

# Multidimensional Restorative Justice for Everyone: Romanian developments.

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## **1. Introduction. Restorative Justice: Trends and tendencies.**

If in the 90s the programmes and practices of Restorative Justice were considered rather an alternative strategy to the contact with the formal justice institutions system, designed especially for minors, the results of recent analysis, undertaken both at European as well as international level, already indicate a stressed *institutionalization* process. (Ivo Aertsen, Tom Daems and Luc Robert, 2006). Actually, the analysis of Restorative Justice at the European level that have been accomplished within a consortium of 70 researchers from 21 states, within the COST A21 programme, *Restorative Justice Developments in Europe*, was stimulated both by the large number of programmes from different European states, as well as the need to comparatively evaluate with programs from the USA, Canada, Australia etc.

At a *first level*, the aim of the comparative analysis is to allow the identification of the diversity of models, practices, programmes, juridical-normative framework, of the restorative justice implementations and, on this basis, to detect the possible synergies as well as good practices accumulated in the field. Such an action provides the answer to a number of questions: *What are the theories that found the practices, models and restorative justice practices? What is the relation between the restorative justice and social justice, procedural justice, penal/retributive justice, cultural justice etc.? What are the types of conflicts that can be solved with restorative justice practices? What is the relationship between the restorative justice practices and the formal conflict resolution practices (the courts)? What are the advantages and disadvantages of alternative conflict resolution practices compared to the formal justice system? How are (are not) the rights of the parties that accept to enter an alternative conflict resolution procedure protected? Do the programs and restorative justice practices contribute to the prevention of criminality? What are the practical methods to refer e the cases? What are the politics and models of preparing the practitioners in the field of restorative justice? Etc.*

In this intervention, I *have taken into account the fact that comparative analysis, regarding the implementation of restorative justice programs and practices, must be accomplished within the framework of the current general trend that exist in the European States, but, wider, of the developments in other cultural areas.*

### **1.1 Restorative justice: meanings, definitions and models**

In order to understand how, under what conditions, the restorative justice became an alternative to the dissatisfactions produced by the formal conflict resolution system; one must first analyze the *socio-juridical and cultural trends* that have (re)brought about this practice to present interest. In this endeavor, what proved to be very useful was the

possibility to directly evaluate the experience gathered in different European and non-European states within the work groups of the European COST programmes, of the European Forum for Restorative Justice, as well as the International Institute for Restorative Justice (IIRP-SUA).

The concept of restorative justice has a diversity of meanings. It is, many times, used as an „umbrella” to *designate a variety of alternative practices* for conflict resolution. Those talking about restorative justice, as Paul McCold noticed, do not have the same thing in mind (P.McCold, 2002:111). In the exegetics on restorative justice, there are mentions of *victim-offender reconciliation programmes* (VORP) initiated, in the middle of the 8th decade of the 20th century, by the Canadian juvenile justice systems.; the programmes that aimed, in the 80s-90s, at the legitimating of the *traditional conflict resolution practices*, as integrating part of a wider process of the right to identity recognition of some populations and aboriginal groups (Maori in New Zealand, Navajo in the USA) etc. Recently, programmes for the reconstruction of communities affected by violent conflicts and mass victimization are implemented under the umbrella of restorative justice. They operate, many times, in addition to the international traditional justice strategies.

One of the frequently used definitions of restorative justice is the one elaborated by Tony Marshall (1997). It was adopted as a working definition for the *Resolution of the 10th Congress of the United Nations on the Prevention of Criminality and Penal Justice* (Viena, 2000). Marshall considers that „restorative justice represents a step towards the resolution of problems generated by criminality, by implicating all those affected by its being committed and, with the active participation of the institutions empowered by law to deal with the offences.” (T.Marshall in G.Johnstone, 2005:28). Marshall believes that restorative justice is not a practice, but „a set of principles that could orient the practice of some groups or agents dealing with the problem of criminality” (Marshall, 2005:28). Opting for a *sociological definition* starting from the premises that any offence is the effect of social problems and that, therefore, its consequences can only be repaired by an answer integrated in the social context, Marshall offers a a general perspective on understanding restorative justice which gives way to a great variety of practices. Such a definition, however, leaves unsolved a series of issues, out of which, the most important in my opinion, refers to: *What is it that is restored through such an approach?* In the comments he makes on this definition, Marshall talks about the needs of the victim, that could be satisfied within the framework of such a procedure, about the necessity of integrating the offender in rehabilitation programmes and, wider, about involving the community. However, even with all these explanations, his definitions do not allow the differentiating of restorative justice from other alternative practices of conflict resolution.

Some authors consider that, despite the diversity of practices and models, there is a *specific kernel of values, processes and results* that constitute the difference between the restorative justice and other forms of alternative conflict resolution. In one of the reference works in the field, *Restorative Justice and Responsive Regulations*, John Braithwaite considers that we find ourselves „in the presence of restorative justice, from the republican perspective, if property is restored, if the damage done is repaired, if the feeling of safety, dignity, deliberative democracy are renewed, if the harmony based on

the feeling that justice has been done and support social relations are restored.” (Braithwaite, 2002:11). Such a definition of restorative justice has, comparatively, a deeper meaning than that of alternative techniques and practices, even when it stresses, as in Marshall’s definition, upon the therapeutically-recovery valences of the victim, the forgotten actor of the modern process. Braithwaite links restorative justice to the deliberative justice and its role in a democratic society.

In Modernity, the penal process had as aim to penalize the person responsible for the offence and to inform, through the whole symbolic of the trial process, that such a person is undesirable to the community. From this point of view, the penal trial is in fact, as Braithwaite stressed, „a ceremony of degradation”, as Garfinkel pertinently characterized it. With such a strategy, we noticed recently (Doina Balahur, Paul Balahur 2005), the modern process had done nothing but reinforce the violence and conflict cycle. In spite of the idea of proportionality, it has accomplished neither justice (how do you punish a pedophile, a rapist, a serial killer? etc.), nor has it contributed to „community peace”. In order to resolve the conflict and restore the rights and freedoms of the parties, Braithwaite stressed, the ceremony of degradation must be replaced with a „*ceremony of integration*” (Braithwaite, Mugford 1994:143). This would be, according to the Australian researcher, the aim of restorative justice: to involve the victim, the offender, the supporting persons and, wider, the members of the community, in order to reestablish the social relationships affected by the penal offence. The reintegration ceremony must contribute to the reestablishment of the „dominion”, respectively the rights and freedoms that each citizen must enjoy in a democratic society. Braithwaite considers that we cannot talk about restorative justice unless we accomplish the material repairing of the damaged caused to the victim, as well as their emotional and emotional-affective recovery of the victim and their feeling of safety, dignity and self esteem. Equally important for the restorative justice, the Australian researcher noticed, is the reintegration within the community of the person who committed the offence. Stigmatization, the breaking of the ties with the family, colleagues, by taking the offender outside the community compromises on the long term their reintegration within the society. The resorts and mechanisms of this process were described by Braithwaite in the theory that legitimated the steps and practices of restorative justice, *Reintegrative shame theory*.

Braithwaite’s perspective represents one of the *strong visions* on restorative justice. It proposes a set of „frame values” of the restorative processes. Their upholding not only ensures the accomplishment of the restorative procedure’s objectives, but at the same time represents *standards for evaluating its efficiency*. Among the values of the restorative justice, Braithwaite enumerates: respect for the fundamental rights stated in the Universal Declaration of Human Rights (...), restoring human dignity, freedom, property, sense of duty as citizen, social relations affected by criminality etc. (Braithwaite, 2002:14, 2002:164).

The connection between restorative justice, civil society and „good life” within a community is presented also in the perspective elaborated by Ted Wachtel, known as „Real Justice”. During the talk I had with Ted Wachtel, from the *International Institute for Restorative Practice*, the promoter of one of the *reference trends*, extremely

influential in the restorative justice, the idea of *social capital* reoccurred constantly. The aim of restorative practices, as Ted Wachtel was telling me, invoking Robert Putnam, is to maintain or restore the *generalized reciprocity*, that virtue that constitutes the *good life* within a community, as well as the *mutual trust* of its members (Budapest, 2004; Manchester, 2005). Explicitly based on a philosophy which confers priority to the associational networks, in Wachtel's vision, *restorative practices* represent the „science of restoring and development of registered capital, of social discipline, psychological comfort and civic activism, through participative learning and decision-making”. (Wachtel, 2000:118). Restorative practices mean collaborating and working *together with the people* rather than *for people*, an idea that is always stressed upon by the initiator of the Global Alliance for restorative justice. This definition comprises, in our opinion, best the specifics of restorative justice, allowing its being delimited from other forms and practices of alternative conflict resolution practices. It directly answers the question *what is being restored (restored, given back)* by these practices and, moreover, it tells us what is the *role and social motivation* of this socio-juridical institution, as well as the strategies through which it can be accomplished. Not lastly, this definition allows the *understanding of restorative justice* as a practice for conflict resolution that takes place *outside the formal justice system*, done in the context of the *post-modern government forms that are focused on subsidiary*. As I was pointing out on another occasion, this is one of the *directions that will profoundly mark our modern conflict resolution system, already detectable in the priority that it is given by the European and Non-European governments and by the important international organizations - Council of Europe, European Union- to the reform of the justice systems*.

In trying to *systematize the meanings* attributed to the restorative justice, Daniel Van Ness identifies *three categories* which the majority of definitions would integrate in. *A first category*, „restrained” as Van Ness denotes it, would stress upon the „presence of all those affected by the offence and its consequences”(Van Ness, 2005:3, 4). Marshall's definition fits into this category. The most „extensive” meanings, from the *second category*, contain the definitions that are centered on justice that „stress upon the results and values of the restorative justice” as is, for example, in the present analysis, Braithwaite's definition. Van Ness states that there is also a *third category*, a middle path among the first two endeavors. In the attempt to reconcile the two horizons of meaning, the leader of Prison Fellowship International defines restorative justice as „a justice theory that is centered on repairing the damage done or pointed out by the criminal behavior. It is best accomplished by cooperation and inclusion processes” (Van Ness, 2005:4). Van Ness's definition tells us *what is restored and how*, offering in this manner the premises of an operational theory of the restorative justice. However, the restorative process is limited to the penal conflict, which massively restricts the already outlined field, as the comparative analysis shows, of the restorative practices that have been applied for a considerable period of time, successfully, in family relations, in schools and other socio-organizational environments. The actions of the International Institute for Restorative Justice best illustrates, in my opinion, this middle path.

The contact I had with a variety of restorative practices both from European states (Germany, Holland, Great Britain, Belgium, Poland), as well as non-European states

(USA, Australia, South Africa, Canada, Thailand), the evaluative research accomplished, the direct discussions with the representatives of the international community of the Alliance[1] *for restorative justice* etc., have allowed me to formulate a personal point of view regarding the meaning of this socio-juridical institution. I consider that restorative justice *is a socio-juridical institution of alternative conflict resolution, centered upon the restoring of micro-social relationships that have been affected by conflict, by means of assertive- participative practices, as well as upon principles and values meant to develop tolerance in a pluralist micro-social area.* (small groups, micro local and organizational communities etc.).

If I compare it against Daniel Van Ness's typology, my position is situated in the third category. The justification of this definition is closely related to the theory I have developed on the restorative justice as emblematic model for what I have called the *subsidiarized paradigm of justice* (Subsidiarized paradigm of justice, D.Balahur, 2007). Among the fundamental principles that I take into account in this definition is the respect of the *human dignity*, the principle of *minimum intervention*, of *voluntary participation*, of *non-discriminatory treatment*, are among the most important. The definition I propose to the restorative process takes into account the restoring, emotional affective recovery of the victim, of their trust and safety feeling, reparation to the group, community etc., but also the participation of the aggressor to assistance and support networks with the aim of social reintegration. Also, in the meaning that I have given to the restorative justice, it has not only *re-active* valences of post-conflict intervention, as most definitions state, but also the role of *prevention*, of *pro-active intervention*. Not lastly, this definition avoids the restrictive framework of the penal conflict, considering that restorative practices can contribute to the solving of a variety of conflicts (in family, work relations, schools etc.).

However, as in other fields, the meanings of the restorative justice concept have tended to identify with a model or a type of practice that has been more frequently used and analyzed by the evaluative research. In Europe, for example, the *sense of restorative justice has been (and is) saturated by the victim-offender mediation*, this being a practice that has been used mostly in Germany (Weitekamp, Kerner, 2002, 2003; A.Hartman, 2006), Belgium (Aertsen, 2006), Norway (I.Hydlle, 2006) or in the ex-communist states, Poland, the Check Republic and, recently, in Bulgaria, and in a „statu nascendi” in Romania. However, the evaluative analysis that I made in the *Policy oriented research* work group, within the European COST A21[2] programme, has distinguished the fact that beyond VOM, which truly dominates the European practice, there are a diversity of restorative programmes that are oriented towards the large scale integration of the community in the reparation of the consequences of offences and, wider, of the different types of conflicts (in Great Britain, Holland, Spain etc). On the other hand, the comparative analysis with restorative justice programmes from the USA, Canada, Australia and New Zealand has *shown that what we used to call in Europe restorative justice was, actually, an alternative strategy to the formal justice system, especially in the cases of minors as offenders and only to a smaller extent a restorative practice.*

In close connection to the restrictive (an inexact) identification of restorative justice with the victim-offender mediation, another cliché that has limited and still limits the

understanding of restorative justice refers to the types of conflicts that could still be solved by appealing to restorative practices. Otherwise obvious also from other definitions, the penal conflict is what caught the attention of practitioners and researchers and generated the significant „jurisprudence” in the restorative justice matter. It is a more resistant cliché, in spite of the significant diversification of contexts and types of conflicts to which it applies. At the first International Conference of the International Institute for Juridical Sociology, *The European Way of Law* (Onate, Spain, 2005), out of the more than 500 papers presented by sociologists and jurists from all over the world, more than a third were on restorative justice and, among these, only two on the penal conflict. The majority of interventions presented the implementation of restorative justice in different types of conflicts (work, family, in different organizations etc.), including the process of reestablishment of the local community and the democratic life after armed, violent conflicts.

## **2. Trends and sources of restorative justice**

The presence of the restorative justice in the center of the present socio-juridical research stage, as well as under the attention of reform politics of the justice systems has more sources.

There is no satisfactory systematization of them. The researchers usually prefer to invoke, in chronological order, the restorative justice programmes promoted in different states, starting with the 8th decade of the 20th century (the programme from Ontario, Mennonite, Canada, 1974). Without any doubt, reporting to the „context of discovery” (Imre Lakatos) allows the identification of some social facts, but does not help to a great extent in understanding what happened and how this breach in the formal system of conflict resolution occurred, that gave way to informal alternatives and, most of all, the ascending trend of this direction.

The sources of restorative justice, the visibility which it benefits from today, are closely related to a complex of processes and phenomena. Among these, the *decolonization movements* and *cultural justice; the mutations in the governing processes; the crisis of welfare-ist penal institutions and the first projects of victim-offender conciliation, the influence of the European and international recommendations and legislation* and most frequently invoked by different analysis and research.

### **•a) Restorative justice and cultural justice**

One of the essential sources is represented, according to us, by the *decolonization movements*, and of the affirming of the right to self determination and self governing of the peoples of the 20th century. Among other consequences, these movements led to the *reaffirming of identity, of cultural tradition and, this way, to the traditional forms of conflict resolution*. They are those that explain the reoccurrence of interest for what was called *cultural or communitarian justice*, for the premodern (more precisely, pre-colonial) forms of restorative resolution of conflicts: in New Zealand (*Pakeha*), South Africa (*ubuntu*), North America (*nalyeeh*, at Navajo Indians), and Canada etc.

In New Zealand, constituting a own justice system was an integrating part of the decolonization process, of the accomplishment of sovereignty (*tino rangatiratanga*) and self governing by the Maori population. „Fundamental in this process, according to Moana Jackson, is the recognition of the fact that colonial dependence meant more than the creation of a socio-economical disparity which racialized poverty and grew the crime rate. Colonization is an act of total control that overtakes from the colonized population the right and capacity to take decisions and exercise jurisdiction over their own lives (...). An integrating part of this process was the re-establishment of a Maori justice system.” (Jackson, in McElrea, 1995:33). This process led to the reuse of traditional practices, specific to the Maori communities, of conflict resolution. Among them, the best known became the *family group conference* and *community group conferencing*, „as practices of a restorative justice system” (McElrea, 1995:61). With a series of modifications and adaptations, they were taken over in Australia, USA and, from there, in Europe and Asia, becoming, after the victim-offender mediation, the widest used restorative practices, as shown in the analysis of the International Institute for Restorative Justice.

#### •b) Restorative Justice and traditional practices of conflict resolution

Another major source that we identified refers to the *mutations produced at the level of government*, in the context of *regionalization and „re-medievalization“ processes* (J.Rosenau) of the modern world. According to David Garland, the major transformations that took place at the level of government are linked to the „erosion of one of the founding myths of modern society: the myth according to which the sovereign state is capable of realizing ‚the justice and order’ and crime control within the territory limits in which it exercises its sovereignty (...). In controlling criminality, as in other spheres, the limits of the state’s capacity to govern social life, in all its details, have become more obvious than ever in late modernity. Assigning itself control functions and responsibilities that once belonged to the civil society’s institutions, the late modernity’s state is confronted today with its own inability to accomplish the expected level of control over criminality and criminal behavior” (Garland, 2001:109, 110). We were recently noticing the fact that „new forms of government have led to the transfer of some competences which, during the whole modernity, belonged to the state, to local communities. In the context of this process, together with local self governing, the communities assumed also the responsibility of ensuring the safety of their citizens, of controlling criminality outside the formal justice system. Within this background, alternative, non-state conflict resolution strategies, that were present in the community juridical tradition, have gained visibility” (D.Balahur, P Balahur 2006). Based on a different logic than the one of the modern trial, in which one side loses and the other gains, these strategies allow simultaneously the resolution of the conflict and the reintegration in the society of the parties involved.

Illustrative is, for example, the system practiced by the Jewish community, from Israel or the Diaspora. Aside from the formal system developed in the modernization process, the Jews have a very old tradition, *psharah*, of mediated resolution of conflicts. This tradition of civil, commercial and family resolution of conflicts totally forbids the use of strategies in which one of the parties loses and the other wins. *Psharah* represents a mediation form

based, to a high extent, on the religious tradition, and refers to the conflict resolution based on the compromise among parties. „The Talmud, in which the basis of the Jewish juridical procedure is described, distinguishes the advantages of mediation on the formal decision in which only one part wins.” (Steinberg, 2006:5). By mediation - *psharah* - there is a simultaneous accomplishment of the *peace trial* and *justice trial* - the conflict is resolved and the community peace is ensured. The Talmud stipulates that only *psharah* accomplishes the ideal of justice (*mishpat shalom*) and justice (*mishpat tzedek*).

In the research I have undergone I was interested as to what extent the *traditional strategies* for conflict resolution were still active in Romania. I have identified such practices at the level of some ethnical minorities. The Roma community uses, since immemorial times, an own method of conflict resolution known as the *Gypsy peace trial* or the ‚*Stabor*’. The interviews and conversations I had with Mrs. Margareta Herțanu, counselor of the prefect of the Iași county on Roma problems (October, November 2006) have allowed me to reconstruct the procedure and conditions in which the *Stabor* takes place.[\[3\]](#).

#### **The Gypsy peace trial - Criss rromani**

MH: *The Rroma community is spread today in the whole world. Our origin is very old and is related to India. We are known under different names: in England ‘travelers gypsy’, in France ‘tziganes’ or ‘manouches’, ‘Sinti’ in Germany, in Spain ‘gitanos’, etc. In Romania, the term most often used is ‘rroma’.* DB: In the studies and research on the Rroma community, sometimes it is called ‚closed community’. Does it still correspond to the present reality? MH: *No culture is an island. Meanwhile, the tradition of our community has interfered with others; mutual transfers took place with other cultures. There are however practices that have remained unchanged from immemorial times. The peace trial is one of them.* DB: How would you characterize the Peace trial in comparison to the formal, court resolution of conflicts between the members of the Rroma community? MH: *The peace trial has priority against the state trial. According to the belief and tradition we have, only by this trial can true justice be made. The Rroma peace trial is a justice custom and the members of our community believe that it is the right one, because the parties make the Rroma oath, are tried according to ‘jus sacramentum’, through which they have the belief that only the truth is said. The truth cannot be found by the state trial, because the judges are of other ethnicity than the Rroma and cannot understand them (they are „gagii”) or discriminate them. For these reasons, the Rroma trial has priority. Therefore, even though Rroma people have gone through a trial, these trials are not valid. They ask the community for the meeting of the stabor in order for true peace to be made within the community.* DB: What role does the peace trial have for the community? MH: *The Rroma peace trial, as the name suggests, has, on one hand, the role of solving by appeal to customary practices and strategies, the conflicts between the members of the Rroma community and on the other hand, to reestablish peace within the community.*

DB: How is the peace trial started and what are the rules, the rituals of proceeding?

MH: *The start of the peace trial refers to the request of the relatives of those involved in the conflict. They establish a date and announce the whole community in order to participate in the trial. In accordance to tradition, the trial takes place in front and with the participation of the whole community. The judges are proposed and elected by the parties. Each judge is evaluated and if one of the parties does not accept him, he is replaced. Starting with the moment they were elected, the judges must stay together, and if the trial lasts more days, they must live and eat together. During the trial, the judges are forbidden any contact with the parties involved. If there is any suspicion that any judge had any contact with one of the parties, he is replaced and has the obligation to compensate the parties for the expenses they made. The judges are paid by the parties for their activity, with a sum of money called „vatrai”, paid before the sentence is pronounced.*

*The trial takes place in open air in front of the whole community. It starts with a ceremony in which the judges speak aloud the sacred judgment of peace - „salahaimos” or „alav romanos”. In the debate phase, the parties are invited in turn to take the floor and tell their opinion on the conflict. According to tradition, in the talks they give, the parties address the whole community and the judges as its representatives, using specific politeness formulae - „romale hai shavale” or „raia crisinatori” (dear rroma and dear judges). The judges can ask questions to the parties in order to formulate a point of view. The witnesses brought by the parties are also heard. The Rroma peace trial allows as witnesses the relatives of the parties as well, since it is considered that no one lies. If there is any suspicion as to the truth of the declarations made, the witnesses are obliged to swear.”*

DB: What is the role of the oath within the Rroma peace trial?

MH: *The oath represents a distinct phase in the peace trial. It is used every time, as result of debates, contradictory situations remain, or there is doubt or suspicion. The judges are those who decide which party will make the oath and in what manner it will be made. According to tradition, the oath can be made on the cross, water, pork, fire, lit candle or other sacred elements. Once made, the oath cannot be commented upon or contested. According to tradition the oath can be made on the crux, water, pork, fire, lighted candle or other sacred elements. Once the oath was made it can not be commented or contested anymore. By means of the oath, all contradictory situations are eliminated and the truth is established. It usually represents a final phase, followed by the judges’ verdict. There are also situations in which the verdict is no longer necessary, since as a result of the oath, the parties made peace.*

DB: What are the solutions - sanctions which can be pronounced by the judges as consequence of the Peace trial?

MH: *Tradition stipulates the possibility of applying some hierarchical sanctions: moral*

*qualms in front of the community of the party which was found guilty of starting the conflict; payment of certain sums of money; exclusion from the community. The sanction imposed depends on the facts that were committed. The moral qualm is the easiest. The payment of certain sums of money is the most frequent. The most serious sanction is exclusion and it is pronounced in exceptional cases, for very serious crimes. The exclusion from the community prevents acts of revenge and ensures community peace.*

*Starting with the moment in which the sentence was pronounced, it is considered that peace within the community was reestablished.*

(Conversations and interviews taken during the period October- November 2006; published with the permission of Mrs. Margareta Herțanu).

The Rroma peace trial, „Criss rromani”, is a part of the cultural tradition, of the custom of Rroma communities related to the conflict resolution. The peace trial is accomplished regardless of the parties’ appeal (sometimes compulsory by state law) to courts and the results of the formal trial. Its aim, as it also results from the interview presented above, is the reestablish the peace within the community, the dignity of the persons affected by the conflict etc. It does not produce however any effect outside the community.

This type of strategy has gained the interest of the politicians in search of credible means of reducing the overcharged roles of the courts, of the overrepresentation of ethnic minority groups in prisons, but also of strategies that would better answer the *citizens’ anxieties*, among which *the fear of crime*, which occupies a top place in the western states. In some communities, these practices existed already and, possibly, they were just re-legislated, either as non-state means of conflict resolution or as auxiliary means. As effect of the mutations that intervened at the government level, including in the justice domain, in Canada for example, the Royal Commission decided to recognize the aboriginal population its constitutional right to set up and administrate its own, distinct, justice system. The commission distinguished that the legal initiatives related to the alternative justice system can develop on two paths. One of them is self government, and the other aims at accomplishing certain changes in the existing system.” (Rudin, 2005:89).

For other communities, the fragmentation of government and justice has lead to the transfer and adoption of alternative practices with a strong communitarian character. This is the typical situation of family group conferences. It was imported from New Zealand by the programs on all continents in search of more efficient alternatives of intervention and control of juvenile delinquency.

### **•c) Restorative justice and the crisis of modern penal justice institutions**

A third major source which imposed the restorative justice was represented by the *crisis of the penal welfare-ist institutions and especially of the models centered upon the*

*rehabilitation of criminals through traditional probation programs.* In trying to solve the *rehabilitation crisis*, as it had been declared, alarmist and inexact, by Martinson [4], in a paper in 1974, the probation services looked for new, creative solutions, that would allow increased efficacy in controlling criminality. On this background, the probation service from a Canadian town, Kitchener-Ontario, initiated a procedure that went down in history as the first victim-offender mediation program: the so-called *Kitchener experiment* or *Elmira case*.

Practiced initially under the form of experimental projects, afterwards as explicit programs to control criminality, but also as response to the victim's needs, the victim-offender mediation-counseling rapidly spread on all continents. In the programs thirty years ago, first of all the minor offenders and their direct victims were involved, in the case of crimes of reduced or medium gravity. Presently, the victim-offender mediation is accomplished for a diversity of crimes (the situation differs sensitively from one legislation to another), including the homicide, rape, robbery cases etc., sometimes involve direct victims, other times indirect victims, integrate both juvenile as well as major offenders.

Surely, today we wonder, *if and to what extent can we consider victim-offender mediation a restorative practice of alternative conflict resolution, a simple pragmatic modality of conflict resolution without restorative virtues or if it remained like it was initially, an alternative strategy of limiting and reducing contact with the formal penal justice system, or a solution to save the rehabilitation action, especially in the situation of minors having committed penal crimes?* To these questions there are no unique answers. There are both resemblances and differences among the national jurisdictions. In some of them, the victim-offender mediation is just *a diversionary strategy* complementary to probation, of limiting the contact with the penal justice system, remaining, therefore, centered upon the problems of the offender, and, only subsidiary, on the victim's problems. In this situation we talk about a *minimalist* process, which remains connected to the formal penal justice system and the offender's problems. As I was mentioning on another occasion, „as an alternative to the contradictory system of courts for conflict resolution, the victim-offender mediation has as aim the reparation of the consequences of the penal act by means of interpersonal strategies that are supported and facilitated by a third person (the mediator). Despite the fact that it can have (indirectly) restorative effects, it represents, in fact, a transfer of the transaction from civil law to the penal conflict or other types of conflicts. This is the reason why victim-offender mediation represents the *minimalist approach of the restorative justice*, close to and resembling the act that takes place in courts. However, both restorative justice practices as well as victim-offender mediation can be seen on the same continuum, having on one extreme the conflict resolution courts system and on the other, the informal strategies based on the community's participation to the conflict resolution. Between these two extremes, there is a variety of alternative forms of conflict resolution that keep, to different extents, characteristics of both extremes” (Balahur in I.Aertsen, D.Miers, 2007). If, however, we analyze the victim-offender mediation from a *maximalist* perspective, then, without any doubt, *VOM remains just a practice with restorative valences, limited, in principle, to restitution.* In the same article mentioned above, I was reckoning that „in a maximalist

approach, restorative justice is a reconstruction strategy, of the organized reciprocity networks and of civic solidarity' (R.Putnam, 1995:20) as well as of community and democracy, or at least of the competences of being democrat' (Braithwaite, 2002:132). It can be, as well, considered from a maximalist perspective, as strategy to develop social capital (...) and civic participation by participative learning and decision making' (Wachtel and McCold, 2000: 118).” (D.Balahur in I.Aertsen, D.Miers, 2007).

Nevertheless, beyond the evaluations that we make today - when projects and programs of alternative conflict resolution are widely spread on all continents, in more than 100 countries (D.Van Ness, 2005) - we cannot fail to notice that the echo, and above all the rapid spreading of the victim-offender conciliation programs have favored transfers, synergies among different practices and programs, thus generating this vigorous trend which we characterize today with the help of the *umbrella concept* (P.McCold) of restorative justice. In *Restorative Justice and Responsive Regulations* (2002:8), John Braithwaite was mentioning more than 300 programs in North America, over 500 in Europe, over 400 in Canada. G.Bazemore and M.Schiff (2005) identified over 500 programs of restorative justice in the USA, implemented within the juvenile justice reform process.

What is instructive, not only for research, but, first of all, for the development of the restorative intervention programs, is the transfer of good practices, the diversity and combinations with traditional models, the improvements and completions with the experience accumulated in different projects etc. This *open system* generated a great variety of *restorative justice models* that apply to different types of conflicts and organizations. In the interviews that I have taken, Terry O’Connell, (Manchester, 2005; Tel Aviv, 2006) the initiator of *family group mediation in Australia*, was telling me the fact that two events had influenced him in a decisive manner, in the 90s, as a police officer in charge of minor delinquents, to develop and implement a restorative justice model that bears the name of the first Australian community in which it was applied, Wagga Wagga (*the Wagga Wagga Model of Conferencing*). O’Connell mentioned family group mediation practiced by the Maori groups from New Zealand in cases with minor offenders and the theory elaborated by John Braithwaite. The Maori practice of working together with the families of the delinquent child, to integrate the victim and the its support persons, seemed to O’Connell new means through which they could prevent, in collaboration with the social assistants, the criminal behavior or young offenders and children. Starting from this practice and in close relation to Braithwaite’s theory (Braithwaite, 1989) which proposed a strategy of reintegration based on the respect of the dignity of the person who committed penal offences and the sentiment of shame, O’Connell developed *a new restorative justice model*. The main amendments brought to the Maori practice aimed at the structuring of the mediation process (conferencing) based on set of guidelines (*script*), on a set of questions (*restorative questions*) which have the aim of conducting the process to the desired results, of restitution, apologies to the victim and community, the expressing of regret for the committed offence and the common identification of the means for material and emotional reparation of the consequences of the penal crime etc., respectively. This practice spread rapidly in Australia. Based on an adjusted script, it could also be applied in cases in which there were no direct victims,

and, at a later moment, in the development of restorative micro - communities in schools or other communities. His meeting with Ted Wachtel (IIRP SUA) in 1994, led to the setting up of an international program international, *real justice* (that later became an organization), whose aim was to promote the mediation model (conferencing) based on a script.

Based on the collaboration between Terry O'Connell and Ted Wachtel, *the script model of conferencing* was developed, in the sense of systematizing and extension based on theoretical grounds. In the handbook they elaborated together, *Conferencing Handbook* (Terry O'Connell, Ted Wachtel, Benjamin Wachtel, 1999), this model is justified starting from the *Affect theory* elaborated by Silvan Tomkins, developed by Donald Nathanson, keeping however as main argument Braithwaite's idea of reintegration through shame (*reintegrative shame*). Actually, at a later moment, Ted Wachtel together with Paul McCold elaborated one of the few theories that exist in the field of restorative justice, based on the evaluation of the programs they implemented.

Under this form, *the script model of conferencing*, is known and practiced today on all continents, being, after mediation, the most widely used model, as the data of the International Institute for Restorative Justice estimates. By adapting to the conditions of the different types of conflicts, to the victims, community, institution it applies in etc., the model elaborated by Wachtel-O'Connell and McCold generated other intermediate forms, as: restorative cautioning, community conferencing, restorative conferencing etc. It is not by chance that the Global Alliance for restorative justice, promoted by the International Institute for Restorative Justice, has such a powerful echo, gathering at its annual meetings hundreds of practitioners, researchers, and representatives of international governmental and non-governmental organizations from all over the world.

#### **d) The socio-juridical pluralism and restorative justice**

The fact that the issues of the restorative justice reentered the main focus of research and justice reform strategies is closely related to what the sociologists and criminologists call *the global legal pluralism*. It is related to the present law forms born outside the state and the law process. Gunther Teubner (1997, 2004) uses the syntagma of *neo-spontaneous law* to characterize a great variety of juridical regimes that were developed by non-state global actors. The pluralization process is, according to Teubner, the essential characteristic of law in the globalization era. „The global regimes develop, more and more, a material law, without the participation of the state, without the national legislation or the international treaties. Everywhere, the private spreading of the private regulations is growing; in short, the production of law takes place parallel to the state.” (Teubner, 2004:73).

Between the positive law and the customary practices, the so-called forms of 'neo-spontaneous forms of law' etc., lays a *hybrid system* that combines, to different proportions, the elements of formal conflict resolution system with informal practices. It is visible, above all, in the present strategies of alternative conflict resolution in the civil,

commercial, penal, family relations, group and community counseling after violent conflicts etc. area.

Restorative justice, in the diversity of the practices, techniques, models etc., in which it is accomplished, represents also a manifestation of the *hybrid system*, of the present juridical pluralism. The mediation practice - and I take as example the victim-offender mediation- combines elements of procedure and values of the modern penal trial with informal strategies of conflict resolution. The procedural part aims at the cases referral system, the procedural moment of referral and, not lastly, to the fact that in order to benefit from the authority of 'res judicata', the parties' decision to cease the conflict among them is recorded, usually, in the court, and replaces thus the court's decision. This way the agreement of the parties in conflict observes one of the fundamental principles of the modern procedural law, 'non bis in idem' (no one shall be twice tried for the same offence).

The stipulation that sides are assisted during trial is linked, also, to what the penal modernity called trial guarantees and is connected to the upholding of some fundamental rights of the parties in conflict - the right to defense, to a fair trial etc.

In Europe, what we called *the proceduralization of the informal strategies of conflict resolution* was influenced and modeled by the set of Recommendations elaborated by the *Council of Europe*. They aim at, successively, the resolution of *family conflicts* by mediation (R (98) 1), in *penal domain* (R (99) 19), of the conflicts between the public authorities and private citizens (Rec. (2001) 9), and, the most recent one, mediation in *civil cases* (Rec. (2002) 10). Also, at the level of the European Union, there were adopted normative acts, referring to the protection of the victim in the penal trial, as well as the compensation of the victims of crimes [5]. At the global level, extremely influential in the development of restorative justice programs and protection of the victims of crimes were the *Fundamental principles regarding the implementation of the restorative justice programs in penal cases*, elaborated by the Economic-Social Council of the United Nations (July, 2002)[6].

As I was observing above, in the restorative justice practice, the degree of the formal and informal elements depends on the cultural background of the group and community, on the tradition of the civil society, on the existence of legal stipulations that give effect to such practices etc.

Synthesizing, the vision which the *socio-juridical pluralism* opens, distinguishes a great variety of conflict resolution practices. *The modern formal trial and the traditional (communitarian, cultural) practices of conflict resolution (Ubuntu, in South Africa, Psharah, in the Jewish communities from Israel and Diaspora; Sulha, for the Muslims, Nalyeeh in the Navajo Amerindian communities from the USA, the Roma peace trial in the Roma communities etc.) represent the extremes*. Between them there is a variety of forms, generically identified by G.Teubner as *neo-spontaneous*, others which we named as *hybrid systems*, which combine, to different extents, the elements of the formal process with traditional practices of active community involvement with the aim of identifying a

common answer to the committed offence, in order to solve the conflict and ensure community peace. Among the latter we integrate the diversity of restorative justice practices that have been developed in the last thirty years: counseling or victim-offender mediation; family group or community mediation, conviction circles, restorative communitarian committees etc.

**•d) Theories, models, studies that legitimated the restorative justice programs**

*Among the theories and studies* that have contributed to the interpretation and understanding of the frustration accumulated towards the modern, formal-procedural conflict resolution system, the Norwegian criminologist Nils Christie's paper, *Conflict as property*, as the researchers of restorative justice unanimously admit, was extremely influential.

The practice of alternative conflict resolution and, above all, *the control of the parties on the conflict*, were and are present in the civil and commercial law today (in identical or close-resembling ways in all states of continental Europe). During the whole duration of the trial, through a procedure called 'transaction', the parties can agree to settle, on an amiable ground, outside the court, by negotiation, the conflict between them. Moreover, in commercial area, in order to address the court, the parties must bring proof to the court that they have previously made attempts to settle peacefully, by negotiation, their conflict. In the penal law, the possibility of parties giving up the trial is limited only to crimes whose investigation/ prosecution depends on the former complaint of the victim. The parties' conciliation and the withdrawal of the complaint lead, depending on the case, to the cease of pursuance or of the penal trial. This is a common settlement of more penal European legislations. The crimes in this category are regulated, exclusively, in the penal codes. However, in the whole penal modernity, for most types of crimes, the state, by its specialized bodies, has taken notice with the aim of pursuance, trial and penal conviction of the persons responsible for committing a crime. The parties, in this situation, have a reduced control over the trial which, once started, takes the former strictly established route procedures. During the whole modernity, the state was the owner of the right to punish. It assumed the obligation to guarantee the safety of the citizen, the protection of the fundamental values of the community and, in a correlated manner, assumed the position of *generic victim* for the majority of the crimes committed. *The real victim*, the offended party, had a marginal position and generally had no say in the punishment of the guilty person. The participation in the trial meant many times supplementary victimization and its consequences, the rerun of the violence cycle. Nils Christie, Norwegian criminologist, stated in a paper which became very influential, that the state *got hold of the conflict*, ,confiscated; it from the real actors, marginalizing its true victim. „The victim is situated totally outside the case; he/she has never the opportunity to know the criminal. He/she stays outside the trial, is humiliated in hearings in the court, without having the chance of a human contact with the criminal. He/she would like to understand something but instead remains a non-person in a Kafka play. Of course, the victim will leave the stage more scared than ever....” (N.Christie, in G.Johnstone 2005:62).

The true problem, as the Norwegian criminologist stated, *resides in the manner in which modernity understood criminality and punishment*. An alternative paradigm, in the meaning that was given by Kuhn, of *new way to see the world*, involves, as Christie wrote, „a definition of the crime as it is lived: as a breaking of the rights of a person by another person. The crime is a conflict between humans, not an offence brought to the state. The right answer should be one that restores. Instead of the retributive paradigm, we must orient towards a restorative paradigm (N.Christie, in G.Johnstone 2005:79).

The Norwegian criminologist Nils Christie's study put, radically, under the question mark, the *modern penal paradigm*, the capacity of modern procedural justice to indeed make justice and contribute to the citizen's and community's safety. However, the major challenges and at the same time openings generated by his study refer to the role of *restitution in pre-modern practices* of conflict resolution and the victim's possibilities to control the process, „the act of justice” through which its dignity is reestablished. In these topics, seen as new, the supporters of alternative justice saw the *important sources of legitimating their steps*.

### **3. Restorative justice in Europe**

The memorandum of the European COST A21 project, *Restorative Justice Developments in Europe*, at the accomplishment of which I participated, stated the fact that in Europe, there were, since the 60s, debates on the manner in which those involved in the penal conflict, the victim and the offender, can contribute to solving of the situation created by the committing of the crime. Even since then, there was a reaction of discontent towards the traditional manners of the penal justice to solve this kind of conflicts. These discussions were taking place at the same time, or even before the first victim-offender mediation experiments in Canada and the USA (Memorandum, 2002:3)[7].

The restorative justice programs, under the form of victim-offender mediation, were implemented in different states in Western Europe starting with the 80s, and in some ex-communist countries after the 1990s. Presently, there is a great diversity of restorative justice programs. However, despite the great number of programs that exist in different European states, there is no evidence and satisfactory evaluation of their efficiency, of the impact they have on the (penal) justice systems. Starting from these observations, the general objective of the COST A21 *Restorative Justice Developments in Europe* Action aimed at the identification and comparative evaluation of the restorative justice programs in some European states. The network constituted within the program brought together over 70 researchers from 21 member states: Austria, Belgium, Bulgaria, Cyprus, Finland, France, Germany, Hungary; Ireland; Israel, Italy, Luxembourg, Switzerland, Holland, Norway, Poland, Portugal, Romania, Slovenia, Spain and Great Britain. The analysis and evaluations accomplished within the European network identified *four major directions of research*:

- I. Evaluative research on the restorative justice practices;
- II. Research oriented towards policies of promotion and implementation of restorative justice in different member states;

- III. Theories and models of restorative justice;
- IV. Restorative justice, violent conflicts and mass victimization.

Within these directions of the COST A21 action, a series of analysis were made, that aimed at the:

- Comparative evaluation of the national legislations;
- The evaluation of relations between restorative and penal justice;
- The evaluation of training models for practitioners in the field of restorative justice;
- The evaluation of the new models of restorative justice;
- The study of the national data recording systems regarding restorative justice;
- Restorative justice and the community;
- The restorative justice and the violent conflicts - the meta-analysis of existing research;
- The study of some regional conflicts (Congo, Kosovo, Israel-Palestine) etc.

The analysis of data and experience from different European states has allowed me to identify some *common directions of the processes of implementation of restorative justice* in Europe, but also of some *peculiarities related to socio-juridical-cultural local contexts* (Garland, 2006) which confer a specific identity to a certain socio-juridical institution.

**3.1** The implementation of the restorative justice programs in the western European states and, recently, in Central and Eastern Europe, was related to what we called above *the crisis of the modern penal institutions and their failure in accomplishing an efficient control of criminality*. It gained maximum visibility in the 80s-90s, especially in juvenile justice, when the welfare-ist institutions were under the fire of a strong criticism, both from the public view, as well as from politicians. As it results from the analysis of the experience of the 21 states involved in the European COST A21 Excellence Network, but also from other studies and comparative research, *the first restorative justice programs were related to the search of more efficient answers, capable of keeping under control the juvenile delinquency*.

From the comparative research, it results that this was *the major direction* in which the first restorative justice programs were implemented, usually under the form of victim-offender mediation, in the European states. It is the case of Austria, Great Britain, Belgium, Holland, Sweden, Norway, Germany, Poland, Romania, Albania etc.

The recent comparative study, made by Anna Mestitz and Simona Ghetti, regarding the victim-offender mediation in cases with minor offenders, in 15 European states, confirm this conclusion (Mestitz and Ghetti, 2005). Congruent conclusions as drawn in our work are also made by J.Muncie (2005), J.Shapland (2006); A.Crawford, T.Newburn (2003); B.Littlechild (2003); R.Smith (2003), K.Haines and D.O'Mahony (2006) etc.

In respect to the restorative justice programs, *the European experience integrates in the global trend that we identified before, of investigation new directions, programs and measures destined to reform the juvenile justice, starting with the 8th decade of the 20th century.*

**3.2** Another characteristic shared by the practice of the implementation of restorative justice in some European states is related to the *experimental, pilot programs* developed at the initiative of researchers, of the civil society or governmental organizations - probation services, police, municipality - religious confessions etc. As a peculiarity, in comparison to other socio-juridical institutions, which are usually implemented by normative acts or administrative decisions, so by 'up-down strategies', the restorative justice was implemented, in the majority of the states, by a different strategy. It developed initially under the form of *experimental programs*, in the absence of express juridical regulations. Afterwards based on evaluations that confirmed the advantages to the formal conflict resolution system, the governments approved, legislated etc., „the changes that had already occurred outside their action” (Mayerhofer, 2000:110). The evaluative analysis I made within the work group centered on national policies in the field of restorative justice, within the European COST A21 program „*Restorative Justice Developments in Europe*”, have pointed out that in over 90% of the European states, the practices of alternative conflict resolution were introduced by experimental projects.

A comparative analysis with the processes of the restorative justice implementation in the USA (H.Zehr, T.Wachtel, P.McCold, M.Umbreit, D.van Ness etc.), Canada (R.Gordon, E.Elliott); New Zealand (A.Morris G,Maxwell, J.Consendine), Australia (J.Braithwaite), Japan (T.Yoshida) etc, *reveal that also through this characteristic, the restorative justice in the European states integrates in the general, global trend of promotion of alternatives to the modern process of conflict resolution.*

**3.3** Referring to the models of restorative practices developed in the European states, we see a *distancing from the general trend* existing in Canada, USA, Australia, New Zealand etc. In Europe, as we had the chance to see in the evaluation we made on the basis of questionnaires elaborated and applied within the COST A21 project, but also in other research, *the most practiced model is victim-offender mediation* (Weitekamp, Kerner 2003; D.Miers, Willemsen, 2004; I.Aertsen, D.Miers, 2007).

This situation is not random. A special role in the promoting of victim-offender mediation was held and is still held by the Council of Europe, to which we owe the elaboration of the recommendations referring to the conflict mediation in family relations (1998), penal (1999), in the relations between the public authority and the private or juridical persons (2001); in civil matters (2003). The Council of Europe was, also, one of the first financers of the experimental programs of victim-offender mediation. The member states of the European Union, as well as the candidate states had also the obligation to introduce express regulations in their legislation (until January 1st 2006) referring to the protection and recuperation of victims of crimes, of trafficking (2001, 2004) etc. Among the 21 analyzed states, Holland represents an exception. The preferred program is *family group mediation*. „It was introduced experimentally, to solve the

problematic situations between parents and children. One of the main objectives was developing of mediation plans in which the extended family is involved in order to avoid institutionalization.” (Blade, 2005:101). As far as the candidate states are concerned, the regulations related to introducing alternative strategies of conflict resolution were part of the obligations assumed in the process of negotiating the accession to the EU.

On a second place, among the restorative justice models practiced in the European states, is *family group mediation*. It is present in Great Britain, Ireland, Belgium, Albania, Finland etc. In Romania, within the CNCSIS research project I am doing „*The sociological and juridical analysis of the reform of justice from Romania in the perspective of the implementation of European standards and restorative justice*” I am accomplishing, under an experimental form, a family group mediation program. Other models, present in the European states, identified by the evaluative analysis, are: *restorative circles, sentencing circles, community conferencing* etc.

**3.4** Together with the extension of the victim-offender mediation programs in the European states, there was also a *diversification of the sphere of conflicts* whose solving is accomplished by such strategies. The conflicts related to the family relations, civil, commercial conflicts, were transferred from courts to informal mediation boards (in Belgium, Great Britain, Austria, Germany, Norway, Albania, Israel etc.). Also, we are witnessing today the *modification of the philosophy and values of these programs*. If initially the restorative justice programs aimed only at solving conflicts (penal, especially) today they are used, more and more often, in their prevention. One of the successful experiences in Europe in conflict prevention and the accomplishment of restorative communities in schools was developed by Belinda Hopkins in Great Britain. A similar trend developed in the USA, where restorative practices are already part of the managerial practices of conflict prevention and solving in the most diverse organizations - banks, universities, industrial companies etc.

#### **4. The implementation of restorative justice in Romania**

##### **4.1 Juvenile justice reform programs and victim-offender mediation in Romania.**

The implementation of restorative justice practices in Romania followed, in general lines, the directions that we find in most EU states. This situation is not random. The harmonization with the communitarian *acquis* was an integrating part of the negotiation process for the country’s integration in the EU. In the context of this process, the regulation of alternative strategies was an obligation Romania assumed within the justice system reform and of the implementation of the EU standards of Justice, Freedom and Security (the third communitarian axis).

As in the other European states, in Romania, the practice of alternative conflict resolution was implemented within the *juvenile justice system reform process*, by means of experimental projects. In the initial intention, the victim-offender mediation was going to complete the framework of alternative institutions (probation) developed by the project which was financed by Great Britain by DFID during the period 1998-2004. The

probation institution had as objective to increase the flexibility of the sanction system applied to children in conflict with the penal law, the reduction of the contact with the penal justice system and the facilitation of their reintegration within the community. (D.Balahur, 2004). During a six-year period, this project contributed to the reform of the juvenile justice system in Romania, by implementing the UN Convention's standards with respect to Children's Rights. Also within its framework, in the period between 2002 and 2004, also the first experiments with victim-offender mediation were accomplished. They aimed at deepening the juvenile justice reform process and the creation of socio-judicial institutions mentioned by the Convention in art. 40, paragraph 3b, referring to the penal conflict resolution in which children are involved „without resorting to judicial procedures (...)”.

The victim-offender mediation experiments have completed the alternative conflict resolution practices, initiated starting with the year 2000 by the Commerce and Industry Association in Romania in commercial and civil cases. For this aim, the Association set up a specialized body, *The Centre for Commercial Disputes Mediation*, which, in 2003, published the *Rules of the mediation procedure*.

Therefore, regarding the major sources of mediation in Romania, as in other European states, the essential role was held by the initiatives of the civil society and academic circles. The legislation of this alternative strategy for conflict resolution had done nothing more than to *legitimize an informal* practice developed by different private agencies within the framework of different experimental projects. „The law of mediation, as I was recently stressing upon, is not an exception from the observation according to which the reform of the justice system was promoted as a result of the pressure of the civil society and international obligations. It legitimated the existing informal practices that were developed by non-governmental organizations. This normative act represented as well, an answer to the requirements of European integration that imposed the improvement in quality of the justice act, especially through a better case management, by reducing the number of files, as well as by adopting alternative conflict resolution strategies.” (Balahur in I.Aertsen, D.Miers, 2007).

Alternative practices for conflict resolution could contribute to the solving of the problem of overloading the roles of the courts. The statistical data show the constant growth in the number of files solved on a yearly basis by judges. If in 1990, 1.513 judges solved 589.660 civil and penal files, the average being 390 files per judge, in 2003, 3.557 judges solved 1.453.776 files, which means, on an average, 409 files for a judge. With such an overloaded role, the efficiency of the Romanian justice system was one of weakest in Europe, resulting in close surveillance by the European Commission.

#### **4.2 Legislative framework for the implementation of alternative justice programs in Romania.**

The reform of the justice system in Romania assumed, as an essential requirement in the process of harmonization with the European practices in the field, the elaboration of a

legislative framework that was adequate for the implementation of the alternative conflict resolution practices.

Chronologically, in the fields evaluated by the Agis project „*Multidimensional Restorative Justice for Everyone*” - domestic violence, juvenile delinquency, aggressiveness in schools - the normative frame that allows the resolution of the conflicts by use of informal strategies, sometimes of restorative type, has developed recently.

Starting with the year 2000 (D.Balahur, 2001, D.Balahur, in I.Epstein, 2008) violence against children and women has become a priority problem within the wider process of reforming the social assistance system and children’s rights protection. On this background, the law 217/2003 was adopted, referring to the *Prevention and fight against domestic violence*. The philosophy on which this normative act is founded aims at following restorative strategies both for solving as well as for prevention of family conflicts. (among husband and wife, among parents and children). In chapter V of the Law 217/2003 (art.19-22), the possibility of mediation in cases of domestic violence is regulated. The mediation process can be accomplished either by the *Family Council*, or by an authorized mediator. By transferring the competence of solving the conflict to the Family Council, this normative act opens the possibility of implementing some practices with a marked restorative character which are close, in many ways, to the family group conferencing. The Family Council is defined, in art.21, as an association without juridical status and patrimonial capital, formed by the family members with full juridical capacity. The initiative of accomplishing the counseling through the Family Council belongs to one of the members of the family in question, or to the family care social worker.

Unfortunately, these normative stipulations proposed by Law 217/2003 are not applied. As the statistical data from the competent authorities show, the parties involved in domestic violence conflicts continue referring to the courts, since this normative framework is missing.

It has been noticed many times that a great diversity of initiatives developed within the framework of penal justice have become associated with the values and principles of restorative justice for their contribution to the recovery of victims of crimes and the reparation of the material damage caused by antisocial facts. In Romania, the typical example for this situation is given by the practice generated by Law 211/2004 referring to the *Protection of the victims of crimes*. The activity of assistance and psychological counseling of the victims of crimes, including the victims of trafficking, entered the competence of the probation services. The mentioned law came in action on January 1st 2005, setting up the premises of organizing and functioning of a unitary structure that offered assistance to the victims of crimes and at the same time ensured the social reintegration programs for the persons who have committed criminal deeds. The statistical data given by the specialized department from the Ministry of Justice show however that in practice, the number of victims that have requested psychological and juridical assistance remains, still, low. (see the Appendix of this study).

Integrating the minimalist actions of restorative justice, mediation, as alternative conflict resolution strategy for civil, commercial, family and penal conflicts, was regulated by Law 192/2006 (referring to Mediation and the regulation of the mediator profession). It was adopted, with many difficulties, in the context of strict monitoring by the European Commission of the justice system reform in Romania, following, among others, the reduction of the overloaded role of courts, the harmonization of Romanian law to the European standards and rules in the field of alternative conflict resolution (ADR) and reducing of corruption.

In accordance to the stipulations of this normative act, „mediation is an optional manner of informal conflict resolution, accomplished with the support of a third person called the mediator, under the conditions of respecting neutrality, impartiality and confidentiality.” Both physical and juridical entities can opt for the resolution of the conflicts using mediation, even under the conditions that the trial has already started, but before any final sentence is given. Article 6 from Law 192/2006 foresees the obligation of the judiciary and arbitrary organs to bring to knowledge and counsel the parties on the possibility of deferring the conflict to an authorized mediator under legal conditions. The types of conflicts that can be deferred to mediation, according to the stipulations of the normative acts in operation, are of civil, commercial, family law and penal law nature. The right to juridical assistance and translation (if it is the case) must be ensured on the whole duration of the mediation procedure.

The project of mediation law sent to the Romanian Parliament stipulated the possibility of organizing this activity both by the public and private organisms, as well as by private persons that are authorized under the conditions of the law. The adopted law (192/2006) modified this stipulation. According to art.22, the mediators activate in the framework of association forms based on cooperation agreements or under the aegis of non-governmental organizations. As a consequence, in Romania, mediation is possible just within private arrangements. Their activity is coordinated by a National Council, constituted by nine members for a period of two years. This Council has started its activity in august 2007 and is about to started its accreditation process in October, 2007.

Presently, in Romania, the practice of alternative resolution of conflicts - mainly *under the form of mediation and less of the real strategies of restorative justice* is just beginning. As a consequence, no appreciations to an accumulated good practice can be done and no referring to data or statistical indicators can be given. Actually, from the analysis made within the work group for statistical indicators of the COST A21 program, it has resulted that of the European states, only Germany quantifies statistical data related, in general, to alternative strategies of conflict resolution.

In the national research that I am doing (2005-2008), referring to the development of a restorative justice model adapted to the socio-economic circumstances of reform and transition in Romania, I am coordinating a program of prevention of juvenile delinquency and antisocial behavior based on restorative practices. Although this sequence of the project is in its first year, the results we obtained with teenagers from two gymnasium classes and two high school classes (from two theoretical high schools in the Iasi county)

which are confronted with problems related to the potential and efficiency of restorative programs to reduce the violence and hooliganism in schools. The project aimed at the development of restorative circles in the student classes, both for solving the conflicts between students and their prevention. After six months from the debut of the experiment, the frequency of violent acts has dropped to half.

Within the same research, we have investigated the attitude and trust of the magistrates regarding the potential of restorative justice practices and mediation (especially in penal cases) to contribute to the justice reform in Romania and to reduce the caseload, and of the great number of files the courts/judges have solved each year. At the semi-structured self-administered interview, a number of 216 magistrates have responded (judges and prosecutors) from 15 courts (of different degrees -judges, courts, appeal courts) from 8 counties in Romania and Bucharest city.

The recent empirical research I carried out investigated the potential of the alternative dispute resolution practices, especially mediation and restorative justice practices, to contribute to the reform of the Romanian justice system through the strategies that restitute the conflict to the parties involved. A first step aimed at the evaluation of the *attitude and trust of the magistrates* on the potential of the alternative justice strategies to better contribute to the conflict resolution, the satisfaction of the parties (victim), to a decrease in the number of cases to be heard by the courts, and thus to speedier justice. At the semi-structured self-administered interview, a number of 216 magistrates have responded (judges and prosecutors) from 15 courts (of different level – first instance courts, tribunals, and appeal courts) from 8 counties in Romania and Bucharest.

The quantitative analysis showed that as far as *trust* in the alternative/informal practices of conflict resolution is concerned, the answers ranged according to the age, the field of specialization, the type/level of the court and gender.

Regarding *trust* the highest rank scores have been registered for the age group 27, 6 - 35 years closely followed by the age group 35 - 45 years old. At the opposite pole, the age group 55 - 65 years manifested total distrust on the possibility of alternative practices to contribute to the conflict resolution and especially to the penal conflicts resolution. At the level of this age group, we recorded the highest rank scores regarding the role of imprisonment and of incapacitation in the fight against the crime.

As far as the *types of conflicts* that could be solved with better results are concerned, in less time and with lower expenses, the age groups 27, 6 - 35 and 35 - 45 years have registered maximum frequencies in the diversity of penal conflicts that could be referred to the alternative justice bodies or persons. According to the rank order, the highest frequencies registered the following answers:

- All penal cases in which juveniles are involved – except homicide, theft and rape (95% of the questioned);
- All cases with adult offenders for non-violent crimes, of low or medium gravity (83% of the questioned);
- For offences by culpa (when penal law stipulates their sanctioning) (78%).
- Cases of domestic violence and other offences connected to family life (with the exception of rape, homicide), (76% of the questioned) etc.

Regarding the *risks* that the informal strategies imply, the maximum rank frequency (72% of the questioned in all age groups) was for the „risk of violating rights and warranties that the formal procedure ensures the parties in court”. In a decreasing rank order the other risks mentioned were: the violation of the right to defense, to a fair trial, to the non-discriminatory access to justice, possibility for the revision of the case etc.

So as the data briefly presented above suggest, there is an important ‘capital of trust’ of the judges regarding the alternative dispute resolution practices (mediation and restorative justice in our research) as well as important concerns regarding, mainly, the observance of the human rights of the parties involved in the penal conflict. At the same time, we have registered an important agreement on the ‘possibility and desirability’ (judge) to use both mediation and restorative justice practices in the cases with juvenile offenders.

## Notes

- 1. „According to COST A21 Memorandum of Understanding the scope of work of WG 2 are: national legislation in relation to victim-offender mediation; the relation between criminal justice and restorative justice practices and agencies; training models and the experience of training legal professionals in the restorative justice area; new restorative justice models and applications.”
- 2. Parts of this interview were also presented in the European COST Conference *Restorative Justice Research in Europe: Research and Outcomes*, Warsaw, 22-24 November, within the paper that I presented: Doina Balahur, Paul Balahur, *The European Way of Restorative Justice: Towards a subsidiarized Paradigm of Justice*.
- 3. In relation to the critics brought to the conclusion which Martinson was drawing, *nothing works*, based on a statistical analysis and a superficial interpretation of data, see Francis T.Cullen’s article, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, *Criminology*, Vol. 43 Number 1, 2005.
- 4. We do not have a satisfactory equivalent in Romanian for the term *conferencing*; it derives, in English, from the term *conference*, defined by the Longman Dictionary of Contemporary English: as a „large formal meeting where a lot of people discuss important matters...” (Longman, 1995 Edition, p. 280). Of course, the idea of the community participation (family members, support persons, for both sides involved in the conflict, other persons from the community) is comprised by the term *conferencing*; however, what is not comprised in this term is exactly the restorative mediation process, of therapy, of

common identification of solutions etc. This is the reason why I used for conferencing the term mediation (family group mediation, for example) with the mention that this term either, not only does not fully comprise the restorative processes that take place in such circles, but also coincides with other techniques and models (VOM, for example). We will however not have in Romanian the possibility of an adequate translation. This is the reason why I have repeatedly used the name it has in English.

- 5. Council of the European Union framework decision on the *Standing of Victim in Criminal Proceedings* adopted on 15<sup>th</sup> of March 2001; Council of the European Union *Directive relating to Compensation to Crime Victims*, adopted on 29<sup>th</sup> of April, 2004.
- 6. UNO, ECOSOC Resolution 2002/12, 24 July , 2002 regarding Basic Principles on the use of Restorative Justice Programmes in Criminal Matters.
- 7. Designated as COST Action A 21 *Restorative Justice Developments in Europe*, Brussels, 22 May, Draft Memorandum of Understanding for the Implementation of a European Concerted Research Action 2002.

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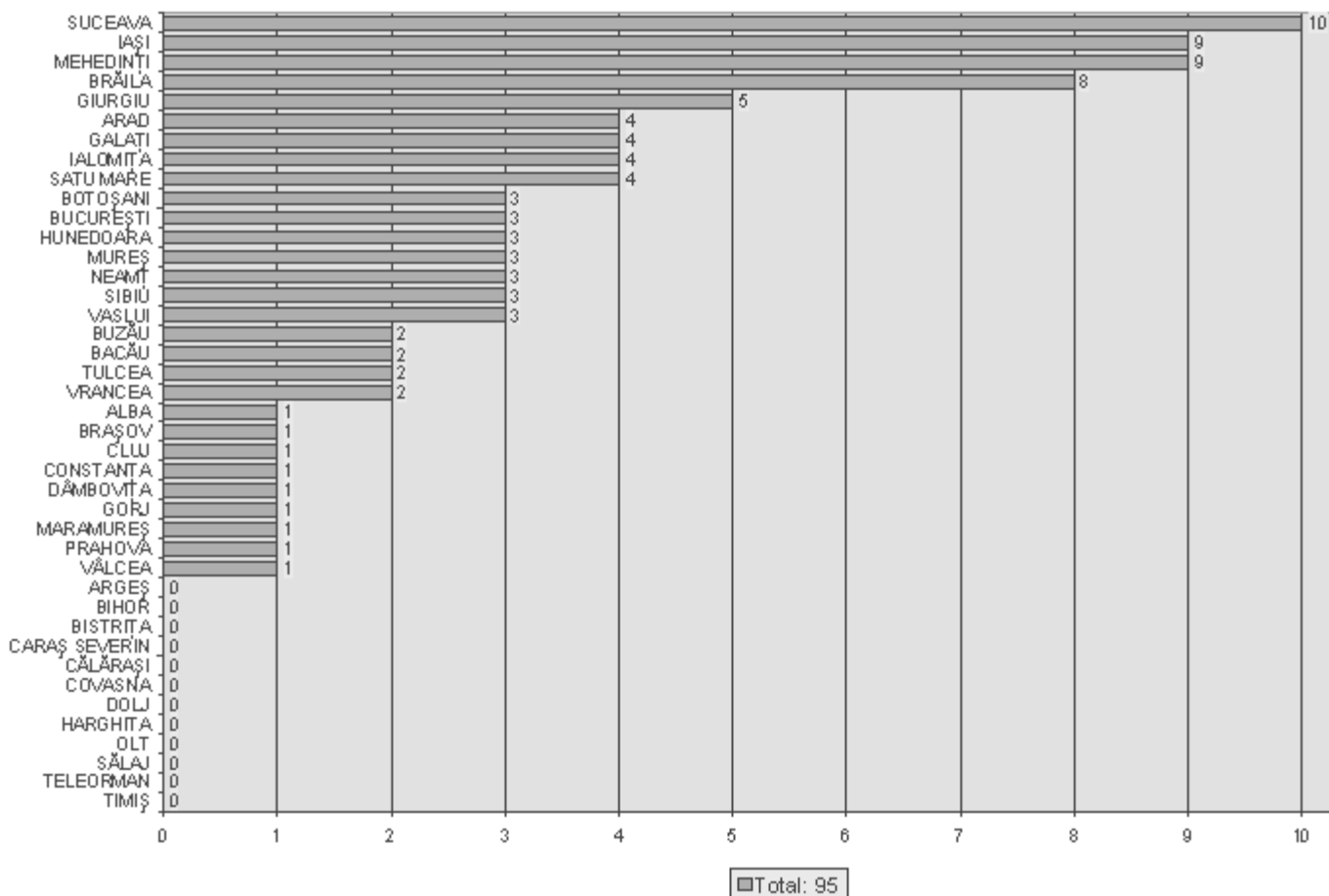
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## ANNEXES

**Victime prevăzute de Legea 211/2004 care au beneficiat de asistență și consiliere din partea serviciilor**



[1] The Global Alliance for Restorative Justice has been set up by the International Institute for restorative Practices(IIRP) in USA[2], „According to COST A21 Memorandum of Understanding the scopes of work of WG 2 are: national legislation in relation to victim-offender mediation; the relation between criminal justice and restorative justice practices and agencies; training models and the experience of training legal professionals in the restorative justice area; new restorative justice models and applications.”

[3] I presented parts of this interview also in the European COST Conference *Restorative Justice Research in Europe: Research and Outcomes*, Warsaw, 22-24 november, within the paper I presented: Doina Balahur, Paul Balahur, *The European Way of Restorative Justice: Towards a subsidiarized Paradigm of Justice*.

[4] Regarding the critics of the conclusions Martinsons has arrived at, please see the paper of Francis T.Cullen, *The Twelve People Who Saved Rehabilitation: How the*

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Council of the European Union framework decision on the *Standing of Victim in Criminal Proceedings* adopted on 15<sup>th</sup> of March 2001; Council of the European Union *Directive relating to Compensation to Crime Victims*, adopted on 29<sup>th</sup> of April, 2004.

[6] UNO, ECOSOC Resolution 2002/12, 24 July , 2002 regarding Basic Principles on the use of Restorative Justice Programmes in Criminal Matters.

[7] Designated as COST Action A 21 *Restorative Justice Developments in Europe*, Brussels, 22 May, Draft Memorandum of Understanding for the Implementation of a European Concerted Research Action 2002.