THE PERSON DEPRIVED OF LIBERTY AND THE RESTORATIVE JUSTICE

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Abstract

The concept of restorative justice offers a new way of approaching and understanding all the concepts with which professionals in the field of criminal law work: crime, offender, victim, criminal trial, criminal sanction, imprisonment, etc.

Restorative justice aims to balance the problems of the victim and the community, as well as the need for social reintegration of the offender, to assist the victim in the recovery process and to give all parties the right to be present and to be actively involved in justice. caused by the commission of an offense, based on an approach involving not only the parties but also the community at large, in close liaison with specialized institutions in the field.

Starting from the hypotheses according to which the crime has its origins in social conditions and community relations, that crime prevention depends on the assumption by local and central authorities of responsibilities related to social policy to remedy the conditions that cause crime, the consequences of the crime can not be fully resolved for the parties without their personal involvement, the main objectives of restorative justice are:

- to respond to the needs of the victims - material, financial, emotional and social needs (including those close to the victim, who may also be affected);

- to prevent recidivism by reintegrating criminals into the community;

- to determine the criminals to actively assume responsibility for their deeds;

- to create a community that supports the rehabilitation of criminals and victims and that is active in crime prevention;

- to provide some means of avoiding the burden of the criminal system, costs and delays, but also the abandonment by society of passive roles in traditional retributive, rehabilitative justice..

Keywords: *offender, victim, compensation, mediation, enforcement.*

1. Introduction

Initiated in North America in the 1970s[1], this criminal philosophy is based on programs aimed at reconciling the victim and the offender and identifying appropriate solutions to repair the harm caused by the crime, developing as an alternative to the retributive criminal system.

In 1996, the British criminologist Tony Marshall[2] offered the world a definition of the concept of restorative justice, a definition recognized as valid by the entire world movement in this field: *Restorative Justice is a process whereby parties with as take in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.*

In his opinion, Restorative Justice is based on the following *assumptions*:

- that crime has its origins in social conditions and relationships in the community,
- that crime prevention is dependent on communities taking some responsibility (along with local and central governments responsibility for general social policy) for remedying those conditions that cause crime,
- that the aftermath of crime cannot be fully resolved for the parties themselves without facilitating their personal involvement,
- that justice measures must be flexible enough to respond to the particular exigencies, personal needs and potential for action in each case,
- that partnership and common objectives among justice agencies, and between them and the community, are essential to optimal effectiveness and efficiency
- that justice consists of a balanced approach in which a single objective is not allowed to dominate the others.

2. Approaching and interpreting the concept of restorative justice

From the perspective of international documents[3], the interest of specialists in implementing the ideas of

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[1] The name of Restorative Justice comes from the English language, which demonstrates the Anglo-Saxon origins of the concept that was first applied in 1974 when two Canadians, Mark Yantzi and Dave Worth, asked a judge in Kitchener, Ontario, to allow them to try a different approach in the intervention of justice on two young criminals arrested for destroying property. The idea was to allow the victim and the offender to play a leading role in deciding on the most appropriate method of responding to the harm done. *Apud* Elena Bedros in the article *Conceptul de justiție restaurativă și legătura acestuia cu tendințele moderne de dezvoltare a procesului penal*, p.39, available on line: http://www.legeasiviata.in.ua/archive/2014/6/8.pdf, consulted on 04.03.2021, 04:56 hour.

[2] T.Marshall, *Restorative justice: an overview,* pp.5-6, available on line: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf, consulted on 03.03.2021, 18:58 hour.

[3] National Institute of Criminology, Restorative Justice Programs in the Contemporary World (Documentary Analysis), 2005, p.11, available on line pe http://criminologie.org.ro/wp-content/uploads/2015/08/Programe-de-justitie-restaurativa-in-lumea-contemporana-Studiu.pdf, document consulted on 16.08.2018, ora 16:26

restorative justice in judicial practice in more and more countries around the world, as well as the introduction of restorative practices that meet high methodological requirements, but also take into account the particularities of each state, has materialized in the elaboration of international documents regarding the basic principles of restorative justice in criminal matters.

One of the basic international documents in the field of restorative justice is *ECOSOC Resolution 2012/12 Basic principles on the use of restorative justice programmes in criminal matters*, adopted on 37th plenary meeting 24 July 2002 which, in art. 2 of the Annex defines the restorative process as means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

The same document, in art. 3, defines the "Restorative outcome" as means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

Restorative outcomes[4] include responses and programs such as reparation, restitution, and community service to meet individual and collective needs, offender reintegration, family and community reconciliation, individual and group counseling in prisons, mediation actions between the offender and the victim, various educational programs in the field of communication, literacy, schooling, professional qualification, moral education, special programs for preparation for release, with the active participation of the detainee, family and community in which will return.

The model of restorative justice was one of the topics addressed at United Nations congresses, such as: the 11th Congress in Bangkok, April 18-25, 2005, and the XIIth Congress in El Salvador (Brazil), between April 12-19, 2010.

The work of both congresses focused on the need to reform the criminal system and by implementing the model of restorative justice, as an alternative to the traditional criminal system, to avoid the harmful effects of incarceration, in order to reduce the workload of courts, emphasizing the need for Reintegrate alternatives to incarceration, which may include community service work, restorative justice, electronic surveillance, and the need to support rehabilitation and reintegration programs, including those aimed at correcting criminal behavior, along with educational programs and vocational for convicts[5].

The approach and interpretation of the concept of restorative justice have also been established on the European continent[6] because the most vulnerable persons are those who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents, are in need of special support and legal protection. Victims of terrorism also need special attention, support and social recognition. An integrated and coordinated approach to victims is needed, in line with the Council conclusions on a strategy to ensure fulfilment of the rights of, and improve support for, persons who fall victims of crime.

Emphasizing, as a matter of priority, the support and recognition of the rights of all victims, so that they receive adequate support to facilitate their recovery and to have sufficient access to justice, *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*[7], in art.12 provide that Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services.

In this spirit, as the terminology of „restorative justice" developed around the globe[8], Emphasizing the benefits of such a way of compensating for damage caused by crime, as well as the limitations that characterize traditional approaches to criminal justice, having regard to the provisions of Directive 2012/29 /EU, Recommendation CM/Rec(2018) 8 concerning

[4] I.M.Rusu, *Drept execuţional penal,* Editura Hamangiu, Bucureşti, 2015, p.417.

[5] E.Bedros, *Conceptul de justiţie restaurativă şi legătura acestuia cu tendinţele moderne de dezvoltare a procesului penal*, p.39, available on line http://www.legeasiviata.in.ua/archive/2014/6/8.pdf, consulted on 01.03.2021, 19:17 hour.

[6] *The Stockholm Programme — an open and secure Europe serving and protecting citizens*, *2010/C 115/01*, art.2. 3. 4, consulted on 04.03.2021, 07:03 hour, available on line: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:52010XG0504(01).

[7] Published in Official Journal of the European Union, series L nr.315/14.11.2012, available on line http://data.europa.eu/eli/dir/2012/29/oj, consulted on 04.03.2021, 07:21 hour .

[8] *Commentary to Recommendation* CM/Rec(2018)8 *of the Committee of Ministers to member States concerning restorative justice in criminal matters*, available online on https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808cdc8a, consulted on 26.02.2021, 18:35 hour.

restorative justice in criminal matters[9] updated the list of international documents and agreements considered and placed greater emphasis on the principles of restorative justice and recent advances in studies in this field, adding in due course to the growing number of international instruments working in the field of use and evolution of restorative justice. The recommendation reflects the idea that restorative justice should be regulated only to the extent necessary and that restorative justice services should be independent in carrying out their mission. The Recommendation also calls on the Member States to strengthen the capacity to exercise restorative justice in all geographical areas under their jurisdiction, for all offenses and all stages of criminal proceedings.

In the Romanian criminal system, most part of this directive are already transposed, especially by the provisions of the Code of Criminal Procedure, and of Law no. 211/2004[10] on certain measures to ensure the protection of victims of crime.

However, there are also a number of provisions of the directive that require adaptation to domestic law by creating a legislative framework to amend and supplement Law no. 211/2004 and Law no. 192/2006[11] on mediation and organization of the mediator profession.

By Law no. 97 of April 27, 2018[12] on some measures to protect victims of crime, the provisions have been transposed the provision of art. art.3 para. (3), art. 4 para. (1) leter i and j, art. 5 para. (1) and (3), art. 12 para.(1) letter c and art. 19 para. (2) of Directive 2012/29 / EU, in order to ensure that victims are treated with respect and to enable them to make informed decisions about their rights, as well as their participation in the mediation procedure.

These provisions must be correlated with the provisions of Criminal Procedure Code which in art.16 para.1, letter g (concluding a mediation agreement being one of the cases that prevent the initiation and exercise of criminal proceedings), art. 23 para. 1 (the transaction, mediation and recognition of civil claims), art.81 para.1, letter i (right of the injured person to resort to a mediator), art. 83 para.1 letter g (right of the defendant to appeal to a mediator), art. 108 para. 4 (communication of rights and obligations), art. 111 para.1, letter b (the manner of hearing the injured person), art. 313 para.3 (mediation is one of the cases of suspension of the criminal investigation), art. 318 para.4 (waiving the criminal investigation), art. 483, para.3 (submission by the prosecutor to the court of the plea agreement, accompanied by the transaction or the mediation agreement), art. 486 (settlement of the civil action), recognizing both the injured person and the defendant the right to appeal to a mediator in the cases provided by law.

By forming the „victim-offender-community triad" [13] this new criminal philosophy differs from that of traditional justice in that restorative justice focuses on repairing harm caused by crime, while traditional justice focuses on punishing a crime; then, restorative justice is characterized by dialogue and negotiation between the parties, while traditional justice is based on the principle of adversarial proceedings, and, thirdly, restorative justice requires members of the community or organizations to take an active role, to take responsibility for both sanctioning, as well as for the recovery of the delinquent, while for traditional justice, the "community" is represented by the state[14].

Payment of damage to the victim, requirement for parole

Mediation, in the criminal trial, as an alternative method of resolving conflicts, is applied both on the criminal side and on the civil side of the criminal trial. On the criminal side , the provisions on mediation apply only in cases of offenses for which, according to the law, the withdrawal of the prior complaint or reconciliation removes criminal liability[15].

The law does not limit, in relation to the type of crime committed, the possibility of resorting to mediation to resolve the civil side of the case, therefore recognizing the right to appeal to a mediator to resolve the civil side of any criminal trial.

However, the exercise of this right may be restricted in certain situations, such as taking a preventive measure against the defendant which involves, *inter alia*, a ban on approaching of the injured person and communicating directly with this person or

[9] Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies, available on line:https://www.coe.int/en/web/prison/home/-/asset_publisher/ky2olXXXogcx/content/recommendation-cm-rec-2018-8, consulted 05.02.2021, ora 18:35.

[10] Published in Monitorul Official Gazette of Romania, Part I, nr. 505/ June 4, 2004.

[11] Published in Monitorul Official Gazette of Romania, Part I, nr. 441/ May 22, 2006, with subsequent amendment.

[12] Published in Monitorul Official Gazette of Romania, Part I, nr. 376/ May 2, 2018.

[13] M.I. Rusu, *op.cit*, p.416.

[14] K. Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, p.6, To appear in Restorative Justice: From Philosophy to Practice, edited by Heather Strang and John Braithwaite, Australian National University.Aldershot:Dartmouth(2000), available on line https://www.griffith.edu.au/__data/assets/pdf_file/0028/223759/2001-Daly-Revisiting-the-relationship-pre-print.pdf, consulted on 16.02.2021, 10:53 hour.

[15] Art.II paragraph 2, thesis II of the Law no.97 / 2018 on some measures for the protection of victims of crime, the conclusion of a mediation agreement in the criminal side, under the conditions of this law, may occur until the reading of the act of notification of the court. By Decision no. 397/15 June 2016 of the Constitutional Court, following the debate on the exception of unconstitutionality of the provisions of art. 16 par. (1) lit. g) the final thesis Criminal Procedure Code and of art.67 of Law no.192 / 2006 on mediation and organization of the mediator profession, the exception of high unconstitutionality was admitted and it was established that these provisions are constitutional insofar as the mediation agreement on the offenses for which the reconciliation may occur produces effects only if it takes place until the reading of the act of notification to the court..

a reasonable suspicion that the defendant is trying to fraudulent deal with injured person. However, the parties of the criminal dispute, both on the criminal side and on the civil side, may give special power of attorney to another person to conclude the mediation contract, thus having the possibility to avoid direct contact between the subjects of the crime[16].

Restorative justice is in the criminal code a new condition imposed by law the persons deprived of liberty until the date of analysis in the parole board. We note in practice that at the level of parole board there is intransigence regarding this criterion, the presentation of payment receipts being mandatory.

However, some inmates, although they have been serving a long period of imprisonment, during which time they have spent large amounts of money deposited by relatives in the penitentiary account, far beyond their needs in detention, did not show any interest in paying these expenses to the civil parties, to the state (in this case National Agency for Fiscal Administration-ANAF), considering themselves persons without income from work, justifying their disinterest by the fact that, being several participants in the crime, they have joint and several obligations in the damages payment, so it is not known who would be the share of each defendant in these payment, that he cannot contact the other defendants because they are out of the country or are imprisoned in other prisons and also lack financial means, that the injured person no longer lives at the address known to the detainee in an attempt to make a payment agreement with this person, that the injured person wishes to be paid in full the amount due by the beneficiary of the damages payment, etc.

We consider as correct the practice adopted by the parole board to order the postponement of the analysis of the situation of the inmates who does not met the condition of full payment of damages (art. 99 para. Letter c and art. 100 para. 1 letter c of Criminal Code), until the intervention of one of the following situations:

- full payment of damages;
- proof that the detainees has made every effort to pay the damages, i.e. payment agreements concluded between the detainee and the legal persons of the civil parties (e.g. Ambulance Service, Emergency Reception Unit, etc.) or between him and the injured persons, agreement authenticated by a notary in the latter situation, from wich to result an agreement on the payment schedule, the opening an account at CEC Bank in the name and at the disposal of the injured person in which to transfer the amounts due to the latter, until full payment, requests made by the detainees addressed to the Financial Service, requesting the retention of a percentage of the amounts from the account or in order to pay the damages or proof of extinction of the obligation by compensation (deed regarding the transfer in order to extinguishment of the payment obligation);
- or proof that the injured person has expressly waived compensation.

We cannot agree with the statements of the detainees who are dissatisfied with the fact that the discussion of their situation in the parole board has been postponed precisely because of non-payment of damages, which would, in their view, be an abusive decision of parole board, the detainees considering that if they show a certificate from ANAF that they do not appear with income, it means that they are unable to pay the damages, even if during the execution of the custodial sentence they spent thousands lei from their account, much more than had to pay to the civil parties, and did not take the slightest step in order to pay these damages, which proves the bad faith on the part of the convict.

The Constitutional Court[17] ruled that the premise that the criticized provisions exclude from the right to obtain conditional release those detainees who do not have the means to pay compensation is wrong.

Thus, from the very way of regulating the provisions of art. 99 para.1 letter c) Criminal Code, it results that the full fulfillment of the civil obligations established by the conviction decision is circumstantial, precisely from the perspective of the individual financial possibilities, the convicts having the possibility to prove the fact that they did not have the material resources required to fulfill the civil obligations. Thus, the non-fulfillment of this condition can be found only if the convicted person, who requests parole, does not fulfill in bad faith the civil obligations established by the conviction, and not in all cases, regardless of the existence or not of material resources.

Given that the proof of the impossibility of voluntary payment of civil obligations can be made by certifying the lack of income or by a certificate issued by the City Hall (especially in the case of detainees from rural areas) that the person does not own properties, by correlating this information with those resulting from the analysis of the amount in the personal account, we ask ourselves, what about the victim"s right to be compensated?

Does the impossibility of the convict's voluntary payment of civil obligations mean the disappearance of the obligation to repair the damage? Or can the prescription of the right of the civil parties to request the forced execution it can be considered as a tacit, virtual waiver of damages?

The answer can only be negative, the person deprived of liberty will not be exempted from the payment of civil obligations because the civil party did not enforce the decision, and thus his right to request enforcement was prescribed.

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[16] N.Volonciu (scientific coordinator), Codul de procedură penală comentat, p.236, Editura Hamangiu, Bucureşti, 2017.

[17] Decision of the Constitutional Court nr.57 on February 2, 2017, pct. 20, regarding the exception of unconstitutionality of the provisions of art. 100 para. (1) lit. c) of the Criminal Code and the provisions of art. 97 para. (3) lit. c) of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial, published în Official Gazette, Part I, nr. 366/May 17, 2017.

The text of the law was established precisely to verify the attitude of the person deprived of liberty towards the obligations imposed by the court, as well as to protect the interests of civil parties, so that the prescription of the right of civil parties to enforcement cannot be considered tacit waiver, as long as an express manifestation of the will of the civil party is required.

The essential condition imposed by Art. 99 para.1 letter c) of the Criminal Code, the second thesis, that of being a debtor in good faith, i.e. to prove that, despite all his efforts, it was impossible for him to fulfill his obligations is not fulfilled if the convict avoided the execution of civil damages, waiting until expiration of the right of the civil party to request enforcement.

The prescription[18] concerns only the forced pursuit of the execution of the claim resulting from the conviction decision, without affecting in any way the validity of the obligation, according to art. 707 para (2) Code of Civil Procedure, reason for which, if the debtor pays the obligation after the expiration of the limitation period, he can no longer request the refund. However, if the statute of limitations does not affect the claim itself, it is natural that the person deprived of liberty should be obliged to pay it in order to be offered parole.

The reason for the condition examined does not consist in forcing the convict to pay compensation, which could no longer be achieved as a result of the intervention of the statute of limitations, but in that his efforts to repair the damage caused by the crime show a subjective position on the consequences and an element of appreciation of the extent to which he has become a responsible person, the discharge of civil obligations being precisely the means by which this is established.

We consider that it is necessary *de lege ferenda* to amend Art. 99 para.1 letter c) and art.100 para.1 letter c) of the Criminal Code, by introducing in their body as a way of extinguishing the civil obligations, the express waiver of the civil party to the compensations due to him, following that the text of the law should have the following content: "the convicted person has fully fulfilled the civil obligations established by the conviction, unless he proves that he had no possibility to fulfill them or the civil party he expressly waived the compensation".

3. Conclusions

Parole is a privilege, not a constitutionally protected right, being a „commitment" made by the detainee to the community through its ability to manage interpersonal relationships, by setting significant goals in education or training, through involvement in the activity self-improvement and therapy, using available resources (dwelling house, financial stability, family support) will overcome the recognized problems and help the offender to continue to serve in his efforts to reintegrate the community and within his family unit as useful productive individual.

Compared to the way of regulating the parole institution, we note the emphasis placed by the legislator on proving by the detainee good faith only in terms of payment the civil expenses to which he was obliged by the court decision, not in respect of other expenses the detainee was obliged by the court during the execution of the sentence, for example the judicial expenses to the state as a result of the rejection of some requests, so that their non-payment will not influence in any way the decision of the parole board, as long as the civil expenses of the sentence were paid.

Considering the fact that the lack of obligations constitutes one of the proofs of good faith, we consider that another proposal *de lege ferenda* would be welcome, consisting in the introduction of a new condition at Art. 99 par.1 letter c) and art.100 par.1 letter c) of the Criminal Code, that of ordering the deprivation of persons deprived of liberty to pay of legal expenses due to the state during detention, in the sense that "the convicted person has fulfilled his established civil obligations required by the court in which case he proves that he has no possibility of fulfilling them".

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[18] See Minutes of the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and of the courts of appeal Bucharest Court of Appeal, 16-17 mai 2019, p.3, available on- line http://inm-lex.ro/fisiere/d_2441/Minuta%20intalnire%20presedinti%20sectii%20penale%2016%2017%20mai%202019.pdf., consulted on 09.03.2021, ora 06:43.

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