

Mediation as an Alternative Solution to the Felony of Battery and Other Violences

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ABSTRACT: In most cases, the interest in starting the mediation procedure is given precisely by the existing harm, in cases where the perpetrator provides the injured party with the necessary money to cover the damage or to cover the moral damage suffered by the victim. The lack of interest in mediating the conflict can come from the absence of injury, which is already recovered either during the investigation or at a different time before the mediation. In this situation, where there is no harm to be recovered, mediation is harder to accomplish, but not impossible and material damage can be claimed and offered for the purpose of causing moral damage, thus reaching a settlement. At the same time, the interest in mediation comes mostly from the defendant, from his desire not to go to court, or from the desire to stop the criminal proceedings. According to Art. 23 of the New Criminal Procedure Code of Romania, mediation may intervene "in the criminal proceedings on civil claims, the defendant, the injured party and the civilly liable party, are able to enter into a transaction or mediation agreement, under the conditions laid down by law."

KEYWORDS: mediation, felony of battery and other violences, procedure, agreement

Introduction

This introduction aims to outline a credible idea about the history and the circumstances of the emergence of the mediation concept. Mediation has always played an important role in the smooth running of both the legal process, in the sense that we know today, and in the good course and possible misunderstandings of the day-to-day disputes, starting with the days of ancient Greece and Rome. Although historians report the emergence of mediation during Phoenician trade, there are scientific papers that refer to a form of mediation since prehistoric times. In the prehistoric tribes, when two or more members of the tribe had a dispute over food or weapons, the tribe leader adopted a peaceful resolution approach of the conflict, the reason being a simple one: one of the parties in the conflict was dying, and one man down would be an additional danger to the tribe (Chirică and Boghian 2003).

In the Middle Ages, some countries banned the practice of mediation, while others permitted mediation only by central authorities. On the other hand, certain African tribes, as well as the Indian villages in America and Canada, felt that the wisest of the villagers was the most capable to mediate and resolve a conflict, the elderly being generally considered the wisest men of the village.

We note that mediation is a means of solving conflicts that date back long before the emergence of writing, and it may go even further in stating that mediation, in a primary form, of course, dates before man could even become aware of and admit to its existence, being considered today, the embryo of today's diplomacy.

The development of mediation as described above to its present form was determined by the countries' political and demographic development, the king or the wise men having ceased in being able to listen and also address each dispute or litigation that was brought to their attention. To facilitate this, once with the Code of Hammurabi and the accession to the Magna Carta, the existence of a clear legislation became extremely necessary, thus also official positions being established with the role of settling these disputes. In the view of the great *Confucius* (Confucius 1943), most conflicts come from a moral constraint, not a legal one. However, in the view of the great Confucius, most conflicts come from a moral constraint, not a legal one. However, in the Confucianism view, reaching the stage of a trial was considered to be only a concern for one's own interest at the expense of a general interest pertaining to society.

The coercive force was also rejected by the Buddhists, according to whom the settlement of misunderstandings and disputes should be made through compromise. Even today, although the

word of the law can not be questioned, China has a strong focus on conciliation, mediation and self-determination as ways of settling disputes.

Another country where the culture of mediation has been and is still highly developed is Japan. In Japan, there are a relatively small number of lawyers in relation to the country's population, and this is due to the country's longstanding tradition of mediation. In today's Japan, mediation is seen as an integrated part of business culture, where "Shokai-sha" and "Chukai-sha" have as their primary objective to facilitate these types of relationships (Hodgson, Sano, Graham 2008, 38).

In some African countries, the tradition of the "head master" has been preserved so far that any person may request an informal meeting of his community, a district's or village's residents, for a discussion in order to settle such a dispute. In this case, the role of the mediator is occupied by the most respected member of the respective community.

The Islamic world does not fall under either, with a strong and long-standing tradition of reconciliation and mediation, these being preferred dispute settlement approaches. This is ensured by the so-called "quadis". These "quadis" specialize in preserving or establishing social harmony by reaching a solution agreed by both parties involved in a possible dispute.

The West also has a long history of mediation. Ever since the Middle Ages churches were used by refugees as a place of refuge, and clergy were often considered the "connecting bridge" between fugitives and authorities basically militating for a non-invasive peaceful solution tolerated by both sides.

Returning to our days, the reputation of mediation arose once with the international treaties. Organizations such as the League of Nations or the United Nations have introduced provisions on mediation in their norms, thus, emerging with the ratification of these treaties by several states, which we now regard as the International Law.

A form as near as possible to nowadays was emerged in the United States in the 1970s, named ADR - Alternative Dispute Resolution, as a result of the increasing losses of money and human resources in the litigation process. The origins of A.D.R originated in the "Harvard Negotiation Project" (Ury and Fischer 1981, 93), made known to the general public in 1981. It was based on four essential principles, these being presented as success rules by its initiators. The first principle refers to separating people from the problem. This principle assumes that, after knowing the problem as a whole, the mediator proceeds to detach the parties from each other, the authors of the work William Ury and Roger Fischer considering that, after consuming the triggering act, the real problem lies in the person with whom an individual is in dispute.

A second principle refers to identifying the interests and not the positions of the parties. In particular, the mediator must fully understand the interests of the parties, whether they are obvious or not. The third principle refers to the mediator's identification of options for the reciprocal winnings of the parties, the aim being to have both sides' in a win-win situation, the last principle referring to the objective criteria of mediation.

This study was of such high accuracy and of so resounding success that in 1998, mediation was officially recognized in the United States through the "Alternative Dispute Resolution Law" which officially introduced for the first time a neutral third party, someone other than the judge, for dispute settlement.

In conclusion, we can admit that mediation has always existed for people, its role being similar to today's.

Criminal reconciliation and the mediation agreement in criminal matters. Observations and specific conditions

In order to better understand mediation in criminal matters, we will discuss about both the conditions of reconciliation and the terms of the mediation agreement in the following, thus observing the difference between the two institutions both in terms of the validity conditions in the criminal proceedings, and in terms of incidents in criminal proceedings.

According to art. 16 of the Criminal Procedure Code, the criminal action cannot be put into motion, and if it has been put into motion, it can no longer be exercised, if the parties have reconciled or a mediation agreement was concluded according to the law. Thus, both reconciliation and mediation are two distinct institutions that lead to the termination of the criminal trial. According to the same article, reconciliation and mediation are different institutions with different legal regimes and laws, their similarity being the effect they have in the criminal proceedings, namely the termination of the criminal proceedings.

Mediation in criminal cases is considered an attempt of restorative justice, in particular with the aim of repairing the crime of an offense to the victim or community receiving “what is proper” in accordance with good moral practice (Dănilăuț 2014, 156-157).

The mediation agreement, considered by the doctrine as the formal outcome of mediation, plays an extremely important role in criminal proceedings, mediators' practice and in the judicial practice, generating at a certain moment pertinent solutions that will support and simplify the work of mediators, lawyers and magistrates (Constantinescu and Buzatu 2014, 397).

The Reconciliation

Well-known to law practitioners, reconciliation is an institution that was also applicable in the former criminal legislation. Under the new legislation, reconciliation must meet certain special conditions to be valid. For example, reconciliation cannot intervene in the case of the offenses on which *ex-officio* prosecution operates; it removes the criminal liability and stops the civil action only if the reconciliation is total, unconditional, absolute, express and direct between the suspect and the injured person. The High Court of Cassation and Justice stipulates in its decision no. 27/2006 that: “*Termination of the criminal inquiry for offenses for which the conciliation of the parties removes the criminal liability may be ordered by the court only when it directly observes the consent between the defendant and the injured person to fully, unconditionally and definitively settle, expressly presented during the hearing of these parties, personally or by specially mandated persons, or by authentic documents*” (The Decision no. 27/2006 of the High Court of Cassation and Justice).

Another essential condition of the reconciliation is that it only takes effect if it is made until the court's appeal has been read. In the case of individuals without legal competence, the reconciliation is done exclusively by their legal representatives, and in the case of persons with limited capacity, only with the consent of the persons expressly provided by the law. Legal persons can also benefit from the prerogatives of reconciliation, which can bring about reconciliation through a legal or conventional representative.

Regarding the unconstitutionality of the reconciliation, on the possibility of concluding it until the court's appeal has been read, my opinion is that as long as the parties in the cases, where reconciliation is allowed, have the possibility of mediation, free and unlimited access to justice, and equality before the law is covered because the parties still have the option of removing the criminal responsibility through a mediation agreement, what is achievable for the offenses where reconciliation of the parties is also allowed, the effects of the mediation agreement being exactly the same as those of reconciliation: Termination of the criminal inquiry. Otherwise, until the court has been notified, the involved parties have both the right of reconciliation and the right to conclude a mediation agreement. Upon notification of the court, the possibility of reconciliation disappears, leaving only the possibility of mediation, therefore only through the intermediary of a person authorized as a mediator.

In this respect, there is a presumption that the legislator wanted to establish an authorized procedure that would protect the injured parties during the trial, precisely at the moments when the tensions between the defendant and the injured person are increasing. From a psychological point of view, it is very well known that defendants, during the proceedings before the court, exert enormous pressure on injured persons to achieve reconciliation. It is precisely for this reason that I consider that criminal mediation has been established as the only option after the court has been notified, namely that the negotiation of an amicable solution to the criminal conflict takes place in an organized and authorized, neutral and independent framework, without threats or hindering

factors, without the pressure exerted by the defendants on the victims, in an atmosphere that ensures a friendly, sustainable and fully satisfactory solution for each of the parties involved in the criminal conflict.

Criminal mediation

As previously mentioned, the mediation agreement is the cause that leads to the termination of the criminal inquiry, according to art. 16 N.C.P.P., totally different from reconciliation. The difference to the institution of reconciliation arises from the fact that the mediation agreement comes as a result of an extensive mediation process, which is carried out according to Law 192/2006 - Mediation Law, based on clearly stipulated mediation procedures.

By reading the Mediation Law no. 192/2006, we identify the procedural conditions of mediation, as follows:

- a. Criminal mediation may only be carried out by a mediator authorized under the same law;
- b. Criminal mediation can only be conducted in the context of a professional procedure that begins by requesting mediation through the mediation preparation contract, sending an invitation to mediation, discussing mediation with all persons involved in the criminal conflict, signing the mediation contract, drawing up the minutes of closure of the mediation and, subsequently, in the event of an agreement, the mediation agreement.
- c. Criminal mediation can only be carried out with due respect for the rights of the persons involved. The right to legal assistance or the assistance of an interpreter is guaranteed by law, and where it is mandatory, but has not been called into question, and the mediation took place without the presence of the interpreter or legal assistance, it automatically cancels the mediation act and implicitly all mediation proceedings performed by the mediator.
- d. Following mediation, the mediator is required to transmit the minutes of mediation and the mediation agreement to the judicial body where the case is located.

The mediation agreement is in fact reaching a private understanding between the defendant / suspect and the injured person. With the help of Law no. 255/19.07.2013 on the implementation of Law no. 135/2010 on the Code of Criminal Procedure and on amending and supplementing those normative acts containing criminal procedural provisions, it can be observed that the amendments made to the Mediation Law in the criminal provisions chapter, the lawmaker has always replaced the word “*reconciliation*” with the word “*settlement*” as an amicable solution to the conflict. Thus, according to art. 69 of the Mediation Law, “*Criminal mediation is closed by resolving the conflict and concluding a settlement*” (Art. 69 from the Law 192/2006 on the mediation and organization of the mediator profession, published in the Official Gazette, Part I, no. 441 of 21 May 2006, as subsequently amended and supplemented). Also, art. 69, par. 2, this time, states that “*if the parties to the conflict have not reached a settlement*”. Article 70, paragraph 4, “*there is no settlement reached*”. We see thus that the legislature put great emphasis on taking meaning of the word “*settlement*”.

In this respect, we note that the purpose of mediation is not a reconciliation between the parties, and the mediation agreement is not a reconciliation in the criminal sense but a private amicable settlement to a particular conflict. The mediator has the position of a facilitator of the settlement between the parties but does not play the role of peace-maker, after the mediation has ended, the parties are not obliged to recognize a “reconciliation” in the literal sense. Settlements can take various forms, may be conditional, may have various stipulations in content, may contain any kind of understanding between the parties if the understanding is within the legal and moral framework. In other words, the mediation agreement is a private contract between persons in the criminal conflict, a contract subject to the rules of civil contracts.

Recognized as a civil contract between the parties, the mediation contract has the effect of terminating the criminal proceedings, but is not subject to any condition of validity (N.C.P.P, Art. 159) as opposed to reconciliation, as it is conditioned by the New Criminal Procedure Code.

Mediation Agreement

The Mediation Agreement is considered to be the expression of the settlement of the issues that are the subject of the mediation process, explicitly transposed and outlined for both parties. Regarding the Mediation Agreement from a legal point of view, this is a contract between the parties, which has value when the mediation procedure is followed.

In the case of mediation, there is a bilateral, consensual and sinalagmatic contract, meaning that it is concluded between two or more parties, explicitly giving their consent to it and containing mutual obligations.

In terms of the legal effect that this type of agreement has, it being a private agreement, which shall take effect at the time of its signature, its effects are “*ad probationem*,” not “*ad validitatem*.” It should be noted that summarizing the terms of the agreement in the presence of all the participants as well as its signing by each of them is considered to be extremely necessary.

During a civil litigation in court, the mediation agreement reached during this procedure may be subject to review by the court in the council chamber by a request for judicial observance of the understanding between the parties therein.

In the field of family law, the mediation agreement concerning the decision to end the marriage, the management of the spouses' property and its liquidation, establishing the minor's domicile, where applicable, as well as other details regarding the visiting program, establishing the maintenance obligation of the minor concerned, may intervene at any time, even if the court has already delivered a judgement in regards to the matter.

In the field of criminal law, the mediation agreement carries several traits. According to art. 318 of the Criminal Procedure Code, the mediation agreement concluded between the parties leads to the termination of the criminal proceedings for certain offenses, which are followed after the victim's prior complaint. If the trial is in the criminal investigation phase, after the criminal case has been opened, the mediation agreement concluded with the mediator will be filed with the case prosecutor, who can decide the waiver of the criminal prosecution.

At the same time, during the criminal trial, if the mediation agreement is reached during this stage, it will be a useful tool for the judge who can order the waiver of the punishment or its postponement, the conditional suspension of the execution of the punishment or may retain in the defendant's favor mitigating circumstances. With respect to the civil claims, the civil party, the defendant and the civilly liable party may conclude a transaction or a mediation agreement under the conditions laid down by the legislation in force. In this respect, the defendant may admit, with the consent of the civilly responsible party, all or part of the claims that the civil party has. In the event of the defendant's acknowledgment of the civil claims, the court will oblige compensation to the extent of recognition.

The Mediation Procedure

Opening of the Procedure

In the case of the common assault offense, as presented in the Criminal Code, mediation can intervene at any time between the two parties. For this reason, the mere manifestation of will on behalf of all the parties involved is a sufficient condition for making the first step towards amicable settlement, alternative to the criminal trial. In this regard, the parties involved must go to a mediation office and undertake a mediation agreement with the respective mediation office.

The mediator must be impartial, and he must be chosen in mutual agreement by the parties. Any doubt about the impartiality of the mediator can be removed by randomly choosing a mediator from the mediators' official table. It should be noted that the mediation process is an alternative solution to the criminal trial, eliminating any further possibility to follow the natural course of a criminal trial.

Conducting the Mediation

Here begins the hardest part for a mediator. He must first listen to the versions of the parties. A first appearance places the two parties at the negotiating table, simultaneously, the mediator listening to the parties' statements. This stage is of a very high importance, the mediator being able to pin-point an image of the parties' personalities, frustrations and their needs in relation to the cause subject to mediation. This is not to be neglected, given that the mediator can prepare, based on this step, a technique of approaching the parties in the individual discussion phase.

At the same time, this stage is also the stage where strong contradictions between the aggressor and the victim arise, the mediator having to pose a strong ability to control the possible escalation of the discussion, even postponing the discussion or canceling the meeting.

Individual Discussions

The next stage of the mediation process is to conduct a private discussion with each of the parties. Each of the parties involved informs the mediator of their requirements for the conclusion of the mediation agreement and the wishes they have towards the other party. Please note that these requirements must be rational, relevant and achievable in relation to the other parties. The mediator has the duty to make known to the parties, during the individual discussions, the possibility or, as the case may be, the impossibility of their requirements being achieved by the other party, but only in the light of their reasonableness in relation to normal. Once the stage of the individual discussions has been completed, the mediator has to inform the parties of the requirements they have, discussing on this occasion these requirements with each of the parties.

The Negotiation

The next step is to negotiate the conditions of the parties involved. They can make references to the quantum of requirements, when there are money-implied requirements, or to certain actions or inactions that each of them should obey. At this point, the mediator must take into account the financial power that the parties have, the right to enjoy reasonable conditions of survival or other fundamental rights that they have, the mediator being the guarantor of the fact that none of the rights and freedoms of the parties will not be violated with the signing of the Mediation Agreement. Any mediation agreement that disregards the rights, interests or freedoms of individuals directly involved in the conflict entails the absolute nullity of the agreement. According to Art. 52, par. 2 (Art. 52, alin. 2 from the Law 192/2006 on the mediation and organization of the mediator profession, published in the Official Gazette, Part I, no. 441 of 21 May 2006, as subsequently amended and supplemented), the understanding of the parties involved should not include provisions that bring or might be prejudicial to law and order.

There are cases where neither party agrees with the requirements of the other party, in which case the mediator must resume the individual discussion procedure in order to find with them a solution suitable for concluding this type of agreement.

Closing the Agreement

Once you determine the terms and conditions of the agreement, the mediator will read all these conditions in the presence of the parties, ensuring that they fully understand what they mean and, at the same time, their imperative nature. Once the parties have been informed of the above, they must sign each of them by hand, that moment being considered as the moment from which the mediation agreement takes effect. The lawyers of the parties may participate in any of the following stages only in the interest of the client they assist.

The purpose of the mediation process must not always be marked by the agreement between the parties, either wholly or in part. It may be terminated either by denunciation of mediation by either party or both, or by the observance of mediation failure, made by the mediator, provided the latter finds that no agreement can be reached between the parties. Coming back to the agreement reached between the parties case, it should be noted that mediation is aimed at finding a viable and valid solution by the parties with satisfactory results for both sides.

Neither party may be compelled or forced to agree a solution imposed in any circumstances by the mediator, by a third party or by any other participant in the mediation process. Any solution that results in the Mediation Agreement must express absolutely and completely the exclusive will of the parties, which must be explicit, contain sufficient data for the obligations assumed to produce the legal effects desired by the parties involved.

Also, all parties involved in the conflict must be present in the mediation process, with the mediator being obliged to ask the parties involved who are exactly the persons involved in the mediation case and to invite them all to mediation, and he has to inform the parties which calls for mediation that the mediation process will only take place in the presence of all the people involved. This is due to the impartiality of the mediator in relation to the cause, the presence of all persons being necessary for knowing all the data of the conflict. It should be noted that the mediator is not responsible if the parties were in bad faith and did not notify him of the involvement of all persons in the conflict that is the object of the mediation cause who have or could have rights and obligations related to that conflict.

The mediation agreement is valid and also viable and takes effect from the moment of contracting between the parties "*solo consensusum*." Its drafting by the mediator is optional, the parties having the power of decision if the agreement is written by the mediator, or is not written at all. If the mediation takes place during a judicial process, the mediation agreement will be submitted to the court, which has the duty to decide, at the request of the parties, in accordance with the provisions of art. 438-441 of Law 134/2010.

The Felony of Battery and Other Violences – Art. 193 Criminal Code

As provided in Chapter II - Offenses against body or health integrity, Art. 193 alin. 1 defines the offense of battery or other violences as "Hitting or any acts of violence causing physical suffering". The punishment for this crime is imprisonment from 3 months to 2 years or a fine. Alin. 2 mentions the situation in which the punishment's limits are increased, from 6 months to 5 years or a fine if there have been committed "Deeds that cause traumatic injuries or affect the health of a person, the severity of which is assessed by days of medical care of up to 90 days."

Analysis on the the Felony of Battery and Other Violences

The special legal object of this felony is represented by those social relations regarding the protection of the body and health integrity of every person, as a fundamental right provided by the Constitution. As the material object of the offense, we find the body of the victim against whom the offense was directed, which of course is seen in its physical and mental integrity.

The active subject can be considered to be any natural person who fulfills all the legal requirements for criminal liability, and the passive subject, in the case of the simple form of the offense may be any natural person. In the case of a qualified passive subject, it must be a family member to fulfill that quality.

The material element of the offense is realized by strike or any other act of violence that causes physical suffering, by the term of striking meaning the act of aggression consisting in the mechanical action of touching, compressing or sudden and violent striking of the contact surface by the perpetrator body or an object, whatever it may be the case. The immediate consequence is the provocation of physical suffering to the victim, this suffering being presumed in the case of the victim and having to be proved in the case of other types of violence.

The attempt, though possible, is not incriminated, since it does not meet the condition of the material element of the offense, the law punishing only the consumed form of the felony, a form that occurs only when the victim is hit or when, through an act of violence he suffers physical suffering. The continued form of the offense occurs when the perpetrator applies strikes or other forms of violence to a person, under different circumstances but on the basis of the same criminal resolution. Criminal participation is possible in the case of this crime in all three forms provided by law: co-author, instigation or complicity.

Mediation in the Event of Battery or Other Violences

In most cases, the interest in initiating the mediation procedure is offered precisely by the existing damage, in cases where the perpetrator provides the injured party with the necessary money to cover the damage or to cover the moral damage suffered by the victim. The lack of interest in mediating the conflict may come from the absence of damage, which is already recovered either during the investigation or at a different time before the mediation. In this situation, where there is no harm to be recovered, mediation is harder to accomplish, but not impossible, and material damage can be claimed and offered for the purpose of causing moral damage, thus reaching a settlement. At the same time, the interest in mediation comes mostly from the defendant, from his desire not to go to court, or from the desire to stop the criminal proceedings.

According to Art. 23 of the New Code of Criminal Procedure, mediation may intervene "in the criminal proceedings on civil claims, the defendant, the injured party and the civilly liable party being able to enter into a transaction or mediation agreement, under the conditions stipulated by the law."

In conclusion, we can admit that mediation in criminal matters and, implicitly, in the case of offenses of battery and other violences is a necessity for the defendant, who can redeem the deed without judicial implications, being beneficial to both parties involved in the conflict.

Conclusions

The necessity of an alternative solution of the criminal lawsuits in the Romanian courts was undoubtedly given to the first level of jurisdiction by the need for a regulation that would align Romania with the other European states. Aligning national and European legislation is a first important step towards a European Romania.

In my opinion, Romania is in a continuous phase of transformation, a phase that began with the fall of the Communist regime in 1989. The efforts made by the legislator over the 30 years of democracy materialized in small but secure steps, suggesting a legally promising trajectory.

In the field of criminal mediation, another issue that I would like to mention, the need for regulation in this regard was also due to the over-agglomeration of the detention facilities, which was the solution that involved the least material investment and which, in my opinion, will steadily cover most of the criminal litigation and not only, providing, with this coverage, extremely useful precedent jurisprudence for practitioners.

We can admit, therefore, that mediation is a successful tool, currently in the initial stages, but promising to evolve and allow for an amicable settlement of possible conflicts.

Meanwhile, mediation also plays an important role in educating the Romanians' civic spirit, giving them the opportunity to polish their spirit and civic instinct, leading to the evolution of society at a higher rank.

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