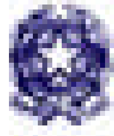

Ministero della Giustizia

DIPARTIMENTO GIUSTIZIA MINORILE

The Words of Mediation

The words of mediation

Although in Italy there is no law concerning penal mediation, several experimental experiences have been carried out. These have brought forward cultural wealth and a new work model based on the principle of a "community of cases", which is meant as an aggregation of a group of people who share work cases, and aims at a reciprocal confrontation and sharing of knowledge. The common target is the result of a negotiation within the group itself. *Participation* (the social experience of actively belonging to the community and being involved in a social initiative) and *reification* (i. e. the action of crystallization and conservation of ideas, knowledge, information, ways of interpreting, that arise from the negotiation processes which have taken place among the members of the community) thus become concrete products of the community of cases, which is therefore a valuable instrument to find a relation with the world and to give a new meaning to the experiences.

In this perspective the project "The words of mediation" has been carried out with the collaboration of the IPRS-Psychoanalytic Institute for Social Research, within the National Operational Project "Security for the Development of Southern Italy" (Programma Operativo Nazionale "Sicurezza per lo Sviluppo del Mezzogiorno d'Italia"), in order to draw up a glossary of the words that are used for juvenile penal mediation cases, to be used by those operating in this sector.

The idea of the glossary gives an answer to the theoretical complexity of this subject, to the uncertainty characterizing some key concepts and to the heterogeneity of the application systems. Its aim is not to flatten the existing differences, but to give way to a richer reflection which can be shared among several levels.

In other words the glossary overcomes the logic of searching for a pre-established model of mediation and wishes to enhance the variety of experiences that are taking place within a context of sharing basic cultural co-ordinates.

The following key words have been defined by operators working in Centres for juvenile penal mediation and by experts of this sector who belong to the academic and legal world.

The available material has been summarised and re-interpreted. This was necessary due to the amount of views expressed and to the semantic complexity, which inevitably imposed making choices. Naturally this work could be improved; but it must be considered valuable for having led to a collective and systematic reflection in an extremely varied context within the Juvenile Justice Department.

Carmela Cavallo, Head Department of Juvenile Justice Department

Introduction

Anybody who uses language (and who does not?) knows that the attempt to clarify – to define the semantic horizon of a term – collides with the polysemy and poly-directionality of language itself. Even a technical term is extremely ambiguous, as it must concentrate upon itself a high level of specialistic knowledge shared by the reference group; it implies in itself all the contradictions relating to the reference theory.

Therefore this glossary is not meant to clarify the terms defining penal mediation acts, by providing the "authentic" meaning they are given by those operating in mediation. On the contrary, its aim is to try to reduce the variety of meanings some words imply, to the meanings that appear to be the most coherent in current debates. Where this is possible, the glossary highlights the contradictory and problematic aspects and thus provides operators with a preliminary work tool in such a complex sphere.

These reflections have determined the first step in the procedure of this work: to reduce the main entries of the current *mini dictionary* to those that strictly refer to juvenile penal mediation. The second stage in the writing of this glossary has intended to make this work not only the product of some

researchers' reflection – which would necessarily be partial – but rather the result of a research including all the actors (or at least a large number of them). Therefore various colleagues and operators have been asked to write their own glossary. During the last stage, we have made an effort in order to re-interpret the gathered answers quite freely, for three reasons. First of all, because the variety of views that had been expressed had to be synthesized. The second reason lies in the fact that the comparison among the many different views had drawn our attention on what had not been mentioned but absolutely needed to be acknowledged among the related definitions. The third and last reason is the afore mentioned semantic complexity: although we tried to relate accurately what had been said, we realized the risk of misinterpretations was extremely high, unless we had carried out a real plagiarism.

Raffaele Bracalenti, President of the Psychoanalytic Institute for Social Research

CONCILIATION

In its common meaning, it is a generic word indicating the pacific rearrangement of a controversy. In this respect, it is part of the vocabulary of juvenile penal mediation, mainly where it is said that, in some cases, conciliation between parties – whether it is written or not – represents the positive outcome of the mediation process.

More specifically, conciliation indicates an Alternative Dispute Resolution (ADR) consisting of a consensual and informal procedure where the parties freely choose an impartial third party (the conciliator) who helps them find a negotiated solution. However the third party cannot make binding decisions for the parties – it can't have common interests with them, it doesn't have an adjudicative function, it has to maintain the confidential nature of the procedure, it has been specifically trained in listening techniques and communication facilitation. The parties' adherence to the procedure is voluntary and retractable.

Thus expressed, conciliation finds its place within the non-adjudicative strategies of management for living together; i. e. within the so-called "win-win approach" (approach where both parties win). Its ideal outcome is an advantage for both parties involved, which is obtained on the grounds of reciprocal concessions and by keeping the relationship between the parties in good terms. In fact the conciliation procedure offers them an opportunity to express their own views concerning what has happened and to listen to each other, in order to let their own free will and creativity find the way to manage their conflict (i. e. the terms of the agreement and the relevant ways of formalizing it).

Conciliation and mediation, among the Alternative Dispute Resolution systems (ADR) put into practice and described in literature, are based on the same theoretical elements: a consensual and non-adjudicative approach, a voluntary free and retractable participation to the procedure, the characteristics of the third party, the enhancement of the potential self setting of the conflict, the quickness and characteristic of social action. They are therefore very alike, and this alikeness is obvious in many European countries where there is no distinction between the two. In particular in the Anglo Saxon world the word conciliation is currently used as a synonym of mediation. On the contrary, in Italy there is a tendency to find a distinction between the two and to give the two terms different meanings. Mediation is usually meant as a mainly social strategy, aiming at re-generating or repairing the bond that has been weakened by the conflict, and put into practice through techniques that emphasize the emotional dimension of communication.

Differently, conciliation is meant as an instrument to reach agreements which mainly take into account the parties' interests, and is therefore more focussed on rational and utilitarian considerations.

The juvenile penal procedure mentions conciliation in article 28, subsection 2 (Suspension of the trial and put to the test: 1. the judge, having listened to the parties, can order the suspension of the trial when he considers it necessary to evaluate the minor's personality at the end of the test which has been ordered in accordance with the subsection 2. [...] 2. By ordering the suspension, the judge entrusts the minor to the juvenile services [...] with the same measure the judge can give orders aiming at repairing the consequences of the offence and promoting the conciliation of the minor and the offended person). However it is not clear whether this is to be referred to conciliation in its specific and most restrictive meaning, or whether it might apply more generically to all the techniques of indirect negotiation of controversies (ADR), where conciliation and mediation appear substantially associated by the afore-mentioned reasons. In this respect, the juvenile penal procedure can be understood as the acknowledgement of a substantial homogeneity between conciliation and mediation,

or otherwise as the attribution of their theoretical constitution and different operative meanings. In this last case (presumption of a real non-homogeneity between conciliation and mediation) there would arise the need for a regulative definition of the first one, since the juvenile penal procedure only refers to conciliation (in the afore-mentioned article 28).

CONCLUSION

In a technical sense, the conclusion is the final moment of the intervention carried out by the mediation service. Thus interpreted, the conclusion represents the formalization of the final phase of a course, just like the starting phase (evaluation of feasibility) and of the development one (parties' meetings in the third party's presence) . When the mediation is over, the service sends the result of the mediation to the legal authority. The way of acting in the conclusive phase of the mediation course can obviously vary depending on the reference theoretical model and on the chosen techniques.

More simply, the word conclusion stands for the moment of acknowledgement of the end of the meditative process. In this respect, the conclusion includes all the possibilities which determine the end of the course; therefore also the interruption, which may occur even before the moment that is theoretically considered the conclusive one. For instance this may happen in relation to the sustainability of the emotional effort which the meditative process involves. In this last case the meditative process is considered incomplete.

Sometimes the word conclusion is also used as a synonym of outcome, with reference to the repairing agreement reached by the parties, whether this is symbolic or compensational. In this respect it is useful to specify that the conclusion points to a time fraction of the meditative process, which corresponds to the final moment, whether this is formalized or not. On the other hand, the outcome represents the positive or negative "product" of the mediation, which can be assessed in accordance with the targets initially set. In this way the two terms appear as distinct and distinguishable, at least from a purely theoretical point of view. However, under a strictly operative profile, they do sometimes coincide.

CONFIDENTIALITY OF PROCEDURES

By confidentiality it is meant the confidential, private and secret character of a procedure, with reference to the set of guarantees preventing the infringement of rights of the individuals' private sphere. Within procedures particular attention is paid to information privacy, that is to say to the way it is used and stored, by avoiding its non-authorised disclosure. As a matter of fact confidential information can be acquired, used and stored only by authorised people – this is sometimes defined as "handling" of personal data – .

Juvenile criminal mediation is part of confidential procedures, that guarantee the total respect of the privacy of the people participating in it. Indeed candidates for mediation, immediately after the consent acquisition, are informed of the fact that the contents of meetings will be protected by the right to privacy and it will not be disclosed in the future, not even in case of trial, by stating that the mediator himself cannot be called to witness.

The confidentiality of procedures constitutes therefore the fiduciary relationship among parties and mediation equipe. Privacy guarantees allows indeed the creation of a setting, able to protect both the interest of parties with respect to the mediation process, and , as a consequence, to create pre-conditions for participants to express their points of view.

The contents of mediation is therefore destined to remain the private heritage of participants and must not be disclosed, unless they have consented to it, in accordance with the confidentiality of procedures, as well as in accordance with the principle of independence of the mediation process with respect to the juvenile criminal procedure.

Once mediation is concluded the service communicates to the "referring" authority a synthetic report on the outcome, that is to say on the meaning of the intervention carried out, without discussing the merits of dynamics existing among participants. Such a report contains only the information agreed and signed by the parties in the conclusive phase. In case the face-to-face meeting between the parties does not take place, a non-feasibility report is given back to the referring authority: such occurrence takes place, for example, in case of failure to acquire consent or, due to the interruption of meetings, as in the case of "defective" mediation process.

From the regulative point of view the confidentiality requirement of the mediation contents is provided for even by the rule regulating the criminal competence of the Justice of the Peace, where the unusefulness, in another context, of the depositions made by the parties before mediators is stated. The exception to this principle is constituted by the finding out of serious and threatening crimes, of which the competent Authorities should be informed – European Recommendation R (99) n° 19.
As regards the handling of personal data of minors taking part in juvenile criminal mediation processes and, who are therefore involved in criminal investigations, the Privacy Commissioner must guarantee that such handling is be carried out (exclusively by the mediation services) only by virtue of the fact that it is part of the aims leading to the implementation of specific rules of the new juvenile criminal proceedings, that enable the concerned judicial authorities to make use of the collaboration of experts, to ascertain the minors' personality and to find, through meetings taking place on a consensual and confidential basis, the possibility of an agreement with the offended parties.

CONSENT

With reference to mediation strategies, the notion of consent is by no means a specific one. The mediation rule system has acquired the notion of consent as informed, free and retractable, and it is thus considered among the necessary presuppositions for the praticability of the mediative intervention just like any other procedure implying respect for the principle of autonomy and self-determination of the subjects.
However it is possible to make some considerations concerning the meaning and the validity of consent in the specific case of juvenile penal mediation. Certainly the correct explanation given by the mediation team in a clear and accessible way informs the parties of the system of rules and laws regulating the procedure; it offers reassurances and guarantees, and it provides for the basic elements which allow the parties to make their choice – at least the initial one. However, the real understanding of mediation only occurs during the process itself, due to its developing nature. Therefore the real informed consent is "built up" during the mediation process ... The result is that building up consent - meant as the key element for the real adherence to the mediation course - finds its specular correspondence in progressively making both parties responsible as they go on in the course itself. Finally we could say that the assumption of responsibility is the "other face" or the "mirror" of the procedure for acquiring or building up consent in mediation.

DEFENDERS

The law does not provide for a role or function of defender of the parties, in the course of juvenile penal mediation. However the defender can be a "privileged guide" since, as a person trusted by the party, his opinion is often influent if not decisive. The fact that lawyers know mediation and its operative systems and they agree with the philosophy and purposes of this intervention, is a useful element in order to reassure the people involved and make it easier for them to get to the agreement that mediation is offering.
Generally speaking, it would therefore be advisable for lawyers to be purposely trained and constantly updated upon the subject of penal mediation.
On an operative basis, the defenders of parties are invited by the mediation service in order to be informed concerning the characteristics of the intervention that the service is going to carry out. Moreover, the parties are allowed to ask for their lawyers' assistance during the preliminary interviews. On the other hand, the defender is kept out of the mediation setting itself: he does not take part in the meetings between the parties and the mediation team. Anyway he is allowed to assist his client if the client asks for it and providing that the other part consents, during the conclusive part of the mediation course, if this implies drawing up an agreement of material compensation.

EVALUATION

The term "evaluation" has been substantially given two accepted meanings: according to the first one evaluating a mediation process means establishing, after a period of time, the possible psychological impact on the subjects, who have participated in the mediation process, and, even more, evaluating, in

terms of efficacy of the system, the reduction in recidivism rates of cases in a given territory with respect to the recourse to reparative justice systems, rather than to formal justice methods.
According to the second accepted meaning evaluation means the examination, by the mediators, of the factors, which led to the success of the process, as well as of the ones that prevented reaching a broader agreement or that caused the intervention failure.
A last dimension of evaluation can be searched for in the introduction of the supervision of cases, as an example of good practice, within mediation service practices.

INDICTABILITY OF THE OFFENDER

The indictability of the offender represents a necessary condition, but not sufficient, to start a juvenile criminal mediation process, since it is necessary to ascertain the minor's capacities, as they actually are, for understanding the meaning of mediation, for being able to listen to the other and for showing empathy. Such characteristics can be verified during the preliminary mediation phase.
It is still an open question whether a non-indictable minor can enter into mediation.
A minority orientation believes that with a view to starting mediation of a minor, it is not as important to ascertain the indictability presuppositions, as to make him recognize his de-facto involvement in the conflict. For these reasons the possibility cannot be automatically excluded that non-indictable minors from a juridical point of view – either it is about fourteen-year-old girls/boys or about girls/boys, who have been already "judged" non-indictable – are referred to the mediation service.

INTERACTION WITH THE FORMAL JUSTICE SYSTEM

As a principle, in the presence of formal justice systems and together with institutional answers relating to the management of life together, the "alternative" meaning of mediation seems to be very much compatible and complementary with the formal justice system. Mediation is an intrinsically independent strategy and it represents an alternative to adjudicative and authoritative strategies for the management of life together, even when it is practised as an integral or complementary system with respect to institutional means (the formal justice system).
This applies even more to juvenile criminal mediation, since the form of complementarity with the formal justice system is the privileged dimension of mediation interventions, as provided for by the Recommendation of the Board of Ministers of the Council of Europe n° R(99)19, adopted on 15 September 1999. Indeed the model established at European level includes criminal mediation in criminal trials as an accessible tool at any stage of the proceedings. The basic idea is to enable the parties to step out of the traditional trial phases at any time, through a conflict resolution method, which, once concluded, must still be formalized by the competent judicial authority. In such a way the genetic relationship among the legal system and mediation is not destroyed by the autonomous and independent character of the latter with respect to the former. In this specific case the Juvenile Judiciary is the competent authority deciding on mediation, both in the "entry" and in the "exit" phase.
Complementarity and alternativity to the formal justice system represent the dimensions in which mediation can concretely be fulfilled. However in the specific case of juvenile criminal mediation there seems to be a substantial coincidence between mediation strategy and the juvenile justice system, both at the level of function and meaning. Both mediation and the juvenile justice system try to produce a continuous and constant transformation process of the individual in terms of making him responsible, also playing upon the role of relations and communication, of which juvenile criminal mediation provides a paradigmatic example.

MEDIATION PROCESS

By "mediation process" it is meant the mediator's activity, that is to say a number of actions carried out with the aim of promoting the encounter between the offender and the victim of a crime, of favouring the mutual recognition as individuals and not as enemies and of straightening out the relational fracture, through the use of words and the reinstatement of communication. This is done in procedural form, as an "informal" but at the same time "structured" process, divided into a set of steps or stages, that, even if they are flexible, appear as strict and sequential.

The structure of the mediation process changes slightly according to the reference theoretical model adopted, and to the respective techniques used.
As a rule, irrespective of the variety of forms, some segments can be determined in this practice, that are common to each single mediation process: 1) start/referral; 2) the preliminary phase; 3) the face-to-face encounter; 4) the conclusion.
While the first and the last of the four recently determined stages present such peculiar features and problems that they deserve an individual section - see the single chapters: "referral" and "conclusion"- the two remaining phases, that is to say "preliminary phase" and "face-to-face encounter", since they are the heart of the mediation process, can be represented as follows.
As regards the preliminary phase, that is propaedeutic to the implementation of the real mediation phase (the face-to-face encounter), it is divided, in its turn, into two phases.
The first is characterized by the absence of a direct contact with the parties and consists of the so called "acceptance", that is to say in the phase of collection and analysis – by the mediator or the mediators' equipe - of information concerning the dynamics of the conflict and the context where it developed, in order to establish whether mediation is practicable or not. The second phase, however, differs because of the indirect contact with the parties – by phone or letter – and in the following stages because of separate preliminary interviews. Such different opportunities offer the mediator/s the possibility of acquiring further information on the case, and at the same time, of explaining in a synthetic manner at first, and then in a more detailed manner, meaning and consequences of the mediation process, intended as confidential and consensual space in which to listen and speak.
As regards the subjects contacted by the mediator, at the moment there is not a joint orientation concerning the party to be contacted first, since some people prefer starting with the victim, while others with the offender. Furthermore, in the present phase a good deal of time and attention is dedicated to parents or to any legal representatives, and, in general terms, to all supporters – including lawyers – of the parties invited to take part in mediation. It is about precious contributions, both for research and for the creation of consensus to mediation, as well as for the evaluation of the opportunity and feasibility of the following phase. Once the necessary information has been collected and the consent of the parties to mediate has been acquired, the face-to-face encounter is programmed.
The face-to-face encounter represents the heart of the mediation process. Such a phase can take place also in one or more interviews, in which, besides the victim and the offender, one or more mediators can participate, who are in charge of mediation. As a rule the mediator is the first to take the floor, thus introducing the rules of dialogue and then inviting the parties to speak. At the end of this phase different options for the reconciliation/restitution are usually formulated and then the final remarks of the mediator/s follow and in the end the possible reconciliatory/restorative agreement is signed by both parties.

MEDIATOR
The mediator is the third party – in most cases in Italy: a mediation team/equipe – which, after evaluating its feasibility and having obtained the consensus of all the parties, promotes and conducts the juvenile criminal mediation process.
The fundamental reason for having a "third party" is due to its impartiality and neutrality, nowadays intended in their meaning of "equivicinity": the mediator is equally close to the parties in fostering mutual "recognition", in promoting the premises for the restoration of communication, in providing assistance with the purpose of determining a joint interpretation basis with respect to the event/crime/conflict, that allows it to be overcome.
The consensual character intrinsic in mediation defines the nature of the mediation process and, at the same time, frames the mediator's role and tasks: third subject, in the meaning described above, without any other authority, except for the one freely attributed by the parties, so that the changes in conflict management procedures emerge indeed out of the skills of mediators, that is to say "from the bottom". For these reasons the mediator is tendentially placed in an independent operative dimension, and not subject to a hierarchical control from any administrative authority, even when the mediator, the whole mediation team, or one of its members, belong to Public Administration. This occurs compatibly with the complementarity between juvenile criminal mediation and formal justice system – above all with reference to the activation procedures of the mediation service and to the transmission of the conclusive report to the referring authority -.

Such defined mediator's role and tasks allow for an outline of the professional profile, not yet formalized by any provision of law, at least in the field of juvenile criminal mediation. Of course there is a high technical level including both the knowledge concerning the environment where mediation takes place – the juvenile criminal one - and the procedures to be put into practice. This creates a complex figure, where specific professional skills must be integrated both by acquisition of the relevant intervention techniques and by a wealth of human gifts, necessary to build relations based on confidence, clarity, coherence and responsibility: all elements considered necessary to carry out the mediation process in a correct way.
Therefore the mediator introduces himself as "powerless", giving up any authoritative character linked to the institutional system. Such renunciation, which is necessary and consistent with the mediation spirit, should automatically correspond to a regaining in terms of authoritativeness, acquired in the relationship with the parties and acknowledged by them gradually, as this service proves to be successful throughout the territory.

OUTCOME
According to general belief, the outcome of mediation is considered positive when the parties have managed to get to an agreement which they feel satisfying in accordance with their own needs, through the restoration of an effective and functional communication. If the parties are able to use the mediation setting (with the help of the mediator) as a place and time to talk, to listen and to understand the other person's reasons, they will feel upon the same level. There will no longer be a subject in an up position and one in a down position. Reaching this pacific form of communication can be considered a positive outcome itself. In other cases, the mediation process leads to reconciliation or to a reparatory act, which could be symbolic or material. According to the operators, a positive outcome – as for the changes produced upon the parties – can occur thanks to the mediation procedures even without an actual face-to-face meeting (in some peculiar situations).
On the contrary, a negative outcome is determined by a lack of understanding or no change taking place in the relationship between the parties.
Between these two contrasting extremes of positive or negative outcome of a mediation course, there are some intermediate forms of outcome:

a. Non-effected mediation, when in the preliminary phase it is understood that the parties have already autonomously solved the conflict or neither of them recognize the existence of a conflict, even when criminal proceedings are standing (it sometimes happens in the event of culpable offences, or in some cases of complicity);
b. "Non-feasible" mediation, concerning those cases where the parties have not appeared once called. The mediation is also considered "non-feasible" when, although the parties consent, the mediator believes the people or the motivations expressed are not suitable to face the mediation course. The last case of "non-feasible" mediation is when the nature of the offence makes it concretely difficult to start a mediation course.

PARENTS
The persons exercising parental authority (parents, tutors, guardians) play a fundamental role in the mediation process, even if preliminary and "face to face" meetings do not take place in their presence.
Indeed, their view of events and their frame of mind with respect to the mediation proposal have a strong influence on the process feasibility.
A recurring element of mediation practices is represented by joint meeting opportunities among children and parents, that precede and, sometimes follow, the meeting between mediators and children. It is important to stress that parents are always involved in the criminal episode of which their children have been protagonists, and that mediators do not face with them problems of different nature.
From the dialogue started with them may emerge elements, that mediators will take into account while developing the mediation activity, both because these elements represent strong points, that lead to prediction of an adequate accompaniment (as, for example the ability of identifying themselves with the other parent's mood and of communicating with him/her, in cases where the two parties are minors, the recognition of a share of responsibility of his/her own child, the presence of expectations

linked to the "educational process" more than to the "criminal-punitive process") and because they might influence the process in a negative way, starting from the expression of consent (among non-favourable elements we find: an attachment to one's child's perspective, the fact of being prejudiced against the other and their motivations etc.). It is a consolidated experience that the implication in the conflict of adults, pre-existing or following the event-crime, makes a parallel action necessary, which sometimes, leads to further mediation meetings among parents.
In other situations it is sufficient, and fundamental anyway, to share with adults the outcome of mediation and any possible agreement reached by the minors involved, so that the importance of the process carried out is not diminished, contaminated or invalidated by parents, who are strongly anchored to starting positions.
Finally, it is to be noted that in some countries, but not in Italy, mediation meetings take place in the presence of large numbers of persons – see Family group conferences - , that include not only parents, but also other family members, lawyers and party supporters.

PRACTICABILITY WITH RESPECT TO CRIME

At present there is no clear and shared indication on any possible selection criteria of the crimes, to which the mediation process is applicable or not; the Recommendation of the Council of Europe R(99) 19 itself does not specify any possible parameters to refer to, except for the types of crime ontologically incompatible with any form of "negotiation" (there is the classic example of crimes "without a victim"). However the traditional approach to this matter tends to see a possible application of the mediation techniques, above all with reference to non specifically serious crimes both against the estate and against the individual, where the violation of the rights of the injured party is not particularly dramatic and not strongly socially alarming.
The trend to limit the applicability of mediation to "less injurious" crimes is understandable only in terms of prudential orientation, aiming at observing the effective validity of this strategy, at least at the beginning, in those cases in which it is easier to foresee a "non-jurisdictional" outlet – closing due to unimportance of facts -. Nevertheless such orientation seems to be in contrast with the meaning and value of mediation, at least for three specific reasons. The first one has its foundation in the fact that if the goal of mediation is guaranteeing more recognition for the "victim" and giving him his dignity back,(also to allow the overcoming of feelings of revenge, grudge and lack of confidence with respect to the authority), such goal cannot be achieved when the "most injurious crimes" are considered as "non mediable" and when the injured party suffers the most serious consequences. The second reason, which is similar to the previous one, concerns the other foundation of mediation: making the minor responsible and rehabilitating him.
Indeed only when the minor has the opportunity to re-examine the conflict event, which originated the crime, even if considerably "serious", mediation is seen as the elective strategy to start a working-out process of the experience.
Moreover the attempt itself to create a hierarchy of gravity of crimes raises many perplexities: indeed it is not clear whether such a hierarchy should stick to what provided is for by the legislator on the basis of the minimum/maximum punishment, or whether an alternative hierarchy should be created.
If, eventually, the topic of practicability with respect to crime is tackled according to the logic of mediation, the only "mediation criterion" of a crime can be found in the consensus of the parties.
In this light, practicability is no longer a function of the "event/crime seriousness" established by the code, nor of the gravity of the social or individual damage linked to it, but of the sustainability of the mediation process on the part of the ones participating in it, and, to sum up, of the degree of responsibility they are accepting to take on.

PRACTICABILITY WITH RESPECT TO THE PROCEDURE

The legislator has not yet established when and how the mediation process can be started, yet the hypotheses to resort to it can be derived from a few well defined rules regulating the juvenile criminal procedure. It is mainly about articles 9, 27 and 28 of the judgment n° 448/88
Irrespective of the rules from which the practicability of criminal mediation originates today, from a theoretical point of view we are led to think, as established at European level – Recommendation of the Council of Europe R. 19 (99)- that mediation can be started at any stage of the formal procedure.

Therefore it can be said that mediation is always practicable, even if the attempt to start it as close to the occurrence of the conflict event as possible is always to be privileged. As for the practicability with respect to crime, it is confirmed that it is the creation of consensus which determines mediation time and possibility, that is always to be attempted as close as possible to the conflict event. Consequently the mediation process can be started at the stage preceding the criminal action, during the inquiry stage or, afterwards, during the endo-trial or even at the post-trial stage and at the stage of enforcement of the formal judgment.

REFERRAL

The term referral is used to mean a preliminary phase of the mediation process, more precisely the time when there is both the selection of cases and the setting in motion of procedures aimed at ascertaining the feasibility of the real intervention and at putting it into practice. This represents the starting point of the whole process.

The word "referral" has actually an imposing/authoritative connotation, which refers to an institutional dimension, that has faculty for determining suitable cases and for starting the formal activation mechanism of the mediation service. Such connotation is incompatible with the "spontaneous" and consensual character intrinsic to mediation, and it is contradicted by the procedures put into practice by the mediation service in the immediately following phases, which occur irrespectively of the "referring authority". Therefore it would be more correct to speak about "start" of the mediation process, that is to say an "invitation" to try the mediation approach, thus wanting to make clear that this process should start by direct initiative of the parties – as would be desirable from a theoretical point of view – or by any third party, able to intercede in the management of the conflict.

The start/referral materializes in the request, submitted to the mediation service, to ascertain the feasibility of a mediation process between two subjects involved in a conflict, from which a crime arose. The referral of cases is made by the judicial authority, the court or the Juvenile Prosecuting Attorney's office – in this case the mediator has access to the records "referred to", and after taking the necessary information, leaves inside the file a letter of acceptance, to be later countersigned by the Public Prosecutor.

The request can be made at any stage and instance of the criminal proceeding – during the preliminary investigations, before the investigating magistrate or at the stage of the hearings).

With regard to procedures referral usually takes place through "formal channels", via a personal file opportunely agreed with the Judiciary, containing all necessary notes to contact the parties, including the names of lawyers, social assistants, as well as the count.

RESPONSIBILITY

The notion of responsibility indicates how innovative and distant mediation is, compared to the formal justice system. Indeed, in mediation, taking responsibility means willingly recognising an attempt to modify a system of hostile relationships, that is (or is going to be) destructive. This translates into a commitment towards future responsibilities. On the contrary, the formal justice system is concerned with "objective" responsibility, which is the result of an evaluation process made by a third party. The latter ratifies the nature and limitations of a person's responsibility towards an event, regardless of the subjective perception of the person involved.

It is required that a minor assumes responsibility at the very beginning of the process, although the actual "responsibilization" expresses itself fully throughout the subsequent phases of the whole mediation process. Since mediation implies a "shared" responsibility, it is necessary that the offended party also assumes responsibility, besides the responsibility taken by the minor. As a matter of fact, in the mediation phase that deals with investigating the feasibility of intervention, the "victim" of crime is also asked to become involved responsibly with the mediation process, that is, to describe the cause of conflict from his/her own perspective. When agreeing to participate, both parties agree on assuming responsibilities. This is a completely new and original perspective of mediation compared to the juvenile justice procedures, which traditionally exonerates the "victim", even in terms of responsibility (the formal juvenile justice system does not give the offended party the responsibility to take part in the procedure, or rather it prefers not to assign to the offended party the burden that comes with such responsibility).

Therefore, the mediation process aims at the responsibility of both parties, by appealing to the importance of living together peacefully, that is to say, to the possibility of being able to renegotiate and reconsider that peaceful life together that was jeopardized by the crime/conflict. As soon as a mediation procedure is accepted, both parties agree on attempting to confront their opposite stories in the presence of an impartial third party. For both, this implies assuming/conferring responsibility: the "victim" 's responsibility, just like the offender's, is essential for the unfolding of the mediation process. Therefore, assuming responsibility primarily concerns complying with the rules and principles of mediation, besides concerning the event/crime itself.

RESTITUTION

Generically, restitution coincides with the final aim of mediation, that is, a strategy for restoring or reconstructing the social relationships damaged by the event/conflict/crime. Technically speaking, restitution stands for a compensation for damage, which constitutes one of the possible means of reaching the final aim of mediation, as described above (restoration/reconstruction of the social relationship).

Restitution modes are various: formal apology, handshake, community services, other activities in support of single individuals or the community, restitution of the stolen object or of an object with the same value, repayment (even symbolic) of damage linked to the event/crime. Usually, a distinction is made between direct and indirect restitution, depending on whether there is a direct or indirect contact between the parties.

All these modes are possible choices for the minor within the mediation process. However, in the logic of mediation, keeping in mind the final objective of restoring/reconstructing the social relationship, symbolic restitution modes can be considered as the most coherent with such an aim, besides the objectives of the Juvenile Justice System (rehabilitation and resocialization of the minor). Symbolic modes stand for the set of restitution opportunities which, without excluding proactive commitment (first among all: the voluntary commitment in social services), are different from monetary restitution. Indeed, the latter is often seen as suspicious, due to its incoherence with the genuine aim of mediation (aimed at the social relationship).

Within the Juvenile Justice System, which includes juvenile penal mediation, restitution made by the minor through positive actions is considered as more valuable and profound than "monetary restitution", besides being independent of the parents' finances. To sum up, besides holding the minor accountable for his actions, it has a deeper social meaning.

SETTING

The setting is the whole of procedures and material conditions (times, places and modes to perform meetings) that enable the achievement and success of the mediation intervention, and somehow define and make it possible to reproduce/transfer an intervention model, by offering a boundary where different operators working in very diverse contexts can put into practice their skills.

Some "golden rules" can be mentioned, that are highly praised, irrespective of the different theoretical approaches:

- Consent acquisition modes must be as transparent and informed as possible;
- Subjects participating in "mediation" share the same power, which, essentially, coincides with the faculty of choosing at any time whether to take part or not in the mediation process;
- Such a process must have a limited duration, but it must ensure at least the necessary time for participants to be able to express themselves completely and to fully understand what happens during mediation itself;
- The mediation venue must be as comfortable as possible. It must guarantee each participant a place, that does not give rise to superiority/inferiority feelings. It must be as neutral as possible compared to institutional connotations (court, social services and other bodies). Furthermore it must be devoid of distinctive traits from an ideological, religious, cultural and ethnic point of view.

It is interesting to note that some Mediation Centres provide itinerant equips within relatively vast territories, to meet the parties' requirements. Such experiences, even if at the nascent state, re-define the possible mediation "venues", even though they continue to adhere to the rules indicated above.

Translated from Italian by Lisa Ceroni (The words of mediation, Introduction, Conciliation, Conclusion, Consent, Defenders, Outcome) and Silvia Pintus (Confidentiality of procedures, Evaluation, Indictability of the offender, Interaction with the formal justice system, Mediation process, Mediator, Parents, Practicability with respect to crime, Practicability with respect to the procedure, Referral, Responsibility, Restitution, Setting).

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