

COMPETITION OR COOPERATION? -REFLECTING THE ANSWER IN THE LEGAL AND PRACTICAL MANNER OF APPROACHING THE ISSUE OF CONFLICT RESOLUTION BY ALTERNATIVE METHODS*

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At a time in which applied mathematical research is concentrated upon social sciences, especially upon economy and upon the study of human conduct in different situations, mathematician John Forbes Nash finds the theme adequate for this phd. thesis „Points of balances in games of N individuals”.

Subsequent research having the same theme and materialized in new scientific works bring him in 1994 the Nobel prize for economy, his theory known under the name Nash's Balance finding a wide application in the field of economy and also in the field of international relations.

One of the greatest merits of this theory resides in the irrefutable demonstration of the superiority of cooperation by comparison with non-cooperative competition. The open market gave the definition of homo economicus in terms of the individual who acts with the sole interest of maximizing his personal gain, without any consideration for others.

What are the levers that determine this manner of action? A good observer identifies them rather briskly in the subjective aspects which design the mentality of homo economicus, but they can be found even in studies that approach the subject of the human conduct and not only:

- the optimism regarding personal abilities, respectively, most of the individuals think they are more intelligent than others;
- the illusion of having control by overestimating the possibilities of control that others may have;
- the error of attribution which consists in the fallacious interpretation of other people motives for acting;
- the reaction of devaluation, characterized by underestimating a benefit for the simple reason that it is offered by another.

A person who is dominated by this kind of mentality has all the chances to make the wrong decision, in this case dominating the irrational as a rational thinking obstructs the individual to loom the risk of giving up a brawl for a possibility or, if the individual is aware of the collective benefit, he prefers the loss over the collective benefit.

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The shortcomings of this type of mentality are obvious, nevertheless, they are dominant in the manner of taking decisions in times of conflict, regardless of the field or the scale where the conflict in question is manifested.

Acknowledging the shortcomings, the harmful experiences undertaken in society have determined the necessity of identifying solutions that are intended to ensure accurate forecasts and decisions based on reason that would lead to success, by not dealing with the idea of the exclusive individual benefit and that would entail, a system of cooperation whose superiority by comparison to the non-cooperative competitive system was demonstrated through the math formula brilliantly built by J.F. Nash.

Nash's balance theory rapidly earned followers within those who become aware of the efficiency of cooperation in the decision-making process, and, the proven advantages of practically applying this theory made visible its effect in the changes of mentality of those who had the necessary availability and the intelligence to correct what proved to be wrong in their reasoning.

The fact of searching for alternative solutions to conflict solving has its origins in the same need to find the paths that at least reduce if not eliminate the destructive and harmful character of conflict, in favor of all those involved, and also to reduce or to eliminate all the pointless loss that assures a benefit for both the individual and the community.

By its long-term or short-term effects, a decision will always prove either its righteousness or its aberrational. Even if, a decision was taken for the obvious purpose of obtaining personal gain, ignoring the negative impact upon community, will produce the desired result on short-term, but on long term, the decision-maker will feel, in turn, the harm that was induced.

The struggle between rational and irrational is also reflected in the manner of imposing rules in a given field, in a given space and during a certain period. From all the alternative tools of alternative conflict resolution, a special attention was showed to the mediation process at the international level, in the outline of the European Union and, for some years, in Romania.

The evolution of our legislative system in the field of mediation fully proves the degree of difficulty we feel with concern to defeat the desire to obtain an immediate and exclusive gain which ignores the collective harmful and long-term effects that are felt by the beneficiaries of immediate gain. The situation contains an obvious paradox when the mentality of *homo economicus* is found in the category of those who have the obligation which is derived from their profession, to convince the persons who are in conflict to cooperate instead of confronting themselves and to underline the advantage of mediation – that of being the procedure of conflict resolution that strives for obtaining a win-win result.

The legal documents that regulate the mediation process and the profession of mediator reflect, by means of their content and by means of practical application, what is the type of decision that prevailed, the reasonable one or the one that ignores the collective benefit.

Law no. 192/2006 represents the basic legal act and the first act that regulated the mediation process as a manner of amicably solving conflicts and contained provisions to organize the mediator profession. The mediator has the obligation to highlight the

advantage of cooperation between the parties involved in conflict and to guide them towards finding a solution that assures a win-win result for all persons involved in conflict and not only for them but also to guide everyone who is directly or indirectly affected by conflict, one way or another, and last but not least, to guide society – which escapes the obligation of bear the necessary costs of solving the conflict by the competent authority.

The regulation approach was assessed during the preparation of the report containing the analysis of the manner in which the member States of the European Union transposed within their domestic legislation, the provisions of Directive 2008/52/EC related to mediation in transboundary litigations, underlining, among others, the positive aspect of the financial facility given to individuals who apply to the mediation process, by means of repaying the stamp duty, inasmuch as they choose to solve their conflict through a mediation convention.

Although the appraisal was legitimate given the chosen approach, that of stimulating and not forcing the individuals to choose the mediation process as the way of solving their conflict, the results of inserting this kind of incentive have not proven the expected efficiency, the passage of three years since the law was adopted indicates a modest appeal from part of the population to this way of solving conflicts.

Considering the obligation to complete the provisions of Law no. 192/2006 by including dispositions that would regulate the way of recognizing the quality of a mediator to persons having foreign citizenship within the European space by applying the principle of mutuality, the project of legal amendment represented an opportunity to submit amendments that would correct the shortcoming found when applying the law, respectively the poor information of the population regarding the existence of mediation, which explains the reduced number of persons who resorted to this procedure.

When formulating the amendments, were clearly distinguished, by means of legal texts and expressed reviews, those who were rational and those who were irrational, respectively those who pursued the collective benefit and those who were eager of individual gain, as follows:

- a set of amendments aimed to making modifications that pursued the invalidation of the recently elected members of the Council and the other set advanced the idea to correct the lack of information regarding the population on the topic of the disadvantages of mediation through the possibility given to the judge to send the parties involved in cases that can be subject to mediation to the mediator in order to be informed in relation to the essence of the procedure and its advantages, so that following this information parties could decide if they chose the path of mediation or if they continue the trial procedure.

The clash of the two positions had the result of refuting both sets of amendments, the modification being restricted to reformulating article 6 of the law having an optional character in the sense of establishing the obligation for judicial authorities to inform all parties about the possibility of implementing the mediation procedure, legal text which was adopted through Law no. 370/2009.

The modification rapidly proved its shortcomings not only with concern to the quality of information but also due to placing the judge in the situation of losing precious time by realizing the information procedure, aspect that injured the good development of justice especially concerning courts that have an extended workload.

A means of redressing this wrongful decision was offered through the law project also known under the title the Small Reform that became law no. 202/2010 after being adopted by the Romanian Parliament, the amendments concerning the judge's competence of sending the parties to the mediator for reasons of information, in case of non-compliance these could be revised, being subjected to parliamentary debates.

The creed of the opened market prevailed once again but, although the re-wording of the text in question, by adding the expression „if parties agree”, was dressed in the elegant and protector coat of the voluntary character of the mediation process but which, in reality, emptied the text of its content.

The promoters of this addendum were part of the liberal professional bodies which were satisfied with seeing the mediation process as a tool that produced the loss of customers, as few were those who gave priority to the benefit of the clients who were involved within the conflict, keeping in this way the vow made on entering the profession, of using all reasonable care to really serve the interests of their client.

Those few people acknowledged, however, what the fear of losing personal benefit stumbled other to achieve: that guiding the client towards mediation does not mean the loss of personal gain, that the support given by juridical counseling was still necessary, that the demarches based on the Court's allowing the agreement was their privilege and that the individual's material benefit was not imperilled since the multiple advantages brought by the process of mediation lead to the natural consequence of gratitude for a satisfactory result.

What remained unchanged from the propositions made by some members of the Mediation Council and endorsed by them were the following:

- the amendments brought to the Criminal Code in the sense of including in the category of infractions that can be settled by reconciliation, the infraction of grievous bodily harm made of negligence;
- the dispositions that state mediation, alongside conciliation, as a prior procedure that is mandatory for commercial litigations as well as
- the provisions according to which the mediation agreement is grounds for ceasing prosecution, respectively for ceasing the criminal trial, respectively the necessary regulations for achieving mediation concerning the civil dimension of criminal causes.

When practically applying the new legal amendments, for mitigating the disadvantages of the legal text modified in Parliament regarding the judge's competence to guide the parties towards a mediator for information, but also for promoting other legal regulations regarding mediation, the Mediation Council had already undertaken a series of actions ment to enhance the efficiency of correct information of those who are interested about the advantages of mediation.

These include the signing of the Protocol of Collaboration with the Superior Council of Magistrates, whose first result of absolute novelty resides in obtaining the first official statistics about mediation, since the date of adopting the Law no. 192/2006, data that contained indicators concerning the number and the type of causes in which the mediation procedure was applied and of those solved on the grounds of a mediation agreement, the reporting periode for the statistics was the first semester of the year 2011.

In order to assure a correct understanding of the efficiency and the advantages of the mediation process in relation to judges and prosecutors, as well as a uniform

interpretation of the new legal regulations, another action that was initiated by the Mediation Council in 2011, was the signing of the Protocol of Collaboration with the National Institute of Magistracy, within which was stated the organization of joint seminars for judges, prosecutors, mediators that would be conducted within the outline of the continuing education program, the first that was organized in this sense was the one that took place in the fall of 2011.

From the same reasons, on the grounds of the collaboration relations between the Mediation Council and the Ministry of Justice, with the involvement of the Association of European Judges who upheld mediation (GEMME), was organized a set of seminars with joint participation: judges, prosecutors, mediators, the action being financed from European funds.

Considering the peculiarities of criminal causes and for the purpose of removing jams regarding the recourse to the mediation procedure in those criminal cases specified by the law, in the same year, 2011, the Mediation Council signed a protocol of collaboration with the Prosecutor's Office afferent to the High Court of Cassation and Justice, following that, on this grounds to sign the necessary protocol with the Interior Ministry.

Pursuing a good collaboration and not a unhealthy confrontation with other liberal professional bodies, the Mediation Council initiated the signing of protocols and common actions with The Union of Public Notaries of Romania, the Bar Lawyers' Association, the Union of Judges Executors etc.

Following these intercessions, in 2011 was signed the protocol with The Union of Public Notaries of Romania, being established a joint commission – notaries, mediators – that was intended to draft a joint regulation, that would lay the foundation of an effective collaboration between the two professions, for the purpose of solving the contentious issues of citizens in the sense of considering the objectives that were assessed when adopting the legal amendments.

Once again, we turn to at least two of the reasons stated above, that determine the wrongful decisions, the first one being the reaction of devaluation, expressed by the new members of the Mediation Council, who have underestimated the value of the benefits brought by the actions of former members, a reaction that was externalized through the abandonment of all projects that were initiated by the former Council.

How could we explain the following issues:

- interrupting the collaboration with the Union of Public Notaries of Romania and abandoning the works of the joint commission which was established for the purpose of drafting the common regulation;

- interrupting the collaboration with the National Institute of Magistracy, first by means of non-communicating the themes that were ought to be proposed for the common program for continuous education addressed to judges, prosecutors, mediators for 2012, according to the provisions of the signed protocol.

- non-communicating the required propositions to the Ministry of Justice for the purpose of modifying the program ECRIS which was intended to assure the official statistics of the courts of justice concerning the results of applying the mediation procedure and also was intended to calculate the savings of the courts' budget, the money that is saved can be implemented, among others, in the payment of the mediators' fees based on the criteria stipulated in the law of public judicial aid.

The examples could continue, but those that were exposed are enough to conclude the negative effects that were produced and that are still produced, in the sense of diminishing the collective benefit brought by mediation.

Regarding the second reason, respectively the illusion of control, it was manifested with regard to the decision of those who initiated, and upheld the bill that was submitted in the fall of 2011, by means of which was intended to introduce the mediation process as mandatory for different types of conflicts, in a wording that did not respect the technical and legislative demands and that would obviously violate the voluntary nature of mediation.

It is not the defective wording that caused the rejection of the bill, but the overestimation of the control that the initiators had upon others, the project being adopted with an essential modification of its content, respectively not mediation itself, but the informative activities concerning the mediation procedure were declared binding, for the causes that were under amendment.

This modification was not enough, as long as the non-compliance with the obligation imposed did not have any unwanted consequence, aspect that was immediately noted, thus was proceeded to identifying a solution which would guarantee its compliance, but that repeated the mistake of the first decision, that of imposing the mandatory character of mediation and overestimating the power of control upon others.

The reaction was not delayed and until the true entry into force of the text, the Constitutional Court declared unconstitutional the articles concerning the obligation of being informed and the sanction of annulment of the action brought to justice in case of non-compliance.

Were these decisions that pursued the collective or the individual benefit?

In order to reach a conclusion, we must first analyse what would mean the collective nature of the benefit, respectively who should be considered the beneficiaries of the legal regulations concerning mediation. According to a rational thinking the answer is implied: those who are in conflict and need a resolution.

But what feels a person, who is more or less charged emotionally, because of the created conflict, if it is required, under the sanction of losing the access to address a court of justice, moving to a third party in order to offer explanations that, even if one can convince that person about the advantage of the mediation procedure, finds that the offer is anyway useless, because the opposing party is not present and she cannot be constrained to be present when exposing these explanations in order to jointly decide, the way to follow for the purpose of solving their dispute?

It is unlikely to ascertain that the legal text was created for the benefit of that person, and not even for the benefit of her opponent, who will be brought to justice with the necessary consequences.

Could there be identified any more beneficiaries that were taken into consideration when drafting the text and the nature of this benefit could be a collective one? The answer is simple: the notion of mediation being strictly connected to the profession of mediator leads to the idea according to which the benefit of a text that forces persons to be informed regarding the mediation procedure should be also felt by the mediators' professional body, at least in view of the opportunity of being applicants for clarifications.

The mentality of different mediators, transformed the collective nature of the gain, in an individual one, the practice demonstrating to this regard different conducts in applying the legal text. It is sufficient the analysis of the different manner of interpreting the legal underlining concerning the gratuity of the information intercession.

Some mediators have construed the text retaining the basic sense of the term „free”, thinking that the law does not allow them to claim any sum of money for the required information. Another category deemed that, one may claim, under the guise of expenses incurred by occasion of achieving information, sums of money that undoubtedly transform the nature of the benefit in a individual nature.

Could this be an explanation for the quantitative explosion of mediators who, within a few months, from the adoption of the legal texts that were then declared unconstitutional, have reached the number from about 3500 to about 10000 authorized mediators? Definitely, yes!

The easy gain, obtained without effort and without any responsibility, by the simple release of information certificates, has once again revealed the preeminence of a open-market – like reasoning, that is found also in this category of mediators: acting with the sole purpose of maximizing personal gain, without any interest for the harmful consequences drew on others.

But this time also the competitive mentality proved to be the one that brings the individual benefit on short term and the non-cooperative system failed once more, the decision of the Constitutional Court, removing or greatly reducing this type of benefit.

What or who may convince with regard to the right answer to the question formulated in the title?

The ultimatum game is one of the examples implemented in the theory of games whose founder was mathematician Neumann János and whose researches in the field of applied mathematics were continued by John Forbes Nash.

According to the rules of this game, a sum of money must be divided between two persons. The one who receives the sum of money will establish the proportion of sharing the sum, respectively will he equally share the sum of money or will he pay less to the other person. The last may accept the offer, even if he is offered less or may refuse it, but in this last case, no one gets anything.

What system is to be applied by the person who distributes the money? The competitive one, which offers only a quarter from the total amount, being interested in maximizing his personal gain and counting on the other's accept, who, in case of refusal would lose the little amount offered or the cooperative one, that allows equally sharing the money, a fact that ensures the other's accept and consequently ensures the equal gain of both partners.

What can the other person do? She may accept the offer of a quarter from the whole amount on the grounds that „better less, than nothing” or she may choose to refuse it because of the unfairness of the offer, which of course will bring the consequence of loosing the material benefit. It is really just about loosing in the last case?

Everyone has the right to assess and has the freedom of choosing. Nevertheless it is useful to remind us why Nash's Balance received the Nobel prize for economy and to observe that the refusal of the second person determines loosing the material benefit, but this is a consequence that is also suffered by the first person, instead, the second person

has an advantage over the first person because she has the tool by means of which the first person is bound to make a fair offer in the future!

Those who are honest followers of the cooperation trend, will find some appropriate manners to promote mediation, through conviction and not through constraint, and the assumption in the New Code of Civil Procedure of the provisions concerning mediation stated in the law of the Little Reform with due proofreading, that would give the judge the right to recommend mediation in those causes where he finds it necessary, and establishes in favor of the parties the duty to comply with the judge's dispositions (art. 227 NCCP), opens new perspectives for the practical application of mediation, if the cooperative system would prevail in the mentality and in the conduct shown by mediators.