

# MEDIATION IN CASES CONCERNING OFFENCES OF HITTING OR OTHER VIOLENCE AND INJURY

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## Abstract

*Restorative justice, a concept that also include mediation in criminal matters aimed primarily compensation for the damage caused to victims, following the determination of the offender to take responsibility of his actions and to actively participate in the repair of this damage.*

*Romanian legislature intended to regulate mediation to those offenses for which according to the law the withdrawal of prior criminal complaint or reconciliation of the parties removes criminal liability. Therefore, mediation is also possible to assault and other offenses of violence and injury, existing strong arguments for example confidentiality procedure, considering that the way to resolve conflicts amicably may be an appropriate means for this kind of offenses.*

**Keywords:** *violence, injury, restorative justice, mediation.*

## Introduction

In a broad sense, mediation is an alternative means of dispute resolution that gives parties an opportunity to settle disputes with an impartial third party, without recourse on in legal authorities. The literature shows that “mediation is a way of solving conflicts through a person chosen by their protagonists which proposes to them a draft solution. Accordingly, the mediation is more of a means of communication, based on the exchanges and taking into account the other, in a thread designed to get in connection with the existing institutions, to a solution found by the parties and estimated as satisfactory for both, and this in the presence of a third party”.<sup>2</sup>

Mediation in Criminal Matters is part of the broader concept of restorative justice, which aims to restore the victim his rights - secondary participant and often ignored in the criminal trial. Under this new concept, the primary purpose of the criminal trial is not punishing the offender but getting a compensation for the damage caused to victims, at the same time aiming to encourage the offender to take responsibility, to plead guilty and to actively determine him to participate in to compensate the damage caused. Restorative justice aims at balancing the concerns of the victim and the community with the need to reintegrate the offender into society.<sup>3</sup>

The restorative process occurs as being that one in which the victim, the offender and other persons or members of society affected by a crime, willing to participate together in order to solve problems caused by crime, often with an impartial third party. This procedure can include victim-offender mediation, conferencing, circles, victim assistance, assistance for ex-convicted, compensate damage community service.<sup>4</sup>

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<sup>2</sup> See P. Schultz, *La médiation pénale et la réparation pour mineurs, L'organisation de la justice en France*, Journées de formation des agents locaux de médiation sociale, cit. de L.Hincker, *La médiation pénale: pour quoi faire?, Culture et sociétés*, Cahiers du Cemric nr. 11/1998, p. 24, cited by Gh. Mateuț, *Medierea penală*, Law Journal no. 7/2007, p. 149.

<sup>3</sup> United Nations Economic and Social Council (2002). *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*, <https://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>.

<sup>4</sup> L. Dragne, A. Trancă, *Medierea în materie penală*, Universul Juridic Publishing House, Bucharest, 2011, p. 12.

Mediation in criminal matters raised the interest of Romanian legislator much later than in European countries<sup>5</sup> and as it is regulated in the current state of Romanian national law, it has opted for only one of the forms of application of the concept of restorative justice, namely mediation between the victim and criminal, criminal procedural aspect which may result in the issue of removal of criminal responsibility.

Also, the legislature intended to devote only a few articles concerning mediation in criminal cases being covered those offenses for which by law the withdrawal of prior criminal complaint or reconciliation of the parties removes criminal liability.

### **Hitting or other violent crimes and injury**

Hitting or other violent offense is provided for by art. 180 C.p. and consists of par. 1 of this article in "hitting or any acts of violence causing physical suffering".<sup>6</sup> Injury offense is provided for by art. 181 C.p. and according to its text consists of "deed through which caused bodily or health harm requiring medical care more than 60 days".<sup>7</sup>

Legal object of such offenses is the social relations concerning the right of everyone to corporal integrity and health, and the material object is a person's body (living), person against whom the offense was committed. Both the active and the passive subject can be any person (subject unqualified).

Regarding the objective side, these crimes are committed by doing - hitting with a body, stabbing etc. - or possibly through inaction such as for example failure of measures to prevent collision or injury to persons.

In terms of the subjective side, the two offenses were committed intentionally, directly or indirectly, assuming that the author foresaw and watched or at least accepted the result produced. The immediate result is physical ailments produced to the person.

Depending on the produced consequences is determined the legal follow of the act. In the case of the offense of striking provided for in art. 180 paragraph 1 and paragraph 1<sup>1</sup> C.p., physical suffering produced to the victim is not reflected in days of medical care. If the offense caused injuries that required maximum of 20 days of medical care, the act may fall within the provisions of art. 180 paragraph 2 or paragraph. 2<sup>1</sup> Cp, depending on the relationship between victim and perpetrator.

If the offense caused injuries that required at least 21 days but not more than 60 medical care, the offense is punishable by the provisions of art. 181 paragraph 1 or paragraph. 1<sup>1</sup> C.p. To determine the number of days of medical care is needed forensic finding. Number of days of medical care is, in forensic examination terms, healing disturbances in the functioning of the victim's body, problems caused by that act. Number of medical care is not thus represented by the number of days needed to reverse all of the effects of the offense, the period of incapacity for work

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<sup>5</sup> Only in 2006 was adopted the Law no. 192 on mediation and the mediator profession - published in the Official Gazette of Romania, Part I, no. 441/22.05.2006.

<sup>6</sup> The full text of art. 180 C. p. reads as follows: ( 1 ) Striking or acts of violence causing physical suffering shall be punished with imprisonment from one month to three months or a fine. (1<sup>1</sup>) acts in paragraph 1 committed against family members, shall be punished with imprisonment from six months to one year or a fine. (2) Striking or acts of violence that have caused an injury requiring medical care for more than 20 days shall be punished by imprisonment from 3 months to 2 years or a fine . (2<sup>2</sup>) acts in paragraph 2 committed against family members be punished by imprisonment of one to two years or a fine. (3) Criminal action is initiated upon prior complaint from the injured person. If the acts in para. 11:21 prosecution is initiated *ex officio*. (4) Reconciliation of parties removes criminal liability, producing effects and where criminal proceedings were set in motion by default.

<sup>7</sup> The full text of art. 181 C.p. reads as follows: (1) The act that caused bodily injury to health or an injury requiring medical care more than 60 days shall be punished with imprisonment from 6 months to 5 years. (1<sup>1</sup>) The act in paragraph. 1 committed against family members, shall be punished with imprisonment from one to 5 years. (2) Criminal action is initiated upon prior complaint from the injured person. If the acts in para. 11 prosecution is initiated *ex officio*. (3) Reconciliation of parties removes criminal liability, producing effects and where criminal proceedings were set in motion by default. (5) acts in para. 1 to 3 penal action is initiated upon prior complaint from the injured person. Reconciliation of parties removes criminal liability.

or during illness. For example, the fact that the victim took the form of local treatment compresses a finger for three days does not mean medical care within the meaning of art. 180 paragraph 2 C.p. Similarly, the fact that removals of any visible external signs of crime were required 3-5 days of medical care does not attract qualified as a crime.<sup>8</sup>

It should be noted that whether or not crime, meeting or missing constituents, assessing subjective side do not fall within the jurisdiction of the mediator. However, in the situations when, for example, the parties appeal to extra-judicial mediation, i.e. before filed a criminal complaint, from the facts presented, it is clear that the act does not fall within any of these three crimes (the crime of injury bodily injury when necessary medical care beyond 60 days), and mediation cannot act as grounds for termination of the criminal trial, the mediator is entitled to refuse to start proceedings and refer the parties to mediation before the prosecution.

If we refer to the material element in the case of assault and other violent crimes and personal injury (art. 180 and 181), the procedures of the commission can be varied: through the perpetrator's own energy, in which case we are in the presence of an action - hitting with fist, palm, feet, with blunt object, by blunt object or in rough plan (when the victim is pushed into a hard object or rough plan with the intention of hitting her), hair pulling, shoving, putting a obstruction of a person putting a victim obstacle for it to strike, producing a psychological shock in order for it to fall or strike, by using other forces offender puts into action - for example, whet a dog, or by guiding a flock of animals to overcome the victim<sup>9</sup>, through inaction - if the act is the result of failure to fulfill an obligation, for example, the perpetrator not the victim warns not to enter into a certain place where they could be subject to collisions, not covering a hole or a ditch, or not marking a dangerous place.

In the case of inaction in criminal trials is necessary to prove that the perpetrator has sought production of harmful outcome since otherwise we are in the presence of unintentional injuries.

If we refer to people injured and the perpetrator quality, and to the possible context of the act, as these elements have direct relevance to mediation process, you have to keep in mind that a large part of this crime relations between neighbors or persons close to what we know, and domestic violence are provided for all severe punishment.

Relating to conflicts between neighbors, often they are caused by misunderstandings regarding the use of common areas, to pay for maintenance or use of common property parking etc.

Usually, such conflicts have long appreciated periods of time, social relations being characterized by a state of tension that worsens over time, degenerated into enmity relations. Physical conflicts are preceded by numerous incidents verbal insults, insults etc., Tensions explode at some point in a physical altercation.

In such situations the success of the mediation process will depend in an overwhelming manner tact, by the understanding or by the ability of the mediator to communicate with parties to the conflict and to facilitate a connection manifesting while fair and unbiased.

Another type of crime of violence consists by physical conflicts occurred in road traffic. It is a category of facts that we want to mention as gaining more ground in the judicial practice of prosecuting authorities and courts. This type of conflict requires that the parties involved are not known and the offense was caused by traffic incidents created tensions, amid pre-existing character more violent, more aggressive of the perpetrator.

Another important category is the acts of domestic violence that legislator has chosen to punish more severely due to their seriousness, nature arising from parts and the possible consequences for the victims, and possibly on other family members.<sup>10</sup>

Domestic violence occurs into most cases as a real pattern - it is not an isolated phenomenon but a long series of acts as varied as they have the same purpose: intimidation mate, will defeat it. In

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<sup>8</sup> V. Cioclei, *Drept penal. Partea specială. Infrațiuni contra persoanei*, Universul Juridic Publishing House, Bucharest, 2007, p. 104.

<sup>9</sup> *Idem*, p. 102.

<sup>10</sup> L. Dragne, A. Trancă, *op. cit.*, p. 51 and next.

the majority of cases, this type of abusive behavior belongs to men accustomed to being into control, especially within the home, the family, which they regard as a private universe. There are however excluded any misconduct of females belonging.

This behavior includes physical violence and, equally, emotional abuse, economic coercion, isolation, sexual abuse, threats and intimidation against the partner's use of children, verbal abuse, damage to or destruction of property.

In this type of crime is given a special feature of the sensitivity of the victim position - in the most cases the wife or children - is generated by the physical inferiority and by deteriorated mental state.<sup>11</sup> This will be a real obstacle in the mediation process, taking into account the danger that the victim be directly or indirectly forced to accept the conclusion of a formal agreement to mediation, of course, if these pressures have already resulted in a reconciliation or withdrawal of the complaint.

Domestic abuse victim lives in a permanent state of fear and often is no more than necessary a smallest gesture from the perpetrator to get what he wants - in the particular, the victim's consent to any idea or desire of the abuser. A mere glance or a gesture usually imperceptible to others, are usually sufficient to alert the victim of desire or need aggressor and the need to act according to it. In many cases it is found that in the relationships victim – perpetrator violence was not actually exercised. Some abusers do not use direct violence or physical assault exercises once and later to use this event terrorize the victim. Using constant threat serves as a means to exercise permanent control over the victim used for this purpose are relatively minor actions, such as hitting a wall, or threatening a child or a relative, destroying an object belonging to the victim, a discussion suicide, however those are subtle ways of intimidating the victim. The behavior of an abuser is, contrary to a common but erroneous opinion, very controlled and calculated, determined to obtain accurate results. Also, external behavior is completely different from one manifest in the family. Therefore, it is essential to know that such a person will lie, deny, minimize hide his abusive behavior in a very inventive.

Usefulness of mediation in domestic violence is a controversial issue in legal tradition in restorative justice.

It is estimated that several circumstances are considered major drawbacks of a possible mediation procedure to acts against domestic violence: the victim will have to be in the same room with her former partner, without other protection outside of the mediator is bound to remain neutral, partner or ex-partner will use very likely tactics of intimidation, such tactics, some subtle enough, may not be recognized as such by the mediator, which they regard thus normal applications, in many cases, women wrongly considered as unreasonable terms for refusing mediation. The key factor remains the feeling of fear expressed by the victim against his abuser.

However, there are strong arguments to believe that mediation can be an appropriate response for this kind of crime.

From the perspective of the victim, the criminal trial has a number of drawbacks that cannot be denied: in the front of the court, the abuser does not have to explore or explain his violent behavior, he will try to deny the allegations and to demonstrate their innocence, or at least will try to convince the court that a person is calm as possible and harmless.

The natural reaction of the aggressor during criminal trial is to mobilize all its forces towards the refutation of accusations against him. Since the process started by his victim constitutes an "inconvenience" the aggressor will emphasize repressive actions against his wife. Future acts of violence will be held in secret, and guilt which is peculiar to victims in such cases will increase. In addition, the trial costs are reflected in the family budget, and assaulted wife will be held responsible for these additional expenses. Victim's voice cannot be heard during criminal trial. It is highly probable that assaulted wife, frightened and under pressure from the abusive husband and of the whole family (she is responsible for starting the criminal trial that caused deep resentment of all

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<sup>11</sup> Domestic violence is not manifested as an isolated case, but under that of a constant state of tension and repeated assaults.

family members), not to produce evidence before the court against her husband or even drop the charges. The defendant will be acquitted and violence will continue, and the victim will learn that every cry for help will only worsen his situation. The victim is only one element of the rules of evidence in the prosecution, a piece which helps to clarify the facts. Although their needs are totally different, these needs prove no interest in court. On the contrary, she will be harassed by the defendant's lawyer during the hearing.<sup>12</sup>

Mediation in domestic violence cases present very special features compared to other types of mediation. Therefore, it is necessary for the mediator to observe in such cases a number of specific "rules": the victim (assaulted wife) must explicitly agree to mediation, and to be made aware that it can stop the mediation at any time. The victim should be aware that the police may denounce any act of violence occurred after the start mediation. The aggressor must assume responsibility for acts of violence committed. All parties need to realize that the act of violence is not the husband in no way a minor act of violence. His wife is neither the cause nor the responsible for the act of aggression, and perpetrator inconvenience faced today are not in any way a cause of concern for the victim. Mediation may be terminated by agreement only if the victim explicitly states they are satisfied with the terms of the deal.<sup>13</sup>

### Conclusions

In the Romanian legal system, criminal mediation is optional, which means that both the victim and the offender may be compelled to resort to this method of resolving conflicts amicably.

Way of legislative regulation of this institution present obvious drawbacks, particularly in terms of mediation in criminal and mention here, for example, that the laws do not govern the way the judiciary control over how obligations are met undertaken in the mediation. In many European countries - England, Austria, Poland, Germany, Italy etc. - concluding a mediating does not lead automatically in discontinue the criminal trial, but only his suspension for a variable period of time in which the judiciary oversees the obligations under the agreement are fulfilled, ending the criminal trial being conditional upon by obligations to which the offender has engaged in the mediation. In some cases, this supervision is given the task even of the mediator, for example Austria - mediation of rape offenses.

Therefore, as currently established, we consider that mediation victim - offender is clearly inefficient and unable to produce concrete results. The general interest is that mediation as an alternative dispute resolution is to be successfully used as often in penal matters, because in essence it appears as an alternative to prosecution and trial phase which is preferably a process long-lasting binding through the steps mentioned.

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<sup>12</sup> C. Pelikan, *Applying RJ in cases of domestic and sexual violence*, Workshop 17, European forum for victim – offender mediation and restorative justice, p. 1, [www.euforumrj.org](http://www.euforumrj.org)

<sup>13</sup> Idem, p. 2.