

Mediation Procedure in Case of Crime of Preventing the Freedom to Practice Religion

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ABSTRACT: In this article we intend to highlight the particularities of the mediation procedure in the case of crimes of preventing the freedom to practice religion provided in article 381 of the Romanian Criminal Code. Mediation applies in criminal cases concerning offenses for which, according to the law, the withdrawal of the prior complaint or the reconciliation of the parties removes the criminal liability. According to the Criminal Code in force, crime of preventing the freedom to practice religion is one of those crimes that are subject to mediation. Mediation includes two phases: the phase preceding the mediation procedure, in which the parties come to find out about the advantages of mediation. Once they have taken note of this, the parties shall decide whether or not to accept the mediation and shall send the invitation to mediation to the opposing party through the mediator. A second phase is the actual mediation, which can take place in a single session or more, being both joint sessions and separate sessions, depending on the will of the parties. The mediation procedure can be concluded by a mediation agreement, by denouncing the mediation contract or the failure of the mediation is ascertained.

KEYWORDS: religious freedom, crime, parties, prior complaint, criminal mediation

Introduction

In Romania, freedom of conscience is one of the fundamental freedoms of citizens, guaranteed by the Romanian Constitution in art. 29. The Constitution prohibits restrictions on freedom of conscience and religion, as well as forcing an individual to adopt a religious belief contrary to his or her beliefs. The constitution stipulates that all cults are autonomous from the state, and religious groups are free to organize “according to their own statutes”.

Constituting an essential value, the social relations that revolve around freedom of conscience are subject to the provisions of Law no. 489 of December 28, 2006, on religious freedom and the general regime of cults, republished in Official Gazette no. 201 of March 21, 2014, essential in this regulation being to ensure the full freedom of conscience and the exercise of religious cults or the activity of religious associations.

Mediation is the legal tool so necessary today for resolving various types of conflicts in society. In the opinion of D.-V. Diaconescu and not only, mediation is the only alternative to relieve the judge of the suffocating burden of solving the numerous and complex cases with which he enters the courtroom, given that the austerity budgets of state institutions do not create current premises for increasing staffing schemes courts (Diaconescu 2012, 1).

Law no. 192 of 16 May 2006 on mediation and the organization of the mediator profession, published in the Official Gazette no. 441 of May 22, 2006, as subsequently amended and supplemented, contains general regulations regarding the conduct of mediation, which may take place outside or in a dispute pending before the prosecutor’s office or the court. Within Chapter VI entitled “Special provisions on mediation of disputes”, the law contains two sections, including mediation in criminal cases (art. 67-70).

Like other forms of conflict resolution, the parties are essential to the mediation process. With regard to persons who may be parties to mediation, the law provides that parties to mediation may be natural persons and legal persons. The quality of party to the mediation procedure is acquired once the mediation contract or clause is signed. As regards the notion of

party to the mediation procedure, it does not overlap with the notion of party to the judicial process both in scope and importance. Thus, persons who, in a judicial process, would not meet the conditions to be a party can be part of the mediation process (procedural quality, etc.). To this is added that category of conflicts which, as a rule, are suitable for mediation, not for a trial, a situation in which the mediator will not become a party to the process. However, in some cases, the scope of the notion of part of the mediation process coincides with that of the judicial process. Thus, in the case of criminal mediation, the parts of the judicial process coincide with those of the mediation process. At the same time, if in the judicial process the role of the parties is “essential”, we could say that in the mediation procedure it is overwhelming, as mediators have a much more important and active role, being those who give and accept the solution to the conflict between them (Păncescu 2014, 41).

In addition to those directly involved in the conflict, other persons may also have the status of party. Thus, in order for mediation to have mutually convenient, efficient and lasting results, we concede that at least sometimes it is necessary to involve other people who are not directly involved in the conflict. Thus, among them could be: the minor’s parents, the employer etc. This circle of people differs from other participants in mediation, such as: the representative, the lawyer, the expert, the witness, the interpreter, etc. (Păncescu 2014, 42-43).

With regard to the relationship between the mediators, it should be noted that the parties to the conflict, most often resulting from non-compliance with a contract, are not always on an equal footing. But, in mediation, the report tends to balance, which is one of the great strengths of this procedure (Păncescu 2014, 43).

As mediation aims to resolve conflicts between individuals, it goes without saying that there are at least two opponents in this procedure. However, the law allows mediation to take place between more than two parties. As no distinction is made, in the case of co-participation, both several natural and legal persons may be parties to the mediation, as well as from both categories; also, the number of parties with the same interests may differ, as may the number of parties with opposing interests. Such cases can be encountered especially in the case of disputes pending before the courts, brought before a judicial mediation procedure. Regarding co-participation, we also mention the fact that it is possible that only some of the parties reach an agreement, while others close the mediation procedure, in which case they will be able to resort to trial, arbitration, etc. (Păncescu 2014, 43-44).

In the case of offenses referral to prior complaint, such as crimes of preventing the freedom to practice religion, the judicial bodies are obliged to inform the parties about the possibility and advantages of using mediation and to guide them to resort to this method of resolving their disputes.

Crime of preventing the freedom to practice religion

Article 381 - *Preventing the freedom to practice religion* of Romanian Criminal Code stipulates:

“The act of preventing or disturbing the freedom to practice any ritual specific to a religion, which was organized and operates according to the law, shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

The act of forcing a person, by coercion, to take part in the service of any religion or to perform a religious act related to the practice of a religion shall be punishable by no less than 1 and no more than 3 years of imprisonment or by a fine.

The same penalty shall apply to forcing an individual, by violence or threats, to perform a religious act forbidden by the religion, organized according to the law, to which he belongs.

Criminal action shall be initiated based on a prior complaint filed by the aggrieved party”.

The crime of preventing the freedom to practice religion protects the relations regarding the social coexistence, whose normal formation, progress and development are conditioned by the defense of the freedom of the person’s conscience and the unhindered exercise of the ritual of a

religious cult that is recognized and works according to the law. The existence of such deeds in social life determined the legislator to incriminate them in order to defend the freedom of the person's conscience and the free exercise of the ritual of a religious cult (Grofu 2016, 96).

An organized cult presupposes the existence of worshipers (priests), houses of prayer (churches, temples), places of deposit of the remains of the deceased (cemeteries, crematoria), the community of people belonging to that cult. The exercise of worship is done through religious services, by attending houses of prayer, by baptismal ceremonies, weddings, funerals, etc. The protection of criminal law is addressed to the entire religious community, which is guaranteed the freedom of any form of worship (Diaconescu and Duvac 2009, 987).

The special legal object of the crime of preventing the freedom to practice religion is represented by the social values of freedom of conscience and the free exercise of the ritual of a religious cult, as well as by the social coexistence relations formed around and due to these social values. Criminal protection concerns the respective social relations, and not the cults themselves, whose content and ritual may vary from one cult to another and which may persist or disappear due to causes outside the legal protection (Dongoroz et al. 1972, 651).

In the second and third paragraphs of the text, the protection of the law is addressed to each person who is guaranteed the freedom not to participate in religious services, not to perform religious acts against his will (Vasiliu and Pavel 1977, 428), respectively of not fulfilling, by being subjected to violence or threat, an act forbidden by the cult, organized according to the law, to which it belongs.

The material object of this crime may be the body of the person or persons on who acts of violence or coercion would be committed in order to prevent the free exercise of a religious cult. Things that serve or are intended to serve the exercise of religious worship may also be a material object if the action is committed against them which results in the impediment or disturbance of the free exercise, for example, the goods are destroyed, stolen or hidden for this purpose. When this happens, it is in real contest with the crime of theft or aggravated theft or the crime of destruction.

The direct active subject - the perpetrator of the crime of preventing the freedom to practice religion can be any person who is criminally liable, without any quality being required.

In any case, this crime is likely to be committed in the form of instigation and complicity.

The main passive subject is the state, as a representative of the society that is directly threatened by the damage caused to the relations on social coexistence and the social values to which they correspond. In addition to the main passive subject, the secondary or adjacent passive subject may be the person against whom the action was taken to prevent the free exercise of the ritual of a religious cult or who was forced, by coercion, to it. The adjacent passive subject can be singular or plural.

In the case of the standard offense provided in article 381 para. (1) of the Romanian Criminal Code, the scope of persons who may be secondary passive subjects is restricted to those who share the religious cult whose free exercise is impeded or disturbed.

In the case of the variant provided in par. (2), the scope of persons who may be passive subjects of the crime does not suffer any restriction, so that any person whether or not he shares the cult in the exercise of which he is obliged to participate or assist, may be a secondary passive subject of the crime. The plurality of passive subjects will determine a real plurality of crimes of impeding the freedom of worship (Diaconescu and Duvac 2009, 989).

In the assimilated variant provided in par. (3), the scope of persons who may be secondary passive subjects is restricted to those who are obliged, by violence or threat, to perform an act prohibited by the cult, organized according to the law, to which they belong (Grofu 2016, 98).

Neither the aggrieved party nor the offender can be forced to accept mediation, but in case they consent to it, mediation is to take place in such a way that each of the parties' right to legal assistance and, if that's the case, an interpreter, is guaranteed (Păroșanu, Balica and Bălan 2013, 9).

The objective side

1. The material element is different in the three variants of the crime of preventing the freedom to practice religion.

The material element of the typical crime, provided in art. 381 para. (1) of the Romanian Criminal Code consists in the action of preventing or disturbing the free exercise of the ritual of a religious cult that is organized and operates according to the law.

At the variant provided in par. (2) the material element consists in the action of forcing a person to participate in the religious services of a cult or to perform a religious act related to the exercise of a cult without his will. To compel means to cause a person to commit the said acts against his will and conscience.

At the variant provided in par. (3) the material element consists in the action of forcing a person, by violence or threat, to perform an act prohibited by the cult, organized according to the law, to which it belongs, against his will and conscience.

2. The immediate consequence is the creation of a state of danger for the relations of social coexistence related to the freedom of conscience and the freedom to exercise a religious cult, a state in which this cult cannot be exercised or cannot be exercised normally.

3. The causal link between the action which constitutes the material element and the immediate consequence of the analyzed crime results implicitly from the materiality of the deed committed by the active subject.

The subjective side

In its standard form, the crime can be committed with both direct and indirect intent, the latter being the case when the perpetrator, although he did not seek to prevent or disturb the free exercise of the ritual of a religious cult, nevertheless accepted the consequences of the event and thus the emergence of a state of danger.

In the case of the species variants from par. (2) and (3) the intention is direct because the person who obliges another, by coercion, to participate in the practice of a religious cult, respectively, by violence or threat, to perform an act prohibited by the cult, organized according to law, to which it belongs not only to predict with certainty the result of its action of coercion, respectively of violence or threat, but it aims precisely at the production of this result.

Preparatory acts, although possible, are not incriminated. *The attempt*, although possible, is not incriminated. The consumption of the crime takes place at the moment of committing the incriminated actions and of producing the state of danger for the social relations protected by the text of article 381 of the Romanian Criminal Code.

Penalties

In the standard version, crimes of preventing the freedom to practice religion are punishable by imprisonment from 3 months to 2 years or a fine. In the case of the species variants provided in par. (2) and (3), the sanction is imprisonment from one to 3 years or a fine.

The criminal action is initiated upon the prior complaint of the injured person, the withdrawal of the prior complaint removing the criminal liability of the person in respect of whom the complaint was withdrawn, according to art. 158 para. (2) of the Romanian Criminal Code. Jurisdiction in the first instance rests with the court.

The preliminary complaint is the procedural act by which the person injured by a crime manifests his will to be prosecuted by the perpetrator, an act without which the criminal liability cannot intervene and, as a result, cannot begin or continue criminal proceedings (Coadă 2013, 136). This can be formulated only by the injured person, both individuals and legal entities. Under certain conditions it can be formulated by other people.

In the doctrine, the withdrawal of the preliminary complaint is defined as representing the manifestation of the will of the injured person to waive the criminal complaint previously introduced, until the final decision (Bulai and Bulai 2007, 369-371). Withdrawal of the prior complaint is a cause that removes criminal liability, but does not remove civil liability. Thus, the injured person can apply to the civil court, within the general limitation period, to recover the damage.

Mediation procedure in case of crime of preventing the freedom to practice religion

The mediation procedure can be carried out in several stages, namely:

- Before notifying the judicial body;
- Between the moment of notification and the moment of starting the criminal investigation;
- After the start of the criminal investigation;
- In the trial phase.

Art. 69 of the Mediation Law refers to the situation in which the parties resort to mediation, before notifying the criminal investigation bodies by the victim with the prior complaint, namely in the extra-procedural phase. At this point, recourse to the mediation procedure between the parties to the conflict as a result of the crime of preventing the freedom to practice religion can take place at the initiative of either of them (victim or perpetrator). If the mediation ends with the reconciliation of the parties, the injured person can no longer notify, for the same deed, the criminal investigation body or, as the case may be, the court, the mediation agreement being a cause of impediment for initiating criminal proceedings.

After the beginning of the criminal trial in the case of crimes of preventing the freedom to practice religion, the parties may resort to mediation, either on their own initiative or on the recommendation of the judicial bodies, with the consent of the parties. The moment until which this procedure can be ordered during the criminal trial is the finality of the decision. The mediation ordered during the criminal trial may end without the parties reaching a result. For this reason, it was provided to suspend the criminal trial during the mediation. The suspension of the criminal trial lasts until the closing of the mediation, but not more than 3 months from the date of signing the mediation contract.

If the parties reach a result, the prosecutor or the court will resume the criminal trial and will order or pronounce, as the case may be, the waiver of the criminal investigation, respectively the termination of the trial. The parties will submit to the judicial body the agreement and the minutes of concluding the mediation in original and electronic format.

Prior procedure to concluding the mediation contract

Mediation is a process in which the parties participate voluntarily and which gives them the opportunity to decide, of their own free will, the fate of the conflict between them. In order to choose mediation, the parties must first of all express their will to resolve the conflict amicably, and not by other means. Then, they must choose mediation as the right means of resolving the conflict, among other amicable ways. When choosing mediation, an important role is played by the information session on mediation, the mediator's explanations, the recommendations of other authorities and institutions, but also the defenders who assist the parties (Păncescu 2014, 154).

The agreement of the will of the parties in the sense of resorting to mediation may meet either simultaneously or successively. Thus, they can agree on mediation, both through a prior mediation clause contained in a contract and by appearing together in front of a mediator. Alternatively, one of the parties may invite the other party to try to resolve the conflict through mediation, either in person or by presenting to the mediator, proposing mediation to the other party, according to art. 43 para. (1). The offer can be accepted or rejected within a period set by the mediator, which cannot exceed 15 days. It has as object the acceptance of mediation and the conclusion of a mediation contract, subject to the rules regarding the offer and the acceptance of the offer (Păncescu 2014, 154).

The invitation will be written and will be sent by means that can ensure the confirmation of receipt (registered letter, fax, e-mail etc.). The invited party may accept or reject the offer made. Acceptance can be made by presenting it to the mediator, or by letter addressed to the mediator. The mediation contract can only be signed in front of the mediator and in the presence of all parties.

Per a contrario, the party to whom the invitation to mediation was sent may refuse. The refusal of the mediation offer may be express or tacit, either by refusing to respond to the invitation, or by not presenting the mediator on two fixed dates, for reasons not attributable to him. Express refusal can only be made in writing.

Once an agreement has been reached on the use of mediation, the next important step is to choose a mediator. The mediator has the duty to refuse to take over a case, according to article 31 of Law no. 192/2006, if there is a conflict of interest that may affect its neutrality and impartiality.

The conclusion of the mediation contract marks the beginning of the mediation procedure.

Carrying out mediation

Mediation takes place in a restricted setting compared to the court, which means that only the parties will be present, who may or may not be accompanied by lawyers, counselors or trusted persons and the mediator, precisely to create a relaxing atmosphere for them.

If the parties wish to come to mediation accompanied by lawyers, counselors or someone you trust, even relatives or close friends, they can attend the meeting / mediation sessions, signing a confidentiality agreement.

Mediation is based on cooperation between the parties which is mainly based on negotiation and cooperation. The mediator stressed that parties cannot impose a solution, which derives from the fact that mediation, in essence, is an assisted negotiation parties. The mediator has no decision-making power over the content of the agreement, but he can propose some solutions to the parties or analyze their proposed solutions.

If the parties have already made a request for a summons or a prior complaint, they may address the mediator at any stage of the proceedings and may present the mediation contract to the judge to suspend the settlement of the case.

If the mediation presents some difficult or controversial aspects, the mediator may request, with the agreement of the parties, the point of view of a specialist. This is possible even if the mediator specializes in that area.

Closing the mediation procedure

The closure of the mediation procedure in the case of crimes of preventing the freedom to practice religion can take place in any of the ways provided by law: mediation agreement, failure of mediation or termination of the mediation contract.

If the parties reach an agreement, the mediation ends with a mediation agreement. This can be a total agreement, which means that the parties agreed on all the issues that were the subject of the mediation, but also partially, when only part of the issues were resolved. After

the conclusion of the agreement, the parties will go to the notary or to the court, as the case may be, for approval or authentication.

In the case of a partial agreement, the parties find another way to resolve the remaining unresolved issues, namely arbitration or the court.

The agreement concluded following the mediation has the value of a document under private signature. The parties may choose to authenticate or approve the agreement.

There is also the possibility that the parties do not understand each other. As a result, a report is signed to close the mediation procedure, and the parties can choose another way to resolve the dispute.

The minutes that will be used to conclude the mediation of crimes of preventing the freedom to practice religion should show whether the parties have been granted the stated guarantees, or, if that's the case, should state that the parties have waived their rights (Păroșanu, Balica and Bălan 2013, 9).

Regardless of the outcome of the mediation, the mediator must not lose his optimistic, relaxed tone that leads the party to a state of confidence in the mediator's ability and professionalism, to congratulate the parties in case of success, and in case of failure to thank the parties for their efforts for reaching an amicable settlement (Mitroi 2010, 52).

Conclusions

Mediation is a means of resolving disputes, along with other such modalities, whether jurisdictional or non-jurisdictional. Mediation does not exclude, in case of failure, the possibility for the parties to resort to trial or arbitration.

The lack of communication and dialogue between the people in conflict and the perpetrator of the crime of preventing the freedom to practice religion and its victim contributes to the perpetuation of a state of tension that increases the risk of more serious situations, even violence, and no reconciliation of success. At mediation, the emphasis is on taking responsibility, on restoring the relations between the parties through communication, which leads to the reduction of stress levels, accumulated tensions, resentments and last but not least to the creation, development and maintenance of a healthy environment in the family and community. Mediation in criminal cases is not free. This could lead to reluctance to use this dispute settlement mechanism. The legal expenses advanced by the state shall be borne by the party provided for in the mediation contract, as well as on the expenses advanced by the parties.

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