important role in enhancing the efficacy of mediation is the trust feeling in the mediator. The efficacy of mediation depends on the trust that parties invest in the mediator, who orchestrates a productive dialogue that can yield more favourable outcomes, wherein responsibilities are recognised, needs are addressed, and relationships among the victim, offender, and community are evaluated and rehabilitated. Both the victim and the perpetrator actively participate in the mediation process, contributing to the emotional and material restitution for the inflicted harm.⁶⁴

a. Mediation and the European Context

In the continental context, the European community consistently demonstrates a strong interest in the promotion of mediation in criminal matters as a comprehensive alternative to the traditional criminal procedure, with a focus on the parties' involvement and the resolution of the issue.⁶⁵ In this sense, the Council of Europe developed several recommendations to the member states, among which is Recommendation (85)11 regarding the position of the victim in criminal law and criminal procedure. Recommendation (87)18 regarding the simplification of criminal justice; Recommendation (87)20 regarding social reactions to juvenile delinquency; Recommendation (87)21 regarding assistance to victims and prevention of victimization; Recommendation (88)6 regarding social reactions to the criminal

⁶² Tinneke Van Camp and Jo-Anne Wemmers, 'La Justice Réparatrice et Les Crimes Graves' (2011) 44 *Criminologie* 171; T Van Camp and J Wemmers, 'Victim Satisfaction with Restorative Justice.' (2013) 19 *The International Review of Victimology* 117.

⁶³ NIQ Nafi'a, K Kuswardani and A L> Prakosa, 'The Urgency of Penal Mediation in Equitable Criminal Law Reform' [2022] *Advances in Social Science, Education and Humanities Research*.

⁶⁴ MS Umbreit and R B> Coates, 'Victim-offender Mediation: Three Decades of Practice and Research' (2004) 22 *Conflict Resolution Quarterly* 279.

⁶⁵ Inmaculada López-Barajas Perea, 'La Efectividad de La Justicia: Una Exigencia Constitucional, (Los Nuevos Sistemas Alternativos de Resolución de Conflictos)' [2012] *Revista de Derecho Político* 141; Jacopo Della Torre, 'Negotiated Criminal Justice and EU Directives on Procedural Rights' (2019) 27 *European Journal of Crime, Criminal Law and Criminal Justice* 155; Clara Rigoni, 'Restorative Justice and Mediation in Penal Matters. A Stock-Taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries' (2016) 4 *Restorative Justice* 276; TA Barabás, 'Restorative Justice in Hungary: A Rapidly Growing Field of Practice' (2015) 3 *Restorative Justice* 387.

behaviour of young people from emigrant families; Recommendation (92)16 regarding European regulations on sanctions and measures applied in the community; Recommendation (95)12 regarding the administration of criminal justice; Recommendation (98)20 on family mediation; Recommendation (99)19 regarding mediation in criminal matters; Recommendation (22)2000 regarding the improvement of the implementation of the European rules for community sanctions and measures.⁶⁶

The identification of consensual conflict resolution models is a common element of all of these resolutions, and their propagation is founded on a new philosophy that is presented in the specialised literature under a variety of titles, including community justice, restorative justice, and informal justice. In practice, the term “mediation” is frequently employed; however, the concepts of mediation and restorative justice are not synonymous. The latter is a much broader concept that encompasses mediation, which is the primary method by which restorative justice is implemented, as well as a variety of specific forms that are part of the restorative concept.⁶⁷

In Europe, there is a growing tendency to emphasise the importance of mediation programs, involving the victim, however, in a way that respects his dignity, the right to private life, and the right to information. Mediation in the Czech Republic and Austria is used in the criminal prosecution phase as an alternative to being sent to court but also in the trial or enforcement phase.⁶⁸ In some European countries (e.g. Norway, Finland), mediation is directly organised through the courts, by special employees or judicial assistants, or by employees of local authorities.⁶⁹ However, mediation is not a novel concept, but it has

⁶⁶ Committee of Ministers of Council of Europe, ‘Rec (88) 6’; Committee of Ministers of Council of Europe, ‘Rec (87) 18’; Committee of Ministers of Council of Europe, ‘Rec (95) 12’; Committee of Ministers of Council of Europe, ‘Rec 2000 22’; European Commission for the Efficiency of Justice, ‘Guidelines for a Better Implementation of the Existing Recommendations Concerning Mediation’ (2007) <<https://rm.coe.int/1680747759>> accessed 27 May 2024; Recommendation R (99) 19; Matthew Hall, ‘Victims and Policy-Making: A Comparative Perspective’ [2012] *Victims and Policy-Making: A Comparative Perspective* 1 <<https://www.taylorfrancis.com/books/mono/10.4324/9780203810309/victims-policy-making-matthew-hall>> accessed 8 January 2025.

⁶⁷ Zehr (n 7).

⁶⁸ Markus Roth and David Gherdane, ‘Mediation in Austria: The European Pioneer in Mediation Law and Practice’ [2012] *Mediation: Principles and Regulation in Comparative Perspective*; Beata Czarnecka-Dzialuk and Dobrochna Wojcik, ‘Mediation Between the Victim and the Offender in Austria: Legal Ramifications and Practice’, *Juvenile Offender-Victim Mediation* (1999) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/mediation-between-victim-and-offender-austria-legal-ramifications>> accessed 8 January 2025.

⁶⁹ Anna Nylund, ‘Restorative Justice and Victim-Offender Mediation in Norway’ <https://www.academia.edu/24358893/Restorative_justice_and_victim_offender_mediation_in_Norway> accessed 8 January 2025; Finish Institute of Health and Welfare, ‘Mediation Process - THL’

acquired social importance only in the last 25-30 years. The most widespread theory maintains that the model developed in America in the 80s was borrowed and applied in Europe as well. The existence of local models must also be taken into account, because spontaneous practices and new methods of conflict resolution have appeared in each country.

Recommendation R (99)19⁷⁰ is the first tool for the implementation of victim-offender mediation, as it encourages member states to ensure the possibility of mediation, as a confidential and voluntary service accepted in all stages of the criminal process. Another document that supports the development of restorative justice is the UN Draft Resolution on restorative justice programs in the criminal field, approved by the UN Commission on Crime Prevention and Criminal Justice in April 2000.⁷¹

Another advancement in this is the establishment on December 8, 2000, of the European Forum for Victim/Offender Mediation and Restorative Justice. The purpose of this body is to support, implement, and develop in Europe victim/offender mediation and other practices specific to restorative justice, establishing as a priority the collaboration between mediators, mediation services, those responsible for developing criminal policies, researchers, and Another advancement in this is the establishment on December 8, 2000, of the European Forum for Victim/Offender Mediation and Restorative Justice. The purpose of this body is to support, implement, and develop in Europe victim/offender mediation and other practices specific to restorative justice, establishing as a priority the collaboration between mediators, mediation services, those responsible for developing criminal policies, researchers, and practitioners in the field.

The Framework Decision of the Council of the European Union concerning the status of victims in criminal proceedings mandates that EU member states amend their national laws to provide a minimum level of protection for crime victims.⁷² Article 10 includes references to mediation within the criminal justice system. Each member state is required to advocate for mediation in criminal cases deemed suitable for this strategy and shall guarantee

<<https://thl.fi/en/services/special-government-services-in-social-welfare-and-health-care/mediation-in-criminal-and-civil-cases/mediation-process>> accessed 24 May 2024.

⁷⁰ Recommendation R (99) 19.

⁷¹ United Nations, 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters :: Revised Draft Resolution /: Austria, Belgium, Bulgaria, Canada, Czech Republic, Mexico, Netherlands, Peru, Saudi Arabia, South Africa and Zimbabwe' (UN, 2000) <<https://digitallibrary.un.org/record/469889>> accessed 8 January 2025.

⁷² Hall (n 66).

that any agreement reached between the victim and the perpetrator during mediation in criminal matters is considered.⁷³ This instrument was in force until 2012, when it was replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.⁷⁴

b. Mediation and Romanian Criminal Justice

i. General Aspects on Penal Mediation in Romania

Although the phrase “restorative justice” is not found in any of the normative acts that regulate the prevention, control, and sanctioning of criminal acts in Romania, the special provisions regarding mediation in criminal cases (Law no. 192/2006 with the amendments and additions later), combined with the provisions of the Criminal Code and the Criminal Procedure Code in force, are sufficient for the development of practice in the field. However, the few available statistics on mediation show that the criminal field is almost non-existent on the list of cases resolved through this alternative dispute resolution method.⁷⁵

In Romania restorative justice is a little-known theoretical concept, even among legal specialists, even less addressed in real life.⁷⁶ The problem of the victim was opened up by adding probation services and assistance and counselling to the victim among the attributions. This accumulation of responsibilities, of reintegrating the offender and also of assisting the victim only at his express request, is seen by some specialists as a paradox. Bringing both the victim and the perpetrator into the same space would have been one of the reasons why this right was almost never claimed by any victim.⁷⁷

Questions related to alternative ways to the classic justice system in solving some criminal cases have become a concern for many academics since the 90s, and it took ten years to concretise into a legal framework. However, the promulgation of Law no. 192 of 2006.⁷⁸ on mediation and the organisation of the mediator profession created the premises for recourse

⁷³ ‘EUR-Lex - 32001F0220 - EN - EUR-Lex’ <https://eur-lex.europa.eu/eli/dec_framw/2001/220/oj> accessed 8 January 2025.

⁷⁴ European Parliament and Council of Europe, ‘Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA’ (2012).

⁷⁵ Dragos Calin and Paula Andrada Cotovanu, *Culegere de Hotarari Judecatoresti Pronuntate in Materia Medierii*.

⁷⁶ A Balan, ‘Medierea- Oportunitati Si Provocari in Prevenirea Delicventei Juvenile in Romania’ [2011] Copiii de azi, parintii de maine- Universitatea de Vest 33.

⁷⁷ Dragne and Tranica (n 25).

⁷⁸ Legea Medierii Romania.

to mediation, including in criminal cases, and the entry into force of the new Criminal Code and Criminal Procedure Code will expand and develop the legal framework so that mediation can become an effective method of prevention and control of delinquency if the institutions and people involved will find out and understand the advantages of resorting to mediation.⁷⁹

ii. Legal Framework

As a result of these recommendations and in order to align with European standards, considering obtaining the status of a member country of the European Union, Romania regulated mediation and the profession of mediator by adopting Law no. 192/2006, with subsequent amendments and additions. Its purpose is to raise the quality of the judicial act by satisfying the interests of the parties more quickly, by reducing the volume of activity of the courts, and by relieving them of as many cases as possible, which can be resolved by the parties outside the courts.

Mediation is defined in art. 1 of the mentioned law as:

“A method of resolving conflicts amicably, with the help of a specialized third person as a mediator, under conditions of neutrality, impartiality and confidentiality, with the free consent of the parties. Mediation is based on the trust that the parties place in the mediator, as a person capable of facilitating negotiations between them and supporting them in resolving the conflict, by obtaining a mutually convenient, efficient and sustainable solution.”⁸⁰

The profession of mediator is relatively new in Romania, considering that its regulation was carried out in 2006, and the first mediators were authorized starting in 2007.

Although it cannot be called an emerging concept, mediation, as an alternative way of resolving disputes, after years of legislative integration, still tries to find its place and role among the liberal professions and is facing challenges characteristic of the society in which, by tradition and mentality, those who have to resolve a conflict situation are mainly addressed to judicial bodies. Moreover, the criminal mediation in Romania is challenged by insufficient information on mediation for professional categories that should be interested in alternative ways of resolving disputes—judges, prosecutors, police officers, lawyers, and representatives of central and local public authorities; poor availability of victim-offender mediation before and after sentencing; the lack of financial funds necessary to cover the costs of the mediation

⁷⁹ Balan (n 77); A Parosanu, E Balica and A Balan, *Medierea in Domeniul Penal in Romania. Evaluare Si Perspective* (CHBeck 2013).

⁸⁰ *Legea Medierii Romania*, translated from Romanian by the author.

procedure for users in criminal cases; and the lack of adequate training of mediators for this type of dispute.⁸¹

A range of initiatives and efforts were implemented to alleviate these challenges. Legislative modifications to the mediation statute and the regulation of the mediator profession were enacted to advance mediation as an alternative conflict resolution strategy for litigants. The paramount provision pertains to the requirement for natural or legal persons to attend an information session on mediation, even subsequent to the commencement of litigation before the appropriate courts, to address conflicts in civil, family, and other matters, including criminal issues.

According to these provisions, attendance at an information session on the benefits of mediation is now obligatory for crimes where the retraction of the initial complaint or reconciliation of the parties eliminates criminal liability, following the filing of the complaint, provided the perpetrator is known or identified, and the victim consents to participate alongside the perpetrator; if the victim declines, the session will occur separately.⁸²

As a result of the recent legislative changes, the interest in the mediator profession has increased: in the Table of Mediators, there are more than 3,500 authorised mediators, organised in 88 professional associations, and the number of those who follow mediation training courses is constantly growing. Mediators have higher education and previous professional experience (minimum 3 years of work experience) from various fields of activity, not only related to the legal realm.⁸³ However, even if clumsily, this step was taken, and this matters a lot in terms of the new guidelines in justice. The involvement of as many actors as possible in the justice process is part of the main ideas of probation, of applying the triangle victim-offender-community.⁸⁴

iii. Procedural Rules

Mediation is applied in criminal cases concerning crimes for which, according to the law, the withdrawal of the prior complaint or the reconciliation of the parties removes the criminal liability. Special provisions regarding mediation in criminal cases are contained in

⁸¹ Parosanu, Balica and Balan (n 80).

⁸² Dragne and Tranca (n 3).

⁸³ Statutul Consiliului de Mediere 2001.

⁸⁴ Balan (n 77).

art. 67-70 of Law no. 192/2006.⁸⁵

As the participation is mandatory, after contenting for mediation, the proof of participation in the mediation initial information meeting, the mediator has the obligation to issue an information certificate. If one of the parties refuses in writing to participate in the information session, does not respond to the invitation or does not appear on the set date, a report is drawn up, which is submitted to the court file.⁸⁶

According to the Criminal Code in force, the following crimes can be the subject of the mediation process: battery or other physical aggression, bodily injury and bodily injury due to negligence, domestic violence, threat, violation of the secrecy of correspondence, disclosure of professional secrecy, rape, seduction, theft—prior complaint, abuse of trust, destruction of goods, possession disturbance, family abandonment, non-compliance with the measures regarding the custody of the minors, and domicile disturbance.⁸⁷ Moreover, the civil side of all the other offences provided for in the criminal legislation can be the subject of mediation.

The voluntary character of mediation is sustained by the provision that neither of the parties can be forced to accept the mediation procedure. Moreover, once initiated, mediation must be carried out in such a way as to guarantee the right of each party to legal assistance and, if necessary, to the services of an interpreter.

The mediation's minute must indicate whether the parties benefitted from the provided guarantees or, as the case may be, the fact that they have expressly waived them. In the case of minors, the guarantees provided by law for the conduct of the criminal process must be ensured, appropriately, also within the mediation procedure.⁸⁸

The outcome of the mediation session determines the legal consequences for both parties; if the mediation sessions are conducted and concluded with the parties' reconciliation before the commencement of the criminal trial, the aggrieved individual can no longer file a complaint over the same act with the criminal investigative authority or, as applicable, with the court. In the case when the mediation process commenced within the legally stipulated timeframe for submitting the preliminary complaint, this timeframe is suspended for the length of the mediation. Given if the conflicting parties have not reconciled, the victim may

⁸⁵ Ibid.

⁸⁶ Daniela Brita, 'Medierea Judiciara' [2011] *Pro Lege Review* 89.

⁸⁷ Noul Cod Penal actualizat 2024 2014.

⁸⁸ Balan (n 77).

submit a preliminary complaint within the same timeframe, which will continue from the date of the last mediation minutes, considering the past time prior to suspension.⁸⁹ At the mediation final, the mediator is required to provide the mediation agreement and the original closing minutes to the court authority in both original and electronic formats. The criminal trial resumes *ex officio* immediately after the mediation's minute submission, establishing that the parties have not reconciled, or, if it is not communicated, upon the expiration of the 3-month term stipulated by law.⁹⁰

Although, initially, the failure to fulfil this obligation was provided with the sanction of the court's rejection of the summons request as inadmissible, the implementation of the provision was postponed, as far as criminal cases are concerned, until the entry into force of the new Criminal Code and of criminal procedure, respectively the beginning of 2014.

A positive aspect is the fact that mediation offices are established in all areas of the country, especially in the major cities, where there are also functioning district courts. Mediators organise themselves and conclude collaboration protocols with the courts. However, in practice the official data depict a sad image; the number of cases resolved through mediation in criminal matters is extremely low—2 at the Prosecutor's Office attached to the High Court of Cassation and Justice and 3 agreements approved by the courts in 2019.⁹¹

iv. Criminal Mediation Challenges

Although, according to the law, mediation is an activity of public interest and,

“judicial and arbitral bodies, as well as other authorities with jurisdictional powers, inform the parties about the possibility and advantages of using the mediation procedure and direct them to resort to this way to resolve conflicts between them,”⁹²

a small percentage of prosecutors and judges are informed about the legislation on mediation,⁹³ and as a result, they do not recommend resorting to this procedure. The situation is the same among the police and local public authorities, and lawyers, which indicates still significant reluctance in advising their clients to resort to mediation.⁹⁴

⁸⁹ Stefan Boncu, *Negocierea Si Medierea. Perspective Psihologice*, vol 1 (3rd edn, Institutul European 2006).

⁹⁰ Gheorghita Mateut, ‘Medierea Penală’ (2007) 18 *Dreptul* 149.

⁹¹ Calin, Calin and Cotovanu (n 42).

⁹² Legea Medierii Romania.

⁹³ Parosanu, Balica and Balan (n 80).

⁹⁴ *Ibid.*

As far as public opinion and civil society are concerned, there is an absence of mediation acknowledgement and even rejection regarding the use of mediation in criminal cases, especially after the latest legislative changes that were interpreted erroneously—in the sense of obliging the victims of a crime to rape to negotiate with the aggressors.⁹⁵

Moreover, the mass media had a negative role in distributing wrong information about criminal meditation. Titles like “Rape is negotiable!,” induced both parties implicated in such a serious crime into a state of confusion; rape victims were advised to forgive their aggressor in exchange for compensation. Other titles insinuating that rape offenders can negotiate their freedom in exchange for monetary compensation raised not only to street demonstrations but also to the postponement of any progress in this matter. In this regard, the legislator did not take any positive steps in ensuring the voluntariness and equity of the mediation process. Victims should not feel compelled to participate, and mediators must be sufficiently qualified to address power imbalances, particularly in instances of serious crimes like domestic abuse. The possibility of offenders engaging in mediation insincerely, lacking authentic regret, presents a threat to the integrity of the process.⁹⁶

In the same vein, mediators - through the Mediation Council, an autonomous body that promotes the activity and represents the interests of authorised mediators⁹⁷ also failed to implement measures to support and promote the benefits of mediation.

Some authors argue that the absence of public financial assistance for mediation in criminal cases, as recommended by European guidelines, significantly diminishes the involvement of both victims and offenders in the mediation process.⁹⁸

Despite its potential benefits, the implementation of restorative justice in Romania faces several challenges. The legislative framework, although established, has not been fully implemented due to cultural, procedural, and practical impediments. There must be enhanced awareness and understanding of restorative justice concepts among legal practitioners and the general populace. The infrastructure required for effective mediation, encompassing competent mediators and accompanying institutions, requires additional enhancement.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Legea Medierii Romania.

⁹⁸ Parosanu, Balica and Balan (n 80).

IV. CONCLUSION

The analysis indicates that, although certain countries have successfully integrated criminal mediation into their criminal procedures and justice practices, Romania's implementation of criminal mediation within its legal system is advancing slowly and ineffectively. This is due to the establishment of stringent criteria for offenders, which has not yet been applied universally to all offenders at every stage of the criminal procedure, in accordance with Article 4 of Recommendation R. (99) 19.

Access to the criminal mediation process is typically restricted based on certain criteria, such as the nature of the offense or perpetrator's age. Consequently, criminal mediation in Romania is predominantly restricted to small offences, so precluding numerous victims from obtaining compensation for their incurred damages.

In Romania, even if there are starting points towards effective community justice, it is still not applied due to the supremacy of the retributive justice rooted in Romanian culture. Although, at least theoretically, due to the European Union's and Council of Europe's pressure, the legal framework exists, the criminal mediation faces reluctance from legal practitioners and the broader Romanian society.

I contend that implementing restorative justice mechanisms is essential for resolving problems between offenders and victims in cases of major crimes, facilitated by community engagement. Notwithstanding the restrictions, distrust, and certain legal contradictions, we ascertain that the practice of criminal mediation appears to stem from improvisation rather than a systematic and cohesive evolution of a theoretical framework. The efficacy of existing criminal mediation practices in fulfilling their aims and addressing the victim's needs for prompt responses to delinquency and alleviating emotions of insecurity remains ambiguous.

Criminal mediation and, more broadly, restorative justice are generally underutilized. The criminal justice system implemented by state institutions seeks to penalise offenders, viewing crime as an affront to the state. Consequently, the state's primary objective is to identify the perpetrator and tailor the penalty in accordance with criminal statutes. The criminal and victim do not engage in discussion; the offender seeks a reduced punishment, while the victim faces the prospect of testifying and frequently experiences revictimization, resulting in the neglect of the victim's interests and needs. The sentence imposed on the criminal by the court cannot fulfil the requirements of the aggrieved party.

I consider that for enhancing the benefits of criminal mediation, it is necessary to shift

towards a more victim-centred and restorative approach, where the focus is not punishing the offenders but offering them a chance to redress. The Romanian system is characterised by a focus on retributive justice, an approach shared by legal professionals, law enforcement, and the public through educational programs and training sessions that are more than necessary.

REFERENCES

- Andrew, K. (2007). *Crime Victims - AN Introduction to Victimology*. Thomson Wadsworth.
- Andronic, R.-L., Ioan, S., & Olteanu, C. (2013). Mediation in Romania - Context and Principles of Action. *procedia- Social and Behavioral Sciences*, 84, 1128. doi:<https://doi.org/10.1016/j.sbspro.2013.06.713>
- Avziu, Q., & Osmani, A. (2015). Restorative Justice in the Republic of Macedonia and the Possibility of Its Application in Juvenile Delinquency with Special Emphasis on the Work of the Mediator, as a European Tendency. *Academic Journal of Interdisciplinary Studies*. doi:<https://doi.org/10.5901/ajis.2015.v4n2s1p162>
- Behrens, J. (2005). Meeting the needs of victims of domestic violence with family law issues: the dangers and possibilities in restorative justice. *International Journal of Law in Context*, 1(3), 215. doi:<https://doi.org/10.1017/s1744552305003010>
- Block, R. (1981). Victim-Offender Dynamics in Violent Crime. *he Journal of Criminal Law and Criminology (1973-)*, 72(2), 743. doi:<https://doi.org/10.2307/1143013>
- Boulle, L., & Rycroft, A. (1997). *Mediation - Principles, Process, Practice*. Butterworths Durban.
- Braithwaite, J. (2002). *Restorative Justice. The Oxford Handbook of Crime and Punishment*.
- Braithwaite, J. (n.d.). *Restorative Justice & Responsive Regulation*. Oxford University Press.
- Choi, J., Green, D., & Kapp, S. (2010). A Qualitative Study of Victim Offender Mediation: Implications for Social Work. *Journal of Human Behavior in the Social Environment*, 20(7), 857. doi:<https://doi.org/10.1080/10911359.2010.494918>
- Ciobanu, M. (2013). Recent Restorative Justice Measures in Romania (2006-2010). *Problems of Post-Communism*, 60(5), 45. doi:<https://doi.org/10.2753/ppc1075-8216600504>
- Cohen, R. (2016). *Restorative Justice*. Springer eBooks. doi:https://doi.org/10.1007/978-1-4939-3216-0_14
- Cooley, D. (2002). La Justice Reparatrice au Canada: Quelques enseignements. *Practical Approches to Appropriate Dispute Resolution*, (p. 2). Vancouver.
- Council of Europe - Committee of Ministers. (1985). *Recommendation R (85) 11*. Retrieved May 15, 2024, from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000016804dcae>
- Council Of Europe - European Committee on Crimes Problems. (2018). *Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States' a, 2018*. Retrieved May 15, 2024, from (<https://rm.coe.int/090000016808cdc8a>)

- Council of Europe. (2000). *Recommendation R (99/19/2000) 34*.
- Council of Europe. (2001). 2001/220/JHA: *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*. Retrieved May 15, 2024, from https://eur-lex.europa.eu/eli/dec_framw/2001/220/oj/eng
- Dandurand, Y. (2020). *Handbook of Restorative Justice Programmes*. Retrieved May 16, 2024, from <https://www.researchgate.net/publication/341611367>.
- Diaconu, D. V. (2012). *Medierea in cauze penale*. Bucuresti: C.H. Beck.
- Dignan, J. (2005). *Understanding Victims and Restorative Justice*. Open University Press.
- Doss, M. T., Broers, S., & Hanganu, C. E. (2001). The Transformation of the Romanian Criminal Justice System. *International Journal of Police Science & Management*, 3(3), 226. doi:<https://doi.org/10.1177/146135570100300304>
- Dragne, D. (2013). Criminal mediation in the Romanian law system. *Agora International Journal of Juridical Sciences*, 7(2). Retrieved May 2, 2024
- Durham, J. (2023). *The differences and similarities of Restorative Justice and Mediation*. Retrieved from <https://www.pathways2rc.com/news/2018/10/24/the-differences-and-similarities-of-restorative-justice-and-mediation>
- Ferlazzo, L. (2023). *Restorative Justice is not an alternative to Discipline*. Retrieved May 15, 2024
- Johnstone, G., & Van Ness, D. (2007). *Handbook of Restorative Justice*.
- Lappi-Seppala, T., & Tony, M. (2011). Crime, Criminal Justice, and Criminology in the Nordic Countries. *Crime and Justice*, 40(1), 1. doi:<https://doi.org/10.1086/660822>
- Marshall, T. (1999). *Restorative Justice: An Overview*. London: Home Office Research Development and Statistics Directorate.
- Matteucci, G. (2015). Mandatory mediation, the Italian experience. *Revista Eletrônica de Direito Processual*, 16(16). doi:<https://doi.org/10.12957/redp.2015.19964>
- Mcevoy, K. (2003). *Criminology, Conflict Resolution and Restorative Justice*. Retrieved from https://www.academia.edu/22594061/Criminology_conflict_resolution_and_restorative_justice
- Morrison, B., & Ahmed, E. (2006). Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence. *Journal of Social Issues*, 62(2), 209. doi:<https://doi.org/10.1111/j.1540-4560.2006.00447.x>
- Oprisan, S. C. (2011). *The person deprived of liberty and the restorative justice*. Retrieved from <http://data.europa.eu/eli/dir/2012/29/oj,>>.
- Pager, D. (2003). The Mark of a Criminal Record. *American Journal of Sociology*, 108(5), 937. doi:<https://doi.org/10.1086/374403>

- Paliero, C. (1992). Diritti penale classico versus diritto penale moderno: cambi di paradigma nel sistema penale attuale? *Revista da Faculdade de Direito UFPR*. doi: <https://doi.org/10.5380/rfdufpr.v27i0.8976>
- Rabaan, H., & Dombrowski, L. (2023).urvivor-Centered Transformative Justice: An Approach to Designing Alongside Domestic Violence Stakeholders in US Muslim Communities. <https://doi.org/10.1145/3544548.3580648> .
- Rosenblatt, F. (2015). *The Role of Community in Restorative Justice*. Taylor & Francis.
- Shoham, S.G., Knepper, P. & Kett, M. (2010). *International Handbook of Victimology*. Routledge.
- Talbert, B. (2024). *Frontiers in Sociology*. Retrieved from Restorative justice as customized creativiti: Tinker Bell's magic: <https://doi.org/10.3389/fsoc.2023.1220470>
- Tokdemir, S. (2011). Ceza adaleti sistemine yeni bir yaklasim: Tamamlayici bir sistem olarak "Onarici Adalet". *Erzincan University Hukuk Fakultesi Dergisi*, 75.
- Vanfraechem, I., Bolívar Fernandez, D & Aertsen, I. (2015). *Victims and Restorative Justice* .Taylor and Francis.
- Umbreit, M. S. (2001). *The Handbook of Victim- Offender Mediation*. Josey- Bass INC.
- UNGA. (1985). *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*.
- Uudag, S. (n.d.). Onraici ve Cezalandirici adalet: Pradigma Degisikligini tetikleyen sartlar. *Polis Bilimleri Dergisi*, 13, 129.
- Wenzel, M., Okimoto, T., Feather, N., & Platow, M. J. (2007). Retributive and restorative justice. *Law and Human Behavior*, 32(5), 375. doi:<https://doi.org/10.1007/s10979-007-9116-6>
- Wood, W. (2013). Soliciting Community Involvement and Support for Restorative Justice Through Community Service. *Criminal Justice Policy Review*, 26(2), 131. doi:<https://doi.org/10.1177/0887403413499580>
- Wright, 'The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research. Mark S. Umbreit. Jossey-Bass, San Francisco, 2001 - Book Review' (2001) 11 Criminal Behaviour and Mental Health, <<https://onlinelibrary.wiley.com/doi/10.1002/cbm.393>>.
- Zehr, H. (2015). *The Little Book of Restorative Justice* . Simon and Schuster.
- Zehr, H. (2018). *Changing Lenses*.