MEDIATION IN THE ITALIAN JUVENILE JUSTICE SYSTEM

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Introduction

The juvenile penal process, regulated in Italy by the d.P.R. 448/88, is characterized by a mainly educational purpose, with the aim of promoting the growth and the gradual empowerment of the child, in order to allowing methods of repairing the damages, such methods that are suitable for overcoming the traditional punitive perspective. One of the peculiarities of the Italian juvenile proceedings lies precisely in the efforts to channel the demands of the conflicting parties, promoting the *confrontation* and the *encounter* between the author of the crime and its victim.

Following this path, the *mediation of conflicts* can be understood as the possibility of promoting the elaboration of problematic situations, even on the basis of the particular condition of the child intended as a subject in formation, and this through dialogical modalities which aim to the gradual overcoming of conflicts. It is therefore sustainable that the horizon of the mediation, with regard to juvenile offenders, is embodied in two requirements: to minimize as much as possible the intervention of the traditional penal law and to differentiate the juvenile proceedings from those of the adults. These objectives corresponding with the principles of the juvenile justice explained in the so called *Bejing Rules* of the year 1985 and in further sources of international law.

The mediation in the italian juvenile process

In the Italian legislation on juvenile trial, an explicit reference to *mediation* cannot be found, although its use is in fact permissible due to the educational purpose to which the entire juvenile proceedings should aim, in order to facilitate the recovery and the reintegration of the young delinquent. It is particularly the article no. 28 of the d.P.R. 448/88 that provides for the judge the possibility to indicate, in the suspensive proceedings of the trial by which is placed the probation, prescriptions that are directed to repairing the consequences of the crime and to promote the reconciliation of the child with the person harmed by the offense. It is noted that through probation, a true measure is introduced for the first time in the Italian legal system, a measure that allows to respond to crime without the infliction of a punishment, and particularly of an imprisonment sentence: subverting in this regard, the assumption that the *size* of the sanction would constitute the only way to respond to the *evil* of the offense.

The *suspension of proceedings* with relative probation (provided by the above-mentioned article no. 28) can be considered, without any doubt, the most important and original innovation of the Italian juvenile justice system. That provision states that the judge, having heard the parties, may order the suspension of proceedings, when he considers that he must evaluate the personality of the child based on the outcome of the evidence ordered by him. The duration of such suspension varies according to the penalty prescribed by law for the committed offense: for a period not exceeding three years for offenses for which the penalty envisaged is the life sentence, or imprisonment not less in the maximum to twelve years, and in other cases, for a period not superior to a year.

The most accredited doctrine agrees on considering that probation is not to be considered in any way a measure of mere clemency, but rather as an innovative and propositive tool, which forms the vehicle to giving implementation to some of the goals and purposes of typical juvenile justice such as, for example, the quick exit from the criminal justice system for minors, the timeliness of the institutional intervention, the diversion, the possibility of using practices of *mediation* and *reconciliation* (between the child and the victim) as well as the need to provide the child with individualized answers.

Therefore, *mediation* is a privileged vehicle which aims, on one hand, to helping the offender expressing his experience and eventually the motivations which led him to committing a crime and, on the other hand, to encourage a new attitude by the victim which is based on a better understanding of the factors which have promoted the illegal conduct, thereby urging responses that limit as much as possible anxiety and fear. The referral of a specific case to the Office of mediation is made possible, moreover, in the article no. 9 of the d.P.R 448/88, which enables the judge and the public prosecutor to gather all the suitable information that could shed some light on the *personality* of the child, in order to provide measures that are appropriate to the educational goal. The main innovation of the norm consists therefore in allowing verification of the subjective characteristics – individual, environmental, economic, social and family - of the child, such verification which is denied to adults *ex* art. no. 220, 2° co., c.p.p (except the profiles concerning the possible exclusion of imputability): this path allows to build, for the first time, a solid basis for intervention strategies shaped according to the concrete needs of the child. Particularly, the magistrate is given the possibility to hear all the people who had relations with the accused; it is also provided that the judge may rely on the opinion of experts "*without any formalities*" (and, therefore, without the need to dispose of an expert opinion in the formal sense).

Furthermore, the use of mediation remains linked, as has been pointed out previously, to *probation*, with which project that it is facilitated, responds to what emerges from mediation. Despite the positive evaluation that is generally given by the doctrine to the probation, and in spite of the quite positive outcome found in most cases, it should unfortunately be noted that, even twenty years after its entry into force, it finds but a very limited application. Compared to the number of criminal proceedings against minors, the measures referred to in the article no. 28, represent a number somewhat limited. Recent and extensive research have shown that the measures provided for probation, in the reality of the Italian juvenile justice system, result in being residual actions, and sometimes even untimely. The timeliness is translated in the release of such measures from fifteen to twenty-four months following the commission of the offense, without neglecting the fact that the judges predispose little verifications regarding the evolution of the path adopted by the minor, demonstrating in this way, a limited interest and a superficial tendency to probation itself.

The adherence to the probation process may also involve certain risks: for example the risk that the child accepts the proposition only for utilitarian purposes, without any emotional involvement. This could happen if the path to be taken is not presented as commitment to be taken seriously, in order to rework the way of living in future prospects. In its turn, the victim may also feel forced to accept a path of mediation, in order to avoid being blamed later on for an eventual judicial fate of the child, which finds its most bitter epilogue in seclusion. Renouncing a conciliation proposal would mean preclude any possibility seeking solutions of a fracture represented by an offense that appear more human compared to the traditional ones, where any dialogical dimension remains extraneous.

Conclusion

In the perspective that has accompanied the analysis conducted so far, has been highlighted the need for a *preventive*, an *educational* as well as a *personalized* configuration of the response to the criminal conducts of a minor. International as well as national norms have made many steps forward in this matter, although from difficulties and resistance from scholars belonging to that line of thought, that recognizes in the *retributive function of the punishment*, with which to address criminality. In Italy, as well as in many other European countries, despite the constant temptations of returning to the past, it is gradually becoming more widespread, that the guidelines which aim to the prevention finalized to the recovery should prevail over repression

(such requirement is made even more concrete in the delicate area of the juvenile criminal justice). In the light of the synthetic analysis that were the subject of this reflection, it appears that the use of probation, favouring mediation techniques, should not be reduced to a simple alternative to retributive and rehabilitative paradigms: a kind of a third way or of a sweet justice that masks however a punitive conception; on the contrary, its dogmatic placement must be supported more independently and functionally, within which the actions with practices of restorative justice are valued as a response to social conflicts.

In case it was only the traditional criminal law to manage conflicts, there will be the risk of punishing without reconciling and of taking away (from the author of the crime) without giving in return (to the victim). Unfortunately however, the sundown of the retributive paradigm appears to be still far away; the arduous efforts of all practitioners, especially those that deal with minors, will be to encourage a rethinking of the traditional criminal justice system where the personalization of the remedial act helps to restore the violated order in ways full of humanizing motivations. This perspective could also encourage a new way of understanding freedom, so that the unlawful conduct intentionally held in the past is no longer intended as a mere assumption of a punishment, but as basis of a firm commitment (even restorative), so that anyone that had transgressed the law knows how to regain the future, and thus, his own freedom.