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Experience with mediation in domestic violence cases in Spain: legal regulation and opinions from judicial practice and criminal law scholars.

ABSTRACT

The incidence rate of domestic violence cases in Europe has not really significantly decreased in the last ten years, and Spain is not an exception on this. Despite legislative changes and improvements that have taken place in many of our countries regarding penal punishment of those behaviors, it seems to be not enough or perhaps not suitable for all possible cases in this field. For this reason, for some time it is being discussed and, in any cases, trying out with the option to apply other techniques of conflict resolution based on restorative justice (and specifically the process of mediation between victim and offender). The purpose of this brief paper is then to examine the current legal situation in Spain about mediation in cases of domestic violence, and the opinions that have been expressed on this from the criminal doctrine.

To begin this analysis we have to start from the fact that in Spain the Organic Law of Integral Protection against Gender Violence 2004 established an absolute prohibition of mediation in cases of violence against women falling within the jurisdiction of the Courts (whether civil – civil- or criminal). Such courts were specifically created to prosecute cases of violence by men against their partners or former partners (within a marriage, dating, cohabitation, etc.).

Moreover, we must keep in mind that Art. 57.2 of the Spanish Penal Code prohibits in all cases of domestic and gender violence, even the slightest, the aggressor to approach the victim (as judicial punishment). In short, if the attacker is necessarily separated from the victim, it is hardly feasible to organize a meeting between them to mediate. Anyway, despite this situation of “*lege lata*”, most Spanish specialists in criminal mediation, as well as many judges, prosecutors, etc., consider that legal prohibition is highly debatable, declaring themselves in favour of a legal reform to allow mediation techniques in some cases of gender violence.

In this regard it has been precisely shown in recent years that conventional Justice has failed to eradicate violence and eliminate all risks for victims. Moreover, even the special punitive hardening of the current criminal policy (policy of “no drop”, “zero tolerance” towards gender-based violence –and its perpetrators) has generated more anger among the attackers, causing the phenomenon to evolve into more serious conduct against women (homicide, murder). This is known as the “brutalization effect”.

Also, speaking from the point of view of critical feminism, there is an ideological or political argument that also encourages us to start with mediation in this field. Namely, that we should consider women as autonomous and responsible persons by strengthening their psychological and social resources and “empowering them”, so that they can freely decide what to do with their lives in the future and how to manage their relationships. I will try to explain this.

It so happens that the current system of police and judicial repression holds a stereotypical and simplistic view of the battered woman. It is assumed that the most beneficial for her is always for the offender to be punished and locked up in prison and that she completely break her relationship with him. Further, it is thought that if a woman does not want to leave her husband or she withdraws the complaint despite the attacks, it is simply because "she is not in her right mind."

From that point of view the current policies of "zero tolerance" for violence against women mistrust the rationality of women and their ability to solve their problems. Therefore, once she denounces the attacks, she loses all control over the judicial process. Immediately the judge will grant her a restraining order against her husband or partner, so they can never call or contact each other for any reason. Therefore the victim is deprived of any opportunity to manage her private relationship independently, because the organs of the state take over that control from a paternalistic approach.

However, it is not the purpose for which most of the victims come to the Administration of justice. Many of them have often only meant to warn the aggressor to stop his violence, but they do not really want to break up the marriage and divorce. Therefore, in this area of combating violence, what a truly feminist and pro-woman position should be, has been misunderstood.

In this sense, exactly one of the reasons alleged in Spain to defend mediation in domestic violence is that the cases considered as "gender violence" by the Spanish Penal Code (and for which mediation is prohibited) are in practice very different from each other. Thus, not all of them actually involve the victim's psychological inability to conduct mediation with the offender. For example, a first slap or "loss of temper" on the part of a man toward his partner will not be identical to that other situation where there has already been sustained abuse and domination against her.

In the latter case, therefore, we can already think of a mediation system that could apply to gender violence. What would then be the specific benefits that women victims would obtain from it, unlike those we already know that the conventional judicial process provides?

1. First, because domestic violence is a relational crime, mediation would be especially indicated in these cases. Indeed, mediation can provide a specific analysis of the interpersonal conflict behind the violence, investigating its causes and helping to restore the communication channels that are broken or seriously damaged between the partners.

2. In turn, by allowing women in mediation sessions to tell "the story they want to tell", their position in the negotiation will improve and they will win "objective credibility" in front of the others. Thus they receive support from other people attending the meetings (relatives, friends, social service officials...). And women will be socially and psychologically empowered by this.

3. In addition, during the mediation meetings the offender will hear the victim's story directly, expressed in her own words. He can no longer pretend that he has not understood or ignore her feelings. Instead, he will have to explain in front of the people attending the meetings why he behaves so aggressively. This is something that he does not need to do before the ordinary courts, where he can remain silent or deny the allegations - indeed he may feel himself to be a victim. In mediation by a kind of "emotional dynamics", the aggressor will come to experience remorse and "constructive shame" for his actions, becoming aware of the damage caused.

In any case, despite these beneficial contributions of a possible mediation, certainly we cannot overlook the disadvantages or dangers that the use of these techniques involves in cases of gender violence.

1. First, it has been said that the implementation of mediation means losing the symbol for society that punishing such behaviour under the criminal law implies. Thus, by using mediation we could be sending the wrong message to society: namely that we "trivialize" gender violence and

dangerously return to "privatizing" the treatment of this problem. However, against such criticism it can be argued that in the Spanish judicial system, mediation would not escape from control by the courts at all. In turn, the abuser will always receive a criminal penalty and a severe rebuke for his crime.

2. It has also been argued against mediation that applying it in these cases would not be able to ensure the security and integrity of the victim during the process. However, sometimes the penalty imposed by traditional justice would also not greatly restrict abusive behaviour, if this penalty was a conditional release (probation). Therefore the woman who seeks traditional criminal justice is also at risk.

3. The special psychological status of women because of their nature and characteristic socialization processes has also been stated as an obstacle to mediation. In this sense, researchers have found that women have hormonally a greater natural predisposition to adapt and give up their own interests for others. In addition, according to traditional social expectations of their gender, women have been educated in this way (for them, "doing gender" has long meant developing these qualities). Therefore, the woman is exposed to a position of inferiority in the framework of mediation in cases of gender violence, where there will be strong emotional issues to discuss.

4. Similarly the negotiation that characterizes these meetings requires that both stakeholders participate on an equal footing when it comes to finding a solution. I.e., it requires that there is an *equivalent status* or *balance of power* between them. This condition will not be met in the case of women who have suffered physical or psychological abuse by their partner. On the contrary, here the mediation sessions could lead the offender to a reproduction, albeit subtle, of the mechanisms of subjective and psychological coercion and abuse over his victim. And she could give in to his requests perhaps for fear of further reprisals.

Given this understandable reluctance, a number of precautions are therefore necessary that should be established in a hypothetical mediation program for domestic violence. According to Spanish scholars, such measures would be as follows:

1. First it would be necessary to balance the position of women regarding their former male partner, through this process of "empowerment". Thus all social and psychological resources of the victim should be activated to break the situation of subjection to her husband or ex-partner. In practice, this involves:

a) ensuring that she participates in the meetings on a totally voluntary basis; providing her with a counselling process and with a prior or simultaneous psychological strengthening process, until she feels "safe enough to participate in a joint meeting with the man". Another possibility would be to have only an indirect mediation without bringing the parties together.

b) using as far as possible a mixed mediation team, involving men and women (as has been done in Austria); also using a working group to accompany the implementation of the program, composed of "scientific advisers", members of the police and the prosecution, officials of the victims assistance service, etc. Similarly, the mediators should be specialized in family violence and they should be watching all the time for a possible asymmetry in the relationship. And they should immediately suspend mediation if estimating that inequalities in the negotiation process were too large or that there were manipulations by the aggressor.

Mediators should also maintain the delicate balance between two goals: on the one hand, they should support the weaker party (the woman) more strongly and blame the abuser clearly for his wrongful behaviour. And on the other hand, mediators must also reach some positive understanding with the offender and create a general atmosphere of empathy, which allows the attacker to take responsibility and decide to change his behaviour.

c) Further, to ensure the success of the program it would be essential that, once the mediation is concluded and the agreements are adopted, the authorities monitor their fulfilment extensively during the first months or even years following the meetings. In addition, it should be possible at any time to turn to preventive, coercive and security resources provided by the police and the judicial system in order to stop eventual episodes of violence.

In short, at this point, what might be the outcome of our debate?

In order to implement a future mediation program, we should carefully select the participants.

Thus, we should exclude cases involving a long history of domination, systematic abuse by the man on his actual or former female partner. Under such circumstances the victim would still be trapped in a strong emotional and psychological dependence on her abuser. And it would significantly decrease the likelihood of a fair agreement between them.

However, mediation may still be effective in a few cases:

1) Mediation could work where dealing with a first and single case of aggression (i.e. the first slap, push or kick) in the history of the couple (sporadic and isolated violence), an aggression which is not integrated into a long spiral of violence.

2) Mediation could also operate if a routine of mutual physical violence exists in the relationship, even if the man is the one who attacks more often and more strongly.

In these two non-severe cases, a mediation process could eventually be conducted with success. And this would happen especially when the victim wishes to withdraw the complaint and to re-establish coexistence with the offender.

Anyway, we are fully aware that it is not easy that a mediation process really achieves long-term changes in the relationship and in the communication styles between victim and aggressor.

For these changes to be possible, the victim needs to have some personal strength, either innate or acquired, to confront her offender effectively and to be able to defend her interests in mediation.

On the other hand, the abusive man should also have started a long-term process of change and accountability. For this process, he should also have access to the support of the mediation program and other social and institutional services (i.e., a men's support group, detoxification programs, anger management treatments, psychological help, if necessary, etc.).

In summary, mediation is a short-term intervention which is generally insufficient in itself to achieve more lasting changes in the relationship. But it represents an excellent starting point to plan and promote such changes.

Therefore, according to an important sector of the Spanish criminal doctrine (*Villacampa, Domingo, Larrauri, Esquinas...*) it would be appropriate and useful to start experimenting and researching further in this field. Also, if mediation programs for domestic violence are held in the future, they should certainly be regularly evaluated on their effectiveness and safety.

From this point, we should continue this fascinating discussion always in pursuit of a more just and humanitarian law. Let us wait for favourable legal changes in the future.