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Impact of the Act XC. of 2017 Criminal Procedure on mediation proceedings

1. Foreword

The Act XC. of 2017 *(Criminal Procedure Code)* resulted in very significant changes in Hungarian criminal proceedings.The sharper separation of the investigative and the test phases, increase in the number of consensual methods, and the measures to speed up the number of proceedings all have an impact on the development of criminal proceedings. This inevitably raises the question of the implications for all existing legal institutions.

The mediation procedure has so far had a special status in Hungarian criminal proceedings. The only legal institution - excluding private prosecution proceedings - that has terminated criminal proceedings in a relatively wide range of criminal offenses specifically against the will of the persons. This changed in the summer of 2018, with a number of measures appearing that were similarly based on an agreement (although not necessarily an agreement between the victim and the perpetrator) and also aimed at the speedy conclusion of proceedings.

In my study, I examine how the introduction of the Code has changed the legal background of mediation proceedings and how these changes, as well as other changes in criminal proceedings, have affected the development of mediation in Hungary.

2. Antecedents

Already in the 1990s, Kálmán Györgyi stated that the fault of the Hungarian criminal proceedings is that the victim is not sufficiently focused on the victim's system and that institutions aimed at repairing the victim's damage are needed.[1] In light of this, it is not surprising that the introduction of mediation has been considered useful by the profession.

Herke Csongor made a particularly positive statement about the institution in 2003. In his view, the mediation process has a number of advantages, including the possibility of new diversion, the priority of the victim's needs, and the fact that the parties are given back the opportunity to resolve conflicts.[2] Póka Rita also supported the institution, the benefits of which were outlined in 4 aspects: victims (quick compensation, participation in the proceedings, apology), perpetrators (avoidance of punishment, greater chance of readmission), social (fewer tasks for the investigating authority, more effective prosecution crime, improved trust in public security) and enforcement (fewer custodial sentences, reduced congestion).[3] However, the legal institution also generated a number of unanswered questions prior to its appearance. Barabás Tünde had doubts about its effectiveness. In addition to criticizing the fact that information and dialogue with the profession were far from complete during the legislative process, there may also be problems with public opinion.[4] In her view, due to the public sentiment in favor of severe punishments at the time, there was a chance that the application of the legal institution, which was essentially intended to induce deprivation of liberty, would run counter to the public or deprive it of its function.[5] Concerns were also raised about the details of the procedure. A frequently asked question was how reparation would take place.

Because financial compensation can only be provided by the person who has the necessary assets, compensation for work is quite special, as it is not at all certain that the victim has a need for it. [6] A further question that arises in this connection is whether there is a place to prosecute a case where the perpe-

[1] Herke Csongor: Mediáció, Helyreállító Igazságszolgáltatás és büntetőpolitika. *Belügyi Szemle*, 2003. (51. évfolyam) 11–12. sz., p. 53.
[2] Herke Csongor 2003. p. 54.
[3] Póka Rita: Gondolatok a Tettes-Áldozat mediáció hazai bevezetéséről. *Magyar Jog*, 2006. (53. évfolyam) 12. sz., p. 751–752.
[4] Barabás A. Tünde: Mediáció: új szerepek és feladatok az eljárásban. *Ügyészek Lapja*, 2005. (12. évfolyam), 3. szám, p. 17.
[5] Barabás A. Tünde, 2005. p. 18.
[6] Póka Rita: Gondolatok a Tettes-Áldozat mediáció hazai bevezetéséről. In: Magyar Jog, 2006. (53. évfolyam) 12. sz., p. 756.

trator is not or not fully capable of compensating for the harm caused by his or her crime.

Another dilemma was the issue of relapse. There were views in the drafting of mediation legislation that sought to exclude mediation in recidivism as well. They argue that in relapses, it can be reasonably assumed that mediation would not be a sufficient deterrent.[7]

For my part, I find the view debatable, mostly because of the original purposes of restorative justice. Because it was precisely the fact that neither the traditional nor the perpetrator-centered methods achieved the desired goals (primarily the reduction of recidivism and recidivism) that led to the development of the technique, so some other method was tried. For this reason, an over-tightening of precedent would run counter to the very essence of the paradigm, as it would exclude offenders for whom traditional criminal justice has not achieved its purpose. So it is precisely the principle that has led to the original development of restorative justice. In that regard, I would merely point out that a number of intermediate positions have emerged at that time, such as the possibility of ordering mediation proceedings only in the event of recidivism and the conclusion of an effective procedure with a non-probation or custodial sentence.[8] The solution finally reached can also be seen as a compromise that allows the procedure to be used in the case of smooth relapses, but not in the case of multiple relapses.

3. Transformation of legal background

The initial rules of the mediation procedure are set out in Act IV of 1978 on Criminal Code, and in the Act XIX of 1998 on Criminal Procedure. The regulation limited the scope of the offenses to which the mediation procedure could be applied relatively strictly, but was permissible in terms of legal consequences, and in most cases functioned as a reason for the abolition of criminal liability.

The first dilemma that arose in connection with the mediation procedure was whether it could be applied to a set of crimes if not all of them would have a place for mediation. The Prosecutor General's Office's memorandum lg 99/2007, clearly stated in this connection that there was no place for mediation in the case of a set of crimes if mediation could not be applied to all the crimes in the set. Criminal Collegiete Opinion 67/2008 *(Opinion)* refined this position by stating that it is *"generally not appropriate"* to order mediation in the case of cybercrime, where not all offenses would have mediation. Act XIX of 1998 on Criminal Procedure from July 2013 stated that *"if the accused has also committed other offenses in the group together, the mediation procedure may be used if the offense indicated is decisive in the commission"*.

The Opinion deals with the relationship between the financial situation of the offender and the mediation, in this context it states that the financial situation of the offender cannot be a consideration when ordering the proceedings, only the complete lack of reparation can be considered a reason for refusal.

The first major amendment to the rules on mediation took place in 2011, when it was introduced into law that the procedure could be applied even if the offender had already remedied the harm caused by the crime in the manner and to the extent accepted by the victim. In this case, the mediation procedure only approves the previously performed agreement. This legislative decision can be seen as the final solution to a previous law enforcement dilemma. The memorandum lg 99/2007, cited above, stated that there was no place for mediation if the redress had already taken place. Although this conclusion can be deduced grammatically from the wording of the law, it is not really logical why the victim could not be compensated before the proceedings, and such a prohibition is precisely against reparation. The position of several concerns was also corrected in Opinion, which already stated that the previous reparation did not hinder the conduct of the mediation procedure. This idea was also adopted by the Criminal Code in 2011, which allowed the victim to obtain compensation more quickly, even before the mediation procedure was conducted.[9]

The implement of Act C of 2012 *(Criminal Code)* did not drastically change the rules of the mediation procedure. Although the scope of application has changed, in reality this was a more technical change in the Criminal Code. due to a change in the structure of a particular part.

However, this did not affect the scope of the offenses covered by the mediation procedure in practice, some of the facts (mainly of violent crimes against property) were included, and some of them were included in the scope of mediation. However, the use of mediation was not (or was not) typical of either the circumstances that were removed at that time or those that were newly entered, so this change can be considered formal rather than relevant in practice.

An important step can be considered January 1, 2014, when the use of mediation procedures in infringement cases was made possible. This has corrected an important anomaly in that in the case of certain delinquent behaviors - e.g. theft or traffic vio-

[7] Kuji Eszter: A mediáció büntetőjogi szabályainak kialakítása hazánkban. Ügyészek Lapja, 2006/2. p. 26.

[8] Póka Rita: A mediáció bevezetésével kapcsolatos javaslatok. In: Ügyészek Lapja, 2005. (12. évfolyam) 4. sz. p. 32.

[9] Barabás A. Tünde: Áldozatok és igazságszolgáltatás. P-T Műhely Kft. Budapest, 2014, p. 106.

lation - there was room for mediation in the criminal unit while not the less serious offense in principle, and it often involved fines - sometimes confinement. In 2017, the scope of infringement proceedings was extended to cover traffic offenses and, in the case of juveniles, to all facts where the procedure could be conceptually interpreted, thus making the institution more widely applicable.

4. Changes in the new Codex

4.1. Active repentance and partial separation of mediation proceedings

For a long time, the mediation procedure in Hungary was directly related to active repentance as a reason to end criminality. The previous Criminal Procedure Code explicitly stated that mediation proceedings are only available for those offenses where the legal institution of active repentance is applicable. The new Criminal Procedure Code no longer contains this rule, so the regulation of active repentance and mediation proceedings is separated at the legal level, ie in theory it can take place in the case of any criminal offense.

While in theory this could even significantly increase the number of mediation proceedings, it is unlikely to have a really significant impact on it. My studies in Eastern Europe show that, in general, there is no correlation between the number of mediation proceedings in a country and the amount of criminal offenses applied, we can see a good example of the number of mediation proceedings in a more lenient country being less frequent. This is probably explained by the fact that in the case of already more serious crimes, victims are much less willing to participate in mediation proceedings, and the law enforcement may not want to be given the opportunity to do so. Thus, although there is a legal possibility for the parties to settle a case (or at least in part) within the framework of mediation in the case of a serious, violent crime, this will very rarely happen in practice due to its material weight.

Nevertheless, the amendment is desirable in several respects, mainly because of two legal facts. One is the fact of the robbery, especially the basic case, which is a crime involving a very wide range of behaviors. It is also a robbery when someone is pushed on the street, but it is also a case where someone's apartment is broken into, tied up, beaten and their belongings taken away.[10]

It is very difficult to apply a single rule to these. However, precisely because, very often, only a very minimal amount of violent conduct is sufficient to establish the crime of robbery instead of a misdemeanor, the general prohibition is unfortunate. After all, there is property damage, there is an almost certain need for compensation for the victim, and an effective procedure can also help the perpetrator to practice a law-abiding lifestyle. So all the restorative goals appear. The problem arises from taking the most serious case in such a situation involving so many different behaviors when determining the range of alternative sanctions to be applied, even in the case of diversion (in this case mediation) where it would otherwise work. That is why I welcome this enlargement. The other relevant fact may be harassment, where, in addition to the violation of public order, a tort against a person or property that appears in almost all cases can be remedied through mediation.

It should be noted, however, that although the mediation procedure can now theoretically take place in any situation which does not affect the general prohibitions set out in the Criminal Procedure Code, its remission or indefinite reduction of punishment is still linked to active repentance. Therefor, for offenses not covered by active repentance, a successful agreement will only appear as an attenuating circumstance, no other specific benefit can be applied for that reason alone.

This raises the question of whether perpetrators will be sufficiently motivated to conduct the proceedings and how often the law enforcement officer will apply them. Thus, this significant discount is questionable for the time being, in practice.

4.2. Change in order terms

In addition to the objective criteria, the conditions of the mediation procedure in the old Crriminal Procedure Code include the following subjective condition: "*in view of the nature of the offense, the manner in which it was committed and the identity of the suspect, the conduct of the court proceedings may be waived or it may reasonably be assumed that the court will assess the active repentance when imposing the sentence.*"

In addition to the fact that this definition referred only to active remorse, even its wording was quite ambiguous (compensation alone can be considered as a significant attenuating circumstance in all cases, so it is difficult to imagine a situation where an arbitration proceeding would not be considered by the court as an attenuating circumstance). This subjective condition has been amended in the new Code as follows:

"Given the nature of the crime, the manner in which it was committed and the identity of the suspect.

[10] Bittera Ádám: „Mediáció a büntető- és szabálysértési ügyekben" című workshop. In: Szabó Péter – Gyengéné Nagy Márta (szerk.): Mediációs panoráma II. – Előadások a mediáció köréből, Attraktor Kft. Máriabesnyő, 2015. p. 101.

– Reparation of the consequences of the crime is expected.

– the conduct of criminal proceedings may be dispensed with or the mediation proceedings shall not be contrary to the principles governing the imposition of penalties."

The definition of *"not contrary to the principles governing the imposition of a penalty"* is, in my view, a more appropriate, comprehensible, rational and explanatory condition than the previous law and contains a subjective condition which, although broadly discretionary, is sufficiently specific and comprehensible.

"Compensation for the consequences of a crime is expected" as a condition is even more backward. Compensation must be provided in the manner and to the extent determined by the victim, which does not necessarily have to be proportionate to the damage caused. In regard to the victim does not have to state exactly what kind of compensation he or she needs before the mediation procedure, the law enforcement officer can only make a clear assessment of whether or not reparation is expected in very few situations.

The danger with this definition is that the prosecution will begin to interpret whether the appropriate amount is available to the offender for pecuniary reparation. The perpetrators very often live in rather poor financial conditions, so with such an argument it would be very easy to reject mediation in many cases. On the other hand, it is equally impossible to recover a larger amount of damages, especially if the offender may even have to serve a custodial sentence. For this reason, an immediate, more moderate amount of compensation may be more in the interests of the victims.[11]

Bánáti János also said that, in general, lawyers also try to steer victims in the direction of the agreement, as *"it is worth more than the leather paper that will be born four years later, in which they say that civil and it is so obligatory for the accused to pay, but he will never get it in his life while he is summoned four more times..."*[12] It can therefore be seen that, due to the difficulty of enforcing damages de facto, immediate redress, even at a potentially lower rate, is often more favorable to the victim than a lengthy legal process.

Failure by the law enforcement officer to do so and starting to interpret reparation as substantive reparation can significantly increase the number of denials - even in cases where it would be appropriate to order it.

4.3. Prospect of prosecutorial action

The essence of the legal institution is that the prosecutor actually offers the accused to order a specific measure or make a decision in case of making a confession. Possible decisions include suspending the proceedings for mediation. The intention of the legal institution is quite clear: to speed up and simplify the procedure and thus relieve the authorities involved in law enforcement. It is certainly a step forward in this area that the legislator has reflected on a real need and incorporated it into the legal system. On the other hand, based on the original aims of restorative justice, concerns arise again. It is clear that a person who makes a confession solely and exclusively because he avoids prosecution through mediation is no longer the motivating force for repentance or reconciliation (of course, it is possible that someone may would confess independently, but there would be no need for the prospect).

4.4. Repeal of the Agreement

Another new rule is the quasi-veto right appearing in Section 415 (2) of the Criminal Procedure Code, ie the prosecutor may revoke an agreement entered into by the parties if it violates the mediation procedure act.

Act CXXIII of 2006 on Mediation in Criminal Matters sets out three prohibitions:

– an agreement adversely affecting the legitimate interests or interest of other or others,

– non-compliant agreement,

– an agreement contrary to good morals.

The provision has been the subject of several criticisms. According to Sümegi Zsuzsa, it is very unfortunate that the prosecutor's office has been given this opportunity, because it violates the principle of volunteering, and through the prosecutor's intervention there is a possibility main purpose is taken away.[13]

For my part, I consider that if the prosecution and annulment are in fact limited to the cases applied by the Mediation Act in the strict sense, this will not be a problem, since it cannot be inferred from them that the prosecutor content to any extent. In this case, the prosecutor exercises only a control function so that the conditions laid down by the legislature actually apply during the proceedings.

If we look at the three conditions, it is clear that conflict with the law is a rather objective, intolerant criterion, which would be difficult to abuse in any way. The fact that it infringes the legitimate interests of others or others, although it leaves room for some discretion, is in all cases fairly clear from the circumstances of the case.

Conflict with good morals is perhaps the only thing that raises some dilemmas. One such question may be how unethical an agreement is disproportionately favorable or unfavorable to one of the parties.

In my view, the mere fact that the amount of compensation does not correspond to the actual damage

[11] Herke Csongor: A bűncselekménnyel okozott kár megtérülésének formái. In: Kerezsi Klára – Borbíró Andrea (szerk.): A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve I. Budapest, Igazságügyi és Rendészeti Minisztérium, 2009., p. 130.

[12] Bittera (2015), p. 104.

[13] Sümegi Zsuzsa: A büntetőjogi mediáció a jogalkalmazásban. *Kriminológiai közlemények* 79., 2019., p. 94.

does not make an agreement contrary to good morals, but a striking disproportion may raise the question of whether the agreement was entered into voluntarily or under any coercion or threat.

Another dilemma may be how unethical is an agreement that is not made out of remorse but out of fear of avoiding punishment. This is not inconceivable, because the possibility of terminating criminal proceedings ipso jure may encourage the accused to take this route, especially in the case of a criminal record. However, in my view, this is not a substantive requirement of the agreement which would justify its annulment, but rather may be a ground for refusal that mediation in this case is contrary to the purposes of the penalty.

However, the first statistics are encouraging in this area, with only 9 cases being revoked in the second half of 2018, representing less than 1% of the procedures terminated by the agreement.[14]

In 2019, this was done only 19 times, in the order of 0.5% of the mediation procedures ordered in that year, which suggests that the repeal of the agreements is quite atypical. It is a little interesting that more than a third of these 28 agreements took place in two counties - Somogy and Hajdú-Bihar - but even their volume is not enough to draw any far-reaching conclusions.

4.5. Termination of the mediation procedure at the negotiation stage

An important provision is that the mediation procedure is only possible from 1 July 2018 until the indictment. In my view, this is a clear step backwards from the previous period, even though the number of mediation proceedings ordered by the courts has always been extremely low. This decision is in stark contrast to the international trend of extending the ordering of mediation proceedings at both the vertical and horizontal levels recently. On the other hand, the possibility for a court to quasi-overrule a negative decision on mediation at the negotiated stage is thus lost. This is by no means a positive change.

5. Frequency of the mediation procedure used

The number of mediation proceedings showed an upward trend until 2013, then stagnated roughly, ranging from 4,000 to 4,700 between 2013 and 2017. However, the year 2018 brought a major change in terms of mediation procedures. In the first half of 2018, 2232 proceedings took place, which was roughly the same value as in previous years. In the second half of the year, however, a total of 1,187 mediations took place. In 2019, the picture improved somewhat, but at the annual level, 3,531 cases are still a significant decrease from the previous year. The question inevitably arises as to what is the reason for this? It is unlikely that the changes mentioned earlier (repeal of the agreement, exclusion of mediation from the negotiation phase) would have caused this drastic reduction, as none of them had (or will have) such an impact on criminal proceedings as to justify such a change.

The explanation, in my view, is much more to be found in the fact that the new Criminal Procedure Code has introduced a number of rules aimed at speeding up proceedings, which are sometimes applied instead of mediation proceedings. The explanation, in my view, is much more to be found in the fact that the new Criminal Procedure Code has introduced a number of rules aimed at speeding up proceedings, which are sometimes applied instead of mediation proceedings. This argument is also supported by international statistics. It can be observed that the possibility of an alternative closure faster than mediation within a legal system often means a reduction or low number of mediation proceedings. An eclectic example of this is Lithuania, where all criminal proceedings are approx. 15% of the so-called reconciliation, so that by 2015 mediation did not exist for them.[15]

There is a similar legal institution in Romania, where the number of mediation proceedings is less than 200 per year. In Slovenia, we see examples of alternatives speeding up the closure of criminal proceedings reducing the number of mediation proceedings.[16] It can be seen from the above that even if there is a reason that does not necessarily terminate the procedure of a restorative nature, there is a realistic chance that the faster method prevailing at an earlier stage of the procedure will empty the mediation procedure.[17]

Such a new procedural institution in Hungary is primarily the agreement on the admission of guilt and the prospect of prosecutorial action. In the former case, however, the figures do not support the previous argument. Although the number of settlement-related initiatives was 739 in 2018 (by the way, this is the number of six months since the new C.p. entered

[14] All data used in the study come from the Attorney General's Office. Link: http://ugyeszseg.hu/statistikai-adatok/ugyeszsegi-statistikai-tajekoztato-buntetojogi-szakterulet/ download date: 2020.12.21.

[15] Bikelis, Skirmantas – Sakalauskas, Gintautas – Păroşanu, Andrea: Lithuania. In: *Vanhove, Adelaide – Melotti, Giulia (szerk.): European research on restorative juvenile justice. Research and selection of the most effective juvenile restorative justice practices in Europe: snapshots from 28 EU member states.* Brüsszel, 2015. p. 109.

[16] Filipcic, Katja – Păroşanu, Andrea: Slovenia. In: Vanhove, Adelaide – Melotti, Giulia (szerk.), 2015. p. 162.

[17] It slightly blurs the fact that in Lithuania, mediation in the penitentiary phase of the MIPT project, which started in 2015, was very widespread, with the legal institution of reconciliation remaining in the country, but financial and political support for mediation was also likely to have had a major impact. More on this: Giedryte-Maciuliene, Renata – Venckeviciene, Judita: *Mediacijos įgyvendinimas probacijos tarnybose lietuvoje*, 77. o. Link: https://teise.org/wp-content/uploads/2017/02/Giedryt%C4%97-Ma%C4%8Diulien%C4%97-Venckevi%C4%8Dien%C4%97-2016-2.pdf, Download date: 2021.03.02.

into force on 1 July 2018) and 1417 in 2019, the vast majority (589 and 1082) were where the settlement was initiated by the suspect or defense counsel but was not accepted by the prosecutor. The number of cases actually settled by the settlement was 114 in 2018 and 252 in 2019, which is unlikely to have had a drastic effect on mediation proceedings.

The number of cases actually settled by the settlement was 114 in 2018 and 252 in 2019, which is unlikely to have had a drastic effect on mediation proceedings.

The prospect of a prosecutor's action, discussed earlier, is already much more relevant in this regard. Similar to mediation, the condition for taking a measure or decision is the making of a confession, and the procedure itself may be faster than the mediation procedure, so that the two legal institutions may be involved in fairly similar situations. In addition, its use was relatively common in the early years. Already in 2018, 448 prospects were made, by 2019, that number had risen to 917. And although there were cases where mediation proceedings were envisaged, the number was approx. 25%, while the prospect of a conditional suspension (2018: 35.7%, 2019: 42.3%) and a separate prosecution measure (2018: 35.9% 2019: 32.3%) year was larger.

Obviously, the prosecutor's office must decide in which case a measure can be envisaged, but previously the prosecutor could only decide to continue the proceedings on the basis of the available evidence, and the parties could only initiate mediation proceedings. Because of this, it is possible that the prosecution ordered proceedings in cases where he/her did not personally consider mediation to be the best conclusion, but there was no legal impediment to it. However, by envisaging the prosecutor's action, he/her may "make an offer", it is possible that proceedings which would have ended in a mediation procedure without the offer were subject to a conditional suspension of the offer or a special procedure following an indictment. It should be noted that this cannot be a decisive argument, but previous surveys have included the fact that, although it is a fast-paced procedure, it involves a lot of paperwork,[18] which may also appear to be an influential factor.

6. Conclusion

It can be seen from the above that the new rules have significantly reduced the number of mediation proceedings in the short term, but from the increase in 2019, it seems that law enforcement is also aiming to change this situation. However, it is likely that, even if this intention exists, it will not be visible in the years 2020-21, as emergency measures have probably been and continue to be reduced in the use of face-to-face legal institutions, which is essential in mediation proceedings.

However, it is clear that the extension of mediation procedures did not lead to a significant increase in the number of procedures at all - which is not surprising based on the examples in Eastern Europe - but the other amendments had a distinctly negative effect on the numbers. This raises the question of whether this was an expected consequence of the innovations introduced by the new Criminal Procedure Code, or whether there is any circumstance that the legislature did not take into account. However, the most important goal is not to directly increase the number of mediation procedures.

Rather, it is up to the legislature and the law enforcer to find out in which case which means of diversion best serves the purposes of sentencing. Where restorative considerations are relevant, mediation may be appropriate, despite the potentially slightly slower procedure, and in other cases legal arrangements based on other agreements may be in place. Based on my research so far, I feel that this kind of differentiation has not yet materialized, yet it cannot be ignored that the rules came into force just over 3 years ago and nearly half of that had to be spent in a pandemic period affecting all procedures. Perhaps this is a way of anticipating the confidence that case law will undoubtedly resolve the disproportions that currently exist.

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[18] Sümegi Zsuzsa 2019. p. 79.

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