

MATILDE PROJECT

Family mediation in the Italian normative framework: Some bases for reflection and confrontation on the European level

By Rachele Settesoldi

The institution of family mediation is not legislatively controlled in all the member States. In particular, as far as the partners of the Matilde project are concerned, only Germany has adopted a regulation in this matter, while in Italy and in Spain (as far as is known) family mediation is becoming a widespread practice, without any legislative provisions.

In line with the objectives of the project, therefore, it appears necessary:

1. to trace a normative outline of the subject with regard to the existing legislation, to the laws proposed to introduce the institution of family mediation or to bring modifications and/or integrations with respect to existing laws;
2. to analyze the indications that come from the reading of the European regulations (and noted in Recommendation no. R(98)1 of the Committee of the Ministers to the Member States concerning family mediation, adopted January 21, 1998, at the 616th meeting of the Ministers' Delegates) and to compare these with existing norms – where adopted – or with the legal proposals advanced in this matter by the legislative branches, showing elements of diversity and illustrating, still in light of the introductions to the normative documents, the reasons for the Member States to move away from the suggestions of the European Council;
3. to show – still using the contributions of the existing literature – the legal criticisms that emerge in applying the institution of family mediation, both abstract and concrete, as well as its future prospects.

In light of the close examination of the European Recommendation mentioned above, the legal proposals advanced, and the scanty literature dealing with family mediation, the following issues concerning Italy should stimulate reflection concerning the arguments to be examined in more depth:

- *Rationale* for the institution.

As conceived by Italian procedures and legislation, family mediation does not generally lead to a return to conjugal life, but rather to a jointly-agreed separation. This is expressly the intention of the European Recommendation.

- What is intended by family mediation from a legal point of view? Or rather, does the definition emerge from the normative framework?

While not expressly defining family mediation, the European Recommendation defines it as a consensual method of resolving family disputes.

The Commission for the study and revision of the regulatory and procedural norms concerning the rights of the family and of minors for the unification of the legal authorities in the same matters has recently arranged for the inclusion of family mediation in separation and divorce procedures. It has defined family mediation as “a way to reorganize relationships between parents who are separated or separating in a structured context, autonomous as regards the legal environment, with the help of a specifically trained neutral mediator who is requested by both parties and who respects the guarantee of professional secrecy, so that they can develop a program for carrying out their common parental responsibility in a way that is satisfactory both for them and for the children.”

- Context of family mediation: should mediation take place only in the case of separation and/or divorce between couples with minor children or can it be extended to couples without children or with adult children, to the families of fact and to natural children, or even to disputes connected to the sphere of inter-familial relationships (as for example, inter-generational conflicts about children's education)?

The European Recommendation suggests extending family mediation to all disputes among members of the same family, without making any assumptions about the presence of minor children. (However, the institution is primarily constituted in order to guarantee the rights of minor children. With this premise, in fact, it often refers to the necessity of guaranteeing the superior interest of the child.) The member States are then left free to determine the controversies and specific cases in which family mediation can be applied. The Italian legislative positions are not all in agreement on this subject. While on the one hand mediation is extended to all the proceedings involving minors (Proposal of law no. 173 – *third and connected: New norms regarding personal separation of spouses and break-down of marriage, May 1998*), in reading the works of the Study Commission cited above, family mediation becomes limited to proceedings of separation and divorce, without any explicit referral to the presence of children, minors or not.

- Is family mediation an obligation by law or by order of the magistrate (always or in the presence of certain premises, for example the presence of minor children) or is it an option?

The European Recommendation favors it being non-obligatory.

Italy seems to favor family mediation beginning at the invitation of the judge, and subject to the couple's agreement.

- When should family mediation be resorted to? Should the intervention be previous to or contemporary with the legal proceedings? Should it be within the trial or outside of it? Is there a connection with the legal structure or is there complete autonomy??

According to the European Recommendation, family mediation can take place at any time, before, during or after the legal proceedings, even with the suspension of the latter if this has already begun. In Italian procedure (above all considering the experimental activity of the Milan courts) the recourse to family mediation is proposed during the separation and/or divorce procedures by the same judge, who prepares a postponement of the audience for an undetermined amount of time, directing the couples towards a center of family mediation. Even existing bills (proposals) provide for family mediation taking place during the judicial procedure, with a suspension of the latter for a maximum period of three months.

It is felt, moreover, that family mediation should take place outside the legal procedure, because this is a sounding board for resentments rather than a place for settlement.

- Should the mediator contribute to the elaboration of a written agreement between spouses? In this case are the results of the mediation decided by the judge?

The European Recommendation seems to be oriented in this way. While specifying that the mediator cannot give legal advice, it invites Member States to help the legal authorities to ratify agreements mediated at the request of the parties.

In this connection, no useful guidelines can be drawn from the Italian bills. The reception of the European approach can lead to revealing questions:

- Professionalism of the mediator, who can be mediator: lawyer, psychiatrist, psychologist, social worker?

No indication can be drawn from the Recommendation. (The bills speak generically of experts, but without indicating their professions).

- Preparation of the mediator: a specialized technician or someone without specialization?

The European document recommends that adequately selected, trained and qualified, neutral and impartial, people be used.

- Content of the mediation: total or partial? Does family mediation refer solely to individuals or also to patrimonies?

No useful indications can be drawn from the available normative documents.

- Does evidence show the judge that the couple has withdrawn from mediation, above all if this same legal authority suggested it, it was obliged by law?

No useful indications can be drawn from the available normative documents.

- Involvement of the children: should the children also enter into the mediation?

Generally, the recommendation regarding parties of the mediation talks of sides.

In Italy, the invitation to mediation by the part of the judge seems to refer exclusively to the couple.

- Danger of superimposition with the expert opinion sometimes provided for by the judge during the course of the trial.
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- Who does the mediation: the State or private parties?

The Recommendation leaves the choice with the single Member States.

The Italian Study Commission speaks of public or private consultants who are authorized by the State to undertake mediations.