

MEDIATION IN FAMILY ABANDONMENTS

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Abstract

Mediation appears in penal cases regarding those offences for which, as stipulated by the law, the withdrawal of the complaint or the reconciliations of the parties eliminate the penal responsibility. Family abandonment, as provided by art 305 of the Penal Code, is one of the offences in which mediation is possible.

The mediation activities shall be carried on in conformity with the legal regulations concerning mediation, with the structure and the way of its being applied, with the provisions of the Ethical Code, as well as with other documents that include data about the regulations to be observed. At the national level there are a series of documents containing rules and data connected with the mediation procedures.

Keywords: *family, offence, mediation, Penal Code.*

1. Definition and characteristics of family abandonment

Family is considered to be the natural and fundamental element of society; it stands for one of the oldest and specific social formations meant to perpetuate and maintaining the human species².

Family relationships shall always be based on mutual help and support yet, in case this is not possible, the law maker offered the entitled party a set of means by which he/she can oblige the party who, legally speaking, is due to see to the financial support.

Family abandonment, together with the offence of ill-treatment applied to the under age child and the offence of non-observing the measures on the entrusting of the infant, are considered to be offences against family, as it is provided by the Penal Code in Chapter 1, title IX “Offences that cause damages to relationships regarding the social cohabitation”.

Characteristic for the offences against family is their common juridical object - family itself.

The Constitution of Romania³ in article 48, paragraph (1) stipulates that any family is based on the freely consented union of the two spouses, on the equality between the parties and on the right and obligation of both parents to assure the upbringing, education and training of the child/children.

In article 258 (2), the Civil Code mentions that any family has the right to be protected by the state and society. The fulfillment of the social duties a family is incumbent with, could not be obtained without a normal evolution of the family relationships, and without the way both parties assume their responsibilities. In case these responsibilities cannot be respected, it appears necessary for the juridical and Penal Law procedures to be appealed to.

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² Popescu, A.M.; Mantale, M. – *The child in criminality (Copilul în criminalitate)* in vol. *Home Affairs and Justice in the European integration process and globalization (Afacerile interne □ i justi□ia în procesul integrării europene □ i globalizării)*, Pro Universitaria Publishing House, Bucharest, 2009, p. 121.

³ The Romanian Constitution, as amended by the law of the revision of the Constitution of Romania no. 429/2003, published in the Official Gazette, 1st part, no. 758 of 29 October 2003, republished in the Official Gazette, 1st part, no. 764 of 31 October 2003.

Article 305 of the Penal Code includes the offence of family abandonment as being an offence committed by the person having the legal obligation to maintain the infant - as against the party entitled - in the following situations:

- a) abandoning, driving away or refusing any help and, thus, exposing the infant to physical and moral sufferings;
- b) deliberate refusal to accomplish his/her legal maintenance obligations ;
- c) deliberate refusal to pay, for two months, the legal alimony .

2. The juridical object and the material object of the offence of family abandonment

The *juridical object* of family abandonment is based on the relationships concerning the obligations of both parties to maintain the family. As for the *material object* the specialized literature stated contradictory opinions⁴. One of them defended the idea according to which the material object of the offence can include the material goods of which the person who needed to be supported was deprived of: shelter, food, clothing⁵. The other opinion, backed by many supporters, explains that this type of offence has no material object, insisting on the fact that the respective goods are a means of putting into execution. Although these material good are meant to the maintenance of the family, they cannot be considered a material objective of the offence because the offender's inaction - that is the legal obligation - is not directed against the above mentioned goods: shelter, food and clothing, but it is directed against the legal obligation of the debtor.

3. The subjects involved in the offence of family abandonment

The *active subject* in the case of such an offence is any person who is responsible for the maintenance of the family and penal capacity. Family abandonment may appear in the form of instigation and complicity. In such a situation there is no co-author, as the obligation fixed by the incriminating norm has a personal character.

The *passive subject* can be considered any physical person who is the creditor of the obligation of maintenance. As reported to a real case, the passive subject can become an active person or vice versa.

4. The constitutive content of the offence of family abandonment

The objective aspect

The *material element* is different as reported to the modality of committing the offence

1. In the modality provided by article 305, paragraph (1), letter a) of the Penal Code, the material element derives from an action or an inaction, stipulated alternatively.

The action consists in abandoning or driving away/chasing the one entitled to maintenance.

Abandonment means that the doer left the common habitation or the place, offering the person responsible with the maintenance of the family no means of survival⁶.

Chasing/driving away means casting out, removing from his/her house - through physical or moral compulsion - avoiding to accomplish the obligation of maintenance⁷.

Inaction means to leave the entitled person to maintenance without any support, exposing him/her to physical and moral sufferings.

Leaving with no support means to be passive as concerning the injured person, without offering him/her any support⁸.

⁴ For more details, see Diaconescu, G.; Duvac, C. – *Criminal Law Treaty. Special Part (Tratat de Drept penal. Partea specială)*, C.H. Beck Publishing House, Bucharest, 2009, pp. 905-906.

⁵ Dongoroz, V. & colab. – *Theoretical explanations of the Romanian Penal Code. Special Part (Explicații teoretice ale Codului penal român. Partea specială)*, vol. IV, Academiei Publishing House, Bucharest, 1971, p. 569; Nistoreanu, G.; Boroi, A. – *Criminal Law. Special Part (Drept penal. Partea specială)*, All Beck Publishing House, Bucharest, 2002, p. 561.

⁶ Bulai, C.; Filipaș, A.; Mitrache, C-tin.; Bulai, B.N.; Mitrache, C. – *Institutions of Criminal Law. Selections for the bachelor exam (Instituții de drept penal. Curs selectiv pentru examenul de licență)*, IV Ed., Trei Publishing House, Bucharest, 2008, p. 587.

⁷ *Idem*.

2. As provided by Law 305 paragraph (1) letter b) of the Penal Code, the material object is the deliberate inaction of non-completing the legal obligation of maintenance. The Law refers to those cases in which the maintenance operates *ope legis*, because it does not involve a pecuniary obligation in the form of an allowance, but only a supply for the necessary things for the every day necessities.

As the Law does not impose that the obligation of maintenance should be carried out in certain given conditions, these conditions will separately be analyzed⁹.

With the exception of the infant, in the case of other possible beneficiaries proofs shall be presented indicating the needs of the abandoned family and the impossibility of guaranteeing a decent life through work alone. In such a case the offence is permanent.

In the case of permanent offences, it is necessary for them to be stopped, because from this moment on, the term of prescription will come into penal force and the penal law will be applied to the doer¹⁰.

3. As provided by Law 305 paragraph (1) letter c) of the Penal Code, the material element is considered to be the deliberate non-payment, for a period of two months, of the allowance fixed by the court. This situation is the mostly met with in practice. For such a situation to appear it is necessary that the allowance should have been fixed by the court in the basis of an enforceable sentence.

The term starts from the moment the sentence fixed the allowance becomes enforceable or, from the date of the last payment¹¹. The partial payment of the allowance is equivalent with a non-payment.

The *immediate consequence* generates the impossibility for the person justified to receive it to survive.

The *casualty consequence* derives *ex re* that is from the materiality of the deed which needs not to be proved.

The subjective aspect

The deed is committed deliberately - should it be directly or indirectly done. If the non-fulfillment is caused by a material impossibility, the doer is of good-will and, consequently, the deed is not considered an offence.

The aim or the reason why the offence of family abandonment was committed is not important.

5. Forms, penalties and specific procedural aspects of family abandonment

Preparatory aspects are possible only in the form of commission, as provided in article 305 paragraph (1), letter a) of the Penal Code, without being incriminatory.

The *attempt* is also possible only in the form of commission as provided in article 305 paragraph (1), letter a) of the Penal Code, without punishment.

The offence provided in article 305 *is consumed* in the moment of leaving the family, chasing, or providing no material support - aspects that can produce physical or material sufferings to the injured person or, at the moment of disrespecting the obligation of maintenance; such a situation can be ended by accomplishing the respective obligation or by a definitive sentence of the offender, or at the end of the second month of non-payment, and is exhausted the moment the payment is resumed or the moment the doer is definitely sentenced.

⁸ *Idem.*

⁹ Munteanu, I.A.; Cunesco, C. – *In connection with the offense of family abandonment committed in bad-faith for failure maintenance obligation provided by law (În legătură cu infracțiunea de abandon de familie săvârșită prin neîndeplinirea cu rea-credință a obligației de întreținere prevăzute de lege)*, in RRD no. 1/1977, p. 35.

¹⁰ Radu, M.E. – *Criminal Law. General Part. Individual study manual (Drept penal. Partea generală. Manual de studiu individual)*, Pro Universitaria Publishing House, Bucharest, p. 91.

¹¹ Loghin, O.; Filipaș, A. – *Romanian Criminal Law. Special Part (Drept penal român. Partea specială)*, Ansa Publishing House, Bucharest, 1992, p. 298.

As provided by Law 305 paragraph (2) of the Penal Code, the penal action is started at the existence of a beforehand complaint of the injured person. Article 279 paragraph 2 letter b) of the Penal Code, the complaint is sent to the penal authority or to the prosecutor.

As because the offences punished in the basis of a beforehand complaint are few and, generally, involve mutual personal relations, the law offered the possibility for an injured person to reconcile with the doer or to withdraw the complaint against him/her¹².

Paragraph (3) of the same article also decides the fact that the reconciliation of the parties eliminated the penal responsibility.

The reconciliation of the parties produces *in personam* effects.

Coercing is established between the state and the doer/offender, both parties having right and obligation, as well. The state has the right to bring the offender to account by proving his/her guilt, by sentencing and forcing him/her to execute it. At the same, the guilty person is obliged to give account for his/her actions or inactions and deeds¹³.

Penal responsibility

In case the defendant did not reconcile with the injured person, but in the period of the trial he/she accomplishes the rights, the instance shall decide the suspension of the obligatory execution of the penalty even if the conditions provided by article 81 of the Penal Code are not fulfilled (the conditions of applying the obligatory suspension).

Countermanding the obligatory suspension takes place only when, within the probative term, the offender commits again the offence of family abandonment and does not carry out his/her duties all through the trial.

Punishment. Family abandonment is punished, as provided by letters a) and b) with prison from 6 months to 2 years, fine, as provided by letter c), or with fine and prison from 1-3 years. The limits of punishments were modified: the minimum limits for the two versions of the family abandonment, with 6 months, by Law no. 197/2000 for amending and completing certain decisions of the Penal Code of November 13, 2000, as published in the Official Gazette no. 568/2000.

6. Proceedings of mediation

Law no 192/2006 on mediation and mediator training, published in the Official Gazette no. 441 of May 22, 2006 with further amendments provides - in Chapter VI, section 2 - special dispositions regarding the mediation of penal cases.

Family abandonment is generally established in the basis of a complaint of the parent remaining to protect and care the child/children and who no longer receives the allowance and who can demonstrate the bad intentions of the other parent.

Mediation can be initiated by the parent considered to have been wronged by the penal deed of the other parent, in order to find a quick solution and amiable for the conflict that appeared among them two.

At the same time, the mediation can start at the request of the offender with a view to avoid any penal complaint that might have consequences on him/her. On the other side, the measure can be taken as to determine the injured parent to withdraw the complaint and thus, to stop the penal action in an amiable way.

As the law stipulates, neither the injured person nor the offender can be obliged to accept mediation. In case the two agree that mediation should be done, this procedure has to take place in such a way as to offer juridical assistance to each of the parties, and if necessary, to be provided an interpreter.

¹² Radu, M.E. – *op. cit.*, p. 123.

¹³ Flămânzeanu, I. – *The legal liability (Răspunderea juridică)*, Pro Universitaria Publishing House, Bucharest, 2010, p. 69.

These guarantees are offered only to persons to whom the penal pursuit started, so that if the mediation started before the penal authorities were informed or before being applied the penal dispositions of the Penal Procedural Code referring to juridical assistance, are not applicable¹⁴.

The representation of the parties in the mediation procedure can be legal or conventional. The legal representation is incidental in the case of persons under interdiction or of infants under 14 who have no practical capacity.

The penal doctrine, since 1938, used the term infant as related to the civil law when referring to children and adolescents. After 1990, under the influence of the international norms, the Romanian legislation includes the term child, as a synonym to infant, accepting the sociologic point of view rather than the juridical one¹⁵.

The conventional representation can take place under the conditions of article 52 of Law no. 192/2006 that stipulated that during the procedure of mediation the parties can be represented by other persons who can elaborate dispositions in agreement with the law. The conventional representative can be an attorney, a kin or a friend having full responsibility. In penal cases the parties of the mediation contract are, in principle, the injured person and the doer/accused, that is the defendant. During the procedure of mediation there can participate other persons, too. It is, thus, necessary their agreement of the parties as to enable them to take part in the procedure.

The procedure of mediation in the case of family abandonment can take place before the beginning or after the penal trial (see article 68 and 69 of Law no. 192/2006 on mediation and mediator training, published in the Official Gazette no. 441 of May 22, 2006 with further amendments).

1. In case the mediation procedure takes place before the beginning of the penal trial and ends by the reconciliation of the party, the injured party can no longer inform the instance or the pursuing authority about the family abandonment.

If the mediation procedure started within the limits of the term fixed by the law for lodging the beforehand complaint, the term is suspended all through the mediation period.

In case the conflicting parties did not reconcile after the mediation, the injured person can lodge the beforehand complaint within the same term that will be resumed from the date of the written report of closing the procedure of mediation including also the period before suspension.

2. In case the mediation takes place after the beginning of the penal trial, penal pursuit or in some other situations, the trial is suspended in the conditions in which the parties have to present the mediation contract. The suspension lasts until the procedure of mediation is closed by any of the ways provided by article 56, paragraph (1) of Law no. 192/2006: closure of an agreement between the parties as a result of solving/settling the conflict, failure of mediation or lodging the mediation contract by one of the parties. No more than 3 months shall pass since the conclusion of the mediation contract.

The penal trial is taken *ex officio* immediately, after the reception of the report mentioning that the parties did not reconcile or, in case no such mention is made, at the expiration of the term stipulated in paragraph (2) of article 70 that is, no more than three months since the conclusion of the mediation contract.

In order to solve the penal causes in the basis of the agreement concluded as a result of mediation, the mediator is obliged to inform the judicial authority the mediation agreement and the written report of the mediation contract in original and electronically, if the parties reached a reconciliation or, only the written report concluding the mediation according to the stipulation of article 56 paragraph (1) letter b) and c).

As provided by article 57 of Law no. 192/2006 for the closure of the mediation procedure - no matter of the cases provided in article 56 paragraph (1) - the mediator will write a report which will be signed by both parties or by their representative, and by the mediator.

¹⁴ Dragne, L.; Trancă, A.M. – *Mediation in criminal cases (Medierea în materie penală)*. Bucharest: Universul Juridic Publishing House, 2011, p. 133.

¹⁵ Leftreache, L. – *Criminal Law. General Part (Drept penal. Partea generală)*, Universul Juridic Publishing House, Bucharest, 2009, p. 578.

When the conflicting parties reach an agreement, a written agreement can be drafted; it will contain all the clauses agreed upon and will have the value of a privately signed document.

The mediation agreement can contain the possible modalities meant to repair the prejudice, as: moral repair, repair in kind, by equivalence.

Generally, the agreement is written by the mediator, lest the parties and the mediator have another agreement (article 58 of Law no. 192/2006).

The mediation agreement shall represent the exclusive result of the will of the parties. The law does not allow the mediator to supervise the way in which the agreed assumed obligations are carried out by the parties. At the same time, there is no legal disposal to forbid the parties to fix post-mediation meetings. During these meetings the parties will analyze the way in which the agreement was carried on properly.

7. Conclusions

The specific of the penal conflicts make mediation to differ from other domains. The emotional state of the parties in a penal conflict is hard to be surpassed, and the general discussions can take part after a long period when the parties can be less stressed because of the active hearing and because of the other techniques of mediation the mediator shall apply.

Very often, the facts that offer the parties a state of guiltiness, is a barrier in communication the mediator has to overrun by naturalness and adequate psychological knowledge.

In Romania, family abandonment is a well known phenomenon, almost quickly forgotten, with no remorse from the part of those leaving their families. Very few of the denounced of abandonment are sent to prison. In their majority the complaints have no penal ending because some of the offenders pay the allowance immediately after the complaint is lodged. To commit a family abandonment is a mainly a moral offence, irrespective of what the law considers it, irrespective if the wife - in general, the child's mother - does not lodge a penal complaint. The very fact of abandoning the domicile and the family is shameful and indicate the lack of human and humanitarian feelings.

To establish a family abandonment has very serious consequences for the negligent parent. Consequently, the amiable agreement should be preferable, and if both parents can not reach such an agreement, they can appeal to a neutral mediator able to create them better conditions for an amiable understanding.

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