

European Best Practices of Restorative Justice in the Criminal Procedure

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FOREWORD

Trust and Criminal Policy of the Rule of Law

These days, seeing and experiencing problems everywhere, almost no one is satisfied with the operation of criminal justice. Most researchers, politicians and public opinion makers agree that the institutions which have been established for treating conflicts are exceedingly far removed from the context in which conflicts themselves appear. The state monopoly over criminal justice is not an end in itself but rather a guarantee for those affected by the conflict, and through them, for the whole political and social community, for getting fair justice.

I agree with the criminal lawyer *Katalin Ligeti* that criminal law and its institutions should not operate for the accomplishment of a „higher justice quality” but rather, for an actual objective. These institutions should aim at ensuring security and peace among people or restoring it when necessary. Therefore, she believes that the function of criminal law is not merely the achievement of “justice”. In order to restore social peace, criminal law must above all reinforce the rights of freedom violated by a criminal offence. However, *Ligeti* thinks that compensation should also be provided for victims who have been violated in their rights. Criminal justice should serve justice for those involved in the conflict, whether the offenders or the victims, so that the norm itself and its moral contents are strengthened. Furthermore, it should, at the same time, within the framework of the rule of law, fulfil its preventive objectives, or at least to contribute to the prevention of the emergence of similar conflicts and the possibility of becoming a repeat offender or victim.

I believe that these objectives should be fulfilled by accomplishing the aims set out in the philosophy of restorative justice. This is a topic that has been debated by many in the Hungarian literature over the past few years. Several years ago I myself found the role of conflict resolution in emotionally tense situations viable only through punishments enforceable in the community and only analysed its significance in this context. However, since then I have realised that the philosophy of restorative justice is a suitable guide to criminal policy reform and as a mechanism to achieve a change in attitudes within the framework of the existing legal institutions while sustaining those at the same time. Namely, restorative justice creates a closer link in the frame of the criminal procedure between attitudes based on ethical or rule of law considerations of punishment. It aims at repairing the relationship between the offender and the victim involving the community. It strives further to reduce the harm caused to the victim and to the injured community as well as at resolving the conflict manifested in the criminal offence. In this way, the penalty is given a new meaning, and the extent of the element of unnecessary and unreasoned punitivity is reduced. At the same time, the awareness of the rational behind the sanction increases simultaneously for the offender, the victim and the community concerned. In contrast to the above, it does not endanger the values of classical criminal justice nor the guarantee system of it.

According to a document of the UN Economic and Social Council (hereinafter ECOSOC) adopted in 2002, restorative justice is an institutional reaction developed to criminal activities which, in addition to respecting the dignity and equality of each person builds understanding and promotes social harmony. It allows all those affected by the crime to express their emotions, experiences, objectives and their needs. Restorative justice is capable of restoring the emotional and financial losses of the victims as well as restoring their sense of security. Furthermore, the offenders are able to directly face the consequences of their offence, as they are given the opportunity to consider their responsibility. Thus, accountability becomes interpretable for the offender and the punishment becomes a rational fact. At the same time, the affected community understands the causes and consequences of the offence committed (Hudson 2006).

These types of criminal proceedings and punishments imposed in this way can also serve to console the members of the affected community, particularly in cases when the offence directly damage community interests. (This could, for example, be group vandalism affecting public order or criminal acts damaging the environment.) Under constant professional supervision, both the victim and the offender, and when necessary any other person or community representative who was affected by and concerned with the offence, participate in the restorative process. The participants, with the help of a specially trained expert, jointly seek a solution for every problem that has arisen as a result of the crime. Examples of restorative processes may be mediation or a conference aiming at reconciliation or the determination of the method and extent of the punishment to be applied. In the restorative process, the equality of the parties should be ensured and attention should be paid to the potential variation in their abilities, which can be a reflection of their respective cultural and social status. Over the course of the process, the manner of reparation and restitution can be determined; for instance a punishment could be formulated by defining a given service which must be rendered to the community, provided that it is fair and proportionate to individual and community needs. Furthermore, the respective liabilities of the participants may be clarified in order to serve the integration of both the victim and the offender.

The restorative process, which always concludes as a traditional criminal proceeding, can only be applied when both the victim and the offender have given their consent to its use. This consent may be withdrawn by the parties concerned at any time during the course of the restorative process. The agreement and the settlement should be voluntary and a confession made in the course of the restorative process may not be used as evidence against the offender in any traditional criminal proceedings. If the restorative process had no result the traditional criminal process has to be resumed on the spot. However the criminal institutions have to enforce the most important values of restorative justice against the offender, the victim and the community concerned.

The institution in charge of restorative process and the law enforcement agency must be informed without delay in the event that a given agreement arrived at through restorative process fails to be implemented. However, the lack of agreement or the failure to reach an agreement should not be used as justification for a more severe sentence in subsequent criminal proceedings. Restorative justice programmes may be used at any stage of the criminal justice system. For example it may be ordered by the prosecutor's office, the court or the judge who is imposing parole.

The ECOSOC document referred to above summarises the philosophy of restorative justice, defines the principles applied when methods other than the traditional criminal proceedings are applied and presents those forms which are essential for the implementation of this approach, namely those which can be applied by law enforcement agencies in any phase of the proceeding and, theoretically, to every offence. Furthermore, a court should take into consideration a covenant, promise, or agreement reached and fulfilled in a successful restorative proceeding since the realisation of the objective of a sanction becomes more realistic by applying the outcome of the restorative processes.

However, no crime should remain unpunished. The restorative process will not replace the punitive power of the state; instead it augments it with new approaches. The expression of the society's disapproval against offenders of a minor offence may not be neglected even when the restorative process was successful and the agreement was complied with. Without this, responsibility for the criminal act is drained of meaning, or risks becoming intermingled with the compensatory damages awarded in civil law. Criminal justice must give strong and clear messages concerning its condemnation of the behavioural norms that it penalises and that it considers them such negative manifestations, which cannot be permitted to remain without consequences. No one can be forced to feel regret, guilt or to make restitution; however, when one shows a willingness to do so, the system should honour it. All offenders, however, require the experience of "penitential burden" in order to allow them to regain their full-fledged membership within the community or society. The path begins with punishment and the remorse accompanying it, through the use of social assistance provided for integration, to "forgiveness" (Duff 2001).

For example, it would contradict the principles of both criminal law and restorative justice if criminal proceedings were to conclude with wealthy perpetrators paying compensation to the victims, who as a result of the offence found themselves in a vulnerable position. The principle of equal treatment would be compromised when offenders unable to provide financial compensation due to their social status would be excluded from restorative processes for this reason. Everybody has to face the consequences of his/her offence. Nevertheless, apart from the financial compensation other reparation methods may be applied for the compensation of victims and the community concerned, e.g., service in kind or making an apology. Yet even when the objective of the restorative process is simplified to the level of financial reparation of injuries, it might appear as if restorative justice is only an alternative to traditional criminal proceedings, only or mainly deemed expensive, by sparing litigation. This might occur without any cock-eyed practices on the part of politicians or by law enforcement authorities. Nowadays, the recognition and potential compensation of the injury caused by the criminal act counts as a significant accomplishment in and of itself for the victims. Victims are in a vulnerable position within current criminal justice. Their situation in the proceedings is traditionally unfavourable and they often find themselves in humiliating situations before the authorities. Considering the bureaucratised nature of the system and the length of criminal proceedings, the victims can hardly expect meaningful reparation for their injury. The prevailing attitude is today that criminal law and the punitive claims of the state should be governed by approaches of a higher order than the interests of the person concerned. The opportunities provided by the restorative will be exhausted when it performs its functions in full based on the principles of necessity and proportionality with regard to the injured parties (victims), the offender, and the affected community. Criminal policy practice, which has developed on the basis of a narrow interpretation, according to the examples listed above, may even result in violation of human rights.

Restorative justice is not an alternative to traditional criminal justice as stated by Norwegian criminologist *Nils Christie*. It does not treat conflicts which, through its monopoly over justice, were "stolen" by the state from the parties concerned and which should be returned by it to its rightful owners in order to restore



social tranquillity. When the institution of restorative proceedings is applied against the offenders, it still amounts to the enforcement of the state's punitive claim. According to the interpretation of *Péter Bárándy*, a restorative proceeding is none other than "a proceeding led by a mediator and temporarily forming a part of the criminal proceedings under the voluntary commitment of parties who are polarised against each other in the criminal proceedings (the victim and the offender). The result of this is then taken into consideration as a basic point of view by the criminal authorities when the process is returned back into the basic proceedings in the course of determining guilt or levying the sentence" (Bárándy 2007).

The philosophy and the procedural forms of restorative justice have not been monopolised by criminal justice. A large amount of practical experience has been accumulated documenting the fact that numerous conflicts in human relationships not terminating in criminal acts can be treated well via proceedings developed in this spirit. Restorative philosophy and processes are successfully applied, for example, in schools and with other similar age groups for the peaceful resolution of conflicts within the neighbourhood or in the local community and also for the relaxation of tensions between minority and majority cultures (Herczog 2003).

Some experts have high hopes for utilising the restorative philosophy and the process developed thereunder in solving some international conflicts as well. The widespread and efficient application of these processes may result in such a positive turn of events, where one can contemplate the decriminalisation of offences that are less perilous.

The supporters of restorative justice do not wish to "defeat" traditional criminal proceedings; they do not even wish to force it behind the scenes. Rather, they are thinking about a shift in perspective, of the reforming of criminal policy within its existing system of guarantees, while at the same time sustaining it (Christie 2004).

The objective of all restorative processes is an attempt to come to an agreement. Agreements are possible only when the opposing parties listen to each other's arguments and then, in the light of these arguments, look for a common solution. Consequently, we are talking about a compromise developed via the participation of parties with opposing interests who are ready to cooperate with each other. The parties volunteer for the restorative process based on their own interests or beliefs, knowing fully well what those are.

During the course of the process the offenders may present not just their defence, but other arguments as well. These can include arguments that led to the conflict and contributed to its morally wrong solution as well as those which may serve the objectives of a successful agreement. Consequently, within the framework of the process, which include the account of the victims and other parties involved, the causes of their own actions may become clear to the offenders. The offenders have a chance to learn of, and/or face the consequences of their actions. For instance, an offender who committed a robbery may experience how as a result of their violent act they deprived the victim of an entire month's worth of livelihood, and that as a consequence of this they may have to go to prison. It is not at all certain that such new perspectives will either shock the offenders or compel them to change their former lifestyle or at least invoke in them a sense of regret for their act, but the chances of this occurring are better this way than if they had not gone through this process at all. And when a positive change does occur, the offenders may get reinforcement of their preconceived ideas from their immediate community – which is potentially participating in the proceeding as well – i.e. their families, teachers, etc. It is also possible that they will have opportunities to utilise external professional help, e.g., treatment, healing, professional training or a job. The participation of the offender could be motivated most of all by the fact that the public prosecutor or the court of justice judges the agreement in favour of him when deciding about guilt or punishment. To put it more simply the offender gets a shorter prison term or escapes incarceration.

The injured party (victim) and the community concerned may have interest in the agreement because they may hope that the related process contributes to the remedy of their emotional and financial losses, or that their fears may be calmed and their sense of security increased. The emotional tension of the victims can also be reduced since they may have the opportunity to hear the explanation of the other party, the perpetrator, in the course of the proceeding, and thus may perhaps be able to perceive the subjective reasons which motivated the commission of the crime. This, in turn, can make it possible

to understand and deal with the crime. Should this be the case, it may make the victims more open to coming to an agreement, and to accepting compensation. A further benefit of the process is that the victims have a chance to feel the heightened solidarity and empathy of the community which directly supports them and there is a high chance of learning about the institutions ready to support them in dealing with the consequences of the offence. The victims may also have the opportunity to influence the method and the extent of compensation.

The agreement reached in the restorative process offers new opportunities in selecting the sanction to be applied by the court. For example, criminal punishments for environmental offences may be presented in a new light. The representative of the community affected might make the agreement subject to the full re-cultivation of the damaged soil and may request offenders polluting the air to plant trees and forests at the location in question. As for those causing damage to mass transport vehicles and public areas, an expert representative of the affected community may, in the course of negotiations aimed at reaching an agreement, provide quite accurate specifications as to the tasks or services in kind required for and proportionate with the restoration of the damages caused. Acts of vandalism committed by football hooligans may be understood from a new perspective in the restorative process if the manner of compensation and conciliation were to be established with the participation of the representative of the sports club concerned. Such a representative could convey experiences for the affected community as well as the experience gained by the club in the restorative process so that they can also make gains in the struggle to prevent the occurrence of similar acts. An agreement could potentially be reached between the representative of forest owners and "wood thieves" who damaging the forest: the offenders may undertake to look after the forest under professional supervision and the forest owners may provide an opportunity for those in need to regularly collect forest brushwood "as long as their trust is not violated."

In fact the prosecutor or the court can only approve an agreement when they have received the documents related to the restorative process (i.e. when the documents are returned to them). Based on these and other documents, the court can establish criminal liability, express the disapproval of society, impose the sentence and, in this context, even elect to engage in unlimited mitigation.

The content of the agreement in the restorative process, as well as the facts and arguments that are essential for its interpretation, may be utilised when establishing guilt and imposing the sentence, in accordance with the rules of the prohibition of aggravating sanctions. The court may oblige the defendant to comply with the agreement and may – beside imposing probation supervision – order corresponding individual behaviour rules.

However, the restorative attitude should not stop at the prison gate. For those convicts who are willing to participate in the restorative process, meaning the opportunity to face the consequences of their actions, should be made available in prison as well. However, in such a case it is not with the actual victim but rather with the representatives of the wider community that the offender may attempt to reach an agreement or settlement. A successful attempt may be rewarded in the parole-procedure, in agreement with the offender further obligations could be imposed on him for the period of probation on parole. This programme is now operational in all the prisons of Belgium and the results are promising.

As it is evident from the previous arguments, restorative justice can be interpreted in a number of ways and the opportunities given by it are even more numerous. There are ample solutions, deriving from the perspective called "umbrella philosophy" by many, that may be tapped which would be capable of reducing the serious deficit of criminal justice which is predominant today. This would grant an opportunity for politicians and a challenge for those shaping and implementing criminal policy. Restorative justice may be the guiding principle of a new strategy in creating public safety that is based on public trust. Some people fear that such an attitude would harm the guarantee system of traditional criminal justice. In my opinion, it is not about the weakening but rather the strengthening of the existing system. It may increase social support for criminal policy and, in the long term, confidence in the justice system may be restored.



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Executive Summary

I. General introduction to Restorative Justice (see articles 1.1–1.2)

Restorative justice (RJ) is an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence.

The fundamental difference between retributive and restorative justice lies in the assumptions on the aim and function of punishment, the role of responsibility and emotions, the position of the victim and the way the balance upset by the offence is to be restored.

Victims who participate in restorative justice find the outcomes more satisfying than those participating in traditional judicial sanctions. Among offenders, the willingness to participate in a restorative process is also high. It is the process during the meeting itself which makes most offenders understand what they caused, and to become increasingly emotionally involved and less rationally calculating. There is a slightly lower rate to repeat offending, compared to traditional criminal justice, while programmes targeting mostly violent and serious offenders achieved better results.

Restorative justice goes far beyond criminalizable matters. It increasingly penetrates issues of discipline in schools, neighbourhood conflicts, child welfare and protection matters, and other fields of social life.

It is a uniform system that extends to various special fields and sciences and that responds to various conflicts in society in accordance with a set of principles and rules and with the assistance of institutions and specialists. The borderlines between the subsystems are set by political decisions at each point in time and geographical location.

According to the restorative approach, the breaking of a rule (the crime, for instance) is primarily interpreted as a conflict between the affected persons and communities. Therefore, response to such an act should be made by the community of the individual and not by an external power. There are three rules that apply to all types of the conflict management procedures: conflict management is a conscious activity; its goal is not to decide who is right and who is wrong, instead, the goal is to overcome the problem; and the person managing the conflict should never take sides.

The most common restorative methods are: the victim-offender mediation (VOM), the “conference” model, the “circle” model, community work, community councils and victim protection programmes.

In an ideal case, restorative justice is introduced through social, regulatory and institutional reforms. However, even if no regulatory or institutional reform is implemented in a country but the professionals of the related sectors use restorative practices consistently in their daily work, it can be concluded that restorative approach has started to gain ground among the social policies of that particular country.

II. Restorative practices in crime prevention (outside the criminal justice system)

II.1 Resolving family conflicts (see article 2.1)

A family group conference is a method of letting the responsibility for decision making, where severe family problems are concerned, remain with the family itself. It provides the family with an opportunity to use their own capabilities as well as outside resources for the family paving their way out of the conflict.

Youth care was the domain in which the first conferences took place. In the last years, the attention gradually shifted towards problems of adults. The number of areas in which family group conferencing is used has increased.

The conference model strengthens the position of a dependent client in relation to institutions, and empowers citizens.

Research in the sustainability of social network shows that the network grows even more in strength after the conference, that it builds a good report with professionals, while asking for less support.

II.2 Resolving school conflicts (see articles 2.2–2.5)

Schools should, in addition to basic educational duties, help students to build social and emotional skills within the school community so that schools can be safe and just places. Peer mediation in schools is a form of conflict resolution where the students themselves learn to handle and resolve their conflicts in a way that encourages recognition, empowerment and belief in themselves and others.

The purpose of peer mediation is to create an atmosphere where conflicts are seen as a part of the every day life and their resolution is seen more as a positive challenge than a difficult and unpleasant task. If implemented correctly, peer mediation can enhance learning and encourage young people to become responsible and empathic. The ultimate mission of peer mediation is to transform schools into safer, more caring, and more effective institutions for learning.

Promoting pro-social bonds through the development of academic, emotional, and social competences of both bullies and of those being bullied can prevent bullying. The whole juvenile population is available through schools, which makes crime prevention efforts particularly cost-effective.

By implementing restorative approach in schools, it is essential to train all of the school staff, and not only the teachers. The cleaning staff, the canteen staff, the caretakers, etc. shall also be involved, since they meet the students in different situations, and the students see them in different light than the teachers.

Organising sports and creative activities, and enhancing the role of student self-governments and community forums of students are recommended as a means of preventing violent behaviour. In order to reach long-term results, conflict prevention and violence reduction procedures must become daily practices.



Schools are recommended to introduce a complex system of education and training, which helps children relearn social skills and to correct the behavioural patterns they took on earlier. In order to complement each other's activities and for a more effective cooperation, it is expedient to set up a multidisciplinary faculty staff that includes teachers, family contact persons, programme coordinators or facilitators trained to manage conflicts. Thus, contact with the parents can be established on a more intensive and regular basis, and school conflicts might be managed more effectively.

In the work with students, who have been removed from other schools – as “they are too much to endure for the school system” – the use of restorative approach is of utmost importance whereas the restorative approach shall be the foundation of the school's organisational culture.

II.3 Resolving community conflicts (see articles 2.6–2.7)

Restorative justice can play a role in resolving conflicts that are results of coexistence of people belonging to minority and majority groups of a certain society; or the change of social circumstances due to political transition or war.

Decreasing “discriminatory tendencies”, mutual distrust and increasing tolerance levels in micro- and macro-communities' lives is a slow process. The parties need face-to-face meetings and opportunities to communicate directly. At such occasions, tensions and scepticism can erode swiftly, sometimes even unnoticed by parties, and they can be replaced by relationships built on mutual recognition, respect, and the parties' joint effort to solve their issues.

When kept within a certain extent, a conflict can be a catalyst for solutions by signalling to the parties that there is a problem that needs to be solved, and by creating an opportunity for the parties – sometimes even forcing them – to express their viewpoints and interests openly.

Experiences with programmes for managing conflicts in post-war situations suggest that space and opportunity for a restorative approach can be found regardless of the complexity and destructiveness of the conflict and regardless of the lack of funding and political will at local and national levels.

Post-war communities often face a situation where normal social interactions are scarce, which leads to continuous isolation and mistrust. By resolving conflicts emerging in such situations, the main role of restorative practices are to mend the relationships among the people and to re-establish trust and solidarity within the community, which are all indispensable conditions of a peaceful coexistence in the future.

III. Restorative practices in the criminal procedure during the pre-trial stage and the court procedure (see articles 3.1–3.4)

Under Article 10 of the Council Framework Decision on the standing of victims in criminal proceedings (2001), each member state must seek to promote mediation in criminal cases, and they must ensure that any agreement between the victim and the offender reached in the course of such mediation can be taken into account in criminal cases.

Agreements between parties may significantly contribute to relieving the courts' workload. They also mean that there is no need to examine evidence in criminal proceedings. Thus they create a chance for more cost-effective adjudication. But saving time and cutting costs are not the sole benefit. Agreements do not only help the administration of justice, but the defendant also gets the possibility of having some influence over the final decision and a chance to negotiate a lower punishment. The injured person gets a chance to receive compensation. The agencies responsible for conducting criminal proceedings get time to concentrate on more serious or complicated cases.

Among restorative practices, victim offender mediation is the one institutionalized in the criminal justice systems of most member states. The legislation and jurisdiction concerning mediation process, its legal conditions, its compulsory or facultative character, the status of mediators, and the consequences of the results of mediation process may differ in each specific member state. Legislation and jurisdiction concerning the types of crimes and the stages of criminal procedure where penal mediation is applicable may as well differ in specific member states.

There are member states, where there is a lack of any legislation explicitly regulating penal mediation. However, research and pilot programmes have been running for many years. Mediation may be used as a method of assessing the offender's personality in these countries. The lack of legal regulation might result in a diversity of practices at the different parts of a certain country, where heterogeneous possibilities are provided for offenders and victims.

In the majority of the member states, mediation is applicable on a voluntary basis, but there are examples of practices just the opposite (e.g. in cases of juvenile offenders). Practices obliging parties to take part in mediation process are intensely criticized and scarcely used in the practice.

In many member states, it is a main point of controversy whether cases of stalking and domestic violence are suitable for mediation. Some mediation services offer special methods of mediation in these cases. Indirect mediation may play an especially significant role in sexual assault cases, where a face-to-face meeting with the offender is not appropriate or else not accepted by the victim.

III.1 Restorative practices in cases of juvenile offenders (see articles 3.5–3.9)

Juvenile justice is an ideal area for the implementation of restorative approach, but only in careful steps. Failure due to high expectations without the necessary support to achieve them has an adverse effect on the target group as well as on the success of the measures.

The diversion and education measures more and more often implemented in juvenile offenders' cases might be considered as restorative practices.

The practice of multidisciplinary teams helping youth offenders is getting more and more often applied. The members of such teams can be those representing the juvenile justice system (judges, public prosecutors, policemen, probation officers) or professionals of different (e.g. social, health and education) service providers and other agencies (social workers from the child protection system, local government officials, crime prevention coordinators). The usual activities of these groups are organizing “case conferences” as one possible way to work with juvenile offenders, monitoring current practice, collecting relevant information and data on juvenile delinquency in a given location, negotiating conditions of cooperation among individual bodies, exchange of information on individual juvenile cases.

According to the experiences, attending diversion processes – by forcing young offenders to analyse their actions and the consequences of their actions and making young people explain their actions to their family and apologise to the victim – is far more demanding on young offenders than traditional court process.

In many member states, the Probation Service plays a huge role in restorative processes with juvenile offenders by issuing pre-sentence reports, social inquiry reports, making proposal for referring cases to RJ processes, organising family group conferences or acting as mediators. Therefore, in many member states there is high need for improving the training, the infrastructural support and reducing the extreme overload of probation officers.

Offering training or educational programmes on restorative justice to judges, public prosecutors and probation officers is of utmost importance. It is highly recommended to provide bylaws, regulations or directives that clarify the aims and objectives of the RJ schemes, the processes to be followed, and their relationship with the formal criminal justice system.

According to surveys, the majority of victims are satisfied with the outcomes of diversion and restorative measures. The re-offending rate for juvenile offenders who participated in victim offender mediation processes was significantly lower than by other types of sanctions for juvenile delinquents.

III.2 Restorative practices in specific types of crimes (see articles 3.10–3.11)

The possibility to carry out mediation in severe crimes, and – even if the possibility is given – the willingness of parties to participate in mediation process may raise questions. According to experiences in some member states, the bigger the impact of the crime, the higher the need for mediation is. Victims might be re-victimized if these types of crimes are excluded from the possibility of mediation.



In cases of family violence the main questions are, if the „trauma of victimization“ is restorable through the offender’s forgiveness and reconciliation, and if there is any space to restore the violent relationship. Mediation in such cases can not only be considered successful when it restitutes the relationship between the parties, but also when it raises the victim’s awareness of his/her right to live without violence or helps end the relationship peacefully.

Research findings do address a number of risks of gender discrimination in restorative justice procedures. The appropriateness of mediation and restorative justice in gender issues, such as family violence, has been questioned even in countries with a long tradition in restorative justice and alternative dispute resolution programmes.

According to the views of women’s rights organizations, the priority should (or must) lie in the protection of human dignity, in the victim’s rights and women’s rights, as opposed to family, as a social institution. Feminists seem to insist on the offender’s punishment through the criminal justice system in cases of domestic violence and sexual offences. In a well-regulated system of institutionalisation, punishment and mediation are not excluding each other in such cases, whereas beside the punishment imposed on the offender, mediation is provided as a victim support service to the injured party.

Criminal justice practitioners and victim support workers are keen to explore the prospects of the restorative justice paradigm with more serious crimes such as hate crime. In the search of practices and policies that can bring balance to community tensions, and address integration questions and inequalities, restorative justice principles and practices might appear appealing.

The significance of communities as parties in hate crime, suggests that RJ might indeed be well suited for a holistic approach. According to RJ’s theories, the restorative norm has the philosophical potential to address sensitive and complex crimes such as hate crime. Undoubtedly, victims of hate crime experience a range of effects which can have a long-lasting or sometimes life-lasting impact.

Restorative practices are founded upon the principles of inclusion, respect, mutual understanding and voluntary and honest dialogue. One could argue that these are core values, which, if ingrained in society, could render hate crime almost virtually impossible.

Concurrently with the increase of the numerous volumes of theoretical debates around RJ, fears have been created that they might not be in accordance – or at least at the same speed – with the practical development of the restorative notion. More importantly, they seem to pay none, or little attention to the alarming warnings principally coming from experienced practitioners in the field, who become increasingly concerned about a developing gap between the well-intended normative understandings of RJ and its actual implementation.

III.3 VOM in practice (see articles 3.12–3.14)

The last two decades witnessed the worldwide growth of restorative justice practices. From an initial stage when RJ dealt with petty crimes committed by children and young people, nowadays, RJ practices are implemented in relation to violent crimes and even in the case of large scale violent conflicts.

In several member states, the institutionalisation of VOM in the criminal procedure was promoted as a result of international obligations and the pressure of the civil society. It legitimated the existing informal practices that were developed by non-governmental organizations. The normative acknowledgment also represents an answer to the requirements of European integration that imposed an improvement in the quality of the justice system, especially through better case management, by reducing the number of files, as well as by adopting alternative conflict resolution strategies.

Among many others, essential questions concerning the practice of VOM are: how mediators shall act in relation to the parties, what it means exactly to be impartial; where do the weaknesses lie in mediation process and how can those be eliminated; how the victim, in the dialogue with the offender, deals with his/her experiences.

It is of high importance to define the range of persons/organisations authorized to provide mediation services and what kind of qualifications and skills are required of mediators. While there are uniform regulations concerning these issues in many member states, there is lack or a diversity of regulation in some others (e.g. because mediation service is not defined as a task of the central administration, but as a task at a regional/local level).

IV. Restorative practices implemented during the enforcement of sentences (see articles 4.1–4.2)

The restorative characteristics of practices implemented as a sanction or beside a sanction – which can be either imprisonment or community sanction – not necessarily lie within the process itself (such as voluntary participation of offenders) but their outcome (e.g. restitution for the community, restoring family/community relationships through helping re-integration) is the reason for drawing these practices under the restorative concept.

Recommendation R(2000)22 of the Council of Europe promotes the implementation of the rules on community sanctions and measures, and includes guiding principles for achieving wider and more effective application of community sanctions and measures. The *Recommendation* lists the available community sanctions and the cases in which they can be applied in order to increase the number of cases in which a wide range of community sanctions and measures are implemented. The recommendation determines the introduction of the restorative element to community sanctions as a possible way of progress in criminal policy. Also, the recommendation specifies victim-offender mediation as a possible community sanction.

In order to make the structure and the culture within the prison more restorative justice-oriented, it is highly recommended to employ coordinators designated to inform inmates and make them open to the idea of restorative justice with the support of all the different groups of the prison staff.

IV.1 Restorative practices oriented on victim–offender relationship (see articles 4.3–4.4)

In some member states VOM can take place with the offenders of severe crimes (crimes punishable by more than 5 years of imprisonment, most often homicide, armed robbery, sexual assault) during serving their term in prison. In these cases, mediation would be even inappropriate in the court procedure or the preceding stages.

Mediation in prison can be useful not only in relation to the victim of the crime, which is being actually sanctioned, but for different types of conflicts occurring in the prison setting. As mediation is basically a means of settling conflict between equal parties, the most suitable cases are the ones including parties of the same status level, such as when two prisoners are in a dispute. The mediator might as well help by facilitating a mediation process between the prison and the prisoners in cases such as strikes, especially hunger strikes.

Addressing a conflict between a prisoner and a member of the prison staff is more complicated because of the differences in their statuses.

IV.2 Restorative practices oriented on offender–community relationship (see articles 4.5–4.6)

Symbolic reparation – which is not the direct reparation of the damage caused by individual crimes but a restitution service to the community through unpaid work – can be combined with community



punishments in many ways. The most typical form is community service work, which is a sanction of reparative nature. When the offender carries out community service work, he/she typically does some useful work that the given state or local government organ would otherwise have no funds to pay for. During the implementation of this measure, special opportunities of reintegration arise, given that many of the offenders have a low willingness to work and are not used to hard labour. Through community service work, these people can be brought back to the job market in a non-conventional manner. They have a chance to gain employment at the institution where they worked during the period of their community service.

If community service is organised in a way that makes the enforcement of the sentence and its results visible for the community, the punishment is much more capable of decreasing the general fear caused by the crime within the community and it develops trust that the reintegration objective of the sanction will be reached.

Symbolic restitution may also be made as part of the activities required under the behaviour rules specified by the Probation Service. Alternative sanctions are much more effective and the chance for reintegration is significantly higher if the sanctions are combined with individualized behaviour rules.

When managing a prison with low security levels it is especially important to create a positive relationship with the local community whereby the prison is integrated with the community and *vice versa*. Active citizenship is about being involved in the community, having one's say and taking part in decisions that affect one.

It is essential to involve the governor, senior managers, the prison staff, the offenders and the local community outside. Active citizenship is, above all, about people making things happen and giving serving prisoners a real chance to give something back to the community by way of reparation for the offence that they have committed. But also, as a result of this, they are able to improve the quality of life of residents in the local community and positively enhance their personal confidence and self esteem.

It is quite simple to recognise that the application of restorative justice principles – with its potentially useful objectives – is common sense. The rationale is that the offenders will not evade punishment, but while they serve their terms, they will also carry out an activity that can be valuable for the local community, which is also injured by the crime committed. The supply is therefore provided by the inmates ready to show their remorse by providing services, and the demand is given with the community's various needs. This of course will only become a real restorative practice, if inmates are conscious about that by delivering restitution services they actively accept responsibility for the crime committed.

IV.3 Restorative practices oriented on the reintegration of offenders (see articles 4.7–4.8)

As a set of values, restorative justice offers great promise in regard to promoting healing and strengthening community bonds by addressing the criminal harm done to victims and communities.

The practice of referral orders (United Kingdom) is compulsory in all cases where the juvenile is convicted for the first time and pleads guilty. The juvenile is referred to a team helping youth offenders, which devises a "contract" and, where the victim chooses to attend, for them to meet and talk about the offence with the offender. One meta-analysis indicated that participation in Victim-Offender Mediation (VOM) had lead to significant reduction in re-offending. When the youth participated in VOM did re-offend, they often committed less serious offences.

Family group conferencing/decision making can be used to enhance reintegration potential of specific groups of inmates (e.g. those with addiction issues, who are to be released soon). During after-care, it is recommended to put more emphasis on family relationships and on securing family and small community resources for reintegration purposes. The goal is to bring up the issues important to inmates with specific needs, to raise their and their families' awareness of these challenges and to make them willing to change and rely on their families as the number one source of support.

At a family group conference, communication in general can be resumed between family members and they can put in words what they need. The family members as well have an opportunity to communicate

with professional helpers directly. The personal meeting and the honest and open atmosphere might build trust between the participants and contribute to establishing a long-term relationship with the helpers. It is an important advantage of the method that the professional helpers have a chance to share their views and expectations with the other professionals, and this also promotes cooperation between professionals.

V. General perspective (see articles 5.1–5.2)

The basic research question is how well restorative practices are done. This includes not only the outcome but the structure and the process itself. Further questions are how well the process was carried out and if it involved victims, offenders and members of the community. Did the community make the arrangements needed to enable the offender to make reparation? Is support available for victims whose offenders are not caught? Are we learning from what offenders and victims tell us, so that we can reduce the societal pressures that lead to crime?

Crime is a social phenomenon, some people will still harm each other. The restorative movement proposes that we should respond with a different set of questions, based on putting right the harm and looking for ways to avoid more of it happening in the future.

According to some research findings, there is a reduction in the number re-offending for those who took part in certain restorative practices. Most of research findings show, that a high rate of victims who took part in restorative practices are satisfied with the process and the outcome.

As the current practice of punishment in itself is not sufficient to reduce crime rates efficiently, the restorative paradigm and the retributive paradigm shall be present at the same time in the criminal justice system. Many research and practical projects are aimed at setting up the conditions necessary for the optimal combination of the two paradigms.



1.

General introduction to Restorative Justice

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1.1

Restorative Justice Potentials and Key Questions

1.1.1 Introduction

All over the world, restorative justice (RJ) is steadily gaining credibility as a powerful alternative in responding to crime. Restorative justice now has become a broad and still “widening river” (Zehr 2002: 62) of innovative practices, empirical research, theoretical, juridical and ethical reflection, and is an omnipresent theme in juvenile justice and criminal justice reforms worldwide.

Restorative practices have been inserted into most systems of responding to crime. International organisations have established recommendations and statements to promote restorative principles and practices in dealing with crime.¹ Restorative practices are also being implemented to deal with conflicts and injustices in social institutions. For instance, they are being relied on in employment disputes, neighbourhood and school conflicts, welfare issues, and even as peacemaking initiatives in response to collective politically inspired violence.

¹ E.g. United Nations Economic and Social Council 2002; Council of Europe, Committee of Ministers 1999.

1.1.2 What is restorative justice?

In its modern form, restorative justice reappeared in the late seventies. Its re-emergence was based on multiple roots, in which victims' movements, communitarianism and critical criminology were the three main factors (Faget 1997; Van Ness and Heetderks Strong 2002).

Together with a multitude of other separate initiatives, they led to the creation of a large field now termed "restorative justice". It goes far beyond criminalizable matters. It increasingly penetrates issues of discipline in schools, neighbourhood conflicts, child welfare and protection matters, and other fields of social life.

Given its diverse roots and different forms, it is not surprising that restorative justice does not appear as a clearly defined set of thoughts and practices. Adding to the confusion are other, similar movements called transformative justice, relational justice or community justice.

1.1.2.1 A definition

Some definitions consider the RJ concept as extending to all deliberative ways of conflict resolution in all fields of social life; others confine RJ to dealing with criminalizable matters. Some see RJ as an opportunity for diversion, an additional element to the traditional criminal justice system; maximalists see RJ as a valuable alternative with a potential to replace the existing criminal justice system on the long term.

My own view is a maximalist one, based on the view that RJ may on the longer term completely transform the current punitive criminal justice system.

1.1.2.2 Comments

An outcome-based definition

Contrary to most of the other definitions (as in McCold 2004), RJ is characterized mainly by the objective to repair the harm resulting from the crime, and not by the process. The process is a tool only, but a crucial one to achieve restoration. However, if a meeting based on RJ cannot be organized, then (judicial) coercion must be considered, and the sanction must also – as much as possible – serve the aim of reparation. Examples of such reparative sanctions are material restitution or compensation for the victim, paying a fine to a victim's fund, or community service.

If RJ were limited to voluntary participation, it would be doomed to stay at the margins of the mainstream criminal justice system. And the latter is, with its attitude of punitive apriorism, as we shall see, highly problematic.

A different, harm-focused paradigm

Restorative justice differs from approaches of both punitive and rehabilitative justice in a fundamental way. It offers a distinctive "lens" (Zehr 1990). Crime is perceived through the harm it causes

and not by the mere transgression of legal order. The response is neither to punish nor to rehabilitate the offender, but to set the conditions for repairing as much as possible of the harm caused.

The authorities' action to involve the offender in the response to the offence remains crucial, because his involvement serves the goal of restoration. Influencing the offender is a secondary objective only, within the frame of the primary, restorative goal. The nature and the extent of his obligation are determined by the needs of reasonable reparation, and not by the principles of adequate treatment or proportionate punishment.

Promoting restorative justice as another paradigm does not mean that it is the only way of responding to all crimes. Priority does not mean monopoly. What is suggested here is a shift from the punitive apriorism to a restorative apriorism. The current apriorism that offences must be punished (which in reality does not always happen), is replaced by the apriorism that harm caused by a crime must be repaired (this can also not always be achieved in reality).

Restoration

Two ways of restoration are possible: deliberative processes with a view to restore and judicially imposed sanctions with the purpose to achieve (partial) reparation.

Voluntary deliberative processes between the victim and the offender, as the main parties, are the most suitable methods. Well-conducted restorative processes offer opportunities for a powerful sequence of moral and social emotions and exchanges. It may lead to a common understanding of the harm and suffering caused and to an agreement on how to make amends. It can also enhance the willingness of the offender to fulfill these agreements (Harris et al. 2004).

Agreements aim at the (partial) reparation of the victim's losses, and at the restoration of peace and order in social life. The degree of the offender's willingness to undertake such actions expresses his understanding of the wrong committed and his willingness to make up for it. For the victim, it brings emotional restoration, confirmation of his status as a rights-bearing citizen, and possibly also partial material redress. For the larger community, it contributes to making sure that the offender will respect social rules in the future. All this may also facilitate the offender's reintegration.

Such an ideal sequence is often far from being fully achieved. But even partial results in terms of satisfaction, procedural justice and re-offending are generally significantly better than what the traditional criminal justice procedures can offer.

When participatory processes cannot be achieved voluntarily, use of coercion against the offender can be considered. If judicial coercion against the offender is necessary, the procedures should be oriented towards obligations or sanctions that seek reparation as much as possible (Dignan 2002; Wright 1996; Bazemore and Walgrave 1999). There is no reason to discard the priority of reparation, even if the offender is resistant. Possible sanctions

Restorative justice is an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence. (Walgrave 2008: 21)



with the purpose of reparation are for example material restitution or compensation to the victim, contribution to a victims' fund or community service. These judicial sanctions yield a reduced reparative outcome. However, partial reparation is better than none at all (Van Ness 2002).

Doing justice

The notion of justice has two meanings.

Moral justice is a feeling of equity, a moral balance of rights and wrongs, benefits and burdens. Basically, the feeling is subjective, imbedded in a social-cultural dimension. In punitive justice, the balance is achieved by imposing proportionate suffering on the offender. In restorative justice, the balance is restored by taking away or compensating for suffering and harm caused by the crime. Victims feel that their victimisation has been taken seriously and that the compensation and support are reasonably in balance with their sufferings and losses. Offenders experience that their dignity has not been unnecessarily hurt and that they are given the opportunity to make up for their mistake in a constructive way. All participants, including the community, feel reassured that rights and freedoms are taken seriously by fellow citizens and authorities.

Justice also means legality. Restorative justice processes and their outcomes must respect legal safeguards. This also applies to voluntary mediation. How to do so is a matter of debate among restorative justice proponents. The question is to find a balanced social and institutional context which allows maximum space for genuine deliberative processes but also offers full opportunities for all parties to appeal to judicial agencies if they feel they are not being respected in the process.

Coercive procedures must observe all legal guarantees. But we shall see that, as restorative justice is a different paradigm, traditional criminal justice safeguards cannot simply be copied to this new method of doing justice.

While the procedures and the outcomes of the traditional system of criminal justice may be legally just, they very often become alienated from subjective feelings of justice. This is one of the gravest criticisms against this system. It is the ambition of restorative justice to make the two concepts of justice coincide more.

1.1.3 Restorative justice and criminal punishment

For the offenders, being directly confronted with the suffering and harm caused to others and with the disapproval of beloved persons is a painful burden. Carrying out the agreement often requires serious and unpleasant commitments. The obvious unpleasantness has led several scholars to consider restorative justice as another version of punishment. They term restorative justice interventions as "alternative punishments", rather than "alternatives to punishment" (Duff 1992).

1.1.3.1 Confusion

Much depends of course on how the term punishment is understood. If every painful obligation after an act of wrongdoing is called a punishment (as in Daly 2002) most initiatives aiming at reparation may be viewed as punishments. However, such a position overlooks some critical differences between punishment and restoration (Walgrave 2008).

Intentional infliction of pain versus awareness of painfulness

"Punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong" (von Hirsch 1993: 9). Three elements are distinguished: hard treatment, the intention of inflicting it, and the link with the wrong committed before. If one of these elements is lacking, it is not a punishment. Painful obligations which do not intend to cause suffering are not punishments. It is similar to the difference between fines and taxes.

The crux lies in the intention (Wright 2003). It is the punisher who considers an action to be wrong and who wants the wrongdoer to suffer for it. Even if a juvenile sees the punishment as improving

his reputation in his peer group, it will remain a punishment. Conversely, even if he perceives the obligation to repair to be hard and calls it "a punishment", it will not be a punishment if the intention of the judge was not for the juvenile to suffer, but rather to request from him a reasonable reparative contribution.

However, disregarding the hardship of a reparative obligation could lead to draconian results. If, for example, a deprived juvenile would be obliged to pay back the full amount of the Jaguar he stole and crashed, he would be condemned to a lifetime of repaying and poverty. The restoration should focus on the non-material dimension of the harm, whereas the material repayment should be reduced to a reasonable amount, in view of the boy's financial, mental and social capacities and his future. The remaining material damage should be repaid by the insurance or by a victims' fund.

Knowing that something will hurt and taking the hardship into account is not the same as intentionally inflicting pain. In retributive punishment, painfulness is the principal yardstick, and its amount can be increased or decreased in order to achieve proportionality. In restoration, a relation may be sought between the nature and seriousness of the harm and the restorative effort; painfulness can lead to its decrease, not to its increase.

Punishment as an instrument, restoration as a goal

Punishment is an instrument of enforcing the legal and political system, in truly democratic societies as well as in most dictatorial regimes. It is an act of power to express disapproval, and possibly to enforce compliance, but it is neutral about the value system it enforces. Restoration, on the other hand, is not an instrument, it is an outcome. Restorative justice is characterized by the aim of doing justice through restoration. The broad scope of harm which may be subject to reparation also indicates that in RJ, the quality of social life serves as a normative beacon. Restorative justice is not morally neutral.

Traditional criminal justice conceives punishment as the a priori instrument of intervention, the purpose of which is to achieve a variety of possible goals. However, a long tradition of criminological research shows that punishment is socially not effective.

In contrast, restorative justice advances restoration as the objective, and chooses among a diversity of social and legal instruments.

Can punishment have a reparative effect?

At first sight, certainly not. The *a priori* nature of punishment is a serious obstacle to reparation. The priority within the procedure of determining a proportionate punishment often distracts attention from the harm and suffering of the victims; the threat of punishment makes genuine communication about harm and possible reparation almost impossible; the penalty itself seriously restricts the offender's effort to offer reparation and compensation.

Some scholars advance, however, that, certainly after serious



crimes, inflicting pain is necessary for the victim and for social peace in general (Pemberton 2008; Van Stokkom 2007). The victim must have the opportunity to express his feelings of anger and even revenge. In a constitutional democracy, this is possible only in a “restyled” nature through a punishment inflicted by a public institution. Likewise, public indignation needs to be expressed, which, again should be canalized in a correct procedure and proportionate sentences.

These scholars state that research confirms these punitive needs of the victim and the public. This is of course not surprising in a society in which punishing offences is presented as the evident and unique possible response to crime. It is not evident that most victims would maintain their choice of punishment if they were offered a realistic restorative process which would provide them with a full opportunity to express their emotions and to seek constructive solutions. A New Zealand research found that the punishment of the offender was only a primary wish of 4% of victims (Maxwell and Morris 1996). We found only one out of 45 such victims (Vanfraechem 2003).

Research also shows how important the reparative dimension is for the public in general (Roberts and Hough 2002). Actually, this is surprising given that the public is constantly bombarded by the media and the authorities with the message that punishment is a “natural” consequence of offending and that the public is generally unfamiliar with the potentials of restorative justice. There are also historical arguments for suspecting that reparation after an offence is a more evident idea than the intentional infliction of pain after the offence, but that this idea is suppressed by centuries of punitive apriorism.

Although further research is necessary in this topic, I think that victims need

- the public recognition that injustice has been done to them,
- the opportunity to fully express their emotions about this, and
- prospects of reasonable emotional, relational and material reparation.

The determination of the authorities to arrest and sentence the offender certainly meets the first need. But the focus on inflicting a proportionate punishment on the offender makes many victims feel betrayed, rather than supported and respected. The emotions are mitigated to fit within the procedure, and the focus on punishment restricts real restoration.

Even if the public wished punishment, it would be no reason to accept it uncritically. Public opinion is not a natural given, and it can be changed over time. This would indeed be desirable, because the punitive apriorism also raises serious ethical problems.

1.1.3.2 Ethical problems with the punitive apriorism

Most ethical systems consider the deliberate and coercive imposition of suffering on another person as unethical and socially destructive. Nevertheless, criminal punishment for offences is considered as

self-evident, raising the question why the general ethical rule not to inflict pain on others does not apply to responding to offences (Fatic 1995). Criminal theories advance a variety of arguments. They can be clustered as instrumentalist and retributivist arguments.

According to instrumentalism, criminal law is acceptable because it serves higher social aims: social order and peace. This suggestion can be tested empirically. Extended research concludes that punishment is not effective for any of these goals (McGuire and Priestley 1995; Andrews and Bonta 2003; Tonry and Farrington 1995). The idea that punishment rehabilitates or individually deters offenders has never been confirmed empirically. There is no indication that harsher or more intensive punishments lead to greater public safety and peace. On the contrary, the more public policy relies exclusively on repression and punishment, the more this will lead to more imprisonment, more human and financial costs, less ethics, less public safety and a lower quality of social life.

This does not mean that the threat of punishment never has any effect, but it indicates that the general statement that criminal law must deter (potential) offenders is a doctrine, not an empirically justified theory.

Retributivism

The origins of retribution do not lie in theoretical assumptions. Retribution begins with emotion. Being the victim of a crime or another injustice provokes indignation, feelings of humiliation, anger, and a wish to repay the injuries suffered by inflicting pain on the person who caused them. This is revenge.

However, giving way to personal feelings of revenge may get out of hand. The emotional dimension often overrules the rational balance. If anger and indignation were not channelled, actions of revenge could be catastrophic for social life. Hence, the emotions after a crime are legally “restyled” through the authorities’ response to the crime.

The transformation of revenge into retributivism has, however, reduced or even eliminated the emotional dimension. “Justice” is reduced to general concepts and procedures, equal to all citizens. It is formalised, and transforms experienced events into general terms, understandable and controllable for all (or their lawyers). Emotions do not fit into this transformation. Moreover, the retribution theory focuses more on the public dimension of the crime. As a result, justice may be done in the eyes of the professionals, but the direct parties are very often left frustrated, with feelings of injustice.

Here is where restorative justice has its claim: it tries to address as much as possible the emotional dimensions of crime, and to transform the emotions into constructive motivations. Keeping that process in the frame of a constitutional democracy is one of the most difficult challenges for a maximalist approach of restorative justice. But it is possible.

Retributive theory is grounded in the Kantian principle that punishing wrongdoing is a categorical imperative. Good societies must issue clear rules, enforce them and unambiguously disapprove of law-breaking, so as to keep the norm well understood by all citizens and to reduce law-breaking in the future. While censuring, making clear to the population that criminal behaviour is not tolerated, is necessary, it does not need to be expressed through punishment.

Retributivism is based on a kind of intuitive reciprocity. The assumption is that the feelings of revenge are legally satisfied by imposing on the offender an amount of pain which is in balance with the amount of pain caused by the offence. The grievances are satisfactorily addressed if the offender is also distressed. Others advance that the infliction of punishment erases the illegitimate benefits obtained by the offender. The thief cannot be allowed to take advantage of his illegal act. We must therefore spoil his life by imposing a painful punishment on him.

There is, indeed, a common intuition that “the balance” should be restored. It would simply be unjust if we let the offenders get away or if we left the victims alone with their losses and grievances. “Something” must happen. We want the material, mental and social victimisation to be recognized and wiped out. An intuitive moral balance has to be taken seriously, because reciprocity is a *basso continuo* in our social life. But as imposing intentionally hard treatment on persons is an intrinsically unethical act, other possibilities to restore this intuitive moral balance must be explored thoroughly. This is exactly what restorative justice does.



So, we agree that criminal behaviour must be publicly censured in order to encourage compliance with norms and that an intuitive moral balance must be restored in order to preserve the quality of social relations. These functions are however poorly fulfilled by the current criminal justice system. The potentials of restorative justice are to be further explored.

1.1.3.3 Restorative justice as inversed constructive retributivism

Retribution basically consists of three elements: the unlawful behaviour is condemned, the responsibility of the offender is indicated, and the moral imbalance is repaired by paying back to the offender the suffering he caused by his offence. Restorative justice shares these components, but in a constructive way (Zehr 2002).

Condemning the transgression of norms

Restorative justice clearly articulates the limits of social tolerance. It intervenes because a crime has been committed, which is disapproved of. Moral emotions such as shame, guilt, remorse and embarrassment, are inherent in restorative processes, and result from the disapproval expressed through the process. Restorative justice thus provides the essential elements of censuring.

But there is a difference: censure in the current criminal justice condemns the offender because he has transgressed a clause of criminal law. Restorative censuring is rooted in social relations. The offender's behaviour is disapproved of because it has caused harm to another person and to social life. Restorative censuring refers to the obligation to respect the quality of social life.

Responsibility

As in punitive retributivism, restorative justice raises the responsibility of the offender. But in punitive retributivism, the offender is confronted by the system with his responsibility, and must submit to the punitive consequences imposed on him by that system. He has no active role to play. Passive responsibility is retrospective, in that it is imposed because of an act committed in the past.

Restorative justice invites (under pressure) the offender to take active responsibility, by participating actively in the deliberation and by making active gestures of reparation (Braithwaite and Roche 2001). If this active participation is not achieved, a sanction will be imposed on the offender, requiring from him an active effort as part of (symbolic) reparation. Active responsibility is raised because of the act committed in the past, but it is also oriented towards an action or a situation in the future. Active responsibility, therefore, is both retrospective and prospective.

Balance

In punitive retributivism, the balance is restored by paying back to the offender the same amount of suffering he has caused. It is supposed that things are then evened out: both parties suffer equally. The amount of suffering is doubled, but equally spread out (Wright 1992).

In restorative justice, the offender's paying-back role is reversed: he must himself pay back by repairing as much as possible the harm and suffering caused. The balance is now restored, not by doubling the total amount of suffering, but by taking away suffering. Retribution in its genuine meaning is achieved in a constructive way. One could also see a kind of proportionality in this reversed restorative retributivism. It is based not on "just deserts", but on "just dues". Restorative justice asks the question what kind of a "debt" the offender has, and what he reasonably owes to pay back for the losses he has caused.

"Because crime hurts, justice should heal" (Braithwaite 2005: 296). Restorative justice tries to take hurt away by inverting punitive retributivism into constructive restorative retributivism. Facing the common concern of both retributive and restorative justice to rebalance the consequences of an offence helps to indicate precisely where the fundamental difference lies: it is the way the balance is going to be restored. Punitive retributivism assumes that intentional infliction of pain is indispensable for balancing wrongful behaviour and for censuring it. This is a principle that restorative justice cannot encompass.

This retributive dimension of restorative justice, being retrospective and seeking to balance, is the basis to constructing the safeguards of restorative justice. I shall come back to this.

1.1.4 Why restorative justice?

Two types of arguments have been developed: social-ethical and instrumental ones.

1.1.4.1 The socio-ethical theory of restorative justice

The shift from the punitive apriorism towards a restorative apriorism is based first of all on a social-ethical intuition (Walgrave 2008). Restorative justice recalls the fundamental *raison d'être* of the criminal justice system. Why is it forbidden to steal and to commit private violence? Because, if it were not forbidden, victimisations would occur all the time, provoke counteractions to make things even, and lead to an escalation in mutual victimisations. Social life would be impossible, because it would be dominated by abuse of power and fear.

Therefore, if a crime does occur, what should the first reaction be from a social aspect? It is to repair as much as possible, and in an orderly way, of the harm done to the victimised citizen and the damage to social life. Restorative justice (re)establishes the quality of social relations and of social life as the reason for criminalising certain behaviour. Its aim is to restore this quality, and not primarily to enforce an abstract legal rule.

The quality depends on the recognition of individual rights and freedoms, and on the awareness of mutual dependency to achieve them. We have private lives and private needs which we want to satisfy as autonomously as possible, but we are also members of a community. Because we must unavoidably live together, we depend at least partly on each other. This is why we are entitled to demand certain ethical standards to be kept by others. Our rights and freedoms allow us to make our own choices, but they also confront us with our social responsibilities. We can opt for purely and ruthlessly selfish choices, or we can respect the interests of others and of social life in the choices that we make. This cannot be ruled by law, it is rather a matter of socio-ethical understanding.

Common self-interest

Advocates of restorative justice share the opinion that constructive solutions which are accepted by the direct parties are better for the quality of social life, and that this quality is a crucial condition for our own self-interest. I have called this our common self-interest (Walgrave 2008).

The idea of a common self-interest merges in one notion the seeming contradiction we are living in: liberals underline that we are individuals with particular needs, wishes and ambitions, but communitarians stress that we share our lives with others, with whom we cannot but share opportunities and goods. The concept actively joins both viewpoints in orienting self-interest to a notion of common self-interest, which is seen in turn to serve individual self-interests.



To gain more autonomy, we need each other. The more smoothly mutual dependency operates, the more space there is for each individual to enjoy liberty and live his life as he wishes. It is in my interest to live in peace, to be part of a community that gives me and the others maximum space, based on respect for plurality and solidarity. Living in such a community is the common self-interest.

I promote such a community life, not because I am an unworldly idealist, but because I hope to get the maximum possible benefits from being part of it. But it is more than self-interest, because I am not alone in trying to achieve these benefits. If we all invest in social life, we all profit from its high quality. The more we share a commitment to the community, the greater are our personal possibilities to enjoy freedom.

Responding to sceptics

Sceptics may claim that believing in common self-interest is naive. They refer to the current hardening of social life and human relations, the abuse of power in (international) politics, mercilessness in business, cynical exploitation of legal rights, loss of engagement in community life, and selfishness in daily life. They seem to leave little hope for common self-interest. There are two answers to this.

1. The soil for common self-interest is not completely parched. On a daily basis, we observe expressions of sympathy, compassion and solidarity with the poor, the weak and the victims of war and natural catastrophes. Philosophers like Levinas (1966) advance that we are inevitably confronted by our ethical responsibility in the face of the others. The idea that our self-interest is served by investing in the quality of social life is also promoted by other authors of great authority, such as in Putnam's concept of social capital (2000), the notion of dominion presented by Braithwaite and Pettit (1990), or in the strong democracies as conceived by Barber (2003).
2. Investing in common self-interest is an ethical choice, not a natural condition. Even if it is not observed sufficiently in real life, it remains an ethical standard, to be learned through upbringing, education, social relations and experiences. It is to be cultivated and encouraged in the community and in state interventions.

Restorative Justice as part of an ethical movement

This socio-ethical view is a basis of a wider view on how citizens should ideally participate in social, economic, welfare and cultural policies, and about how they should interact in daily life. Restorative justice is part of this social movement, is largely inspired by it, and aims to contribute to its development.

It does so by relying mainly on deliberation among citizens who accept responsibility for their actions, and not primarily on coercive intervention by the state. It is trusted that, if appropriate conditions are created, most opponents in a conflict will meet in mutual understanding and respect, and find a constructive solution. The philosophy of restorative justice as a whole rests upon the belief that most humans feel a deeply rooted sense of empathy for other humans, and that they understand their common interest in living together in harmony and peace.

This is not a naive belief. Victims and offenders, also of serious offences, do actually meet and come to an agreement. The majority of victims do not begin the meeting captured by anger or a need for revenge. What they want is the recognition that injustice has been done to them, the opportunity to fully express their emotions, and they expect prospects of reasonable reparation. Most offenders understand that they have committed an inadmissible act and that they risk a sanction for it, which they hope to keep as low as possible. The two most prominent protagonists begin a restorative process with the hope to getting something from it for their own sake.

During the process, both gradually begin to understand that there is more to it than that. The victim

becomes aware of the benefits he gets from the reparative actions by the offender and appreciates the restorative value of a well reintegrated offender; the offender realises the harm he has caused, and understands that his social prospects will be better if he assumes his responsibility by making up for the harm he has caused. Both recognize that they have interest in finding a constructive solution, so that they can live in peaceful and supportive social climate. Their self-interest is integrated in common self-interest.

This does certainly not always work, but the question is how to approach the conflict initially. Do we suffocate the potential for respectful encounters beforehand through legal procedures and threats of punishment, or do we give a respectful and constructive solution a chance by acting initially on the assumption that they are able and willing to reach a peaceful agreement? Beginning by relying on the potentials for constructive deliberation is not naive, but rather a well reflected ethical choice. If it appears not to work, the traditional coercive judicial mechanisms have to be activated. Hence, it is not naive to give priority to deliberative potentials; it would only be naive to give exclusivity to them.

1.1.4.2 Empirical data on restorative justice practice

The socio-ethical theory is not inconsistent with the empirical data available so far. The data are not always based on good methodological work, but some conclusions can be drawn from the several surveys currently available (Latimer et al. 2001; McCold 2003; Bonta et al. 2006; Sherman and Strang 2007).

In the great majority of cases referred by the police or by the judiciary, the parties actually come to a meeting, reach an agreement, and the agreement is generally complied with.

Victims

Victims who participate in mediation or conferencing perceive a high degree of procedural justice, appreciate the communicative value of the encounters, and find the outcomes more just than traditional judicial sanctions. Victims also suffer less post-traumatic stress after a conference; have less fear and anger, and more sympathy for the offender.

Our conclusion must remain cautious, but it appears clearly that the victims who are willing to participate are not disappointed.

Offenders

Among offenders, the willingness to participate in a restorative process is also high. Probably many offenders simply hope that the outcome will be better that way than if they went to court. As long as it does not cause secondary victimisation, this is not a problem. It is the process during the meeting itself which makes most offenders understand what they caused, and to become increasingly emotionally involved and less rationally calculating.

Offenders who participated in mediation or a conference understand and accept the obligation to repair better than in a traditional juridical sanction.



Re-offending

The results of studies of re-offending do not lead to triumphant conclusions. Bonta et al. (2006) found an overall 7% lower rate of repeat offending, compared with traditional criminal justice. Better results were achieved in programmes targeting mostly violent and serious offenders. This is paradoxical because conferences are applied mostly to divert less severe youth offences from court.

Also the quality of the conference matters (Maxwell et al. 2004; Hayes and Daly 2003).

If the conference is followed by systematic support or treatment for the offender, the risk of re-offending is much lower. It may be naive to expect that a conference of a few hours could on its own change a life course that has sometimes gone wrong from birth. But the meeting is an excellent opportunity to begin treatment and other social support.

All in all, restorative justice interventions are not a magic potion to eliminate re-offending. But having an impact on the offender is not the primary aim of restorative justice programmes. The primary aim is to repair the harm caused by the offence. All in all, the overall results are encouraging. The participation rate is higher than sceptics would expect; victims and offenders report that they are better off after such a process; and re-offending is not worse. And this is what matters in the coherent approach of restorative justice.

Public security

The most systematic implementation of restorative justice schemes is in New Zealand where, since 1989, family group conferencing for all serious youth offences is a mainstream response under the *Children, Young Persons and their Families' Act*. The statistics on youth offending have shown a spectacular decrease since then (Maxwell et al. 2004). There is a drastic fall in the number of arrests, a halving in the number of young offenders in court and a reduction of the number of confined juveniles to a quarter of the number locked up in 1989. I believe such developments to be beneficial for public safety.

There is so far no reason to believe that more systematic implementation of restorative responses to crime would be detrimental to safety and feelings of safety. There is no empirical indication that the restorative justice approach would be hindered by the so-called general punitiveness of the public. While simplistic repressive outcries may sound the loudest in the media, it is far from evident that they are the mainstream.

1.1.5 The question of legal safeguards

Rejecting the punitive apriorism does not mean rejecting a legal frame for restorative justice. One can, however, not simply transfer the principles guiding the punitive criminal justice system to a restorative justice system. Restorative justice is based on a different paradigm, inspired by a clearly distinct philosophy; it conceptualises

the essentials of crime differently, aims at different goals, involves other key actors, uses dissimilar means, and operates in a different social and juridical context. It is not possible to judge different paradigms with the same criteria, just as it is not possible to play basketball with the rules of football.

Law and legal rules are not inviolable rulers of society; they are servants to the quality of social life. Instead of trying to submit restorative justice to traditional criminal justice principles, the legal criteria need to be revised and reformulated in line with the philosophy of restorative justice. The traditional principles are constructed to preserve two fundamental values: the equivalence of all citizens and the protection of the citizens against abuse of power by other citizens and by the state. These values must also be preserved in restorative justice, but the legal principles must be adapted.

I described restorative justice as inversed constructive retributivism. Both the systems of punitive criminal justice and restorative justice clearly condemn the (harmful) transgression of norms, hold the offender responsible for his behaviour, and seek to restore a kind of balance. Moreover, where necessary, both use coercion according to legal standards.

The challenge to the traditional legal framework comes from the key difference: the punitive apriorism vs. the aim to restore. To attain the restorative goal, ample space must be allowed for informal deliberations including all parties, which is contrary to the strict formalisation in the hands of professionals in the penal system. It is a difficult challenge, but by no means impossible.

As restorative justice is a relatively new paradigm, thoughts about legalisation are only just starting to be made (Van Ness 1999; Braithwaite 2002; von Hirsch et al. 2003; Walgrave 2002). Many examples exist of how restorative processes are currently implemented and positioned in relation to mainstream criminal justice systems. From a maximalist standpoint, these are transitional stages only, but they indicate the need for theoretical juridical work on establishing the principles of restorative justice.

Let me give a few examples.

The equality of all citizens before the law is a crucial value in democracies, but it is poorly preserved in practice. The equality of citizens is unrealistic in a society where inequality is endemic, and this is also true in legal processing and sentencing. If an illiterate person is subject to the same complicated judicial rules as a defendant with a degree in law, if the rich pay exactly the same fine as the poor, this kind of equality is "a travesty of equal justice". The rules of the current judicial system do not guarantee more equivalence than the informal restorative justice processes. On the contrary, the equality of citizens may be better achieved if the protagonists were stripped of their power and status, and met each other in a personal face-to-face dialogue, as proposed in a restorative encounter.

Proportionality in criminal justice is much less evident a concept than is suggested in criminal theories. There is no natural link



between, for example, embezzling a million Euros and spending two years in prison, committing a street robbery with physical violence and serving five years, or stealing a bicycle and being on probation for a year. It all amounts to social convention, which changes over time and space. Research shows that participants in restorative processes spontaneously handle implicit proportionality criteria, and it is worth exploring whether grass-roots assessments of what is a reasonable response, based on the main stakeholders' appreciation, would not be more appropriate than a preconceived imposed tariff. The deliberative way of relating the offence to the response is probably more related to what happened and to what is felt as "just" in real life, than it is in judicial sentencing.

Lawyers of victims and offenders are often seen as the most important guarantees of their clients' legal rights. It is no different in the context of restorative justice (Shapland 2003). However, their mission in a restorative justice environment is different from that in the current criminal justice system. Lawyers must reconsider what is in their clients' best interest. They are currently educated as fighters, aiming to win a battle, while they will now have to learn to make peace. That is something quite different, as can be observed on the international scene, from the interventions in Afghanistan and Iraq. If lawyers can open their minds and strategies to what really is the best interest of their clients, they can make a major contribution to a restorative justice system that respects human rights, procedural guarantees and sentencing limits.

But a lot of experience needs to be accrued, reflection and research has to be carried out. There is no reason for pessimism. Criminal justice has been developed over many centuries, is carried out by a huge body of high standing professionals, supported by authorities, reflected on by an army of legal professors. Yet, look where we stand with it.

1.1.6 Conclusion

Restorative justice is a most promising path towards a more just and more socially constructive way of responding to crime, and one of the social forces that aim at resuscitating participatory democracy. Its potentials are

- its target of restoring individual and social life if a crime has occurred;
- its focus on what binds us together, rather than what divides us;
- the re-conception of the response to crime from authoritative sentencing machine to a deliberative problem-solving system;
- prioritising inclusive deliberation, reducing the use of coercion to the strictest minimum;
- the expansion of deliberative practices to other fields that deal with conflict and injustice;

- the chance it offers for citizens to experience the power of respectful dialogue and the benefits of investing in common interest;
- its basic trust in the constructive potential of people to actively take responsibility in crime and justice matters and in other fields of social life.

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1.2

The Restorative Approach in Practice: Models in Europe and in Hungary

1.2.1 Principles and theories

In the first half of the article it would be analysed what responses under social policy are available in relation to the difficulties that arise in connection with crimes and to the conflicts between the affected persons (the victim and the offender) and their communities. What moral, regulatory and institutional systems and schemes are available for society to give a response to crimes? What social and social policy-related issues arise in the lives of the affected persons and groups as a result of the crimes? Are we aware of the effects the responses of society and the various institutions have on the affected victims, offenders, their families, communities and society in general? Can the reactions persuade the law-abiding members of society that common values and principles are still valid? Can the reactions to crime break the vicious circle of violence? Or, can the reactions ensure that no one feels the urge to resist and strike back?

In the article the sphere beyond the related fields (that is, beyond criminal, legal and social policies) is explored as well. This is because the function of responding does not belong to one particular field (see *Figure 1*). I am proposing a uniform system that extends to various special fields and sciences and that responds to various conflicts in society in accordance with a set of principles and rules and with the assistance of institutions and specialists. The borderlines between the subsystems vary in time and are depending on the geographical location. The borderlines are set by political decisions at each point in time and geographical location.

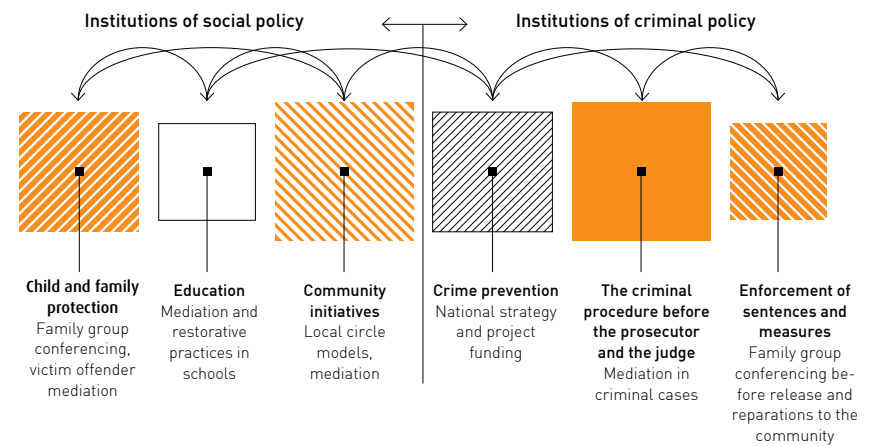
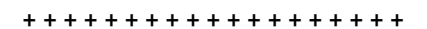


Figure 1
 The emergence of the restorative justice approach at various levels of social institutions in Hungary



It is clear that the criminal justice system is only able to give an answer to some of these questions. A large part of the problems may only be answered if social policy, educational policy and the field of equal opportunities for disadvantaged groups are involved. The knowledge and methods provided by the practitioners of social services are also of key importance. My approach is that crime in itself is just a symptom of an illness, and the real reasons are such micro-, meso- and macro-level factors that criminal justice cannot influence.

It is noticeable that increased resources are available in the field of social policy and criminal justice if the subjects of the service/procedure cooperate voluntarily, if they can propose forms of cooperation and if persons important to them can also be involved in finding a solution.

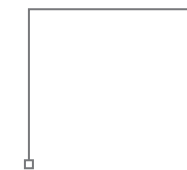
According to the philosophy of restorative procedures, the making and the following of rules are built on a set of norms that the members of the community define. As a result, their needs and requirements, such as for a sense of personal security, peaceful coexistence and a respectful conduct (which are also indispensable for the community to continue to exist), are reflected in the set of rules as a whole. If members of the community break any of these rules, not only do they violate the "rulebook" but they also act against the community. As a result, the response to a crime should be made by the community of the individual and not by an external power. According to the restorative approach, the breaking of a rule (the crime, for instance) is primarily interpreted as a conflict between the affected persons and communities.

Restorative procedures are built on a similar methodology despite the differences between the various models applied in practice. It is emphasised in all cases that the participants must give their voluntary consent to participation, and that they must be informed on the possible alternatives, the potential consequences and the possibility of making their own decision at any point. However, it is an important factor when applying any of the different practices, that participants (especially the victim) should be protected from victimisation and re-victimisation.

These ideas started to appear as a result of a 1977 article by a Norwegian criminologist, Nils Christie. Christie's article discusses how the state "stole" their conflicts from the citizens and gave those to professionals (psychologists, prosecutors, judges and social workers). In the criminal procedure, the damage and grievance caused to the victim is forgotten. The victim becomes a prop in the procedure and may become subject to "secondary victimisation" (re-victimisation). Also, the offenders are stigmatised in the procedure, and this makes it particularly difficult for them to reintegrate into society later. Christie thinks that these harmful effects can be mitigated if the handling of the conflict is returned to the victim and the offender and if they and their communities are directly involved in finding an appropriate answer to the crime (Christie 1977).

Having collected the elements that are mentioned the most often, I believe the procedures with the most restorative content are those programmes in which

- the participants agree to participate in voluntarily;
- the participants are given comprehensive information about the possible consequences of the procedure;
- an important goal is to prevent the victim's re-victimisation;
- the offender will take a certain level of responsibility for the crime;
- the procedure is managed by an appropriately trained, neutral and impartial facilitator/mediator/coordinator;
- the procedure is confidential from the beginning to the end and no third party learns what is said during the procedure;
- the needs of the victims, the offenders and the affected community/communities are considered equally important both from a material and an emotional perspective;
- the affected persons are involved in the procedure directly;
- the circumstances of the case are established during the meetings, including the reasons that led to the crime, the possible reparation, the methods of preventing a future conflict/re-offending and any needs that may arise;
- an opportunity is given to the offender to make a voluntary offer to restore the damage caused: the emphasis therefore is on the offender taking active responsibility;
- it is possible to involve other persons to support the parties;
- the agreement is developed by the widest possible range of persons directly affected by the crime.



The criminal policy changes of postmodernism give a larger role to local communities and gradually reduce the tasks of the state. The community has an extended function in both prevention and sanctioning, and it has also become clear that postmodernist changes in society may fundamentally reinforce the possibility of spreading the restorative approach built on the principles of community. The traditional retributive criminal justice system focusing on the offender and ignoring the physical and mental requirements of the victims is often proven to be unsatisfactory and results in secondary victimisation.

The restorative approach therefore can help the persons affected by the crime to re-integrate into society. Restoration can compensate the citizens for the abnormalities of the criminal justice system (for instance, for the fact that personal grievances and the victims are ignored) and may support the effective operation of the criminal justice system as a whole.

1.2.2 Models built on the restorative approach

Consequently, the restorative approach is not simply the theoretical background of a specific practical model; instead, it is a philosophy



the elements of which appear in the various models, methods and practices in different combinations and with diverse emphases. In the following part of the article the most common restorative methods are discussed.

1.2.2.1 Victim offender mediation

The most frequently used practice in Europe is so-called victim offender mediation. In victim offender mediation, an independent third party called the mediator mediates between the parties, helps them talk over the circumstances and effects of the crime and accomplish an agreement on the form, amount and procedure of restitution. Mediation may be a face-to-face meeting, but it may also be indirect. In the latter case, the mediator meets the parties separately and relays the information to the others to help them come to an agreement. Mediation primarily focuses on the future and seeks to find a solution that will work in the future. In mediation, the expression of interests is given more emphasis than the discovery of the emotional side of the conflict. The participants of the mediation procedures are those persons that are the most directly affected by the conflict. The communities and those supporting the parties are less frequently present at the meetings.

1.2.2.2 The “conference” model

The method of conferencing involves a larger group of affected persons in the decision-making process as the meeting is not only attended by those directly concerned, but also by supporting family members, members of the community, reference persons (“significant others”), representatives of the authorities (police officer, probation officer etc.), professionals providing support (social workers, NGOs’ representatives, teachers etc.) and other representatives of the affected community.

The objective of the discussion is to discover the reasons and the consequences of the crime and the responsibility involved, and to make a decision together about how reparation can be made and how re-offending should be prevented. The neutral, impartial person mediating at the conference is called a “facilitator”. The facilitator’s role is less prominent than the mediator’s. The facilitator primarily focuses on prompting communication between the parties. As opposed to mediation, conferencing puts more emphasis on the discovery of the past events, and the expression of emotions has an equal or even bigger role than rational considerations.

1.2.2.3 The “circle” model

The “circle” model reflects democratic principles the most, and it is used to solve the issues of larger communities where the main objective is to ensure that the affected community is represented by the largest possible number of representatives. The victim, the offender, their supporters, the members of the community and the representatives of the criminal justice system join the same circle and reach a consensus on the judgement, they identify the grievances together, and specify the measures necessary for preventing re-offending.

1.2.2.4 Community work

It is debated to what extent work done for the community (community work sentences) can be considered a restorative practice. If we only regard as community work cases in which the work is carried out in a mandatory manner as a result of a court sentence (as a punishment), then it does not qualify as a restorative method because the work is not carried out on a voluntary basis. However, in cases where community work is undertaken by the offender voluntarily, and its main goal is restitution and not punishment, community work as a sanction can be considered a practice of restorative justice. If community work is applied in this form, it is emphasised that the crime is not simply a violation of a general legal or moral rule but it is also an activity actually causing damage to the community. The restorative approach to community work can have a large impact in those societies where intra-community ties have loosened and where the real meaning of “community life” is disappearing.

1.2.2.5 Community councils

In community councils, the main emphasis is put on the communities affected by the conflict and not on the individuals. In the procedure, the parties overcome the conflict, the events and their effect, and agree on the restitution with the participation of the members (even groups of people) of the affected community.

1.2.2.6 Victim support programmes

These programmes can be considered restorative practices if there is a possibility of involving the offender directly and if it is possible for the victim and the offender (and their respective communities) to communicate directly or indirectly and if a restorative approach appears indirectly in the implementation of the programme.

1.2.3 The introduction of restorative methods in Europe and in Hungary

1.2.3.1 The European systems

Based on Gavrielides’ typology (Gavrielides 2007: 31-32), there are three basic types of restorative systems as implemented and used in Europe. In “dependent” (or can be called integrated) systems, restorative practices are offered as alternatives to the criminal procedure. In these systems, it is not necessary to continue the criminal procedure if an agreement is made. Therefore, the restorative programme is a diversionary measure (diverts the case from court) applied in the case of minor crimes. The mediation procedure in the majority of these systems is carried out within a centralised and uniform system the objective of which is to guarantee equality before the law, that is, to ensure the same protocols are used and guarantees are provided in each judicial administrative region of the country. In these systems, referrals are primarily made by the police, the prosecutor, the parties and their attorneys.

In “relatively dependent” (or partially integrated) systems, successful restorative justice procedures (i.e. when an agreement is reached) have some kind of effect on the criminal procedure (for instance, the judge can mitigate the sentence) but they do not replace the sentence entirely. The restorative and the criminal procedure are therefore carried out simultaneously. In these systems, the (NGO or state) mediator organisation closely cooperates with the criminal justice system to provide mediation services. Most referrals are initiated by courts, the parties and their attorneys.

In “independent” restorative programmes, the result of the mediation does not have a legal effect on the procedure of criminal justice, that is, a penalty (in most cases, a non-suspended prison sentence) is imposed, regardless of the programme. The primary objective of such programmes is to provide for the (symbolic rather than material) needs of the participants. This form of mediation is generally offered when the crime is grave. The mediating organisation is only loosely connected to the criminal justice system and is in most cases an independent NGO. The programmes allow the building of a decentralised system of institutions to launch local (pilot) model programmes, therefore it is not guaranteed (but not impossible either) that the services are offered in a standardised system and at a national level. Most referrals are initiated by the parties themselves.

The reasons behind the development of restorative justice are different in each country. In some countries, citizens were not satisfied with the traditional justice system (in Belgium, Finland, Norway, Portugal and Spain, for example) and the possibility of diversion dominated (for instance, in Belgium, Finland and Norway). For juvenile offenders, the following considerations were taken into account as key factors: the extension of the social support and welfare system to the criminal justice system (Belgium), the enhancement of the educational effect (France, Italy, Portugal and Poland), the implementation of rehabilitation-related objectives (Germany, Sweden and Spain) and the offering of a wider scale of sanctions (Germany). In the majority of countries, mediation is primarily applied in the case of minor crimes (crimes against property or crimes causing bodily harm) (Miers–Williemsens 2004).



When mediation in criminal cases is applied successfully, the most typical results around Europe are the following:

- the prosecutor suspends the procedure and the accused person has the opportunity to make amends during the period of suspension. The case is closed if the accused person takes responsibility for the crime and provides reparation for the damage caused. (Austria, Belgium, the Czech Republic, England and Wales, Finland, Hungary, Germany, Italy, Poland, Portugal, Spain, Slovenia);
- for adults, the case is diverted before it goes to the prosecutor (France and Luxembourg);
- the results of the mediation procedure are taken into consideration when determining the sentence (England and Wales, Hungary and Finland);
- the sentence is suspended (Italy and Spain), replaced (Germany) or reduced (Germany and Poland) if the offender carries out his/her side of the agreement;
- as a special measure for juvenile offenders, the young person makes a "contract" with the probation officer on the content of his/her law-abiding conduct in the future (England and Wales, Portugal).



1.2.3.2 The development of the Hungarian legislative background

The most frequent problems that need to be tackled in Hungary when reforms with a restorative approach are carried out are the following:

- human and financial resources for criminal justice reforms are scarce;
- the professionals' lack of special training and inadequate foreign language skills block the process of acquiring new knowledge and skills;
- the lack of an established institutional background (for the reintegration of the offenders, the protection of victims, community alternative programmes for restitution etc.);
- the state's refusal to cooperate with non-governmental entities and the state's aversion to services provided by non-governmental entities;

As a result, Hungary's situation is controversial as bottom-up initiatives are only permanent and viable if they are supported from the "top", that is, by the government and if they gain external support from international organisations (primarily the European Union). Consequently, by the mid-2000s, the state itself has gained a more and more prominent role in the introduction of restorative justice in Hungary. A comprehensive reform of criminal policy started in 2003 in Hungary. A key objective of this was to add new alternative sanctions to the existing ones and to establish a so-called "double-track criminal policy". In accordance with the approach of building

a differentiated sanctioning system, it has become a primary objective of criminal policy to allow diversionary measures (measures that divert the case from court) to be used as frequently as possible, and to apply imprisonment as a sanction only if the crime is severe.

Before the specific legal and institutional reforms were adopted, Parliament adopted the *National Strategy for Community Crime Prevention* (hereinafter strategy) in 2003 which included a somewhat "utopian" vision. The strategy describes the key areas and activities of crime prevention systematically, including the tasks that must be completed in the interest of effective crime prevention. The strategy specifies the key measures that must be implemented for a pluralistic criminal justice system. According to the strategy's approach, effective prevention and treatment of crimes are no longer the obligation of the state; neighbourhoods, civilians and NGOs and business associations will also have significant roles. In the interest of implementing the strategy, the National Crime Prevention Board provides funding to a large number of initiatives each year whose objectives are in agreement with the following five priorities of the strategy:

1. the prevention and reduction of child and juvenile crime rates;
2. improving the security of urban areas;
3. the prevention of domestic violence;
4. the prevention of victimisation, helping and compensating victims;
5. the prevention of re-offending.

After the preparatory phase described above, the regulatory and institutional background of mediation in criminal cases at a national level has been developed gradually by 2007. However, due to the limitations of this article, details of the current regulatory and institutional background cannot be discussed now, but will be explored in other articles in this publication (see articles 3.4 and 5.2).

1.2.4 Theory and practice: the relationship between legislation and legal practice

The practical evaluation of the theory and principles of restorative justice cannot be carried out without asking the opinions of the key actors of mediation, for instance prosecutors and judges. I made an attempt to inquire about these opinions by preparing an attitude survey of 46 prosecutors and judges through in-depth interviews in 2006 and 2007, that is, before mediation was introduced in criminal cases and when legal practitioners could only voice their expectations and feelings about the new system as there had not been any practice of it in Hungary before then. I will now present an overview of the results.

One of the most important lessons of the survey was that the ideal sanctions pictured by the interviewees and the known effects of certain restorative techniques overlapped to a large extent. However, it is also true that the "wish lists of an ideal sanction" visualised by the participants did not include the representation of the victims' and the community's interest and the voluntary side of mediation was also not mentioned.

Both the prosecutors and the judges mentioned that the official procedures do not provide a trained professional nor time or opportunity for the victims to explain the negative effects the crime had on them, the related needs they may have, their main concerns etc. The authorities in the procedure are simply inadequate for handling the victim's complaints. On the one hand, their workload is too heavy and they have neither the time/capacity nor the training needed for carrying out such activities and on the other hand the rigid regulatory background of the criminal procedure does not allow the discussion of any topics between the victims and the legal practitioners that have little to do with the "subject-matter" of the procedure before the procedure or the court. The lack of opportunities to provide psychological and moral support to the victims is frustrating for both the victims and the legal practitioners.



Based on the 90-minute conversations with each interviewee, they were classified into four groups according to their character type: the “official”, the “teacher”, the “philosopher” and the “self-evaluator” tags imply the dominant character of each legal practitioner were and the aspects he/she considered the most important. Of course, the individuals showed the combined characteristics of the different categories; therefore none of them could be classified into one single category. (However, the concept behind the typology and the proof for its validity need further, in-depth research.)

Types of legal practitioners	Description
The “self-evaluator”	Strong self-reflection and self-criticism; realises own boundaries; emphasises own motivations; emphasises emotional aspects; empathy to clients; primarily uses first person singular; a committed professional; introvert (the only one out of the four); speaks silently; long pauses in speech, stops to think a lot; micro-level analysis.
The “teacher”	A provider type; believes in the educational effect of the procedure and the judge/prosecutor; the importance of the legal practitioner’s subjective approach in the procedure; categorical thinking; self-confident in role; believes in the possibility of change; pays particular attention to juveniles; very little self-reflection and insecurity; more observations about the external world; community-level (meso-level) analysis; determined style of speech, raised voice, fast speech, no interruptions between arguments.
The “philosopher”	Emphasises general connections of logic; holistic approach; statement of beliefs; self-criticism and criticism of the system; sarcastic approach, but believes in people in general; reserved tone, balanced intonation; reflects “peacefulness”; macro-level analysis.
The “official”	Organisation, rule and procedure oriented; his/her main goal is doing his/her job in a conscious manner and according to the rules; seeks to reduce the amount of work to a minimum; focuses on possible hindrances and difficulties in connection with the reforms; rigid; considers deviation from standards a problem; lack of criticism of the system; cynical approach to clients; statements rather than questions; lack of emotions; relaxed manner of speech; balanced intonation; brief or lengthy, monotonous.

Table 1
Some indicators of the four character types

The research proved that legal practitioners do not have consistent moral reasoning and penal philosophy when they consider the necessity of punishment or when they apply punishments in everyday practice. And, although they consider deterrence the main objective of punishment, many of them said that punishment itself is not suitable for deterrence. It can be assumed on the basis of the interviews that it is a more important factor in decision-making to make sure there is actually a response to crime and it is a less important criterion that the response should be painful to the offender. This distinction is highly relevant in studying how restorative programmes can be added to our current penal system.

Due to the organisational structure of the prosecutors’ office and the court system, legal practitioners rarely have the opportunity to share their recommendations and creative solutions with their colleagues and to have them implemented in practice. Isolation and hierarchy together create a conservative system and make it difficult to implement reforms in practice. This, coupled with other factors, quickly leads to the practitioners’ burning out. The lack of external analyses and the resistance to reforms have a double, back-and-forth effect: the less possible (or mandatory) it is for an organisation to open to the public, to become transparent and to reflect on itself, the more important the strategy of avoiding these becomes and the organisation isolates itself from the public.

While listing the elements of “ideal sanctioning” legal practitioners mentioned a number of phenomena (support, supervision, the offenders confronting their own crime, the offender’s active

conduct, reparations and dialogue etc.) that are also fundamental items of the restorative practices’ methodology and approach. This supports the notion that the restorative and the more traditional sanctioning systems are compatible in many ways and that the two systems are more similar to each other than they appear to be at first glance. Nevertheless, it is a political (criminal policy) decision where the borderline, above which private agreements must be combined with the exercising of the state’s criminal power representing the interest of the public, is set.

It is a striking result that the legal practitioners are willing to hand over the decision-making power to the victim, the offender and other persons affected by the crime. There is a consensus among professionals that to some extent the crime is the parties’ private matter as they are the ones that can express what they need in order to repair the damage and to prevent future crimes. The practitioners believe that handing over the power of decision-making is a rational move if basic personality/moral rights are respected, the procedural rules are kept and it is guaranteed that the victims are not re-victimised in the procedure.

1.2.5 Final thoughts

In an ideal case, restorative justice is introduced through social, regulatory and institutional reforms. However, even if no regulatory or institutional reform is implemented in a country but the professionals of the related sectors use restorative practices consistently in their daily work (see the text highlighted below), it can be concluded that restorative approach has started to gain ground among the social policies of that particular country. And this alone can effectively help easing the tensions at micro-, meso- and macro levels.

The list below includes the character traits that the participants (victims, offenders and other parties) should ideally have or should be encouraged to show and the professionals should keep in mind when preparing for a restorative programme of any kind. In any case, the professionals, the participants and the other affected parties must all have a certain level of the following qualities:

- a sense of security,
- sufficient self-esteem and a positive self image,
- responsibility,
- honesty,
- the ability to identify their own needs,
- the ability to express themselves openly according to their own role,
- the ability to trust,
- a sense of community,
- respect and recognition of others,
- the willingness to take care of others,
- the ability to listen and understand the other side’s views,
- cooperation,
- the ability to confront and support the others at the same time,
- the motivation to understand and learn,
- openness to making / accepting reparations,
- communication skills,
- openness and trust regarding the external and independent mediator,
- partner-based communication,
- demand for external evaluation and feedback,
- permanent self-reflection in practice regarding the basic principles, and
- respect and encouragement for personal and voluntary undertakings.



Maybe a similar list (as the one above) should be put on the wall of all of us. If our goal is to spread restorative practices in Hungary, we can achieve a lot just by looking at the list on the wall and evaluating how we could represent these principles in our daily work and life.

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2.

Restorative practices in crime prevention (outside the criminal justice system)

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2.1

Families Solving their Problems – Family Group Conferencing on Family Problems in the Netherlands

2.1.1 Introduction

In the Netherlands, experience with family group conferencing has been gained for a number of years. A family group conference (*Eigen Kracht-conferentie*, hereinafter EKC) is a method of letting the responsibility for decision making, where severe family problems are concerned, remain with the family itself. It provides the family with an opportunity to make a plan, using their own capabilities as well as resources from outside the family.

It is not just a method; it is a procedure that enables citizens in vulnerable positions to devise solutions for problems that arise in their own social environment. From the start, in 2000, it has proven to be effective. Even under difficult circumstances, citizens are able to work towards effective solutions and safe plans as a joint effort of family and friends. In the case of conflicts, a great deal can be accomplished by the cooperation of people, whether in a small or in an extensive network of people. Saying out loud what has happened to you, and how this has affected you, decreases negative feelings, and opens the way to a plan for recovery. This is a simple, effective and inexpensive approach.



Inspired by the family group conferencing movement that originated in New-Zealand, various conference and network approaches have been developed. This article describes the setting up of the *Eigen Kracht Centrale* (the National Centre for Restorative Action); the first conference was held in 2001 and a total of twenty conferences were carried out that year. It was expected that the number of conferences would increase to about eight hundred in 2009. The data that were gathered through registration and research completed in 2008 will be used to illustrate the development of conferencing in the Netherlands: the method itself; its most important results and some issues that arose on evaluation will be described.

2.1.2 Increase in the use of family conferencing

When conferencing was introduced in the Netherlands, the *Eigen Kracht Centrale* made use of the knowledge and experience available in New Zealand, where the *Children, Young Persons and their Families' Act* was passed in 1989. This law ensures that the family has the first say in determining the course of action to make necessary changes concerning a conflict with society about expectations and rules on raising and educating a child.

Youth care was the domain in which the first conferences took place. During the first five years, the focus was almost exclusively on the health and well being of children and adolescents. In the last three years, the attention gradually shifted towards problems of adults: drug abuse, public nuisance, financial problems; in many cases there are serious problems that concern parents and children alike.

The increase in the number of conferences held is characterised by a threefold growth.

Firstly, there is an increase in numbers. The yearly growth was at least 25% and often as much as 30%. We can now draw from experience from about three thousand registered cases of conferencing.

Secondly, the number of areas in which family group conferencing is used has increased. Similarly to other countries, the safety of children was the main issue in the Netherlands as well: EKC's were most commonly initiated by child protection court orders. Presently, there are also other issues that lead to conferences, like the disturbed development of children, neighbourhood conflicts, a lack of security in the social environment, or domestic violence. At present, the child still has the leading role in a conference, but the part is played by an adult more and more often.

Thirdly, there is a growing conviction that the conference model strengthens the position of a dependent client in relation to institutions, and empowers citizens. The present government policy intends that a family requiring care from the government should first look around in its own network to see what help is available. This results in a more equal sharing of rights and responsibilities

in the relation between state and citizens (this is emphasised more than in the last few decades): responsibility for the public sphere of society is shared by all. Over the years, the conference has become a very effective means for citizens to rediscover their responsibility for their community and to play their part in it.

2.1.3 Four strategies for introducing Eigen Kracht

With this background, with the increasing use of conferences, four strategies used by the *Eigen Kracht Centrale* can be distinguished. Originally, family conferencing became more popular by word of mouth. As many conferences as possible were held in various places, rather arbitrarily, to gain experience and to develop good practice. Information on what happened during conferences and what results were achieved was passed on by organisations, professionals and experts to governmental bodies. Until 2007 – the year that the landmark of 1000 conferences was passed – this strategy prevailed.

In the meantime, a second strategy evolved: embedding the conference model in the procedures of official organisations. The decision making about the help that is offered to clients is dominated by professionals, which makes it harder for citizens who come to ask for help to voice their own opinion on what help exactly they need. And once they have become clients of the official procedure, this professional dominance is maintained by a combination of diagnostics and therapy, as defined in protocols. The client fades to the background as far as decision making is concerned. Although this has not yet been achieved, it seems possible for the conference to become a pivot point, a decision moment in the procedures of institutions. This has not, to the present, been achieved by grass roots movements. However, boards of organisations and especially the political government can make this second strategy successful. In 2009, in one of the Dutch provinces a document was drawn up in which the government and the organisations involved name the conference model as a starting point for providing care. These organisations now offer conferences as a standard procedure.

This is a major step toward a third strategy: finding a legal basis for the right of citizens to make a plan of their own before outsiders, be it the law or civil institutions, impose their plans.

Actually, this strategy follows from the second, since if the conference is part of official procedures, as a logical consequence it also has to be regulated formally.

The present legislation in the Netherlands concerning unemployment, youth care and social support implies that citizens also have responsibility.

The fourth strategy consists of the documentation of the conferences for research purposes. This strategy has been employed from the very beginning and supports the other three. It facilitates the support of organisations when they want to make a shift in their policy from offer-orientated thinking to demand-orientated thinking.

After five years of research into related data, the general lines concerning the usability, procedures and result of the conferences had become clear, and new research questions arose: what are the long term effects of family plans? Does it make a difference whether or not a conference was held with regards to the care that was offered and the result of that care?

Does a conference change the cost of the care offered? Does the conference model contribute to active citizenship?

Gradually, such research has been carried out. 2007 was the first year in which an answer could be given to questions concerning long term effects. The research showed that the safety of children remains intact over the years and that the need for social care within the family decreases drastically after a conference, much faster than without a conference. The research also provided remarkable insight in the relation between professionals and communities. For instance, they use the same criteria concerning safety. Professionals get to know more people in the community; there is a greater chance of cooperation and during the first year after the conference the family grows stronger and starts pulling the strings.

Thanks to this strategy of continuous research, the *Eigen Kracht Centrale* has a yearly report on the data of EKC's. An overview of the most important findings from 2008 is given below.



From early on in 2001, it became clear that conferences are dealing with some rather serious issues. Almost all families that took part in a conference in 2008 had experience with social care workers, some of them (8%) for over ten years. In half of the families, youth care intervention measures had been considered. Only 10% of the families never had any involvement with social care. Children are at the centre of a little over a half (52%) of the conferences. The other conferences are about a combination of problems concerning adults and children (33%). The remaining conferences deal exclusively with the problems of adults (15%). The fact that not only children are involved in conferences means that often multiple problems are dealt with (an average of 3 per conference). This is what makes conferences special from the point of view of social care.

2.1.4 What happened in 2008?

In the documentation concerning the year 2008, a total of 471 conferences are included. The number of referrals for that year is a lot higher, but for a lot of conferences the results, and hence the statistical data, were only going to become available in 2009.

In 2008, the initiative to hold conferences was still mainly taken by organisations (78%). In 22% of the cases the initiative was taken by the family, in 10% by the affected person.

In the last three years, the proportions gradually changed; the number of applications not coming from organisations doubled. Families and citizens in general seem to have discovered the method. They are getting increasingly familiar with the possibility of making their own plan when they need a social worker to help them with their problems.

The people in the social environment of the family are usually aware of these multiple problems. They have their (unique) history with the family and often see the connection between behavioural problems of the child and the parents being overburdened, divorced or unemployed or having some kind of addiction.

The social care workers and other professionals who deal with family problems in their own specialized field (family social worker, debt management, school director, etc.) are logically mainly concerned with aspects of the problems connected to their specialized area and do not have the knowledge or competence to see the connections that are known within the community. What is even more serious, however, is the fact that a majority of the professionals exclusively deal with the “client” or the “nuclear family” and seldom (want to, or can, or are allowed to) get in touch with the other family members. This fact also explains why frustration can arise when implementing the solutions decided on in a conference: the social care workers work for their own specialised organisations and lack a platform where they can cooperate.

From the registration of the problems that are dealt with in conferences, it becomes apparent that whole new perspectives are to be gained from cooperation between social care workers.

While organisational cooperation usually cannot be forced from the outside or indeed, cannot be ordered centrally, plans that are made in the social network would make this cooperation necessary. Families for example perceive the difficult behaviour of their children as resulting from the medical treatment of the mother or the aggression of the father, and urge coming to agreement in respect of the children and ordering therapy or (residential) care for the father.

Each conference starts with a number of concrete questions, to which answers have to be found. In 2008, as in preceding years, the questions concerning children were mainly about their education and their behaviour, or about their residence, sometimes

in conjunction with contact arrangements with parents or others. School-related problems occur frequently as well. Where adults are concerned, there is more emphasis on independence, often in combination with housing and financial management.

During the preparations, children take part in discussing the questions. Unless it is absolutely impossible, it is preferable for them to be present at the (their) conference. A mere 20% is younger than 4 years and 35% is older than 13, the remainder is in between. In 2008, 601 minors attended conferences: they were either (partly) the subject or they were present as a friend.

2.1.5 A conference activates

Applying for a conference does not necessarily mean that a conference actually takes place. However, there are no waiting lists. Within a few days after the application is made, an independent coordinator will be at work with the family, trying to raise interest among relatives, friends and acquaintances in attending the conference.

A coordinator is a person from outside the family, who additionally has no link whatsoever with professional organisations that can be of benefit or disadvantage to the family. Their strength lies on the one hand in the ability to assist families with the preparations for a conference, and on the other hand in their independence. Actually, they are fellow citizens who consider this work as an interesting social task that can be fulfilled (temporarily) alongside their regular job or pursuits. They cooperate with the *Eigen Kracht Centrale*, which provides them with a short training as well as facilities that can be used during their coordinatorship. They get paid for their working hours. Countrywide, four hundred coordinators are available.

Thanks to their unprejudiced and independent position, coordinators provide a certain balance between social care institutions and the families that depend on such institutions. Together with the family they work out what information from professionals can be helpful and which professionals can assist at the conferences by bringing information. Coordinators are mainly concerned with empowering the family and bringing the family’s social network together in circumstances that are guaranteed to be safe. This is especially the case for the minors in a family.

When the family starts making their plan, this is done in private. Neither the coordinator nor the professionals are present. The coordinator does, however, stay near.

Activating the network around a family takes some weeks. For families that have been experiencing problems for a while already, this is not always an easy period. Problems often result in isolation, and it takes a lot for families to dare break it. Sometimes the family and the network have lost their faith in each other for quite a while already. Sometimes the network is largely ignorant of the problems (for example, of domestic violence), or there is a shameful reluctance to come forward with problems.

In 2008, in 34% of the cases where a first initiative was taken, no conference was held. In the first years this was 25%. Amongst others, the increase is explained by the fact that in the last few years the number of initiatives has greatly increased, also from organisations where there is insufficient knowledge on family conferencing. It is very important how this method is implemented.

The fact remains that throughout the years a number of attempts at realizing a conference was wrecked by a disagreement that could not be overcome, because conflicts obstructed the necessary safety, or, in exceptional cases, because the social network was too small. In about 10% of the cases it is unknown what exactly happened after the first explorations that lead to no result.

On the other hand it is also known that in a third of these activating processes a conference is no longer needed: a positive result is achieved via another way. The mere getting in touch again can lead to a plan or agreements. There is reason to believe that the activating work of the coordinator in itself can lead to results, and further research in this direction will be done in the next few years.

This adds up to 66% of the initiatives having resulted in a conference. In over 10% the subject matter was the problems of adults, and a large majority was about children and their parents.

Almost three-thirds of the conferences are held within 8 weeks from the application. 84% are concluded



within 13 weeks. These are favourable numbers, compared to the waiting list times that have been agreed upon as acceptable between health care institutions and the government: a first contact has to be made within nine weeks. An interesting detail is that conferences are not even considered by these contracting partners, although it became clear recently to what extent the waiting lists in the case of health care institutions exceed the allowable limit. In many cases, with the help of a conference, a plan would have been available already.

Families decide where their conference is being held. Usually they choose an informal location (64%) like a community centre, a church or a public establishment. 10% take place within the walls of a social care institution.

Almost all conferences are concluded within eight hours, but over half of the families need no more than five hours. An average of thirteen persons participates but this number varies greatly, from three at a very small conference to fifty at a very large one. Often, the people at the conference share a meal. The making of the plan is done in private. A large majority of the families complete the plan within three hours.

2.1.6 Outcome and follow-up

It is an exception for a conference to end without unanimity about a plan. In 2008, 96% of the families made a plan. They laid down the agreements in writing. In 3% the plan was not yet finalized, because it was unclear what resources were available. It is not necessary for the whole group to be involved in the agreement; sometimes a part of the social network shoulders the plan. In a very limited number of cases (1%), the questions were returned to an organisation without a plan.

Per plan, families make a large number of agreements. We have learned from the past that a plan holds an average of 18 agreements, spread out over a number of interconnected areas: housing and care, finances, leisure time, therapy.

In 70% of the plans it is necessary to check the agreements because of a court order: are the agreements safe for the children? In the majority of the cases (94%) this proved to be the case. In a number of cases additional measures had to be added to the plan. No permission was given at two conferences (from a total of 218 plans), because the families had adjourned the meeting against the will of the guardian.

As far as children are concerned, one of the questions often concerns residence: will the child stay with the parents? Will he/she stay with one of the parents? Which one? With the family? With strangers, or in a home? Even if the question is not asked, a change in residence often occurs: 27% of the plans contain a change in housing. Further analysis shows that this change in the child's residence can be seen as a less intensive form of help, given the related costs. In about a quarter of the cases the families decide on more intensive measures than before.

The majority of the families sets a date for a meeting where (part of) the family gathers to see to what extent the agreements have been kept and if some of them have to be adjusted. No such date is set in only 8% of the cases. Furthermore, 82% of the plans provide for contingencies. Also, families tend to include short term safety mechanisms, too.

At the end of the conference the coordinator says goodbye to the family. Participants are contacted two more times. Firstly, about a month after the conference, for support, to speed things up if there seems to be a slow start. The second time is for research purposes only.

It is a follow-up of the proceedings which is handed over to the researchers. During the follow-up, contact was made with an average of over three persons and 90% of these interviews took place within six months after the conference.

2.1.7 Looking back on the conference

After the conference, the participants are given a questionnaire. They are asked to indicate whether they, each from their own position, were sufficiently prepared for the conference and if they were able to realise their objectives. The response to these questionnaires was in 65% from the part of professional social care workers and in 74% from the part of the families and the social networks.

In the past, research has been carried out in order to find out what professionals proposing a conference to a family are interested in. They want to know what part they can play, what the proceedings are at a conference in general and at their own conference in particular, and what it means when families bring in their own resources. In their reaction, the professionals look back with satisfaction on all of these items. They get sufficient information on their role (96%), and know enough about the subject matter of the conference (99%). On average, they rate the conference 7.3 on a 1 to 10 scale.

The plan gets an average rate of 7.3 as well. The professionals pay attention to the feasibility and the clearness of the plan, as well as to safety and cooperation within the social network. The marks 7 and 8 are given most. From the beginning in 2001, the plans have been valued between 7.2 and 7.6.

The coordinator and the region manager, the person who accepts the plan and who coaches the coordinator, get high marks from professionals, 7.9 and 8.2 respectively. What matters in their case is clarity, speed, attention and patience.

The members of the families and the social networks that participate in the conference give high marks as well. 7.7 for the conference, 7.6 for the private time, 7.8 for the plan and 8.1 for the coordinator. The professionals with whom the family dealt with were rated 7.2.

These ratings are given by people who surround the main person in the conference, such as parents, brothers and sisters, but more often

Regardless of the position of the respondents, 43% reply that the plan was executed completely, and 45% that part of the plan was executed. Over 10% reply that the plan has not been executed at all. A few illustrative remarks: "Everything works all right. One month after the conference one item of the plan had to be adjusted. An aunt and uncle did not keep their agreements. Everything is working out exceptionally well." "The family guardian is going to try once more to encourage both families to honour the agreements they made in the plan. Neither family seems motivated and they are reproachful toward each other." "A minor adjustment was made to the plan. Things that didn't work out have been tuned down. The main issue of the plan is going very well, actually."



uncles or aunts (19%) or friends (22%). In the classical and traditional forms of care (youth care, psychiatry), in the contact between social care worker and client, these people are seldom present.

In the conferences, these people from the environment of the main person indicate that they have contributed to the conference by adding their own information (64%), by having been able to ask what they wanted (92%), by having been able to say what they wanted to contribute (93%), and by being able to be part of a solution (83% yes, 14% partly). This indicates a large source of strength in the social environment of people or families who experience problems. The answer to the question whether they felt at ease during the conference was 86% positive and 10% rather positive.

332 minors gave their opinion on the conferences that were registered in 2008. 45% of them are aged between 5 and 12. Three quarters of the children mention that they were listened to. They rate the conference, the plan and the coordinator 7.8 or higher.

2.1.8 Trends

The number of EKC's keeps growing, but the number of families that goes through the activation phase in a way that makes a conference superfluous grows relatively faster. *Eigen Kracht* has a nationwide coverage, although the numbers of conferences differ in various provinces according to the availability of financial means. Where the political government, whether or not in cooperation with social care organisations, is actively supporting the introduction family conferencing, a strong increase can be seen.

The number of fields in which conferences are used increases. Youth care still grows in absolute numbers, but is getting relatively smaller. The increase in citizens who themselves apply continues. This means that the main person in a conference will tend to be an adult more often.

The opinions of the participants over the years show a stable image. Professionals, when they are supervising, judge the plans as safe and feasible. Plans contain less intensive care than would have been offered from a strictly professional approach. Research in the sustainability of social network shows that the network grows even more in strength after the conference, that it builds a good report with professionals, while asking for less support.

Some months after the conference the plan was executed partly or completely, according to 80% of the respondents. Satisfaction remains at an invariably high level. Or, like one of the young persons added to his research form: "If I could do it² again, I would do it exactly the same way!"

² I.e. the conferencing.

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2.2 Resolving Conflicts in Schools in Finland

2.2.1 Conflicts in Finnish schools

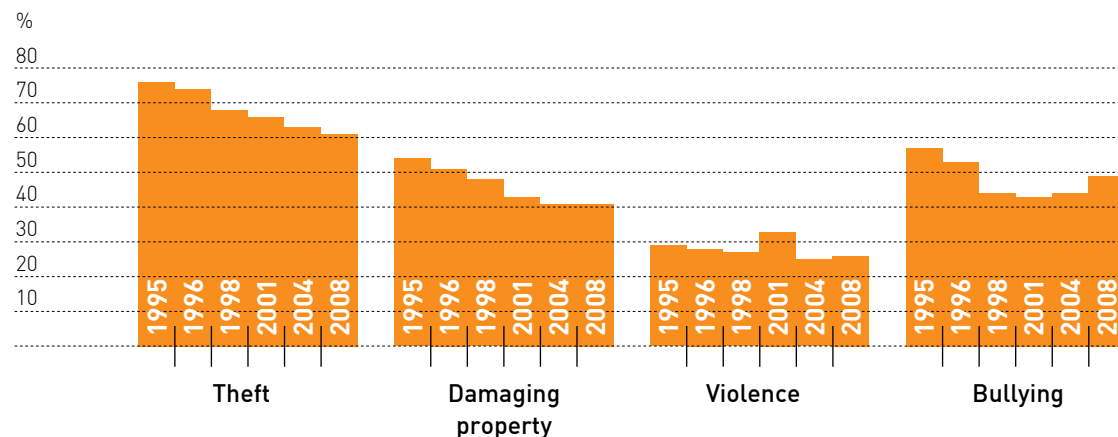
The Finnish *Act on Basic Education* states that a child has the right to a safe studying environment. Schools thus carry the responsibility to react to possible tensions and to ensure that there are enough methods to prevent conflicts. Since harmful and disrespectful behaviour occurs on a daily basis in schools, it is necessary to create different methods to prevent bullying, violence and other types of aggressive behaviour and to create a safe and comfortable learning environment. Schools should thus, in addition to basic educational duties, also help students to build social and emotional skills within the school community so that schools can be safe and just places.

The Finnish educational system has been remarkably successful in comparative surveys that measure the efficacy of education in different countries. Finland was the highest-performing country on the OECD's PISA 2006 survey in the science scale and second highest in reading (www.pisa.oecd.org). Despite of this achievement, according to the Unicef Innocenti Research Centre's studies, Finnish students do not particularly enjoy going to school (see child poverty). Especially boys are fairly dissatisfied with the school atmosphere and pupils' satisfaction with school environment decreases during school years. This finding is in stark contradiction with a more general finding, namely that there appears to be a strong correlation between liking school and educational achievement. It is a self-reinforcing relationship; those who do well tend to like school and those who like school tend to do well. It seems that despite achievements in efficacy of education, schools in Finland have not been that successful in fulfilling other, more social goals, e.g. teaching communication skills, teaching social skills and preventing exclusion from society.

According to self-reported studies on criminal behaviour, the prevalence of delinquency of young Finns has decreased (see Figure 2). For example, theft and participation in shoplifting in particular seem to have lessened. The same goes for damaging property. However, participation in violence and bullying has not decreased.

Bullying in Finnish schools is thus fairly common. Around 8% of primary school pupils are bullied at least once a week and 18% have experienced physical threat during the past 12 months (Luopa et al. 2008). Boys clearly experience bullying more often than girls. Boys also bully others more often than girls. Amongst girls, bullying happens in the form of gossiping and manipulation, in the case of boys bullying more often means elbowing, nicking property, punching and kicking (Salmivalli et al. 2009). Mobile phones, e-mail and various other forms of internet messaging have enabled new forms of bullying.

Figure 2
The prevalence of lifetime self-reported delinquency of young Finns 1995–2008 (Source: the National Research Institute of Legal Policy)



Finnish surveys on bullying in schools have shown that physical disciplinary punishment by parents is a key factor explaining both being a bully or being bullied. Children who often witness violence between others in their homes are also more likely to be victims of violence themselves, and both forms of exposure represent incalculable levels of current misery and long-term damage to the development and wellbeing. Also, poor working climate in schools and depression can cause bullying.

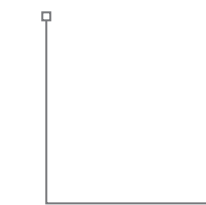
Bullying is often kept in the dark. Those who are bullied often do not talk about their experiences with grown-ups (Luopa et al. 2008). Promoting pro-social bonding through the development of academic, emotional, and social competences of both bullies and of those being bullied can prevent bullying.

Much of the child and adolescent violence that occurs in society takes place in schools. This fact places schools in a key position to help us understand the dynamics of bullying and victimization and to test the effectiveness of strategies for prevention and intervention. In the context of schools the status of "victim" and "offender" is often unclear and after the incident pupils are likely to meet each other again. Therefore it is extremely important to teach conflict solving methods as well as social and emotional skills in schools. Schools are in contact with almost the whole juvenile population, which makes crime prevention efforts particularly cost-effective. A good learning climate in schools can contribute to the child's positive growth more than the home climate on its own. Therefore peer mediation and other restorative justice approaches are particularly interesting methods to be applied in school environments.

2.2.2 The concept of restorative justice and mediation

Different proponents have different ideas about what restorative justice is or should be. According to Marshall (1999) restorative justice is a process whereby parties concerned by a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.

A common tool for practising restorative justice is mediation. Mediation is a voluntary method of conflict management in which an impartial outside party, the mediator, helps the parties of the argument, through a particular mediation process, to come to an agreement that satisfies the arguing parties. One central aspect to mediation is letting the parties meet, face to face, in order to discuss the conflict or crime. The mediator directs the process to which the parties then find a solution themselves. The goal of mediation is also to increase victim satisfaction and to prevent offenders' crimes in the future, especially in the case of juveniles. Within the context of restorative justice, conflicts should be seen as opportunities for growth and development.



Mediation is not any particular practice, but rather a set of principles which orientates the general practices of any agency or group in relation to crime. These principles are

- making room for the personal involvement of those concerned (particularly the offender and the victim, but also their families and communities),
- seeing problems of crime in their social context,
- a forward-looking (or preventative) problem-solving orientation,
- flexibility of practice (creativity).

2.2.3 Peer mediation

Peer mediation as a restorative practice is a promising and popular method for solving conflicts in schools. In Finland, peer mediation started with a *Finnish Red Cross project* in 2000. Since 2005, the Finnish Forum for Mediation has carried out a *peer mediation project* financed by the Finnish Ministry of Education and the Finnish Slot Machine Association. At the beginning of the year 2009, there were 308 schools taking part in the project (elementary schools, secondary schools, gymnasiums, and vocational schools). Altogether 6.000 pupils have been trained as peer mediators and 1.200 adults as supervisors. During year 2008 over 7.500 cases were mediated throughout the country.

The purpose of peer mediation is to lessen dysfunctions in the school by improving the pupils' communication skills. The idea is to create an atmosphere where conflicts are seen as a part of every day life and their resolution more as a positive challenge than a difficult and unpleasant task.

Peer mediation follows a specific uncomplicated model. In this model pupils are trained as mediators who then mediate the conflicts of slightly younger pupils. During the mediation, the parties get to tell their side of the conflict and describe their feelings and think about different solutions to the conflict. By following the model, the parties and the peer mediators reach the point of making an agreement. The implementation of the agreement is subsequently followed up.

A peer mediator in Finland always has the support of a group or a working group of two adults in the school. Before peer mediation is started at a school, training for the whole staff is organised. During the training, all the staff members get to discuss the school's atmosphere and the possible disturbances in it. It is also an occasion to discuss what cases are best suited for mediation and on what grounds cases will get referred to mediation. Also parents are informed about the project. In cases of more serious violence an "expert mediation group" made up of adults create a strategy for how peer mediators should react to a more serious or long term case of bullying, if it is mediated.

Early intervention is an important part of peer mediation. Pupils in schools are trained to search for solutions and look into the future instead of making accusations and seeking to place the guilt. The goal is to give all the pupils a constructive tool for intervening in situations that are seen as bullying or otherwise hurtful. Peer mediators have been trained to go through the main principles of victim offender mediation. Most importantly mediation should be impartial, confidential, voluntary and solution-oriented instead of punishment-oriented.

According to results of the surveys conducted in 2005 and 2006 by Maija Gellin (see Gellin 2007), 86% of the cases were verbal or physical offending. Both the leaders of the peer mediators (teachers or other adults) and peer mediators described peer mediation with positive terminology. They saw it as method that is working well and bringing constructive atmosphere to schools. Teachers also gained skills that could be useful in teaching and class management. From the peer mediators, 90% regarded their task as a mediator as important and meaningful. One of the worries was how the method of peer mediation could be used more widely at schools.

Also satisfaction of participants was generally very good. According to the surveys (Gellin 2007) the participants shared the opinion that the main principles of mediation were respected in the mediation sessions.

Peer mediation often leads to settlement. According to the survey, 95% of the cases led to an agreement and 88% of the agreements were kept. Most of the agreements include a promise to discontinue unwanted behaviour.

2.2.4 Does peer mediation reduce violence?

Peer mediation appears to be a promising strategy for improving school climate. A well conducted peer mediation programme can be successful in changing the way students approach conflicts. These specific practices and skills help individuals understand conflict processes and empower them to use communication and creative thinking to manage and resolve conflicts fairly and peacefully.

As stated above, peer mediation in Finland has had a positive impact on school discipline and curriculum. The use of mediation has decreased the need of interventions by teachers and principals. However, there were big differences between schools in adapting peer mediation in the school environment. Not all schools were ready to accept the new way of dealing with conflicts. Furthermore, in some schools teachers did not trust pupils' skills in resolving conflicts, and thought that they could do it faster and better themselves.

Despite of good results in Finland, globally there is limited research conducted on the impact of school mediation. While some programmes have been found to be effective, there seems to be no evidence on the possible long term effects on the school climate. Systematic reviews of peer mediation show non-significant or weak effects (Gottfredson 1997). Perhaps the most important finding has been increased self-esteem of mediators themselves. Students, who are selected, trained and go through the experience of being a mediator, seem to gain most from the *mediation programmes*. In fact, a possible danger might be that students who are well disciplined and good in school from the beginning on will be chosen to be mediators as an award for their conduct. This can increase the gap between students performing well, and those doing not so well.

Furthermore, it can be questioned whether peer mediation is a suitable method for more serious cases of bullying, where the victim is exposed, repeatedly and over a longer period of time, to negative and domineering actions with a clear purpose of hurting the victim. Handling this type of strong power-imbalances requires exceptional skills and life-experience from the side of the mediators. Peer mediators, who are only slightly older than the parties to the conflict, might not be able to distinct themselves sufficiently from the influence of the bullies. Therefore it might be safer to leave these more serious conflicts to be handled by adults.

However, despite these few doubts peer mediation seems to be a promising method in the field of crime prevention in its attempts to decrease tensions and to improve the studying climate and well-being in the school environment. If implemented correctly, peer mediation can enhance learning and encourage young people to become responsible and empathic. Perhaps, in the future, peer mediation can help schools in creating a safe and comfortable studying environment and solving the paradoxical relation of positive school achievements and negative school atmosphere in Finland.

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2.3

Resolving School Conflicts through Peer Mediation in Sweden

2.3.1 Introduction

The use of peer mediation in Sweden is only starting up, although Norrbotten as a county has been widely applying it since 2004. Peer mediation work is not carried out all over the country homogenously. In Norrbotten, a peer mediation scheme was set up at Luleå Technical University in cooperation with the mediation and negotiation courses held there and with the Association of Local Authorities in Norrbotten. Peer Mediation in Norrbotten became the first organization devoted to the use and promotion of mediation in schools in Sweden on this scale. Today approximately 125 schools and have more than 360 mediation coordinators are involved in the work. In 2010 these will be providing a 15-hour-long training session in mediation to over 1.500 students. All other students at these schools will participate in a day-long workshop that will give them an insight into what mediation is and how it can help them resolve their conflicts.

2.3.2 The Peer Mediation Project in Norrbotten

The legal bases for the work are the UN *Convention on the Rights of the Child*, the Swedish school law and various school circulars. There is no act in particular that promotes peer mediation or any other conflict resolution method and/or any method to counteract bullying at schools in the Swedish legal system. The law only states that the individual schools are obliged to carry out work in this area and should help youth to become good democratic citizens.

In the Nordic countries restorative justice and mediation are heavily influenced by Nils Christie's article entitled "*Conflict as property*" (1977). On this basis, the mediation movement in Norway created "*Konfliktråden*".³ Peer mediation in Sweden is heavily

³ Conflict Councils.

influenced by the Norwegian system and philosophy. The five principle that have evolved from Christie's article are that mediation should be carried out freely, peacefully, confidentially, facilitatively and restoratively (see the text highlighted).

1. Freely – all participants are there freely and should participate and interact with each other in a free manner all through the mediation process. This is the core principle.
2. Peacefully – all use of force, threat and other means of pressure are prohibited. Mediation is a peace movement at a grass roots level. The intention of mediation is to transform the conflict before it escalates any further.
3. Confidentially – Confidentiality has to be observed before, during and after mediation. Nothing said during a mediation session should be used against a party outside the mediation process. Confidentiality is also a tool for creating an open, trusting and honest environment. The exception being when the law demands a notification to the social service if there is a risk that a youth is at danger.
4. Facilitatively – In accordance with Nils Christie's thoughts, the mediator should be a layman, a peer to the parties and not a professional. The mediator's roll is to be a facilitator. The mediator should not offer solutions, evaluate or give judgements. The mediator should be neutral and unbiased, leading the process and not the result.
5. Restoratively – The transformative aspect of mediation has a restorative effect. Mediation should be focused on the relation between the parties and not the issue.



Funding is always an important question when it comes to this kind of work. Who finances the programme will always have an effect on the work carried out. In Norrbotten, fortunately there could be arranged a joint funding collaboration between all the parties who had an interest in launching a *peer mediation project*.

Peer Mediation in Norrbotten has been financed by: _____

- the County Administrative Board in Norrbotten;
- the County Health Board in Norrbotten;
- the Association of Local Authorities in Norrbotten;
- Luleå Technical University;
- the 14 Municipalities of Northern Sweden.

The funding bodies and organisations (see above) all have different reasons for participating in the project. For the municipalities and the Association of Local Authorities it has been a good way to ensure that they fulfil their responsibilities and legal obligations. The County Health Board has seen it as a way to provide better public health services. The university has seen it as a good way of being involved in the community surrounding the university and as a natural extension of the courses in mediation and negotiation. The programme has also been lucky to get two grants. One from the foundation of the Swedish Savings Bank and the other from Skandia's foundation "Ideas for life".

Peer mediation in schools is a form of conflict resolution were the students themselves learn to handle and resolve their conflicts in a way that encourages recognition, empowerment and belief in themselves and others. The mission of peer mediation is to transform schools into safer, more caring, and more effective institutions for learning.

In peer mediation a peer helps the parties to talk and listen to each other and hopefully also to better understand each other. A peer mediator is a neutral, objective and non-judgemental third party that provides a forum for the parties in conflict to have a structured conversation. In schools peer mediators always work in pairs, both in order to help each other and for the comfort of the parties participating in mediation – to ensure that both (all) the parties have a peer supporting them there.

The purpose of the project has been to:

- transform the working environment for everyone in the schools – for the better;
- to prevent and eliminate bullying at schools and to help bullies to change;
- to be a fast and cost-efficient conflict management program – cost-efficient not only in terms of money, but also in feelings and needs as well;
- to teach students and everyone else what feelings are and how they can be handled;
- to teach the students how to solve conflicts themselves without having to resort to violence;
- how to distinguish between a person and his/her actions.



Through the work with mediation young people are encouraged to take charge of their own problems and not to let the grownups in the school "steal" their conflicts. The aim is to help students and teachers see conflicts in a new and more positive way. It is strived to teach students, teachers and others the skills to resolve conflicts peacefully and educate the community in a new way to perceive, handle and resolve conflicts. Students, teachers and others are provided with the knowledge, experience and the



materials necessary to integrate a new way of conflict resolution into their professional practices, their curricula, and their personal lives.

2.3.3 Training

Training everybody at the individual schools has been a very important part of the work. The school management is provided, through several meetings and written information, with a good foundation for deciding on whether they would like to implement peer mediation in their school. It is also arranged follow-up meetings several times a year. For our work it has been important to train all of the school staff, and not only the teachers. The cleaning staff, the canteen staff, the caretakers, etc. are also invited, since they meet the students in different situations and at different times than the teachers do. They see the students in a different light, and the students see them so too, mainly because the students are not in a position depending on them.

Duration and frequency of trainings

Whole school	½-2 days
Mediator coordinators	3×2 days
All students	1 day
Peer Mediators	1 day + 15 h
Peer mediator meetings	1/two weeks
Networking conferences	2/year
Principals, school leaders and politicians of the municipalities	2-4 times a year

The trainings at the schools are arranged in collaboration with the school so that it adheres to their needs.

2.3.4 Conclusions and consequences

Since the start of the peer mediation programme two reports have been prepared within the framework of the programme, and one licentiate thesis as well as three independent research reports have been put together. These include both surveys and interviews. One of the results of the project is that peer mediators say that they understand so much more about their school community and that they are now able to help if they notice that someone is always on his/her own or if two pupils are having a dispute. The mediation coordinators say they feel more confident about handling conflicts and that the number of conflicts has decreased. Peer mediators have acquired a higher self esteem and have developed a greater respect towards other individuals.

Parents were initially sceptical since problem solving traditionally lies with the grownups. But after further information and work at the different schools they has come to see that in fact it is a way for the schools to assume their responsibility in teaching youngsters good conflict-solving skills and democratic values. The difficulty of convincing teachers to let go of the conflicts has been one of the major problems while implementing peer mediation. Time as well as explaining the way peer mediation works has helped us a lot in overcoming this obstacle.

The system of schools in Norrbotten has undergone major changes in recent times, the number of schools decreasing from 310 to 179. This has restricted the possibilities of fully implementing peer mediation in the county. One of the positive outcomes of the implementation of peer mediation has been that although the number of conflicts has been constant, the types of conflicts have changed. They are not as severe as before, due to the fact that they are spotted much earlier on and the attitude towards conflicts has also changed. Since the conflicts are spotted much earlier, there is also much less bullying. Even if bullying does occur, some schools have achieved very good results through mediation. Another positive aspect of the project has been the really good cooperation with victim offender mediation services that evolved parallel to the programme. And finally, the schools feel that the school staff has now got more time to deal with activities other than conflict resolution.

We believe that peer mediation is a peace movement at grass-roots level!

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2.4

Restorative Justice and Re-integrative Self-esteem: Romanian Good Practice

2.4.1 Developments in restorative justice in Romania

The implementation of restorative justice practices in Romania followed, in general lines, the directions that we find in most EU member states. This situation is not random; the harmonization with the *communitarian acquis* was an integral part of the negotiation process for the country's accession to the EU. In the context of this process, the regulation of alternative strategies was an obligation that Romania assumed within the justice system reform and within the implementation of the EU standards of Justice, Freedom and Security (the third communitarian axis).

As in other European states, in Romania, the practice of alternative conflict resolution was implemented within the juvenile justice system reform process, by means of experimental projects. The initial intention was that victim offender mediation was going to complement the framework of alternative institutions (probation) developed by the project financed by the British department for international development during the period between 1998 and 2004. The objective of the institution of probation was to increase the flexibility of the sanction system applied to children in conflict with the penal law, to reduce their contact with the criminal justice system and to facilitate their reintegration with the community (Balahur 2007, 2009). During a six-year period, this project contributed to the reform of the juvenile justice system in Romania by implementing the *UN Convention's* standards concerning children's rights. Also within its framework, in the period between 2002 and 2004, the first experiments with victim offender mediation were carried out. They aimed at deepening the juvenile justice

reform process and at creating the socio-juridical institutions mentioned by the convention in Article 40, paragraph 3b enabling the resolution of conflicts in which children are involved "without resorting to judicial procedures".

Victim offender mediation experiments complemented the alternative conflict resolution practices initiated in the year 2000 by the Commerce and Industry Association in Romania in commercial and civil cases. For this purpose, the Association set up a specialized body, The Centre for the Mediation of Commercial Disputes, which, in 2003, published the *Rules on the Mediation Procedure*.

Therefore, regarding the promotion of mediation in Romania, as in other European states, initiatives of civil society and academic circles held a primary role. The legislation concerning this alternative strategy for conflict resolution had done nothing more than to legitimize an informal practice developed by different private agencies within the framework of different experimental projects. "The law of mediation, as I was recently stressing upon, is not an exception to the observation according to which the reform of the justice system was promoted as a result of the pressure of the civil society and international obligations. It legitimated the existing informal practices that were developed by non-governmental organizations. This normative act also represented an answer to the requirements of European integration that imposed an improvement in the quality of the justice system, especially through better case management, by reducing the number of files, as well as by adopting alternative conflict resolution strategies." (Balahur 2007)

2.4.2 The legislative framework for the implementation of alternative justice programmes in Romania

The reform of the justice system in Romania assumed, as an essential requirement in the process of harmonization with European practices in the field, the elaboration of a legislative framework that was adequate for the implementation of alternative conflict resolution practices.

Starting with the year 2000 violence against children and women has become a priority problem within the wider process of reforming the social care system and the protection of children's rights (Balahur 2008). With this background, *Act 217 of 2003 on the Prevention and the Fight against Domestic Violence* was adopted. The philosophy on which this normative act is founded aims at following restorative strategies both for solving family conflicts and for their prevention (among husband and wife, among parents and children). In chapter V of the *Act 217 of 2003* (secs. 19–22), the possibility of mediation in cases of domestic violence is regulated. The mediation process can be accomplished either by the Family Council, or by an authorized mediator. By transferring the competence of solving the conflict to the Family Council, this normative act opens the possibility of implementing

Alternative practices for conflict resolution could contribute to solving the problem of the excessive caseload of courts. The statistical data show the constant growth in the number of files solved on a yearly basis by judges. If in 1990, 1.513 judges solved 589.660 civil and penal files, the average being 390 files per judge, in 2003, 3.557 judges solved 1.453.776 files, which means, on an average, 409 files per judge. With such an excessive caseload, the efficiency of the Romanian justice system was one of weakest in Europe, resulting in close surveillance by the European Commission.



some practices with a marked restorative character which are close, in many ways, to family group conferencing. The Family Council is defined, in Section 21, as a non-governmental association without juridical status and constituted of the family members who have full juridical capacity. The initiative to carry out counselling through the Family Council can be made by one of the members of the family in question, or by the family care social worker.

Unfortunately, these provisions of the act are not applied. As the statistical data of the competent authorities show, the parties involved in domestic violence continue to turn to the courts instead.

A great diversity of initiatives developed within the framework of criminal justice have become associated with the values and principles of restorative justice because of their contribution to the recovery of victims of crimes and the reparation of the material damage caused by antisocial behaviour. In Romania, the typical example for this situation is given by the practice generated by *Act 211 of 2004 on the Protection of the Victims of Crimes*. The activity of assistance and psychological counselling of the victims of crimes, including the victims of trafficking, became the competence of the probation services. The mentioned law came into effect on 1 January 2005, creating the basis for setting up and for the operation of a unified structure offering assistance to the victims of crimes and at the same time supporting social reintegration programmes for the persons who have committed criminal deeds. The statistical data provided by the specialized department from the Ministry of Justice however show that in practice, the number of victims that have requested psychological and juridical assistance remains, still, low.

Mediation as an alternative conflict resolution strategy for civil, commercial, family and penal conflicts was regulated by *Act 192 of 2006 on Mediation and the Activity of Mediators*. It was adopted, with many difficulties, and was closely monitored by the European Commission in the context of the reform of the justice system in Romania, which included, among others, the reduction of the overloaded role of courts, the harmonization of Romanian law to European standards and rules in the field of alternative conflict resolution (hereinafter ADR) and the reduction of corruption.

According to this normative act, "mediation is an optional arrangement of informal conflict resolution carried out with the support of a third person called the mediator, and conducted respecting the principles of neutrality, impartiality and confidentiality." Both physical and legal entities can decide on resolving a conflict by way of mediation, even if a trial has already been started, but before any final sentence has been given. Section 6 from *Act 192 of 2006* imposes on the judiciary and arbitrary organs an obligation to inform and advise the parties on the possibility of referring the conflict to an authorized mediator. The types of conflicts that can be referred to mediation, according to the stipulations of legislation currently in force are of civil, commercial, family and penal nature. The right to legal assistance and translation (if necessary) must be ensured during the whole procedure of mediation.

The draft on mediation law submitted to the Romanian Parliament

stipulated the possibility of both public and private organisations as well as private persons – so authorized by law – to carry out mediation. The adopted act (*Act 192 of 2006*) modified this rule. According to Section 22, mediators can carry out their activities in associations based on agreements of cooperation or under the aegis of non-governmental organizations. As a consequence, in Romania, mediation is possible only within private arrangements. The mediators' activity is coordinated by a National Council with nine members who are all elected for a period of two years. The Council started its activity in August 2007 and initiated the process of accreditation in October, 2007. This legal framework generated a quasi court system which, as I have already observed elsewhere (Balahur 2007), is a minimalist approach to restorative justice.

Presently, in Romania, the practice of alternative conflict resolution – mainly in the form of mediation and based less on the real strategies of restorative justice – is still in its primary phases. As a consequence, beyond some rhetoric, no systematic evaluation has been carried out regarding its efficiency and effects.

The implementation of restorative justice practices has been developed within the frame of different projects promoted mainly by alternative research and organisations of civil society.

2.4.3 Re-integrative self-esteem: theoretical background

2.4.3.1 Restorative justice and re-integrative mechanisms

The last two decades witnessed the worldwide growth of restorative justice practices. From an initial stage when RJ dealt with petty crimes committed by children and young people, nowadays, RJ practices are implemented in relation to violent crimes and even in the case of large scale violent conflicts.

In the small scale experiment described below we chose to use restorative practices (restorative circles mainly) in order to re-mould the social and psychological environment in some educational settings so as to curb and prevent violence and bullying in two vocational high schools.

Our method of restorative justice was determined by the fact that lenient means of controlling children's and young people's violence had a better and deeper effect on the long term, as also evidenced by various empirical analyses (Walgrave 2002; Bazemore and Schiff 2005; Bailleau and Cartuyvels 2007; Littlechild 2007).

John Braithwaite's influential theory on re-integrative shaming has so far provided an interpretative framework for restorative justice. According to Braithwaite "shaming [...] is a means of making citizens actively responsible, of informing them of how justifiably resentful their fellow citizens are toward criminal behaviour which harms them" (Braithwaite 1989: 12).

Braithwaite considers that there are at least two kinds of shame. One that is identical with stigmatization and a different one that supports people in conflict with criminal law to re-integrate into the community. Only "re-integrative shaming controls crime; stigmatization pushes offenders toward criminal subculture. [...] Shaming is the most potent weapon of social control unless it shades into stigmatization" states Braithwaite (Braithwaite 1989: 13–14).

Some of the overviews of the re-integrative shaming theory tried to identify the "generative mechanisms" that "might produce an observed association" between RJ procedures and the subsequent "restoration" of the victim, the offender or the community (Bottoms 2003: 93). In line with this testing of the validity of the theory, we have observed that even if Braithwaite considers that re-integrative shaming is more appropriate for communitarian societies he nevertheless uses shaming in a uniform sense, identical over cultures and places. In the meantime one should notice that "shaming", even in its positive form, is not unproblematic, being sometimes associated with humiliation, and therefore with criminal subculture. In his later analysis on "shaming" Braithwaite prefers to speak about "shame-guilt" emphasizing the aspects of taking responsibility for wrongdoings and apologizing to the victim as important mechanisms of the restorative process. Only this type of shame can be perceived as constructive shame. As observed by Nussbaum, only this type of shame can lead to change through critical self-evaluation (Nussbaum 2004: 241).

Shame, even in its positive, constructive form, has important cultural connotations meaning different concepts in different cultural contexts. In our research with children and young people in conflict with the criminal law (in Romania) we have noticed that the motivation for change and desistance from crime is more complex and is not (only) connected with the shaming experience. At the same time, our research



on children's life style has shown that shame does not play an important mechanism regulating morals and behaviour anymore. These conclusions are in line with similar empirical studies on children and young people's values and life style.

Based on these observations and outcomes, in the experiment carried out in order to re-mould the psycho-social environment in two vocational high schools burdened with violence, we have added some complementary dimensions aiming at making our intervention strategy more efficient both on a short term and on the long run.

We considered that the triad dignity-self-efficacy-self-esteem provides an important source of desistance from delinquent behaviour and violence as well as for the re-building of the educational milieu. Dignity understood as a complex relationship based on the reciprocal recognition and respect of the rights and obligations of both pupils and teachers could be reinforced through the development of self-efficacy and self-esteem.

Dignity remains an empty, abstract expectation as long as it is not built on self-efficacy and self-esteem. In our research strategy we took into consideration and checked with the students, if and how they enjoy the rights regulated by UN *Convention on the Rights of the Child*. In our preliminary meetings with the pupils involved in the research we paid special attention to the right of participation (Art. 12 of UN *Convention on the Rights of the Child* 1989) in school and classroom decisions. The outcomes of the dialogue and interviews we took revealed that for the 50 boys in our sample the idea of having rights and of exercising them were totally new.

Within the economy of our research self-efficacy is understood as the interface between individual and the group (or micro-social structures) and it means, after Bandura, the person's belief about his/her "capability to produce designated levels of performance that exercise influence over the events that affect their lives" (Bandura 1994: 71).

We based our exploratory research on the hypothesis that the main sources of violence and aggressive behaviour are associated with the above mentioned concepts. The continuous experience of humiliation, pain and oppression experienced by most of the individuals in our exploratory research both in the family and at school contributed to the development and reinforcement of violent-aggressive patterns of behaviour as every day life strategies (reactions) of survival.

Among the sources of creating and strengthening self-efficacy Bandura emphasizes the importance of role models, the family and the school. For the purposes and objectives of our research we chose the role models and the school.

In our model of analysis self-esteem complements self-efficacy. It represents the other side of the coin, that is, the social reaction/answer that the activity of an individual "counted as a worthwhile contribution to society" (Honneth 1995: 129).

2.4.3.2 Brief description of the research

The aims and objectives of the research were to develop and implement a strategy able to curb and prevent – in the short term and on the long run – the violence and aggression in schools and to re-mould the psycho-sociological climate in order to promote studying and education. In the meantime, we aimed at gathering empirical evidence on how a restorative approach could contribute to the rebuilding of the social bonds even if they have been seriously affected by hate, humiliation and pain.

The operational objectives of the research

- Contributing to the development of the pupils' self-efficacy and self-esteem.
- Contributing to the better observance of the rights of the children in educational settings/schools.
- Raising awareness of both the teachers and the pupils on the role restorative practices can play in conflict resolution and prevention.
- Training both the pupils and the teachers on how to set up and run a restorative circle.

A concrete example

Our Research Centre for Social Management and Community Development was asked by the local educational board to help them solve a situation they had been confronted with for over three years and which threatened to become "normal" in two vocational high schools in the county of Suceava. The two high schools were confronted with a massive fluctuation of teachers due to the violence and bullying going on among pupils. The teachers appreciated that their physical integrity and mental health were in danger and after two weeks of permanent incidents with the pupils, they all resigned and two classes remained without teachers. This was the moment the local educational body asked for our advice.

In our later dialogues and interviews with some of the pupils in the two schools, we learned that it was sort of a competition among the two schools on which is more successful in "convincing" the teachers to leave. A 17-year-old boy said, that because learning was the "last thing in the world" that was happening during their classes and in their high school, "the main aim of our intimidating actions was for the teachers to leave".

Sample description
 Our research integrated two groups of pupils from the two vocational high schools (from the county of Suceava, the total sample included 50 boys). Among them:

- 35 had one unemployed parent;
- 10 had both parents working abroad;
- 5 had both parents unemployed;
- 20 were under probation.

Research strategy and research plan

Our research was designed to be carried out over a period of two years. In the first year, 4 programmes were implemented:

1. Within the framework of the *role models programme* 50 pupils from the two vocational high schools (after a one month period of training with the researchers in the research), were moved for one semester, upon request, to the corresponding classes of two other high schools who acted as host schools in our research. The host schools were ones recognized for the good performance of their pupils as well as for the programmes they organized for pupils and their pleasant environment. Joint cultural and sport activities were carried out every weekend at one of the four schools involved in the role model programme.
2. The *conflict-free school programme* was aimed at familiarizing the pupils and teachers in the two vocational high schools with restorative justice practices. The participants of this programme were trained on how to organize and run restorative circles and how to use them both for solving as well as for preventing the

conflicts and other problematic issues that could appear in everyday life of a class or school. At request, this programme was extended to the teachers and pupils of the two host schools involved in our research.

3. The programme called “*My ideal school*” was carried out mainly at the initiative of the 50 pupils moved to the host schools in our research. From the feedback we had from the first programme, the pupils appreciated that if their vocational schools looked “more like the other ones, clean and very well maintained by the pupils, with green areas and flowers, sports areas etc., the environment would become more friendly and favourable for learning” (opinion of a 16-year-old boy). The pupils in the research appreciated that in order to be able to host cultural and sports activities at their school, the image of the school had to be improved. With limited financial support and mostly voluntary work, the 50 pupils (and later other 30) built the first green area of the school. Then, they continued with the inner environment of the school and again with minimal financial support they managed to repaint the walls of three classes.

4. *Children’s rights* was the fourth programme implemented in the two vocational high schools. It consisted of providing training for both the 50 pupils and the teachers on the UN *Convention on the Rights of the Child* as well as in setting up councils of pupils and teachers (with representatives of parents) where the main decisions affecting the pupils were taken.

In the second year all the four programmes were running as part of the normal activities of the schools and were only supervised very generally by the research team.

Evaluation and outcomes

The final evaluation of the *research project* demonstrated important changes and positive outcomes. Among them we briefly enumerate the most important ones below.

- At the end of our two year research the violent events (conflicts) in the two vocational high schools dropped by 50%. They appeared mainly in the classrooms with pupils coming from other schools. The violent incidents dropped down in both schools involved in the research and not only in the classes integrated in the research. The final evaluation demonstrated that even the pupils who were not involved in the research developed a sort of pride that their schools became “important” and was known not only for the “bad things that are happening there” (18-year-old girl) but also for their constructive initiative.
- The pupils trained in restorative practices (restorative circles) became in their turn trainers to other pupils, so that restorative practices became the normal way of dealing with conflicts,

potential conflicts and any other problematic issues.

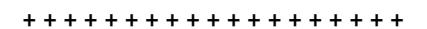
- The practice of running restorative circles became part of the organizational strategy and culture of prevention and conflict resolution both for the pupils and the teachers.
- The former leaders of the violent events became leaders of the change. They became the core group of promoters of the values and practices of a school that is “free of violence” and “green”.
- Our final evaluative interviews with the 50 pupils involved in our research registered an important change in their attitudes towards school, teachers and peers. All the 50 pupils also had a personal project which included graduating from high school and then either finding a job or getting a university degree. They mentioned that for them it was really illuminating that their relationships with each other and with school staff could completely change if they restored the observance of rights and obligations (i.e. dignity) and if, instead of violence, cooperation and restorative practices were relied on.
- In terms of self-efficacy and self-esteem the pupils declared that before being part of this research they used to consider themselves as “nothing” (a 16 year old girl) but in the end they all had a strong desire to prove that they could become “someone” and abandon violence and unlawful behaviour.
- The fluctuation of the teachers as a mass phenomenon stopped.
- The educational performance of the pupils involved in the research became better. Absenteeism also decreased and ceased being the “usual practice” for the pupils involved in the research. A positive impact was registered for all the pupils participating in the third cycle.
- The practice of the councils of pupils and teachers also became part of the organizational culture and practices which contributed to the better observance of children’s rights and to their participation in the decisions that could affect them.
- The activities carried out within the project had a multiplying effect. At the request of the local educational authorities, training sessions on restorative justice practices were organized for the pupils and teachers in five other high schools in the county of Suceava.

2.4.4 Conclusions

The outcome of the research project showed that it is possible to eliminate violence in schools if appropriate strategies and practices are implemented and if both the pupils and teachers are involved in the process of change.

Our exploratory research demonstrated that restorative justice practices could contribute to re-moulding the organizational culture and values and to re-building the social bonds among pupils and among them and teachers.

The effects of restorative practices and their impact on preventing and curbing violence are considerably improved when they are associated with approaches aiming at re-building dignity, self-efficacy and self-esteem of the pupils and in a wider sense of victims and offenders.



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2.5

Resolving School Conflicts: “Safe School” Initiatives in Hungary

2.5.1 Introduction

In the Hungarian Ministry of Justice and Law Enforcement, in addition to drafting and giving opinions on laws, there is an opportunity in accordance with the spirit of public administration as a service provider and as a promoter of innovation, to carry out activities that are still relatively uncommon in Hungary: issuing calls for proposals and managing the implementation of local programmes.

It is an important part of the job that through the coordination and the monitoring of the programmes we use the results and the practice of the best pilot programmes to improve the justice system, the social services, the prison system and the education system and to ensure that the individual activities conform to the ideal model. Thanks to our special position, as opposed to most observers, we have an insight into social developments, the concrete events of practice and therefore into school violence and safety issues (although we do not have the possibility of analysing these data in depth).



2.5.2 The emergence of violence in Hungarian schools

According to relevant literature of the field, violence between children is not exclusive to the 21st century. However, in Hungary, school violence only came into the centre of attention in 2008.

In a central, partly ghettoised district of Budapest, a 9th grader threatened a teacher with a tap and imitated kicking movements against the teacher. A classmate recorded the scene with a mobile phone, uploaded the video to a video sharing site, and television channels found the video.⁴ The media called the incident “teacher beating”. It is true that the student threatened the physics teacher, but the video did not show any physical harm being done. It was, however, discovered in the court procedure that one of the kicks actually hit the teacher (this did not appear on the video). It is clear that the event must have been humiliating for the teacher, regardless of the classification of the event under criminal law and of whether there was physical contact. We must take these events into account, regardless of the fact that there was no actual beating and that the media later learnt that the teacher had not been particularly fair to his class and that there had been a number of serious conflicts between the class and the teacher. Therefore both this particular case and the more and more general and more and more public phenomenon of school violence must be dealt with.

The media has covered a number of similar cases. The public’s reactions were quite extreme. Although the Internet sites’ comments should not be considered a representative survey, it can be concluded that the large majority of those expressing their opinions believed that the minimum measure should be that all aggressive pupils are expelled. A lot of the Internet comments showed discriminatory and stigmatising attitudes according to which school violence is an ethnic issue. The opinions of politicians and experts were mixed. One of the most influential trade unions of teachers demanded stronger protection for teachers, even protection under criminal law and asked the legislators to make it easier for schools to expel pupils. Many politicians backed these demands. For instance, in the “teacher beating” case, the mayor declared that the student threatening the physics teacher would not be granted admission to any school in the district. As opposed to these solutions, the Ministry of Education (the main organ of professional leadership) chose real solutions to the problem, that is, solutions focusing on integration.

Unfortunately, it is typical that school violence only became an issue of public debate when a video showing evidence had been broadcasted on the Internet. It is even more unfortunate that cases of violence between students and cases that are well-known by professionals but never received publicity were not enough for the profession to start some form of serious debate over the problem.

Debate only started and solutions were only demanded after a public outcry. And, of course, only the serious cases received publicity, albeit in increased numbers after the phenomenon had

become publicly known. On the basis of these cases, the citizens rightfully believed that children had suddenly become particularly violent when the truth was that the frequency of such incidents had been constant. According to the relevant studies (such as the report entitled “*Health Behaviour of School-aged Children*”)⁵ and latency surveys, the number of cases of violence has not grown over the past few years, and the results of the studies suggest that the frequency of such cases in Hungary is typically below or at the level of the European average. According to criminal statistics, the level of child and juvenile crime has been stagnant lately (however, the size of the age group has become a bit smaller). Nevertheless, some data taken in 2008 should be mentioned here. According to these, children below the age of 14 (especially 13-year-olds) became victims of violent crimes or disorderly conduct much more often than previously. However, as minor crimes very often go unreported, as the institutional background is inappropriate and as presumably there have been more reported crimes and law enforcement agencies have paid more attention⁶ due to the public scrutiny, it is questionable whether the crime rates have actually grown. It is possible that the active public attention and personal sensitivity as a consequence “contributed” to the growth of school violence in the statistics.

In conclusion: a year ago, things started to change. Dialogues and debates began. What was accomplished?

2.5.3 Proposed solutions

After the brief description of the current situation, I present the initiatives made and accepted in the interest of improving school safety and in order to resolve conflicts at the levels and with the assistance of the state, local governments, schools and NGOs. I will focus on those initiatives and practices that are in line with the *National Strategy for Community Crime Prevention* (2003), which is the main document containing guidelines on crime prevention measures in Hungary. Therefore, in spite of the negative tendencies, I still support complex interventions of youth policy that are built on crime prevention experience (as recommended by the crime prevention strategy), and reject measures that are founded on ideas of repression and segregation.

In this part, I will present good practices and positive examples that actually work; and I will not mention – as I do not consider them suitable for reaching the goals specified in the strategy – attempts like installing security cameras in schools, introducing stricter criminal law regulations or rearranging communities.

2.5.3.1 Government reactions

The measures of the Ministry of Education

It is an important result that the government took immediate steps in the particular case. The Ministry of Education established the “School Safety Commission”. Its members included educational experts, teachers, representatives of parents’ organisations and ministry officials from the affected ministries. Crime prevention officials also joined the commission.

According to the commission’s *Statement of position* (2008), the professionals, the parents and the students have shared responsibility for the emergence of violence in schools, and they can only solve it through joint efforts. The statement established that the laws governing the operation of schools are appropriate, but they need to be enforced and given real content for effective implementation. Coordinated efforts are needed, and for this purpose schools must be more open to external initiatives. For instance, they must accept and promote the role of the child protection early warning system’s⁷ members in schools and they must cooperate with parents and NGOs.

The majority of the commission members were convinced that only educational measures will offer a real solution. The commission made a number of specific recommendations. I will discuss those that are relevant from the aspect of crime prevention, that is, those proposed measures that may help reduce and handle violent cases, even on a short term. The commission suggested collecting good practices, enhancing the school’s child protection and education functions and developing a

⁴ See at <http://www.youtube.com/watch?v=vz0TBz2n98andandfeature=related>.

⁵ See at <http://www.hbsc.org/countries/hungary.html>

⁶ See the report on the criminal situation and the measures implemented earlier at <http://www.bunmegelozes.hu/index.html?pid=1719>.

⁷ The members of the child protection early warning system are – under Section 17 of Act XXXI of 1997 on the Protection of Children and on the Administration of Guardianship – health service providers (the school nurse service, general practitioners, paediatricians etc.), family support services, institutions of public education (schools, education counsellors etc.), the police, public prosecutors, courts, and the services of the Office of Justice (such as the probation service or the victim helper service), refugee authorities and organisations, non-governmental organisations and churches. The members of the child protection early warning system must notify child welfare agencies if a child is in danger. These persons and organisations must cooperate and inform each other for the purpose of preventing and eliminating dangers to children.



professional cooperation with a psychologist. The commission supported the integration of education institutions and the improvement of cooperation between such institutions. The commission considered it indispensable to enhance the role of student self-governments and community forums as decision-making forums for students. Organising sport and art events is also a great method for preventing violence. The commission also emphasised that conflict prevention and violence reduction procedures must become daily practices and therefore it recommended the organising of individual programmes for spreading conflict management techniques and practices in Hungary.

On the commission's recommendation, the Ministry of Education started the *Safe School Movement* with one of its subordinate organs in control. Within the framework of the movement, elementary and secondary schools could submit proposals and win funds when they presented good practices for the prevention of violence. Regional conferences were organised and participants heard presentations on good practices and were shown award-winning proposals. A helpline was set up to give advice and help to students and parents. The Ministry of Education succeeded in reallocating resources to fund the establishment and expansion of a network of school psychologists in micro-regions. A law was amended to allow students, parents, teachers and other affected persons to participate in the conflict management procedure or in the therapy conducted by school psychologists.

The most significant project that produced results immediately was a three-year programme that was aimed at spreading alternative conflict resolution in vocational schools, the most disadvantaged section of the education. The programme was managed from a professional aspect by the Education Mediation Service (*Oktatásügyi Közvetítői Szolgálat*); this organisation has been providing free mediation services for five years to those who want to settle school conflicts amicably, through mediation. The goals of the programme were the following:

- to improve the relationship between schools and parents in vocational schools (the target group of the programme);
- to reduce the level of violence through restorative procedures;
- to help disadvantaged students integrate in the school;
- to improve communication between schools and their environment.

As a direct service, the parties in dispute were given an opportunity to participate in a mediation procedure. Also, they were given training on techniques that the teachers and students could use on a daily basis. The project targeted the most deprived regions and offered direct and local services there.

The programme was promising and seemed to have an actual and positive content. Unfortunately, it halted and took a different direction.⁸ It would be advisable to return to the implementation of the original targets instead of just scratching the surface by organising conferences, giving titles etc., which, of course, bring more public attention and more short-term results, but these developments are not permanent.

The Ministry of Education must take action through a national programme and provide direct services to make schools safer, especially with regard to the bottom-up initiatives that have been made recently. The government should provide tangible and accessible services which can be used in everyday school life directly to the persons and entities involved in education. An actual solution will only come if the institutional culture changes and the organisation as a whole (from the janitor to the principal), including the children in particular, can be motivated to create an open, tolerant, peaceful and positive atmosphere, for instance by implementing the principles and directions originally defined by the School Safety Commission and supplemented by a large number of organisations and groups since then. Change can only be made through local, customised and complex services and not through trainings and conferences organised for those who are already open to this approach.

The measures of the Ministry of Justice and Law Enforcement

In the field of justice, it is primarily the crime prevention policy as a horizontal and cross-sector policy that focuses on the prevention of violence in schools. The main document governing crime prevention

is the *National Strategy for Community Crime Prevention* adopted by Parliament in 2003. One of the prioritised goals of this strategy is the prevention/reduction of juvenile crime.

The strategy and its *annual action plans* in general call for training on non-violent forms of dispute resolution, the implementation of restorative methods and the strengthening of tolerance in order to handle violent cases and especially to fight the children's aggressive behaviour. Although the 2003 strategy was adopted before the well-publicized cases of school violence, it stressed the importance of allowing violent youth to face the consequences of their actions and to improve their sense of moral responsibility. The annual action plans describing crime prevention tasks for each year specifically require

- the adoption of measures to prevent violence in and near schools,
- peer help programmes to overcome the children's integration problems,
- the application of mediation and restorative schemes,
- dissemination of leisure and joint parent-children projects.

In spite of the emergence of school violence, the national crime prevention organs did not change their opinion and continued to suggest that school violence may be best prevented through a constantly developed and more professional child protection early warning system, through the involvement of schools in the operation of the network and through their enhanced role in case conferences and discussions. Recommendations were made to organise open schools, that is, to make them operate through a partner network, to be receptive to bottom-up (parents' and NGOs') initiatives and to support and help arranging these. It is vital for persons and entities in the field of education to have access to assistance and professionals, they should have someone organising extracurricular activities, as well as a psychologist and a social worker available in the institution.

The tasks specified in the action plans may be carried out by organising model projects funded through calls for proposals. I will discuss one later, among the NGO initiatives. I will present the programme of an NGO because the schools and education institutions in general rarely deliver projects, while the model programmes implemented by NGOs can be applied in school practice effectively.

This description shows that the Ministry of Education's and the Ministry of Justice and Law Enforcement's efforts have shared goals. As a result, a knowledge base has been developed over the past years on the basis of which real progress can be made. A number of institutions and institutes have made recommendations with a similar content to tackle school violence. This means that the attitude of the profession is consistent. Nevertheless, no comprehensive action seems to have been taken; we have only seen fragmented measures that only scratch at the surface of the issue. This is probably because the different persons and entities do not act jointly. They make similar efforts but are isolated from each other. It would be advisable to gather the resources and use them in one consistent direction, as results cannot be achieved otherwise.

⁸ The programme was downgraded to a simple multi-level training given to teachers who applied individually. It was integrated into school life much less; therefore I believe it is much less effective. There are a lot of different opportunities to participate in trainings, but in this way the original goal of the programme seems to have been lost. See: <http://ofi.hu/mediacio-ofi-hu/ beszamololo-nszft-2009>.



2.5.3.2 An initiative of a local government

Dominó Általános Iskola is an elementary school run by the 9th district council of Budapest. The majority of the students failed to integrate into their environment and a lot of them have some kind of behavioural problem. For instance, some of the teenagers attending the school tend to say things like this: “When I’m annoyed with the teachers and the other kids, I just walk out of class. I feel stressed all the time. I leave, try to relax and have a smoke. [...] Oh yes, violence can be a solution. I beat the kid up, and that’s that.”⁹ At *Dominó*, they introduced a complex system of education and training with the assistance of the Presley Ridge Foundation. Under this system, children relearn social skills to correct the behavioural patterns they took on earlier. The staff includes teachers, family contact persons and programme coordinators who complement each other’s activities and cooperate efficiently. There is regular and active contact between the school and parents.

According to the *report*¹⁰ of a programme coordinator on the programme implemented in the school, the children in the school have very specific goals regarding their school results and behaviour. “None of the kids say that their goal is to be good. We try to make it more concrete and set rules like ‘I won’t leave my seat during class’ and ‘I’ll use a respectful tone with my classmates’, but sometimes we are even more specific. There is a student who spits a lot. This boy spits at everything and everyone in his environment. Clearly, this is an act of compensation or compulsive behaviour. The hyperactive kid’s initial goal was the following: ‘I will keep my saliva in my mouth.’ In other words, we expressed the promise not to spit in a positive form with the involvement of the kid. However, it did not work. We therefore decided to change the goal: ‘I will not spit at my mates and their stuff.’ After a seven-month struggle from September (the beginning of the school year), we achieved a result: the boy now spits much less frequently.”

If the students keep their promise, they are rewarded verbally and they receive “school money” which they can spend in a special school shop. However, consequences also follow if they cannot keep their promise. In this case, they have to make amends. The school therefore runs a system of rewards. Rewards are combined with regular (positive and negative) feedback. It should be noted that the system is not about the tangible reward, “school money”. It is rather about feedback, which means that the children are given constant feedback from the teachers, from their peers and even from themselves through regular evaluations. The professional staff of the school reported that the motivation and expectations for development have become internal motivating factors and expectations. The teachers often work with students individually and give a lot of feedback to parents. The majority of parents appreciate this.

2.5.3.3 An alternative provided by an educational institution

Zöld Kakas Líceum is a technical school of secondary education. It was founded over a decade ago. It is a “second chance” school established for students who have been removed from other schools as “they are too much to endure for the school system”. These children were forced to leave their earlier schools in spite of the fact that they have the skills to graduate and even to go to college. They are “troubled youth”, as the school calls them.



Picture 1

Art club in the *Zöld Kakas Líceum*

(Source: www.album.zoldkakas.hu/main.php?cmd=imageviewandvar1=T%E9manap+2007.10.19/S7301439.jpg)

School life is dominated by a restorative attitude. The restorative approach is the foundation of the school’s organisational culture. First the school only solved individual cases by facilitation, but later it turned out that the principle would only work if the restorative approach was present in daily life and became the number one guiding principle for the community. The *Zöld Kakas Líceum* uses the method of the “face-to-face” conflict resolution. The two pillars of the method are the training of peer facilitators on the basis of their own experiences and the handling of conflicts through the method of community conferencing. Within the framework of these methods, they organise structured conversations for those involved in minor or major conflicts. If rules have been broken, the “offenders”, the “victims”, their relatives, friends and the affected community are all invited to the meeting. The objective of the method, of course, is to help those affected talk over the effects of the damage caused and the behaviour, and to make a decision on repairing the damage and rebuilding the relationships. The community in this case has a controlling role.

Personal help and mentoring have a significant role in the school. Immediately after admission, the student is given a temporary mentor, who will help him/her during the first month in setting the annual learning plan. A month later, a ceremonial selection of a mentor takes place. The person selected only becomes the mentor if he/she approves. Later, the student and the mentor define behaviour, appearance, attendance and school result goals and targets. For the purpose of achieving these goals, the students, the teachers and the professional team sign minor contracts if necessary. There can be more than one contract in force at the same time. Each contract may be violated maximum twice; a third breach results in the end of cooperation between the student and the school. During the ten-year history of the school, it only rarely happened that the affected parties could not come to a settlement acceptable for all of them before a third breach.

These efforts are supported by a dedicated team of well-trained teachers, social workers, labour market experts, mental hygiene professionals and psychologists.

2.5.3.4 The NGO know-how supported by the Ministry of Justice and Law Enforcement The dissemination of restorative methods

The financial support gained through a Ministry of Justice and Law Enforcement calls for proposals helped spreading the methods and philosophy of the *Zöld Kakas Líceum*. Under this scheme, in a Budapest district, professionals (teachers and social workers) showing interest were granted an opportunity to learn the “face-to-face” conflict management methods.

Picture 2

The logo of the “*Ha bejön, akkor bejössz?* (If it’s cool, will you join?) – alternative programmes and conflict management methods in practice” project



Ha bejön, akkor bejössz?

⁹ From the radio programme *Vendég a háznál* (A guest at the house), 13 March 2009, MR1 Radio Kossuth.

¹⁰ An interview with Peer Krisztina in the radio programme *Vendég a háznál* (A guest at the house), 13 March 2009, MR1 Radio Kossuth.



We derived from the programme that the method regularly applied by teachers and social workers today of finding out what their clients need without the client and telling them what to do is, in most cases, a failure. For those affected, it may suggest that these professionals have no effective methods available. However, restorative methods may bring excellent results, but for this, entire institutional operations, organisations and systems need to be reformed.

Peer help for the prevention of violence

Under crime prevention policies, NGO initiatives with the purpose of reducing child and youth crime rates through social development and through enhancing tolerance and integration were granted support from 2004. All of the calls for proposals under this scheme were local initiatives implemented through the partnership and cooperation of professional organisations. A proposal for the prevention of violence in and near schools was granted joint financial support from the Esztergom-based *Fényközpont* (Lightcenter) and the *Szent Jakab Foundation* (Saint Jacob Foundation).

The first level of the programme was peer help training. What made the training special was that special target groups were involved, including children who are typically left out of such schemes. Therefore, disadvantaged youth, children living in foster homes or with foster parents, and youth on probation and under diversionary measures also participated in the work of groups in addition to grammar school and college students willing to help. The other pillar of the model project was that the peer helpers presented different types of crimes and prepared video clips on them and the related deviant patterns of behaviour. Naturally, the primary objective was therapy, treatment and community-building. The kids involved in the project wrote the script and the soundtrack and played the parts. The films were about theft, prostitution, drug trafficking, domestic violence and gambling. The project owner wrote about one of the actors: "Babunka is a 17-year-old boy. He has already been involved in various programmes, but now he is not just a participant: he is involved in the creative work. Last year, he hardly spoke. This year, he says things like this: 'In my opinion...', 'Watching the others, I realised...'. There is also a boy, Gergő, who is sixteen and in sixth grade. When he joined the programme, he made progress quickly and this was noticed by the child protection professionals, the teachers and the parents. Although Gergő has reading problems, he was first in his class to learn his part. He is the most enthusiastic of all; he is always there, even when he has no role in the scene. What is more, he started to attend school quite regularly [...]"¹¹

The films and the methodological material have been used by hundreds of professionals since 2008 in their own groups. The feedback received suggests that the films can be used efficiently for crime and conflict prevention purposes. The programme is recognised by the European Crime Prevention Network as good practice. As a result, it could be applied in everyday school life.

¹¹ According to the report by the manager of the project, Ildikó Hentes at <http://www.bunmegelozes.hu/index.html?pid=354&lang=hu>.

2.5.4 Summary

What have we achieved over the past year? First of all, we learnt that the theoretical background is there and there are quite a few practices available. The results achieved and the directions discovered should be organised and collected systematically, and they should be analysed and evaluated in order to gain a realistic idea of the current situation and to set the course of future development correctly. It is indispensable to place the emphasis on actual content. This means that the tested methods must actually reach schools, teaching staff and children and not just in theory. The various efforts must be coordinated to avoid parallel endeavours, and to exploit synergies for greater efficiency.

In addition to immediate steps to prevent school violence, the Ministry of Education must also strengthen the central competence-based teacher training, must emphasise the importance of introducing alternative teaching methods in schools and must provide such regulatory background that allows sport and art activities to gain an appropriate share of school programmes.

Community crime prevention must continue to promote the introduction of restorative techniques at an institutional level and to provide services locally, that is, directly to individual institutions. However, statute-based and comprehensive measures which exceed pilot projects in scope and promise long-term and sustainable results may only be taken if there is appropriate financial and moral support. It is needless to say that crime prevention policymakers are willing to participate in the inter-ministerial cooperative efforts.

It seems that we have departed in the right direction, but we are still stumbling a little. However, actual initiatives with real results must be implemented in practice without delay. Coordinated reactions by the state are indispensable for this purpose.

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2.6

Community mediation in Hungary

2.6.1 Conflicts in micro-communities and macro-communities

After the political changes in the late 1980s and early 1990s, Hungary experienced such developments that fundamentally transformed the values of certain groups of society and their relationships with other groups. This was a common phenomenon in the region. The well-known and familiar relationships of the past, which had been both positive and negative but nevertheless had specifically defined the position of various groups in relation to each other, started to deteriorate.

New needs, behavioural patterns and communication methods emerged in the relations between various groups of society and local institutions. The new values and needs of certain groups were (and often still are) rejected by others. This builds mutual distrust and suspicion, which eventually leads to social tensions and conflicts. These institutional conflicts and tensions within small communities are the most difficult to manage as such conflicts are very often caused by a train of events that do not develop rationally. The problems can only be solved permanently if the attitudes and dispositions of society are changed. For this, determination and, of course, a lot of time is necessary.



Concurrently with these social changes, Hungarian society started to be polarised economically and politically, and unprecedented social problems materialised. These factors all lowered the general level of tolerance within society and the micro- and macro-communities' ability to endure and manage conflicts, and they resulted in a lot of discrimination-related local tensions where the parties were certain natural, determinable groups of local society or formal local institutions.

Decreasing "discriminatory tendencies" and mutual distrust and increasing tolerance levels in micro- and macro-communities' lives is a slow process. The parties need face-to-face meetings and opportunities to communicate directly. At such occasions, tensions and scepticism can erode swiftly, sometimes unnoticed by parties, and they can be replaced by relationships built on mutual recognition, respect, and the parties' joint effort to solve their issues.

Such changes should be initiated at a local level primarily, and they can only bring results within a reasonable time at a local level. A network of personal relationships with a capacity to generate anti-discriminatory effects directly may only be built in local communities and only such local networks can lower the number of conflicts and the related tension to a level that allows the affected parties to develop a mutually acceptable level of communication, and a mutually beneficial and accepted solution through this.

It is therefore essential to create settings of communication and interaction at the level of both local and macro-communities where the local authorities, social, minority, labour, education and other institutions can meet and interact with each other, and in this way

- they can reduce the level of tensions in the local community,
- they can act against discriminatory procedures and phenomena,
- they have a better chance to identify problems that can and should be solved locally, and
- they can find solutions to existing and potential conflicts together.

This is of course a complex procedure. It works like a multiple entry matrix where the players (the key actors, institutions in local society) have a permanent effect on each other.

The cooperation built on communication and mutual understanding between local communities and organisations and a wide range of conflict management activities carried out within this cooperative framework may help to lower the number of problems and may serve as a model in Hungary and in the other conflict-burdened countries of the region. NGOs specialised in anti-discriminatory efforts should have a key role in this.

2.6.2 The main characteristics of conflicts

In order to examine conflict management, it is first of all necessary to discuss conflicts in general, their main characteristics and their reasons and phases. If these basic characteristics are not identified, the process of recognising and analysing conflicts is difficult and unreliable. If a conflict is not recognised properly or is misdiagnosed, the attempts and efforts made to resolve it will tend to be inappropriate, in which case the efforts will be either futile (in the circumstances, the best case scenario) or may even increase tension (the worst case scenario).

In the life of a community, group or institution, it occurs quite often that the members of the community need to respond to a dilemma or they must resolve an issue that has some kind of (minor or major) relevance in the lives of the members. The affected parties usually perceive these problems as conflicts. Conflicts can only be handled effectively by the parties if we know what the definition of a conflict is.

2.6.2.1 What is a conflict?

Definitions of a conflict can be classified into two groups. One group of definitions focuses on the phenomenon, while the other group of definitions considers conflicts as opportunities. Let us take a look at these in detail.

Conflicts as problems

Those definitions that see conflicts as phenomena focus on the reasons and the characteristics of conflicts.

According to this approach, conflicts can be competitions for goals or possessions that are only available in restricted quantities for the parties in conflict or at least the parties believe that the amounts are limited.

The other type of conflicts is when the subject-matter of the conflict is intangible, but its availability is limited by nature. These include positions in an institution or community, titles, careers, or respect.

The third category of rivalry is when the participants strive to acquire such possessions or reach such goals that are not limited from an objective perspective, but the cognitive or emotional perception of the participants makes them believe that they are limited. In such cases, the purpose of the conflict is intangible, and the rivalry is based on the false perception that the objective is limited. This, however, does not mean that the competition is less fierce from the aspect of the participants than in cases when the availability of the objective is actually restricted.

This approach sees conflicts as a negative phenomenon and stresses the problematic and difficult side of a conflict. From this viewpoint, there are a number of potential risks of conflicts. Conflict-related risks:

- the parties' interests may be hurt in a conflict;
- there is a risk that the behaviour of the parties will not be rational and sensible but instead it will be determined by actions and reactions and therefore tensions will escalate;
- the conflict may polarise the community;
- it may escalate, it may raise the level of tension within the community or the institution and in extreme cases it may disturb the internal peace and threaten the integrity of the community or the institution;
- the conflict can use up some or all of the energy and resources that could be used for finding a solution;
- the conflict makes the building of partnerships and focused joint efforts impossible;
- the conflict may prevent the participants from giving up the stance they took during the conflict;
- the conflict may result in a loss of support;
- it may prevent necessary changes; and
- it may destroy the operation of the community or institution in which it emerges.

Conflicts as signals and opportunities

Conflicts should not always be seen as nuisances. They have a positive side that we can use to help us.

Conflicts do not have to be considered a stroke of fate; they can be seen as signals. They provide the framework of the solution, and, very often, they force the participants to approach the conflict with a view to find a solution.

In our personal and social life and in the operation of a community or an institution, conflicts have a role similar to that of fever in the human body. Fever in itself is not an illness but rather a sign that there is an "inappropriate" phenomenon in the body (an inflammation, an infection etc). Conflict is a similar sign. It shows that a problem has emerged or there is a tension of some kind between people, communities and organisations (or within the latter two).

Not only do conflicts clearly indicate the existence of a problem but they also offer a solution as, by recognising the problem, the participants may begin to resolve the issue.

The affected parties usually consider conflicts an undesirable incident. It is indeed true that conflicts bring tension, and nobody likes tension. However, I would like to repeat that within an appropriate framework, a conflict can be a catalyst for solutions

- by signalling to the parties that there is a problem that needs to be solved, and
- by creating an opportunity and sometimes even forcing the parties to express their viewpoints and interests openly.

In such circumstances, the positive side of a conflict can become dominant, that is,

- useful interaction can develop,
- the communication generated by the conflict allows the parties to explain their respective positions and learn about the other's standpoint, so it can be used as an emotional and cognitive method of easing the tension (the problem may be half solved if the parties talk it over),
- helps build cohesion and solidarity between the participants (common interests, shared goals etc.),
- useful ideas for solutions can be identified in the process of conflict resolution,
- effective and customary conflict management and conflict resolution attitudes and processes may develop.

This, of course, will only work if the dynamics of conflicts operate in an established, well-defined and stable environment. The main aim of conflict management and the role of the person managing the conflict is to create such an environment.

2.6.2.2 The three paradigms of conflict management

Conflict management on the one hand means positive thinking when one faces problems, and on the other hand it is a collection of procedures that provide the framework for conflict resolution efforts. There are three rules that apply to all types of such procedures and that must be kept in all circumstances.

The first paradigm: conflict management is a conscious activity

Any conflict management activity is carried out on the basis of conscious behaviour and introspection, regardless of whether it is the management of our daily conflicts or professional conflict management, which means that it involves the discovery of the reasons and the phases of the conflict and the restriction of any emotions and instinctive/impulsive actions in connection with the situation.

The second paradigm: in conflict management, the goal is not to decide who is right and who is wrong; instead, the goal is to overcome the problem

As mentioned in the first paradigm, if a conflict emerges, the intentions of the parties, and the background and the elements of the conflict must all be identified. However, it should not mean finding who is right and who is wrong as finding an answer to this question would mean a decision in favour of one of the parties in conflict, and such a decision would deepen the conflict. The third paradigm is derived from the first two.

The third paradigm: the person managing the conflict should never take sides

If the persons whose original task was to manage and resolve the conflict take sides, they will no longer focus on looking for or assisting the parties in finding a solution but instead they will start to protect those parties' interests, position and rights whom they decided to support. However, when this happens, the person no longer manages the conflict, but rather protects the rights and advocates the interests of one of the parties. This is a completely different activity with different objectives and a different set of methods.



2.6.3 The concept and content of mediation

There are quite a lot of definitions used for mediation, including a number of misconceptions. One of the most typical mistakes is when the Hungarian translations of the English term “mediation” (*közbenjárás, közvetítés*) are used without proper interpretation. This is because the Hungarian terms can refer to any activity when a person acts as an intermediary (including real estate agents, marriage brokers, matchmakers) while in English the content of mediation is much narrower as it cannot be used for all of these activities.

It is another common error that mediation is used as a synonym of conflict management although conflict management is a much broader concept than mediation. Mediation is a procedure defined by law in which an external, neutral party helps the parties in dispute in a conflict that has already developed and deepened to the level where there is no communication between the parties. In mediation, the impartial mediator’s objective is to find a solution that is acceptable to all the parties involved. Conflict management on the other hand is a complex concept that includes all forms of resolving a conflict, including direct and indirect methods, methods defined and not defined by law, and methods available outside of legal procedures.

The relevant literature considers it a basic rule that in mediation the mediator never makes decisions on behalf of the parties but instead helps them in creating a situation in which they are able to make the decisions that lead to a solution.

Although this rule is a general rule, it is particularly true in countries where mediation has been applied for a number of decades. In Hungarian practice, there are still situations where the participants expect some form of intervention. This happens especially when in the mediation session the parties cannot give up their victory-oriented approach or have difficulty in doing so. The intervention can never mean that the decision is made by the mediator, but in daily practice the mediator may have to ask questions that have hidden proposals in them, as such questions may direct the parties towards a presumed solution in a way that they have the liberty to reject those proposals. A proposal can be hidden in a question that starts as follows: “Wouldn’t you consider...?”

2.6.3.1 When can mediation occur?

The situation when two parties have a dispute is considered a conflict. In appropriate circumstances, such conflicts may help solve issues as parties in conflicts have the opportunity to express their interests openly, learn about and understand the other’s stance and reach an agreement on the basis of this.

Conflicts, however, can worsen to a state where the parties in dispute refuse to or are unable to communicate directly, but they are willing to make an attempt at settlement through an external mediator.

2.6.3.2 The mediation procedure

Mediation has four basic phases. In real-life mediation, these phases sometimes overlap. Nevertheless, it is a good idea to keep them in mind as awareness of them helps in structuring and handling mediation, in implementing it effectively and in reaching permanent and mutually favourable solutions. These basic phases are: making contact, preparation, the mediation meeting and follow-up.

The first phase: making contact

In mediation literature, there are a number of cases in which the mediation process and the mediation session are considered synonyms. However, they are not the same. The mediation meeting is launched when the parties start a dialogue with the assistance of a mediator.

The procedure of mediation actually starts much earlier than the beginning of the meeting. As a first step, somebody asks the mediator to mediate the case. In an ideal case, the parties in conflict engage the mediator to mediate between them, but it also often happens that the mediator is asked by an external organisation or person that is affected by the dispute. Regardless of who initiates the mediation, the mediator first identifies the parties involved and contacts them. In the contact phase, the mediator contacts each party personally and separately.

At these meetings, the mediator

- shares with them the objective of his/her activity,
- creates an environment of trust necessary for the mediator’s work, informs the conflict’s participants of the mediator’s tasks and obligations (neutrality, confidentiality etc.),
- asks for the given party’s agreement that he/she will participate in the procedure.

In this phase, the greatest challenge is to lower or eliminate the distrust of the parties they almost always show. The object of the distrust is not necessarily the person of the mediator but rather their unusual status. In the Hungarian conflict management culture a person or organisation involved in a conflict is more or less expected to take sides, that is, to declare which party is right. With such expectations, a person claiming that he/she is independent is like a Martian on Earth. This makes communication between the mediator and the parties in conflict quite difficult early on in the procedure, and the mediator may be tempted to take sides or to say that one of the parties is right (or all of them are right). If the mediator does so, the mediation will definitely fail and sooner or later the parties will lose their trust in the mediator and mediation in general. “Temptation” can be overcome if the mediators remind themselves of the three paradigms of conflict management (consciousness and neutrality) and thus strengthen their mind and soul against the “siren song” of partiality.

The second phase: preparation

By the second phase, the mediator has already made contact with the parties, has built the trust necessary for the job and the parties have accepted the mediator. Building on this, the mediator then prepares the mediation meeting.

As the main objectives of the preparation phase, the mediator will

- help the parties in conflict to reach an emotional and mental state where their goals are no longer total confrontation, rejection of the other and victory at all cost,
- help the development of a solution-oriented conflict management attitude,
- collect some basic information about the conflict,



- make sure all affected parties are identified (as in almost all cases there are more persons affected by the conflict than it appears at first glance) and try to involve these additional parties who are “in hiding”; otherwise, there is a chance that they will block the procedure of finding a solution for emotional reasons or other interests.

The third phase: the mediation meeting

The mediation meeting will only take place when the parties have reached an emotional and mental state in which they will presumably be able to work on finding a solution. It will be the mediator’s task (and responsibility) to assess when the parties reach this state. If the meeting is not prepared for properly, or if the parties’ willingness is misjudged, it can have serious adverse effects on the conflict and on the parties’ relationship (see the text highlighted).

The fourth phase: follow-up

If the mediation meeting has been successful, the participants have a tendency to sit back and enjoy the fruit of their labour, namely the agreement reached in the mediation process. While this is understandable, the satisfaction of the parties should not make them forget to act on the agreement. The implementation of the agreement must be monitored and, if the implementation gets stuck, intervention must be made to help the parties.

An example of misjudging the level of tensions: in a Transdanubian town, the mayor invited the leaders of certain organisations in the town to a mediation meeting. The organisations had had a really bad relationship with each other. The negative emotions had not been treated before the meeting was convened, and tensions became so “dense” in the room that they erupted, similarly to a fissile material reaching critical mass. A fight broke out at the meeting and communication broke off for years.

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2.7

Pakrac, Croatia: an Example of Innovative Restorative Practices during an Armed Conflict

2.7.1 Introduction

During and after the four-year war in Croatia in the early 1990s, restorative practices were introduced and applied in the communities that were affected by physical destruction and by the complex and long-term consequences of division and mistrust between different ethnic and social groups. The lessons learned in those communities have shown that a space and opportunity for a restorative approach can be found regardless of the complexity and destructiveness of the conflict and regardless of the lack of funding and political will at local and national levels. Therefore, there are no excuses for delaying actions aiming at building a basis for restorative processes, such as enabling people to understand the conflict and behaviour in conflict situations; helping them to improve their communication skills and, when possible, acting as an intermediary; or identifying strong and independent-minded individuals and empowering them through training, networking and continuous support.



2.7.2 Social Reconciliation Project Pakrac

The town of Pakrac, situated in the region of Western Slavonia, was the second most destroyed Croatian community as a result of the armed conflict. Ethnically mixed, it was populated mainly by Croats and Serbs, and also by some other ethnic minorities such as Czechs, Italians and Slovaks, who – before the war – were living side by side, working together and often married outside their own ethnic group. After several months of heavy fighting, the frontline was established between the town centre, held by the Croatian government forces, and the Eastern suburb, held by Serb rebels. This suburban area became the edge of the United Nations Protected Area (hereinafter UNPA) with a check-point controlled by UN soldiers.

The UNPA was politically controlled by the Serb rebels and occupied approximately 30% of the Croatian territory during the war. Only international aid workers were crossing check-points to and from the UNPA. The frontline divided not only territories, but also family members and friends. War operations and destroyed infrastructure caused a massive flight of the Pakrac population: out of the pre-war 15.000 inhabitants of its larger area, only 3.000 remained in the town in 1992. They were mostly those who had no resources or relatives in other parts of Croatia or abroad to help them relocate. All the town's industries were destroyed, and people depended on humanitarian aid, welfare benefits and on the modest salaries of the local men who were recruited by the army or by the police. Most of the houses were either demolished or heavily damaged and many families were living in basements, garages or cramped in the houses of neighbours and friends. Damaged infrastructure often caused shortages in electricity and water.

Relationships were also damaged. The families that were ethnically mixed were torn by the conflicts, and the family members of the "wrong" ethnicity got isolated from the majority group. Competition for scarce resources further damaged trust and solidarity. Former best friends could be found fighting over a package of old clothes that arrived from Germany, and stopped greeting each other afterwards.

These were the circumstances found by a group of five local and international activists who visited Pakrac in 1993. They slept on the floor of the former high-school dormitory which was damaged by fighting and at the time all the window glasses were broken. The activists, members of the Antiwar Campaign Croatia, sought support for establishing an international volunteer camp, called "*Social Reconstruction Project Pakrac*". Support was provided by a UK organization Quaker Peace and Social Witness (hereinafter QPSW) and by the United Nations Office in Vienna. The first volunteers arrived in Pakrac at the beginning of 1994 and over 300 of them stayed there from 3 weeks up to 3 years. At the other side, in the UNPA, a peace group from Serbia organized similar activities, although on a smaller scale.

Although the main aim of the activists was to mend the

relationships among the people and to re-establish trust and solidarity within the community, it was clear from the beginning that the idea of restoring inter-personal relationships cannot be "sold" to the people whose basic human needs are not met. In order to recognize and respond to those needs, it was first of all necessary to somehow find entry into the community. In this particular case, with men on the frontline and women struggling on their own to take care of their families, a strong young helping hand meant a lot. Immediately after establishing the volunteer camp, its members started helping the locals with the most urgent issues, such as cleaning rubble, repairing damaged houses or chopping up wood. However, each volunteer had been trained, prior to the arrival to Pakrac, in basic skills necessary for the underlying social reconstruction work. While doing hard physical work, they also undertook active listening, conducted informal mediations and empowered individuals from the community. The international volunteers were able to cross the UN check-point and they used those opportunities to carry across letters to relatives and friends. This was the only opportunity to keep in touch, since the telephone lines and postal services did not function between the territories controlled by the Croat and by the Serb forces.

It was not a smooth process. Besides the suspicion of the locals who at first thought that all the volunteers were spies selling confidential information to the other side, there was also resistance towards their "strange" ways – a patriarchal community proud of its traditional pork sausages and hams was reluctant to accept a group of youngsters, mostly foreigners, with strange clothes and hairdos, males and females living together in rented houses... It took a lot of patience and persistence to establish personal relationships and build trust with the locals, who were also having difficulties in re-establishing relationships and trust among themselves.

One of the project founders Goran Božičević, described how the volunteers did it: "We did not intervene directly in the conflict, and we did not judge or give advice, but we created space for the transformation of the conflict through our own behaviour and attitude. We had contacts with all sides. We did not see two sides, but we saw the official and the private level on both sides. The only clear division was the territorial one, and all the other divisions were multi-layered and complex – civilians/soldiers, government/opposition, men/women."

(Personal interview by the author)

Volunteers realized that one of the reasons for the continuous isolation and mistrust in the community was the fact that normal social interactions were scarce. Pre-war activities that brought people together such as birthday celebrations or simple gossip over a coffee were not possible anymore, since in a room inhabited by a family of 5 there is no space, and in the cupboard there is no coffee for the guests, so people just stopped inviting each other. Youngsters did not have a place to hang out for after school activities, but they often had access to the basements where their family kept homemade wine and brandy. Many of the teenagers started drinking on regular basis. Women were struggling with the housework. Doing the laundry was one of the most difficult tasks, since most of the washing machines were destroyed, and women had to do the laundry manually.

After a year of the volunteers' presence in the community, some of the locals had lost their initial reluctance to talk to the outsiders and started turning to them for help and support in personal matters.



A husband prone to drinking, a daughter that violates her curfew, a former friend who now turns her head when passing by... Listeners were desperately needed, and volunteers did a good job. So they started gathering in groups those individuals who were most interested in making changes in their lives, but did not know how to do it. Volunteers asked questions and facilitated their discussions. It turned out that youngsters needed a space for extracurricular activities, and women needed help in washing their clothes. Funds were raised for the youth-club and for the laundry. The foreign donors understood the importance of social gatherings and besides the obviously necessary equipment such as cassette players and washing machines they also approved expenses for detergent, sugar, tee and coffee.

Now when there was a place to gather, it was much easier to organize workshops in communication skills and conflict resolution for the groups who had been gathered together, preparing them to establish contact and to build their network independently from the volunteers.

In 1995, in two attacks Croat forces regained control over most of the UNPA territory.¹² Only a few weeks after heavy fighting in Croatia and in Bosnia, women from the laundry travelled to Macedonia to meet over hundred women activists from all the post-Yugoslav countries, a first such opportunity since the war had started. In 1996, a group of teenagers took part in a two-week training workshop on conflict resolution skills for youth from communities affected by the war in Croatia, Bosnia and Herzegovina and Serbia. Pakrac was among the first places whose locals took part in conferences and workshops together with those from the "other side". Each new trip, each new event empowered the travellers who, upon their return home, brought new perspectives and new skills. The former high school dormitory was reconstructed and got a new purpose, so the youth club lost its premises. Most of its' members enrolled to university in Zagreb anyway and the new generations turned to newly opened coffee shops and their own repaired houses for socializing. Some of the teenagers from the youth-club chose helpers' vocations and became teachers and social workers.

Women from the laundry became the most experienced and respected NGO in their county called *Delfin*. They built new alliances within Croatia and grew stronger. In times when rhetoric was still bellicose and just talking "to the other side" was considered a treason, the women initiated and kept contact with the people living across the former frontline; took part in many workshops and conferences in post-Yugoslav countries; ran a programme on affirming minority ethnic identities in Pakrac; and, last but not least, started co-operation with war veterans on issues concerning confronting the recent history and its effect on individuals from all sides. Women came a long way from being suspected traitors to becoming the partners of the local and regional authorities whose assistance is sought in facilitating the processes of cooperation such as planning local development.

¹² The last part, Eastern Slavonia, was returned under Croatian control in 1997, after long negotiations with the local Serbs.

2.7.3 Conclusion

Taking a look back, several factors have contributed to the success of restorative practices of the *Social Reconstruction Project Pakrac*. A small group of self-motivated and committed Croatians from other parts of the country were willing to live in physically and psychologically difficult conditions, without sufficient financial and professional support. The UN provided international volunteers with credentials of UN volunteers and IDs that enabled them to move freely in the area.

Courageous local women had good will to communicate, learn and transform themselves and their community. Ambassadors of the countries funding the laundry with their visits to the women confirmed their credibility and contributed to the more positive image of the women's group and their activities in the community. The high-school headmaster and the chief of the police cared and understood and supported the restorative approach. QPSW chose to support motivated individuals and their ways of working instead of pressuring them to produce tangible immediate results in the activities they funded. And last but not least, there were hundreds of international volunteers who were willing to acquire or share skills necessary for restorative practices and made a choice to live part of their lives in an unhappy and uncomfortable place.



3.

Restorative practices in the criminal procedure during the pre-trial stage and the court procedure

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3.1 Diversion for Promoting Compensation to Victims and Communities during the Pre-trial Proceedings in Austria

3.1.1 Promoting compensation – an issue in Austrian criminal law since 1787

The idea to promote compensation by the offender to the victim has a relatively long tradition in Austria. Its two aspects – the offender actively accepting responsibility and the victim simultaneously receiving compensation – have played a role in Austrian criminal law for over 200 years. The institution of so called “active repentance” (“*Tätige Reue*”) was established in the *Criminal Code* in 1787, and is still in force for offences explicitly mentioned in the Code (especially in the case of offences against property).¹⁴ If the offender manifests repentance by compensation or reparation of the overall damage resulting from the offence, no punishment shall be imposed. This act of repentance, based on its acceptance by the offender,¹⁵ must take place before the police authorities become aware of the offender’s guilt.

3.1.2 A broad range of provisions to promote compensation

Beside this rule which provides a possibility for the offender’s exemption from punishment, there is also a broad range of other provisions based on the approach of restorative justice in Austrian law.¹⁶ They can be found in the *Criminal Code* (*Strafgesetzbuch*, hereinafter CC),¹⁷ the *Corporate Liability Act* (*Verbandsverantwortlichkeitsgesetz*, hereinafter CLA),¹⁸ and the *Crime Victims Act* (*Verbrechensopfergesetz*),¹⁹ but they are mainly included in the *Code of Criminal Procedure* (*Strafprozessrecht*, hereinafter CCP),¹⁹ and the *Juvenile Court Act* (*Jugendgerichtsgesetz*, hereinafter JCA),²⁰ diversion being at the centre of these provisions.

An essential step to promote compensation and also to enforce the victims’ rights as a whole in the Austrian criminal procedure was taken by the latest major reform to the CCP, which came into force at the beginning of 2008. In addition to the reform of the pre-trial stage, another aim was to make the position of victims stronger during the whole criminal procedure (Hilf and Anzenberger 2008: 886; Bruckmüller and Nachbar 2009/2010). Victims are now provided with numerous participation rights during the whole proceedings. As a condition to these rights, there are also comprehensive information rights provided by the law. To strengthen the restorative aspect, it is now explicitly stated in the CCP that the authorities (judges and prosecutors) have to act in the best interest of the victim and should ensure that the victim is compensated as fully as possible.²¹

¹³ Karin Bruckmüller is responsible for the legal parts (3.1.1-3.1.3.3) and the conclusions, Christoph Koss for the practical implementation of the victim-offender-mediation (3.1.3.4).

¹⁴ See in particular Section 167 CC.

¹⁵ Also if there is some pressure of the victim, it can be interpreted as a decision on a free will.

¹⁶ For a detailed report on restorative justice in Austria see Hilf 2009 (in print). Thanks to Professor Hilf, for making her manuscript available for this article. See also Löschnig-Gspandl (1995: 766).

¹⁷ E.g. compensation for damage constitutes a mitigating circumstance (Sec. 34 CC).

¹⁸ See in particular Section 8 CLA, and the rule concerning diversionary measures (Sec. 19 CLA).

¹⁹ See below.

²⁰ See Section 7 et seq JCA.

²¹ See Section 10 CCP.



The referring provision of the CCP states that

- (1) if the sanction for the act is only a fine or if the offence is punishable by no more than three years of imprisonment or by such an imprisonment combined with a fine,
- (2) and the offender's guilt is minor and the offence has resulted in no more than slight consequences or if the offender compensates for the damage caused or otherwise makes up for the consequences of the crime,
- (3) and a punishment is not necessary from aspects of special- or general prevention the proceedings shall be closed.

3.1.3 Diversion as the main element of restorative justice and compensation

3.1.3.1 The development of diversion in Austria

Diversionary measures were introduced into the Austrian criminal procedure from very early on. The starting point was a victim offender mediation pilot project in 1985 (for details concerning the origins of the project see: Jesionek 2003). This experiment only involved juvenile offenders and their victims and was legally based on the discretionary powers set out in the criminal law concerning juveniles at that time. Because of the very good results of the project, similar rules were included in the JCA in 1988.

Due to the success of the project concerning juveniles, another pilot-project was set up, this time for adult offenders (the "ATA-E" project). The legal basis for this project was a rule in the CC, "Mangelnde Strafwürdigkeit der Tat", meaning that in special cases the crime shall not be punishable (see for doubts from a constitutional law perspective: Muzak 1993: 690; and the replica from a criminal law angle Miklau 1993: 697). This rule was – nearly word by word – transferred to the CCP in 2008 (see the text highlighted).²²

In 2000 – according to the results of the ATA-E project – the measure proved to be effective in the case of adults also (Pilgram 1994: 231). Therefore, victim offender mediation was included in the CCP as one of the four diversionary measures.

3.1.3.2 The legal conditions for diversion

The following methods of diversion are available:

- suspending prosecution for a probation period (from one to two years), which can be combined with supervision by a probation officer and/or the completion of so-called "obligations";
- the offender paying a certain amount of money;
- community service;
- out-of-court settlement, victim offender mediation now being referred to as "case settlement" ("Tausgleich", which indicates the fact that victim offender mediation is not necessarily always carried out between the victim and the offender).

The legal conditions for diversion are determined in Section 198 et seq. CCP (Schroll 2004; Kienapfel and Höpfel 2009):²³

- the facts of the case must be clarified in an adequate way;
- the act must fall within the jurisdiction of the district court or of the single judge at the regional court (Landesgericht) – this means that the offence must be punishable by no more than five years of imprisonment or by a fine;
- the guilt of the suspect must not be considered to be severe; the offence may not result in fatalities – there is one exception: in

cases of juvenile offenders, if the victim is a relative of the juvenile offender, and the offender undergoes severe psychological strain as a result, a diversionary measure is possible²⁴ (mostly this is true in cases of car accidents; for example where the car was driven by the juvenile and his/her sister died);

- no other – traditional – criminal sanction is necessary from aspects of individual and general prevention;
- one may say that also reparation or compensation for the damage resulting from the crime is a condition for ordering diversion (since 2008)²⁵ – exceptions can only be made in special circumstances, e.g. if the offender is a juvenile the compensation should be in proportion with his/her financial situation.

If the legal criteria (see above) are met, the public prosecutor has to offer a diversionary measure to the suspect in the pre-trial stage (before an accusation is made).²⁶ The public prosecutor is obliged to choose a diversionary measure which supports the victim's interests and needs to the greatest extent possible. The diversion measure can only be carried out if the suspect accepts it. (The suspect also has the possibility to ask for the proceedings to be continued at any time before the final decision for the dismissal of the case is made.) For victim offender mediation, the victim's consent is also necessary (except in cases of juveniles).

²⁴ See Section 7(2) JCA.

²⁵ See sections 200(3), 201(3), 203(2), 204(1).

²⁶ After an accusation the judge is the one, who has to offer one of the measures, when the legal preconditions are met.

²⁷ Offered by prosecutors and judges. In 90% of the cases, referral is done by the public prosecutor. In 10% of the cases the order comes from a judge.

²⁸ See at http://www.justiz.gv.at/_cms_upload/_docs/Jahresstatistik_Diversion_2007_und_Vergleich_2006_2007.pdf [30.09.2009]. To empirical data see also Grafl (2002: 413).

²² With the new appellation "Einstellung wegen Geringfügigkeit" ("closing the proceedings because of pettiness" – Section 191 CCP).

²³ For diversionary measures for juveniles see Section 7 JCA; in Section 6 of JCA are also stated a non-intervention diversion. A special form of a diversion is established in the Austrian Drug Law. Both last mentioned diversionary measures are not combined with compensation to the victim.

	Offers of diversion 2007	% of the total amount	Unsuccessful diversion in % of the offers
Amount of money	22.361	49.34%	17.60%
Community services	3.187	7.03%	17.54%
Probation period without supervision and obligations to be performed	8.293	18.30%	10.1%
Probation period with supervision or obligations to be performed	2.097	4.63%	26.08%
Victim offender mediation	9.379	20.70%	25.61%

Table 2
Diversionary measures²⁷ in 2007
(Source: Annual statistics of Diversion 2007)²⁸



3.1.3.3 Victim offender mediation

Victim offender mediation is at the heart of restorative justice in Austria, because – according to the law²⁹ – the aim of this measure is primarily reparation, restitution or compensation and/or reparation in a symbolic way (especially if a “true” apology is offered).

Victim offender mediation tries to achieve the following aims in particular: for the offender to accept responsibility for his/her act and to confront him/herself with the causes and the results of the offence (retrospective-emotional element). By compensating the victim, the victims’ interests and needs are strongly supported (restorative aim). Finally, the offender shows a willingness to abstain from re-offending, thus in the future the offender is prevented from re-offending and the victim is prevented from being revictimized (preventive element).

There is also a community aspect: diversionary measures and mediation in particular are based on the understanding that an offence is not only a violation of criminal law and an act that causes harm to a single person – the victim – but also may affect the community. Therefore the criminal procedure has to facilitate restoration and involve not only the offender but also the victim and – as much as possible – their communities in the reaction to the offence (more precisely to both last paragraphs see Hilf 2009).

3.1.3.4 Victim offender mediation in practice

All victim offender mediation (VOM) cases are referred to Neustart, a nationwide private non-profit organisation which is also responsible for managing the probation service, community service, after-care, and crime prevention programmes in Austria. The mediation process is illustrated by *Figure 3*.

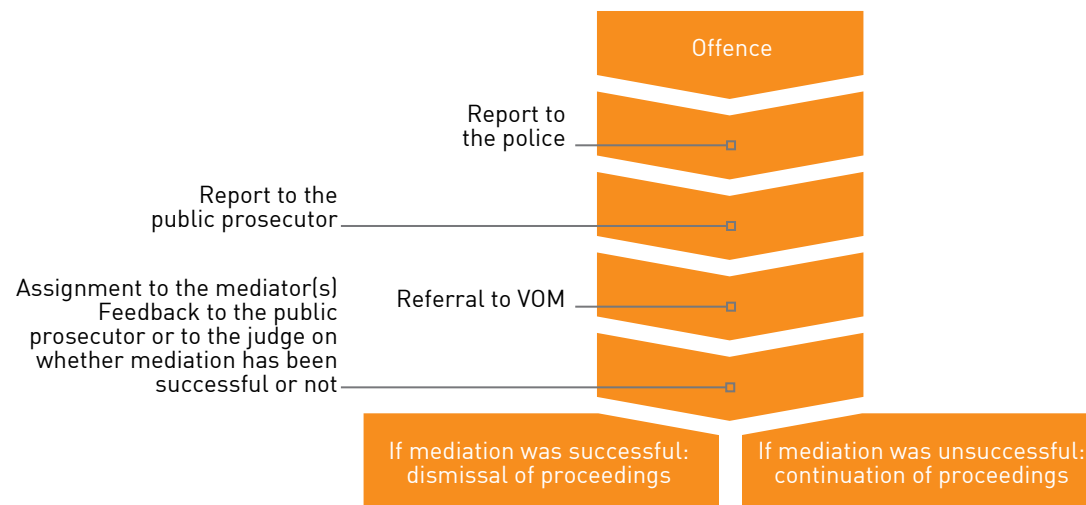


Figure 3
VOM process in Austria

²⁹ See Section 201[1] CCP.

³⁰ A victim offender mediation for adults has been the first time proceeded in the year 1992.

Each year between 8.000 and 9.000 cases are referred from prosecutors or judges to Neustart in order to carry out victim offender mediation. *Table 3* below shows the development between 1985 and 2008.

Year	Juveniles	Adults ³⁰	Total
1985	116	0	116
1986	363	0	363
1987	606	0	606
1988	712	0	712
1989	1.236	0	1.236
1990	1.426	0	1.426
1991	1.516	0	1.516
1992	1.884	669	2.553
1993	2.033	898	2.931
1994	2.341	1.876	4.217
1995	2.599	2.052	4.651
1996	2.657	2.720	5.377
1997	2.727	3.478	6.205
1998	2.680	4.814	7.494
1999	2.579	6.845	9.424
2000	2.164	6.985	9.149
2001	2.051	6.895	8.946
2002	1.536	7.264	8.800
2003	1.388	7.008	8.396
2004	1.610	7.352	8.962
2005	1.591	7.382	8.973
2006	1.474	7.028	8.502
2007	1.498	6.898	8.396
2008	1.448	6.650	8.098
	40.235	86.814	127.049

Table 3
VOM development
in Austria, 1985–2008

All cases start with a pre-mediative phase where only one-to-one meetings either with the offender or the victim take place. Only if the requirements are met will there be a mediation session with both parties.

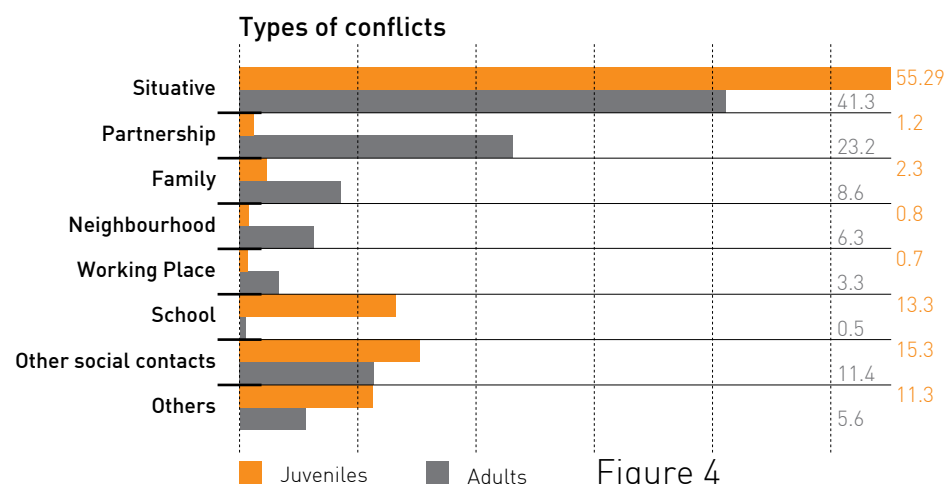


Figure 4
Types of offences and conflicts

84% of all cases referred for mediation are offences related to aggression, in particular assault and battery, others include serious threats, coercion, harassment and in some cases robbery.

The remaining 16% comprise mainly offences against property, i.e. theft, burglary, vandalism.

Mediators must always take into account the type of conflict and its environments. 55% of conflicts concern the immediate social environment, i.e. partnerships (mainly violent offences), family and friends, work place, school, as well as the most difficult type of conflict to mediate – conflicts among neighbours.

Given that in these cases the clients were known to each other before the offence was committed and are in most cases likely to remain in contact in the future, it is of particular importance to work out a plan of what future contacts between the parties could be like.

Objectives of victim offender mediation

- The victim has the possibility to receive restitution, both emotional and material.
- Needs and emotions of the victim are taken seriously.
- The suspect is given an opportunity to consider how to provide restitution for the offence. The suspect is not in a defensive position like in the case of a trial but can take an active role in repairing the harm caused.
- The dismissal of proceedings following successful mediation means that the offender will avoid having a criminal record and the potential negative consequences thereof (particularly important for job-seeking in a crowded labour market).

A viable agreement negotiated by the suspect and the victim offers a chance for lasting social peace (55% of allocated cases originate in the immediate social environment).

Organization and methods

Mediation is organised as a specially defined field of practice. This means that only specialised and trained mediators carry out mediation in criminal cases.

Depending on the type of conflict, different methods may be employed. One or two mediators may work on individual cases. A female and a male mediator, for instance, will handle cases of domestic violence. Special methods are applied in stalking offences to prevent offenders and victims from meeting.

Acceptance, success and rates of re-offending

85% of the cases involving juveniles and 70% of the cases involving adults are concluded by the mediator(s) reporting the success of the mediation process to the public prosecutor and thereby ending criminal proceedings.

A research by the University of Innsbruck (Altweger and Hitzl 2001) shows that victims are very satisfied with the outcome of victim offender mediation: 75% of the victims would choose to rely on mediation again in a similar future case.

A research carried out by the Institute for the Sociology of Law and Criminology shows that the recidivism rate within 2.5 to 3.5 years after successful victim offender mediation is 13% (Hofinger and Neumann 2008). In cases of domestic violence it is only 11%. 66% of all cases referred to *Neustart* are assaults. In case of mediation, the recidivism was 15% compared to 41% if the same offence was punished in the traditional system. Another research by the Institute for Penal Law from the University of Vienna found that the main reasons for such positive results were the following: prosecutors and judges are successful in choosing cases that are suitable for mediation and the preventative effect that victim offender mediation has (Schütz 1999: 161).

Cooperation with other institutions

There is intensive cooperation in particular with those who are entitled to refer cases for mediation, such as the public prosecutors and, to a lesser extent, the judges.

Cooperation involves questions relating to individual cases as well as developing joint concepts concerning which cases are suitable for victim offender mediation and which are not.

Depending on the given problem, additional co-operation is undertaken with victim support organisations, female organisations, other social organisations, police, lawyers, therapists, etc.

If the mediation process shows that victim offender mediation is not suitable and the offender needs supervision by a probation worker, the mediator(s) will try to obtain a probation order from the court.

3.1.4 Conclusions

The state's duty to assist a victim of an offence by providing a criminal proceeding does not mean that the process has to lead to a verdict and the conviction of the offender (to this aspect and the human rights see: Dearing 2004: 81; 2002: 165). A traditional sanction or very harsh sentencing is not necessarily important to the harmed person. What is important for a victim is a formal reaction from the state (Sessar 1985: 1137). Therefore the state should be given as much room as possible to react in a restorative manner in criminal cases, to support the compensation of the victim, to integrate the community in the procedure as much as possible and to prevent victimisation in the future.

3.1.4.1 Best practices in Austria

In particular, victim offender mediation should be mentioned among best practice examples in restorative justice.

- The legal rules were based on a successful pilot process, so they have a solid and practical basis enabling them to function very well in practice.
- The organisation responsible for mediation called *Neustart* ensures high and differentiated standards in Austria. High because of the specially trained mediators and differentiated because specific procedures applicable to different types of victim offender mediation cases have been established.
- Additionally, effective cooperation between *Neustart* and the responsible authorities as well as relevant victim support organisations has made diversion, and victim offender mediation in particular, a great success.

Hence the bigger part of practitioners – the public prosecutor and the criminal judges – but also the majority of the public accepts diversionary measures and mediation in particular as an appropriate response to criminal behaviour. But there are still some sceptical opinions concerning restorative justice being used by the police. The main reason for this is a “general feeling of frustration” that their sometimes lengthy investigation-process will not necessarily result in an accusation (Hilf 2009).

3.1.4.2 One example of malpractice in Austria

There is also a harmful method that has to be mentioned. This is the case of “victim-offenders”, for example cases of car- and ski accidents, of affray or cases of mutual injuries. The rights of all people involved are violated – so they are victims –, but all or some of them are also guilty – so they are at the same time offenders. Under these circumstances the prosecutors sometimes refer all of the parties to mediation, without checking the exact facts of the case. Hence the public prosecutor does not verify one of the legal preconditions for diversionary measures. For example one result can be that a victim, who acted in self-defence, is classified as an offender in the mediation process.

3.1.4.3 Points of discussion in Austria

The main point of controversy is whether stalking and domestic violence are suitable for mediation. Although *Neustart* offers special methods of mediation in these cases (Koss 1996: 69; Höpfl and Kert 1999: 127; Königshofer and Mössmer 2007: 121), mainly representatives of women’s organizations still advance the view that mediation is not a harsh enough reaction to repeated domestic violence.³¹

³¹ Discussion at the Conference “Psychosoziale Prozessbegleitung im Zivilverfahren”, May 2009, unpublished.

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3.2

Reparation as a Mitigating Circumstance – Mediation in Poland

3.2.1 Introduction

Slowly but surely, the philosophy of restorative justice is becoming a part of the Polish judicial system. Within the last few years there has been an improvement in the legal situation of the victim in the criminal system.

Interest in mediation in Poland first appeared in the early 1990s. A group of government employees and representatives from a non-governmental organization helping prisoners visited German mediation centres. At the same time, several researchers and academics in criminology and especially juvenile justice became interested in mediation as well. They sought new ways of responding to crime – providing more help to juveniles and meeting the needs of victims. A working group established the following directions for the development of mediation projects in Poland: carrying out experiments in mediation; establishing legal principles; organizing trainings for mediators as well as seminars and conferences; and publishing information on mediation. Experimental programmes targeted at juveniles were initiated in 1996, and other steps were also taken (e.g. an international conference in 1995, and training sessions for mediators).

In 1997, Mediation as an institution has been included in the *Criminal Code* (hereinafter CC) and the *Code of Criminal Procedure* (hereinafter CCP) and in 2000, it became part of the *Act of 26 October 1982 on the Proceedings in Cases Concerning Juveniles*.

Among criminal justice officials and legal institutions there is significant support for mediation in juvenile justice. It is not clear whether or not there is the same level of support for mediation in the cases of adult offenders. Judges, prosecutors, and the police express interest in the possibilities but also raise deep concerns about it.

3.2.2 Mediation in the Polish Criminal Procedure

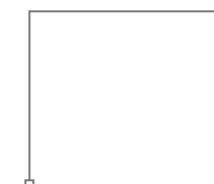
Mediation proceedings were made part of the CCP by the Act of 6 June 1997 that came into force on 1 September 1998. The main purpose of introducing mediation into the Polish criminal system was to reduce the number of litigated cases and to shorten the duration of the criminal proceeding. The legislator had in mind that mediation might also limit the number of sanctions having to be enforced and might decrease court and social costs. Therefore, settlements are encouraged in all legal conflicts.

At first, mediation sessions were conducted only at the pre-trial stage and at the very early stage of judicial proceedings (during the preliminary judicial verification of the indictment). In 2003, however, the law was changed in a way that favours mediation. Special legal regulations concerning mediation were added to the general part of the CCP (Sec. 23a).

Section 23a provides that the court, and in the preparatory proceedings also the state prosecutor, may, *ex officio* or upon application of or with the consent of the injured party and the accused, refer the case to a trustworthy institution or person for carrying out mediation between the injured party and the accused. The duration of the mediation proceedings shall not exceed one month and this time does not count as being part of the duration of the pre-trial proceedings. The success of the mediation process can serve as a basis for

- a conditional discontinuance of the criminal proceedings,
- an extraordinary mitigation of the punishment,
- a conditional suspension of the punishment, or
- the court to decide to only impose a penal measure instead of a punishment.

Due to this amendment, mediation became admissible at every point of the criminal procedure. Moreover, to promote this form of resolving criminal cases at the pre-trial stage, the time necessary to prepare and conduct a mediation session was excluded from the limited amount of time prescribed by law for the police (or prosecutors') investigation. On 13 June 2003, the Ministry of Justice issued a legally binding *regulation* concerning the mediation process (see the text highlighted).



According to provision 11 of the *regulation* issued by the Ministry of Justice, the mediator – immediately after receiving the decision of referral to mediation – is obliged to:

- contact the victim and the offender (either suspected or already formally accused) to arrange the time and place of individual pre-mediation meetings;
- organize individual pre-mediation meetings with each of the parties in order to inform them about the concept of mediation, rules of the mediation process and their rights;
- conduct victim offender mediation sessions face-to-face;
- help parties in writing down the terms of the negotiated agreement and monitor its fulfillment.



It has to be emphasized that the face-to-face meeting of the victim and the offender is a procedural requirement of the Polish criminal procedure – mediation cannot be conducted in the form of shuttle diplomacy!

3.2.3 Referral of cases to mediation

Cases can be referred to mediation by:

- prosecutors – at the stage of the pre-trial proceedings;
- police officers – at the stage of the pre-trial proceedings;
- courts – at any level of the judicial proceedings (up to the final judgment);
- courts – in cases prosecuted based on a private accusation (on the application or consent of both parties) in the place of conciliatory proceedings;
- courts supervising law enforcement (or directors of penal institutions) – at any point of the imprisonment (regardless of the term of the sentence);
- courts supervising law enforcement – at the stage of enforcement proceedings.

3.2.4 Impact of mediation on the final judgment of the criminal court

The successful outcome of the mediation process may influence the court to pass one of the following decisions:

- conditional discontinuance of the criminal proceedings;
- unconditional discontinuance of the criminal proceedings (e.g. when the act does not harm society, or only does so at an insignificant extent);
- a judgment upholding the terms of the reached mediation agreement (e.g. reparation of damages, financial restitution, compensation of moral injury, personal or community service, obliging the offender to change his/her behaviour, undertaking anti-drug or anti-alcohol therapy, apologizing to the victim);
- a judgment without a trial (if the offender has voluntarily submitted himself/herself to the punishment set out in the mediation process).

CC (Act of 1997), chapter VI, Principles of the imposition of punishments, **Section 53**

(1) The court shall impose the punishment at its own discretion, within the limits prescribed by law bearing in mind that the harshness of the punishment should be in line with the perpetrator's degree of guilt considering the level of social consequences of the act committed and taking into account the preventive and educational objectives which the punishment has to attain with regard to the sentenced person, as well as in respect of general prevention.

(2) In imposing the punishment, the court shall above all take into account the motivation and the manner of conduct of the perpetrator, whether the offence was committed together with a minor, the type and degree of transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of perpetrator, his way of life prior to the committing the offence and his conduct thereafter, and particularly his efforts to redress the damage or to compensate in another form for the injustice caused, with regard the public perception of justice. The court shall also consider the behaviour of the injured person.

(3) The court shall also take into consideration the success of the mediation between the injured person and the perpetrator, or the settlement reached by them in the proceedings before the state prosecutor or the court.

3.2.5 Privately prosecutable offences

The main purpose of proceedings in cases of privately prosecutable offences is to create the best conditions for the accused and the private prosecutor to reconcile. The main trial should be preceded by a conciliatory session. This session should begin by calling upon the parties to reconcile. Of course, there is also a possibility for the parties to reach an agreement during the trial, in which case the proceeding shall be discontinued.

3.2.6 Offences prosecutable *ex officio*

In proceedings concerning offences that are prosecutable *ex officio*, the reconciliation of the accused with the injured person may serve as a basis for the conditional discontinuance of the proceedings. This rule is in general only applicable to offences for which the statutory punishment does not exceed 3 years of deprivation of liberty (Sec. 66 subsec. 2 of the CC). But, according to Section 66 subsection 3, in the case that the injured party has been reconciled with the perpetrator, the perpetrator has redressed the damage or the injured party and the perpetrator have agreed on the method of redressing the damage, the conditional discontinuance may be applied to a perpetrator of an offence for which the statutory punishment does not exceed 5 years of deprivation of liberty. Additionally, the court is obliged to ensure the possibility for the parties to reconcile (see the text highlighted).

According to Section 341 subsection 3 of the CCP, if the court finds it reasonable and if there is a possibility of reaching an agreement between the accused and the injured on the matter of compensation, the court may adjourn the session and designate a suitable time-limit for the parties to reach an agreement. On a joint application from the accused and the injured party, the court shall announce a suitable break in the session or shall adjourn the session.

Moreover the court, by imposing the sentence, should also take into consideration the success of the mediation between the injured person and the perpetrator, or the settlement reached by them in the proceedings in the presence of the state prosecutor or the court.

(Sec. 53 subsec. 3 of the CC)



3.2.7 Statistics on mediation

Table 4 shows the frequency of the use of mediation in criminal cases between 1998 and 2003.

Year	Number of cases referred to mediation
1998	18
1999	366
2000	722
2001	800
2002	932
2003	1.838

Table 4
The use of mediation in criminal cases in the period from 1 September 1998 to 31 December 2003
[Source: statistical data of the Ministry of Justice of Poland]

In almost 60% of the cases referred to mediation, the parties managed to reach an agreement, and only 34% of them finished with none at all. In 6% of the cases referred to mediation, sessions did not take place due to various reasons (e.g. the court withdrew the decision of referral, one of the parties did not agree to participate or it was not possible to contact the party).

Type of offence	Ref. to mediation 1999	Ref. to mediation 2002	Decision in judicial proceedings 2000
Offences against family and guardianship	36.6%	34%	15.5%
Offences against life and health	21.9%	26.6%	9.6%
Offences against property	14.1%	10.1%	44.9%
Offences against honour and bodily inviolability	13.6%	16.9%	4.2%
Other	13.76%	12.4%	25.8%

Table 5
Types of criminal cases referred to mediation

As Table 5 shows, mediation is frequently used to dissolve criminal conflicts concerning offences against family and guardianship, life and health, honour and bodily inviolability, while crimes against property are more often decided in traditional judicial proceedings. Table 6 shows the number of court decisions based on mediation in 1999.

Court decisions	Number of cases	% of cases
Unconditional discontinuance of the criminal proceeding	82	23.8
Conditional discontinuance of the criminal proceeding (based on the terms of the mediation agreement)	53	15.4
Conditional discontinuance of the proceeding (with no reference to terms of the mediation agreement)	72	20.9
Suspended imprisonment	80	23.5
Imprisonment	2	0.3
Pecuniary punishment	19	5.5
Voluntary submission to punishment	15	4.3
Other	22	6.4
Total*	345*	100%

Table 6
Court decisions based on mediation (1999)
*The total number does not include the number of cases with no full data available.

3.2.8 The Polish Centre for Mediation

The Polish Centre for Mediation (hereinafter PCM) has 500 mediators associated with it, and about 30 branches located all around Poland.

The activities of the organization are:

- conducting mediation proceedings;
- promoting mediation;
- publishing a quarterly magazine, The mediator, and other materials;
- organizing training programmes.

The main activity of the organization is conducting mediation proceedings for juvenile and adult offenders. Although PCM focuses on victim offender mediation, the organization also deals with other types of cases, for example civil law cases.

In Poland there are regulations which specify who can become a mediator. Such persons must

- be at least 26 years old,
 - have Polish citizenship,
 - have no criminal record,
 - have adequate experience.
- These are the only legal requirements.



PCM emphasises the importance of training. They consider that mediators must take part in at least a basic training course before undertaking any mediation. On completing the course, new mediators may only operate under supervision. They must conduct a minimum of 10 cases under the supervision of experienced mediators. During this phase problems may arise, two of them are to be mentioned here.

The first problem is that of the self-confidence of new mediators. Some of them are so afraid of the responsibility that they ask the supervising person to tell and show them everything, how to open the mediation session, how to write the invitation letter, etc. This creates difficulties, because experienced mediators realize that there are no universal answers. It is also known that in some situations the mediator must act intuitively.

The second and more important problem is how to dissuade unsuitable persons from applying to be mediators. This is closely connected with the evaluation of the mediators' work and behaviour. The rules of procedure for rejecting inappropriate applicants are currently being elaborated.

For the abovementioned two and for other reasons PCM stresses the importance of proper training. During our practice we also noticed some other aspects which mediators must take into account:

- when and how to react in a very emotional situation;
- whether a lawyer should be present at the initial joint meeting;
- what to do when a criminal case gives rise to civil issues.

These and similar questions can arise to both inexperienced and experienced mediators, who must seek to find the right responses.

3.2.9 Conclusions

Settlements between parties may significantly contribute to relieving the courts' workload. They also mean that there is no need to examine evidence in criminal proceedings. Thus they create a chance for more cost-effective adjudication. But saving time and cutting costs are not the sole benefit. Settlements do not only help the administration of justice, but the defendant also gets the possibility of having some influence over the final decision and a chance to negotiate a lower punishment. The injured person gets a chance to receive compensation. The agencies responsible for conducting criminal proceedings get time to concentrate on more serious or complicated cases. Closing the criminal proceeding with a settlement is therefore not only beneficial for the administration of justice and for participants in the proceedings, but also for society as a whole.

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3.3

Legal Provisions on Restorative Justice in Germany

3.3.1 General introduction

"Täter-Opfer-Ausgleich" (hereinafter TOA) is the quasi-official German term for restorative justice and victim offender mediation.

TOA is on the one hand a practical concept developed by a grass-roots movement and the reform effected by it on the criminal justice system and on the other hand a legal term defined in Section 46a of the *German Criminal Code* (*Strafgesetzbuch*, hereinafter StGB) and Section 10 subsection 7 of the *Juvenile Criminal Court Act* (*Jugendgerichtsgesetz*, hereinafter JGG). These two aspects have to be kept in mind when discussing restorative justice and TOA.

Also, in an international context there is no single notion, no single type of process, and no single theory of restorative justice (Johnstone and van Ness 2007; UN Handbook 2006). Additionally, restorative justice is a developing concept which is changing over time. The concept of restorative justice can primarily focus on the nature of the reactions to an offence (the restorative outcome) or on the procedure with which the outcomes are achieved (see Johnstone and van Ness 2007; Walgrave 2009). In Germany, the statutory definition of restorative justice is outcome-oriented, while the practice is primarily procedure-oriented.



3.3.2 History of restorative justice in Germany

Elements of restorative justice could always be found in German criminal law. One example is the “*Adhäsionsverfahren*” (Sec. 403 of the StGB), which provides the victim with a possibility to make a claim for financial restitution within the framework of the criminal procedure. Another example is Section 374 of the *German Code of Criminal Procedure (Strafprozeßordnung*, hereinafter StPO), which gives the victim the possibility to bring private charges against the offender for some misdemeanours including simple bodily injury, trespass and insult. Beside Section 374 of the StPO, only the public prosecutor can refer a case to a criminal court. For a criminal court to accept a private charge, it is necessary for an arbitration procedure to have failed beforehand (Sec. 380 of the StPO). Another restorative element was included in German criminal law in 1953, when reparation became one of the conditions for probation in adult and juvenile criminal law. Reparation and apologising are also independent measures in juvenile criminal law since 1953.

From the late 1970s, two tendencies prepared the ground for restorative justice. On the one hand practitioners as well as researchers became disillusioned about the possibilities to socialize and educate offenders by the means of criminal law, and on the other hand politicians, practitioners and researchers rediscovered the victims, who were for a long period regarded only as sources of evidence. Step by step the legislator improved the rights and powers of victims to influence criminal procedures. The state imposed on itself the duty to provide compensation for the victims of severe crimes. The needs and interests of victims also became a relevant aspect in sentencing. In 1987, according to Section 46 of the StGB, the conduct of the offender after the offence, particularly his efforts to pay restitution for the harm caused, as well as his efforts to reconcile with the victim became a factor to take into account in sentencing. In 1990, TOA was introduced into juvenile criminal law as a measure in Section 10 of the JGG and as a possible way of diverting and dismissing a case in Section 45 subsection 2 and Section 47 of the JGG. In adult criminal law TOA became part of the criminal law for adults in Section 46a of the StGB four years later. From 1999 on, TOA was also included in the criminal procedure. Section 136 subsection 1 phrase 4 of the StPO obliges the courts and also the public prosecutors and the police (see Sec. 163a subsec. 4 of the StPO) to inform suspected persons already at the beginning of the first hearing about the possibility of a TOA if the case seems suitable. Section 155a of the StPO obliges public prosecutors and judges to analyze in every stage of the procedure whether a TOA could be appropriate and in suitable cases it is obligatory to offer TOA to victims and offenders, except if the victim refuses. Section 155b of the StPO gives a legal basis for the exchange of personal data between prosecutors, courts and VOM-schemes in the case of a TOA. In cases of a TOA, in adult criminal law it is also possible for the public prosecutors in cooperation with the judges to drop a charge during the investigative phase or after accusation as set out in Section 153a subsection 1 phrase 5 of the StPO.

3.3.3 The most important legal provisions on restorative justice in Germany

From a systematic point of view, the legal definition of TOA in Section 46a of the StGB is at the centre of the regulation on restorative justice (see the text highlighted).

Section 46a of the StGB states: “If the offender

(1) in an effort to achieve reconciliation with the victim (*Täter-Opfer-Ausgleich*), has provided full restitution or the major part thereof for his offence, or has earnestly tried to provide restitution; or

(2) in a case in which providing restitution for the harm caused required substantial personal services or personal sacrifice on his part, has provided full compensation or the major part thereof to the victim, the court may mitigate the sentence pursuant to Section 49 (1) or, unless the sentence to be imposed on the offender is imprisonment of more than one year or a fine of more than three hundred and sixty daily units, may order a discharge.”

The legislator pursued with Section 46a of the StGB a number of policies. In the first place, the interests and needs of victims were strengthened in the framework of the criminal procedure. The offenders were encouraged to respond to the needs of the victims caused by their crimes. In addition, the offenders were offered an opportunity to take responsibility for the offence in a voluntary manner, to distance themselves in this way from the offence and to reduce their guilt in a legal sense. Section 46a of the StGB also expresses the belief that solving the personal conflict that caused the offence or that was provoked by the offence creates or at least facilitates peace among the parties and beyond that between the offender and the society as whole; also, it eliminates or reduces the need to rely on punishment as a means to balance the outcome and effects of an offence. The provisions in Section 46a of the StGB also ensure that civil compensation for the harm caused by the offence alone will not be sufficient to eliminate criminal liability. Especially rich offenders should not be offered an opportunity to “escape” their offence and the resulting responsibility to the victim and society by paying money (BT-Drucks. 12/6853 S. 21; Supreme Court/BGH on 19.12.2002 – 1 StR 405/02 – published in StV 2003, 273; HK-GS/Rössner/Kempfer Sec. 46a StGB Rn 6).

The court has to take Section 46a of the StGB into consideration in every suitable case, otherwise an appeal to a higher court and a cassation of the verdict is possible (see Supreme Court/BGH on 17.01.1995 – 4 StR 755/94 published in NSTz 1995, 284; HK-GS/Rössner-Kempfer Sec. 46a Rn 39).

Section 46a of the StGB takes the following into consideration: the effort to achieve reconciliation, and providing full compensation or the major part thereof. Reconciliation is used in a wide sense, including material and immaterial (for example emotional) restitution whereas compensation means financial compensation.

Section 46a of the StGB is not restricted to specific offences. It is a general rule for the sentencing of any offence including felonies like robbery, rape and theoretically also murder or attempted murder (see Supreme Court/BGH on 12.07.2000 – 1 StR 281/00 published in StV 2001, 230) as well as business crimes. The wording and the intended purpose of Section 46a of the StGB make it evident that the provision should only be used where the offence injures a natural or a legal person. Thus, there is no point in applying it, for example, in the case of drunk driving where there was no accident and no actual danger to a concrete person or his/her belongings.



Section 46a of the StGB allows the dropping of charges, except if the sentence to be imposed on the offender is imprisonment of more than one year or a fine of more than three hundred and sixty daily units. Therefore, in about 80% to 90% of all convictions in German criminal courts, theoretically a TOA could be the only official reaction to an offence (see Heinz 2006). If the conditions to drop the charge are not fulfilled, Section 46a of the StGB provides a possibility to decrease the sentence according to Section 49 of the StGB. Section 49 of the StGB regulates specific reductions in sentences. Generally, a sentence can be reduced by one quarter of the sentence that would otherwise be imposed.

Section 46a of the StGB only regulates the case where TOA has taken place. The prosecutors and the courts have to inform victims and offenders about the possibility of a TOA and they should suggest using it in every suitable case, but they do not have a legal power to impose it. This possibility is only provided by Section 10 subsection 7 of the JGG, which, as a result, was intensely criticized and is scarcely used in practice. Outside the scope of this provision, offenders and victims cannot be obliged to take part in a TOA.

The two parts of Section 46a StGB concern two different scenarios. Only the first is a TOA, the second regards a special form of financial restitution. TOA has, according to Section 46a subsection 1 of the StGB, some characteristics in common with the financial restitution under Section 46a subsection 2 of the StGB. However, only subsection 1 demands reconciliation on the basis of a communicative process between victim and offender (Supreme Court/BGH on 7.12.2005 – 1 StR 287/05 – published in NSTz 2006, 275 f.). Unilateral restitution paid by the offender without at least an attempt to involve the victim would not suffice for subsection 1, but could, however, fulfil subsection 2. Reconciliation in the sense of subsection 1 includes financial restitution as well as an emotional recognition of the troubles and sufferings of the victim as well as all other forms of immaterial restitution. The amount and nature of the necessary restitution depends therefore on the needs and interests expressed by the victim. On the contrary, full compensation or the major part thereof under subsection 2 means full compensation according to civil law. Subsection 1 is applicable if the offender makes an honest and serious effort to achieve reconciliation and tries earnestly to provide restitution whereas subsection 2 requires that the offender pays more than 50% of the restitution he/she owes to the victim according to civil law.

As important as the requirements of a TOA set out in Section 46a StGB are the circumstances which are not specified by law. The mentioned communicative process between victim and offender needs not to be attended by a mediator, lawyer or any other third party. For the purposes of Section 46a of the StGB, any form of communication between the victim and the offender is suitable. The communicative process can happen in direct communication between the victim and the offender as well as indirect communication facilitated by a third person. It can be organized in

the frame of a mediation scheme but can also be arranged by the judge or prosecutor and it can also take place spontaneously during a court session. Section 46a of the StGB is open for professional as well as volunteer mediators, for conferencing, circles and also direct communication between victims and offenders by letters, e-mail, telephone or meeting each other. It allows new developments in the field of restorative justice and is not restricted to mediation or conferencing.

More or less as a consequence of this approach, questions such as the process of victim offender mediation, qualifications necessary to mediate, the type of institutions that may offer mediation or other restorative justice processes are so far neither regulated by 46a of the StGB nor by any other statute in German criminal law.

Therefore it is presently impossible to say exactly how many cases of TOA are carried out per year.

Because of Directive 2008/52/EC, which states standards for mediation in international civil cases that have to be transferred into national law until 2011, the German legislator has very recently started the preparation of a general mediation law. This law may include general standards for mediative procedures also in criminal cases as well as standards for the necessary training of mediators (see Schmidt 2010 for details).

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3.4

Mediation and the Mediation Procedure in Hungary for Adult Offenders

3.4.1 Legal background

3.4.1.1 In which criminal cases can mediation be applied?

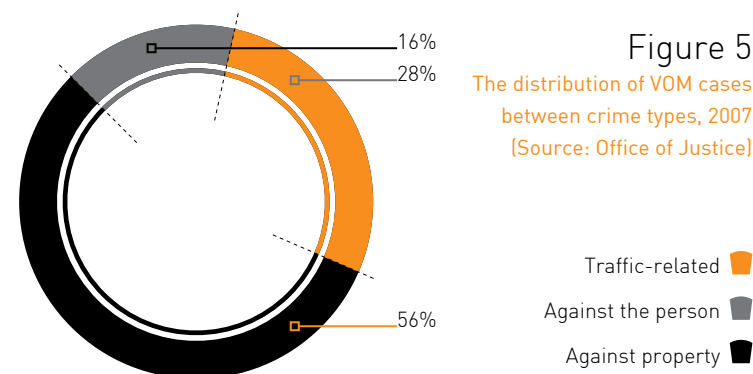
Victim offender mediation (VOM) can be applied in both juvenile and adult criminal cases. The legislator defined the kinds of cases, the prosecutor or the judge is entitled to refer to mediation [see Figure 5]. According to the applicable rules, the case can be referred to mediation if the crime is

- a crime against the person (*Criminal Code*, Chapter XII Titles I and III), or
- a traffic-related offence (*Criminal Code*, Chapter XIII), or
- a crime against property (*Criminal Code*, Chapter XVIII),
- unless the particular crime is punishable by more than five years of imprisonment.

VOM is excluded by law in the following cases:

- if the offender is a habitual offender committing a similar crime for the second time or committing a crime more than twice;
- if the offender commits the crime as a member of a criminal organisation;
- if the crime results in death;
- if the crime is committed intentionally
 - during the term of a suspended sentence;
 - after the offender has been sentenced to an unconditional term of imprisonment and before the unconditional term is served;
 - during probation; or
 - during the term of postponement of accusation.

Figure 5 shows how VOM cases were distributed between the three crime categories defined above in 2007.



3.4.1.2 Legal background in Hungary and in the European Union

Under Article 10 of *Council Framework Decision 2001/220/JHA* on the standing of victims in criminal proceedings, each Member State must seek to promote mediation in criminal cases, and they must ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account. This obligation under EU law was highly significant in the development of criminal mediation in Hungary.

3.4.1.3 The referral of a case to mediation

A case can only be referred to mediation if the criminal procedure has actually started. The prosecutor is the first person in the procedure who may order the suspension of the procedure and refer the case to mediation as a diversionary measure. Both the suspect and the victim (or their legal representatives) are entitled to initiate a mediation procedure, but the prosecutor also has the right to initiate it *ex officio* and to request the offender's and the victim's consent.

If no referral is made for mediation in the prosecution phase of the procedure, the court of first instance may also decide to refer the case for mediation. However, no *ex officio* referral may be made in this phase; the judge may only order mediation if one of the parties requests so. More than 80% of the cases are referred to mediation by prosecutors; therefore the method has definitely become a measure of diversion.

Under Section 221/A of the *Criminal Procedure Code*, the prosecutor or the judge must check whether the offender has plead guilty during the investigation, whether he/she agrees to and is able to compensate the victim for the damage caused by the crime, whether both the suspect and the victim have given their consent to the referral to mediation and whether it is possible to order mediation on the basis of the nature of the crime, the method of committing the crime and the person of the offender.

The introduction of VOM was first specified as a legislative task in Hungary in section III/A/3 of the *National Strategy for Community Crime Prevention* (2003).

Parliament fulfilled its legislative duty under the *Framework Decision* in the summer of 2006 by passing an amendment (Act LI of 2006) to the *Criminal Procedure Code* [Act XIX of 1998]. The amendment added a set of rules to the code to regulate the mediation procedure.

The detailed rules applicable to mediation activities are included in *Act CXXIII of 2006 on Criminal Mediation*, which was passed by Parliament on 18 December 2006. The implementation rules of mediation activities are defined in *Minister of Justice Decree 1/2007* (I. 25.) and *58/2007* (XII. 23.).



3.4.2. The main characteristics of the mediation procedure

3.4.2.1 Mediators in criminal cases

Since 1 January 2007, mediation procedures in criminal cases have been carried out by the probation officers providing mediation services at the Probation Service (a separate department of the County/ Budapest Offices of Justice) of the area the criminal court or the prosecutor has competence over. Since 2008, attorneys who have received special training and that have a contract in place with the Office of Justice for this purpose may also act as mediators.

The mediators must attend at least two 30-hour courses in mediation, which include both theoretical and practical training, and then they must also complete an approximately 90-hour theoretical course on restorative justice. They must also participate in the mentor programme, attend regular case discussions and meet with their supervisor. There are over a hundred specially trained mediators now in Hungary who provide criminal mediation services. 60 of them are probation officers and 42 of them are attorneys.

3.4.2.2 The steps of the mediation procedure

After it has been checked whether the statutory conditions are met, and after a personal hearing of the parties where they have given their consent, the prosecutor or the court makes a decision on referral and suspends the criminal procedure for a period of maximum 6 months.

The mediator contacts the parties following receipt of the decision on referral for mediation and summons them to the mediation session within a period of 15 days. The meeting, which usually takes about 2 to 3 hours, provides the parties with an opportunity to explain what effect the crime has had on them, the offenders may express that they take responsibility for the criminal act and they also have a chance to apologize. Also, the parties can agree on compensation for the damage caused by the crime. If the parties reach consensus on the content of the mediation agreement, the mediator puts the terms of the agreement in writing at the meeting and then it is signed by each party.

The next phase is the performance of the agreement. The mediator monitors the performance of the agreement and sends a report to the prosecutor or the court on whether the agreement has been performed. If the agreement is performed satisfactorily, the court or the prosecutor applies the new rules on "active repentance" as defined in Section 36 of the *Criminal Code*.

3.4.2.3 Additional characteristics of mediation in Hungary

In Hungary, there are no cases when it is mandatory to apply VOM by law. VOM is always provided to the parties free of charge. In Hungary, legal entities can also fall victim to a crime, therefore not only natural persons may participate in the mediation procedure as victims.

Mediators use the technique of direct mediation: the mediation takes place in the form of a personal, face-to-face meeting between the victim and the offender, that is, they are at the same place at the same time. Compensation can be provided in any form if it is not immoral or illegal; it all depends on the parties' agreement. This means that material compensation, a personal service, the repair of the damage caused, or the offender's promise to undergo treatment or therapy for crime prevention purposes are all acceptable.

3.4.2.4 The effect of a successful mediation procedure on the criminal procedure

I would like to stress that the mediation efforts are not considered successful when the deal is struck; the mediation is a success when the agreement is performed. The legislators defined different legal consequences for a successful mediation for adult offenders depending on the severity of the crime.

According to the *Criminal Code's* rules on active repentance, if an offender pays damages to the victim or otherwise compensates the victim and the crime is a crime against the person, a traffic-related crime or a crime against property punishable by maximum 3 years of imprisonment, the offender will no longer be criminally liable. If the crime is more serious, but is punishable by maximum 5 years of imprisonment, the punishment may be reduced without any restrictions. In the latter case, the court

will bring a judgment and sentence the offender, but will have the power to reduce the punishment without any limitations. There is no such distinction for youth offenders; for them, a successful mediation procedure always means that the case is closed.

If the mediation procedure is unsuccessful (no agreement is made, or it is not performed), the parties will have the same status they have had in the original procedure and will not have the right to apply for mediation again.

3.4.3. Case numbers since the introduction of mediation in 2007

In the year it was introduced, VOM was applied in 2.451 cases. In the next year (2008), the number of referrals rose by 21%, which means that mediation was ordered in 2.976 cases. However, the proportion of mediation among all indictments is still low when compared to other European countries' figures. In 2007, mediation was applied in only 1.2% of all indictments and it has not grown by much since then, as it currently stands at 1.5%.

As mentioned earlier, 88% of mediation cases involved an adult offender, which means that the proportion of juvenile cases in all mediation cases is lower than the proportion of juvenile criminals compared to all known offenders. One reason behind this must be that the prosecutor has more diversion methods and the court has more alternative sanctions available for juveniles than for adults.

There are vast differences between counties both in the total numbers of mediation cases and in the proportion of mediation cases among all criminal cases as shown below (see *Figures 6 and 7*).

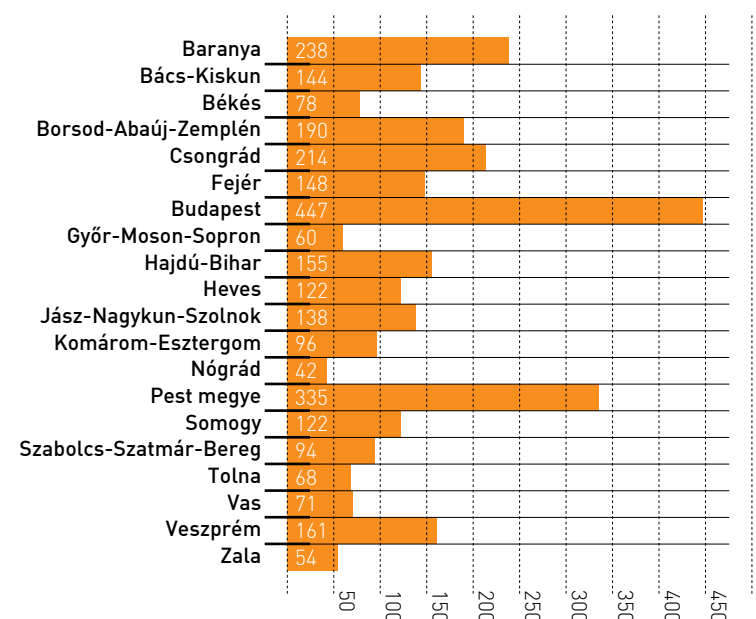


Figure 6
Number of cases referred to mediation in 2008 in each county
(Source: Office of Justice)



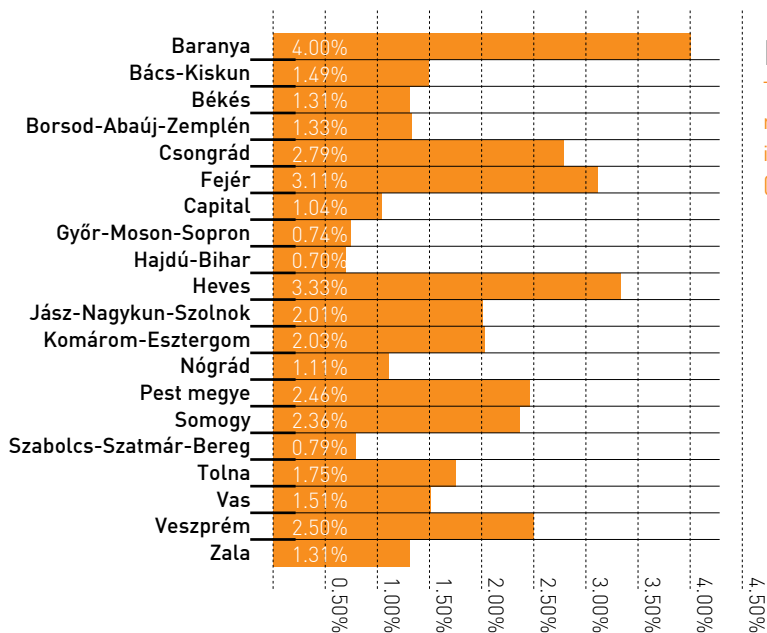


Figure 7
 The proportion of mediation referrals among all accusations in each county (2008)
 [Source: Office of Justice]

It should be noted that while the total number of mediation cases is very high in the capital, their proportion compared to all accusations is lower than the national average (1.5%). To put it another way: an offender and a victim are six times more likely to be referred to mediation in Baranya county than in Hajdú-Bihar county (see also article 5.2 in this publication).

In 2008, 2,308 cases were closed with the result that an agreement for active repentance has been made, which is 80% of the total number of cases referred to mediation (2,872). We have also looked at the percentage of performed agreements in the same period. This is shown in *Figure 8*.

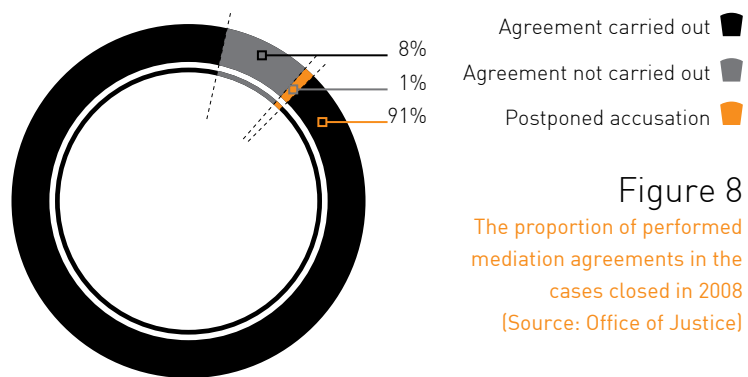


Figure 8
 The proportion of performed mediation agreements in the cases closed in 2008
 [Source: Office of Justice]

Figure 8 shows that over 90% of the agreements have been performed, and this is a promising figure given the fact that probation officers can only monitor the performance of the agreement but may not urge or force the offender to perform it due to the voluntary nature of the procedure. The success rates are similar to international data.

In conclusion, mediation has become acknowledged and used in Hungarian legal practice and the results demonstrate that mediation will be a successful method in Hungary for enforcing victims' rights in the criminal procedure. I believe that there are no legal or capacity-related obstacles to more frequent use of mediation, however, wider knowledge and willingness of legal practitioners to apply this method would be necessary.

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3.5

Alternative Dispute Resolution and Restorative Justice Schemes for Juvenile Offenders in Greece – Potential Limitations and Open Questions

3.5.1 Introduction

From the beginning of the new millennium, new criminal laws with emphasis on the victim have been issued in Greece. This development on a national level was embedded in a global movement, which involved major international organizations³² and affected countries all around the world. Since the mid-1990s, issues such as trafficking and cyber crime, domestic violence, child assault and battery, have more or less become focal points of the national political agenda, the debate of experts (Alexiadis 1992, 1996; Maganas 1996; Artinopoulou and Maganas 1996; see also the early works of Andrianakis 1971/2001) and the practice of professionals. However, only a minor amount of systematic research on victimization, based on medical reports on children had been carried out (Agathonos-Georgopoulou 2001; Lambropoulou 2005: 217). The situation of other social groups such as women and the elderly had only occasionally been investigated (Spinellis 1997: 209–211). The only large-scale victimization study of the general population is the one that was carried out to make amends for Greece’s absence from the first part of the International Crime Victim Survey (ICVS) (Spinellis et al. 1991; Spinellis 1997: 212–222). The legislative developments were therefore explained by “progress” and “the evolution of internet technology”, and were also justified by “human rights” and “social exclusion” rhetoric (Spinellis 1997: 297–307; Jansson et al. 2007: especially chapters 4 and 5).

Following the trend of recent years and the country’s European as well as international commitments to promote mediation in criminal cases and alternative dispute resolution (Walgrave 1995, 2001; Alexiadis 2007), laws and regulations necessary to comply with them [CoE – CM R(99)19; Council Framework Decision 2001, arts. 17 and 18; UN 2000; UN – ECOSOC Resolution 2002/12]³³ have come into force and have been integrated into the national legislation. Also, existing legislation has been reformed [CoE 1996; CoE Rs(85)11; (87)18; (87)20; (87)21; (88)6; (92)16; Rs(95)12; (98)1].

Thus, in 2002, *Act 3064 on Trafficking, Child Pornography and Every Form of Economic Exploitation of Sexual Life in General* was issued (Tsaklaganou 2002; see also UN – CESC, E/2005/22; E/C.12/2004/9; sections D and E of U. S. Department of State 2008). In 2007 a *new act* (3625) regulating child pornography was passed in order to adapt to the United Nations’ Optional Protocol of the Convention on the Rights of the Child (2000; see also UN – CRC 1989; Agathonos-Georgopoulou 2001). It widened the definition of sexual exploitation by encompassing all forms of sexual exploitation of children through inclusion in pornographic material, comprising the production, distribution, selling on the internet and possession of such materials, as well as sexual tourism, under the umbrella of the protection of children’s privacy (CoE, European Convention on the Exercise of Children’s Rights 1996; see also Act 2101 of 1992). In relation to this, the *Greek Civil Code* [hereinafter GCiC, Sec. 57(1)] provides the victim the right to ask through his/her legal

³² E.g. UN Declaration of Basic Principles (Resolution 40/34 1985); UN Vienna Declaration (Resolution 55/59 2000). From the EU see: CoE – CM R(99)19 and CoE – CEPEJ(2007)13.

³³ Similarly in civil matters CoE – CM R(2002)10.



representative for the prohibition of the circulation and future use of the material. The child/minor also has a right for compensation for any harm caused to him/her by the pornographic images.

In the meantime, the release of President Decree (PD) 131/2003 established the protection of e-consumers (e-commerce, distant selling). It provides for the non-judicial settlement of consumers' disputes [Sec. 16(8) according to previous Act 2251 of 1994 and secs. 11³⁴ and 14(3) of the PD], and a code of ethics covering sellers, the responsibility of intermediaries who provide e-services, etc.³⁵

In October 2006, *Act 3500* was issued, regulating the consequences of domestic violence and introducing victim offender mediation (VOM) (Ministry of Interior et al. 2005; 2007). Act 3488 of 2006 criminalized harassment along with sexual harassment. This was carried out in the context of changes effectuated by the Directives 2002/73/EC and 2006/54/EC of the European Parliament to the Council Directive 76/207/EEC of 9 February 1976 on the "Implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions" (European Commission, Unit V/D.5 1999; UN – CESCR 2005).

Until then, the punishment of sexual harassment had been based on the sections of the criminal law protecting sexual life, being perceived either as a violation of sexual freedom or as an assault (physical harm), as well as a civil wrong for which the target/victim may sue for damages or any harm including mental distress due to the assault. Also, equal treatment before the law and equal rights for men and women belong to the fundamental rights referred to among the first sections of the *Constitution* [Sec. 4(1)–(2)].

In the new act (Act 3488 of 2006) both forms of harassment "reflect gender discrimination and are prohibited" [Sec. 4(2)]. According to it, "sexual harassment" means "every kind of undesirable behaviour, either verbal or non verbal, physical or sexual, aiming at, or resulting in the offence of an individual's dignity, especially through the creation of an intimidating, hostile, degrading, humiliating or offensive environment" [Sec. 3(1) c–d].

For the prosecution of sexual harassment the victim/plaintiff needs to file a complaint. The offence is punished with an imprisonment ranging from six months to three years and with a fine of at least EUR 1.000 [Sec. 16(4)]. Also, the accused/defendant has the burden of proof in the civil trial [Sec. 17 of Act 3488 of 2006]. Mediation is set out to be used in all forms of unequal treatment (secs. 12 and 13 of Act 3488 of 2006).

Similar obligations to incorporate EU directives applied to the vast majority of "new" crimes, such as trafficking (secs. 323A and 351), sexual exploitation (secs. 349 and 350), cyber crime (secs. 386A, also 370B, 370C of Act 1492/1950, the *Greek Penal Code*, hereinafter GPC),³⁶ domestic violence [see CoE – CM R(98)1; Act 2867 of 2000,³⁷ also Papadopoulos 2007]. All of them, apart from certain forms of domestic violence (i.e. marital rape), had already been regulated in sections of the GPC within various groups of crime, meaning that good legal standards had already been ensured before the obligation to incorporate the *EU directives*.

³⁴ According to Act 2251 of 1994, Section 11.

³⁵ Directives 2000/31/EC on e-commerce and 2002/58/EC on privacy and electronic communications; 97/7/EC on distance selling.

³⁶ Acts 3064 of 2002; 2928 of 2001; 1805 of 1988; see also CoE – CETS no. 185, 2001 which is not yet ratified (4/6/2009).

³⁷ "Organization and operation of telecommunication": issued regulating amongst others more thorough protection of personal data of telecommunication users (previous Act 2472/1997), followed in 2008 by Act 3674.

³⁸ "Action civile" is a lawsuit for the restitution of a victim (of prejudice ensuing or not) from a violation of criminal law. The lawsuit can be brought either to civil or criminal courts if the offence has violated a private interest together with public order. Therefore, civil action can be filed in parallel with public complaint.

³⁹ Personal "moral" – psychological or mental harm; physical injury, or damage to tangible property.

⁴⁰ Up to two years the suspension is mandatory (Sec. 99 GPC).

3.5.2 Forms of restoration and reconciliation in Greek criminal law

3.5.2.1 Historical overview

Restitution is very well known in the Greek legal culture as well as in the informal dispensation of justice, not only in ancient times but later on as well (see mainly Pantazopoulos 1993, 1994). During the Byzantine time, compensation had a reconciliatory, restorative and non-monetary form. Restitution for resolution of disputes reached its height during the four centuries of Ottoman rule. Initially Greeks avoided going to the Ottoman courts, and settled their disputes through arbitration, namely victim offender mediation (which also involved the victim's and the offender's family). The clergy and eminent citizens acted as mediators. In the course of time this informal adjudication was established quasi formally and the representatives of the communities only asked for ratification of the community decisions by the ottoman courts/judges in certain cases, paying an amount of money as tax. The law applied was that found in the famous codifications of the Byzantine emperors. People who appealed to ottoman courts were branded as "sly traitors" or "enemies of the country" (Pantazopoulos 1994: 16; Manoledakis 2000) and were sometimes even excommunicated. The compensation for the harm was awarded either directly to the victim or symbolically to the community (community service). This type of restorative justice was maintained up to the 19th century, even during the years of the Revolution (1821–27). It was abolished some time after the constitution of the New Greek State along with the organisation of local governments and communities by the Bavarian regency, since it was regarded as outdated and not in line with a centralised western-style state (Pantazopoulos 1993: 40 and 75). Nevertheless, monetary restitution/compensation based on civil law (secs. 914 and 932, GCiC) continued to be widely used.

The idea that harm caused by violation of the personal rights of the victim also insulted the state and the society as a whole protected by the prosecutor dominated. This means that by harming the victim, the offender also indirectly harmed certain legal values of the whole society. Thus the victims' rights were gradually separated from criminal law and found their protection in civil law. The civil compensation aspect of punishment remained untouched. This is the reason for the institution of civil prosecution, which prevailed during the 20th century, despite the fact that it never played a significant role.

3.5.2.2 The present situation – Formal practices

Although there are no organised programmes for restitution in Greece, the existing law, which is similar to the French-Italian "*action-civile*",³⁸ offers several opportunities to satisfy the victim's claims.³⁹ The victim may claim compensation from the opposing party (the party charged with a crime) in a separate civil lawsuit, or within the criminal proceedings. In the latter case, the victim becomes the subject of the criminal trial and has the complete rights of a plaintiff, namely to be informed about his/her case, to participate actively in the trial through his/her attorney etc., and to allege the defendant's guilt. However, this possibility is used only rarely and has more of a symbolic function, because

- the convicted persons usually cannot pay,
- because of the long time needed for the court to reach an irrevocable decision, and
- the uncertainty of the judgement.

Additionally, the court can grant the suspension of a prison sentence for up to three years without probation (discretionary, Sec. 100 GPC),⁴⁰ which cannot be lower than three and longer than five years [Sec. 100 subsec. (1)b point 2 GPC], if after the examination of the defendant's previous life, it is established that due to the conditions under which he/she committed the crime and considering his/her character, imprisonment is not necessary to prevent him/her from committing further crimes. In such a case, the court must also take into account the behaviour of the offender after the crime and whether he/she has shown remorse and genuine willingness to restore the consequences of his/her



offence [Sec. 100 subsec. (1)b point 2 GPC]. Suspension of the prison sentence still depends on the payment of court costs, restitution and just compensation of the victim. Furthermore, a prison sentence from three to five years can be suspended under probation if the defendant fulfils certain obligations, such as financially supporting or acting as the guardian of other persons [secs. 100A (2)f and 106(3) GPC]. Such a person could for example be the victim.

It is worth mentioning that for several decades (1951–1994) the fulfilment by the prisoner of his/her obligations towards the victim “as much as he/she could”, was necessary for release on parole according to the law [106(1) GPC]. This meant that the expiry of the required minimum period of custody was not enough for an earlier release. The rule was abolished in 1994 (by Act 2207) and now applies only to those convicted for high treason [Sec. 106(2) GPC, Sec. 106(1), see also Sec. 66 subsec. (1). point 3 GPC].

Several years ago, an additional provision was included in the act, which can result in the suspension of imprisonment under probation [Sec. 100A(3) GPC] or release on parole [parole, 106(2) GPC]. This is only applicable if the defendant is willing to compensate the victim’s losses.

Additionally, in the sections 79(3)d, 82(8)b, 84(2)d of the GPC the offender’s remorse and his/her willingness to eliminate the consequences of his/her crime by compensating the victim, are taken into consideration by the court for the determination of the sentence and its mitigation. Finally, as already mentioned, the remorse of the offender and the full restitution of the damage to the victim [see i.e. secs. 379, 404(6), 405(2) GPC] cancel the punishable part of the criminal act; in other words withdraw the punishment for the crime. Partial restitution annuls the punishable offence accordingly.

The GPC (Sec. 77) also provides that in the case of punishment with a fine and the obligation to compensate the victim, if the incomes and property of the offender are not sufficient for both, he/she has to give priority to the compensation of the victim.

From the above, it is obvious that the GPC provides several possibilities for restitution/restoration. It also provides the possibility to those convicted persons whose sentences have been converted to community service of offering their service to the victim if he/she is disabled and both parties are willing to accept this solution [Sec. 82(8)b GPC].

After the initial long-standing unwillingness of welfare organizations to participate in the process of community service, they have recently started to cooperate with the courts. There are several practical problems including the form of contracts, employees’ rights, insurance etc. of those working in the community that need to be dealt with (Sec. 64 GrCorrectional Code) [cf. *Neustart*, 2008/09]. Community service has been introduced for adult offenders since 1991 [Sec. 82(7)–(8) GPC], but in practice, it only started after 2000. Originally community service was only an option for sentences of up to 18 months but this has risen to three

years [Sec. 82(6), see also points 7–11 GPC; see also Alexiadis 1992]. Similar problems with those of the adults are expected for the enforcement of community service upon juveniles.

While the legal context exists, it is now also necessary to support the enforcement of the regulation and to register their use separately in order to have an overview of their effectiveness, difficulties and future improvement [see also secs. 65(2), 68 and 248(2) of the *Greek Penal Procedure Code*, hereinafter GPPC].

3.5.2.3 The present situation – Semi-formal practices

Apart from the previously described solutions, mediation and alternative dispute resolution (ADR) (Lambropoulou 1999: 312–397) have also been carried out in Greece, on a semi-statutory basis in the context of the “proactive” (according to one view) or “mediating” role (according to another) of law enforcement agencies.

Firstly, in offences prosecuted after the filing of a complaint, police officers may attempt to bring together the offender and the victim for negotiation in order to reach an agreement out of court. The police officer usually places emphasis on the consequences of the prosecution (costs, length etc.) in order to convince both sides to reach an agreement and avoid sending the case to the prosecutor.

Secondly, the prosecutor can advise those in conflict to agree on a compromise. In the case of petty offences, after registering the events, the prosecutor sends a written order to the police department of the place where the victim is located to mediate and find an acceptable solution. He/she keeps the most serious cases for mediation for him/herself (Sec. 213 GPPC). It is claimed by an older piece of research in 1993–1994, that 100 to 150 of such cases were registered by the public prosecutor’s office in Athens; 80% of them were settled this way, either by the prosecutor or the police (according to Sakkali 1994: 222).

Additionally, the prosecutor can rely on the “proportionality principle”, namely balancing the costs of the litigation to the offender and the benefits to society and the victim, in order to decide against prosecution. Finally, according to the *Code on the Organization of Courts* [secs. 25(4) of Act 1756 of 1988] the prosecutor also has the right to reconcile parties in a conflict, for reasons of prevention.

Thirdly, just before the hearing of the case at the court, the judge may try to reconcile the parties in order for the complaint to be withdrawn. If the parties reach a peaceful settlement in the conflict, the prosecution is definitively discontinued. An impartial way is for both to accept responsibility, terminate the disagreement by mutual consent and compensate each other (car accidents, violation of traffic law and safety etc.).

Section 393(2) of the GPC provides the possibility for those accused of specific crimes (i.e. certain types of theft and fraud) to be released in the case that they fully compensate their victim(s) before the court hearing. In such cases, mediation is possible although we do not know how often it is used.



3.5.3 Innovations for juvenile offenders

3.5.3.1 Legal context and scope

The introduction of restorative schemes (Braithwaite and Mugford 1994) for juveniles was part of a long-standing reform attempted by *Act 3189 of 2003 on the Reform of the Penal Legislation for Juveniles and Other Regulations* (Courakis 2004a: 288; 2004b; Spinellis and Tsitsoura 2006; Alexiadis 2007). The new act, which amended sections of the GPC and the GPPC,⁴¹

- brought into use diversion,
- increased non-custodial measures, and
- promoted due process rights [secs. 4(2) and (5)–(7)].

It is said that it indicates an emancipation from the “paternalistic” character of the juvenile justice system, being the result of a long debate, and a trend towards a more justice-based model [Declaration of Leuven 1998, esp. under 4, (1.3), (5.1), (7.1)]; see also the Introductory Report of the Act 3189 of 2003].

The act introduced victim offender mediation, compensation and community service through diversion (Sec. 45A GPPC) and as educational measures/orders [Sec. 122(1) GPC]. Alternative dispute settlements are possible in cases where an application by the plaintiff is necessary as well as in *ex officio* prosecutable offences (see more in Pitsela 2004: 190–194; Zagoura 2008; cf. Troianou-Loula 1997: 461–535).

Specifically, according to Section 45A GPPC (diversion from prosecution), if a minor commits a petty offence or a misdemeanour (usually, theft, assault, vandalism etc.), the district attorney may refrain from prosecution (filing a charge), if he/she considers that adjudication and prosecution are not necessary to prevent the young offender from committing further crimes (discretionary refraining from prosecution). Diversion from prosecution may be accompanied by one or more educational measure [in extraordinary cases, Sec. 122(2) GPC] and the payment of EUR 1.000 to an NGO, a public welfare institution or a non-profit legal entity [Sec. 122(1) GPC] (cf. Moshos 2005). All three alternatives can also be applied by a juvenile court as educational measures to minors of 8 to 18 years old [Sec. 122(1) GPC]. The act makes no mention of the consent of the parties, since it is the decision of the court; yet experience shows that consent is always sought (Pitsela 2004: 191 with footnote 183, and 271–273).

Victim offender mediation [Sec. 122(1)e GPC] takes place during the trial, with the involvement of juvenile supervisors (otherwise known as juvenile probation officers). The officer cooperates with the minor so that, if reasonable and fair, he/she offers an apology to the victim, and further facilitates the parties’ agreement to terms of settlement. This is mostly used in forms of compensation for loss caused by the young defendant to the victim. During the hearing of the case, the court carefully examines whether it is the true

intention of the minor to make amends and asks for the consent of the victim.

As previously referred to, *Act 3500 of 2006* introduced VOM for cases of domestic violence (secs. 11–14) (Haralambakis 2006; Giovanoglou 2008a; Artinopoulou 2009). According to the act, mediation can be used with juveniles as well, but the whole proceedings are to be carried out by the competent public prosecutor [Sec. 11(3)].

Restitution [compensation; Sec. 122(1)f GPC] can for example mean the return of stolen goods to the victim, making a payment to the victim for the harm caused or reparation of the damage by any other means, and can be combined with other sentences/orders, specially mediation or community service.

Community service [Sec. 122(1)g], aims at increasing the minor’s responsibility and sensitivity through regret, as well as supporting his/her integration into society. Both measures are carried out and monitored by the Juvenile Probation (otherwise known as Supervisors’/Social) Service.⁴²

The competent prosecutor is responsible for enforcing the courts’ decisions on restitution and community service. If an imposed measure is not carried out (i.e. refusal by a party/defendant(s) to fulfil restitution or community service orders), it can be replaced [cf. sec. 1 subsec. (5) point. 1]. In such cases, the juvenile probation officer usually suggests an alternative and/or the public prosecutor brings the case to court again for examination and discussion [Sec. 4 subsec. (2) point 3] (Papadopoulou 2008b: 2).

The Explanatory report (Preamble) of the Act 3189 of 2003 about the criminal reform to legislation concerning juveniles states that mediation is introduced to bring the offender closer to the victim and to make him/her assume responsibility for his/her offence, to provide restitution for the victim, and to achieve a positive impact on the juvenile.

Restorative schemes as alternative sentences in juvenile criminal law show that they focus more on the outcome (compensation, avoiding the use of more severe sentences) than the (reconciliation) process (see also Papadopoulou 2008b: 2). Whether they intend to compensate the victim, or to the support the young offender, is a question that cannot easily be answered (cf. Papadopoulou 2008b).

3.5.3.2 Law in action – Implementation

The Juvenile Probation Service of the Ministry of Justice (Act 378 of 1976; PDs 49/1979 and 195/2006) monitors the implementation of the community treatment of offenders (educational measures) – including restorative orders – according to the court’s decision, supports the juveniles and their families or care person, and prepares the social enquiry report during the stage when the juvenile is questioned. The pre-trial social inquiry reports refer to the minors’ personality, home background, current and past social circumstances and the offender’s need and motivation

⁴¹ I.e. sections 121–133, 18, 51(1), 54, 114c, 360(1), 409b of GPC; sections 27(1)b, 113, 282(5) of GPPC.

⁴² The terms supervisors and probation officers, as well as – service, are used alternatively.



to treatment or other alternative forms of non-custodial care. The officers' devoted, thorough work and their compliance with relevant statutory and organizational norms is a must for this. The assessment carried out by the officers is also used by the courts in determining appropriate sentencing (Mott 1977).

Formally the probation officers are only involved in so far that they support the judge and the juvenile court (Troianou-Loula 1999); they do not act as extra judicial or court mediators.

According to some research based on information provided by the Juvenile Probation Service of Athens and Thessaloniki (the capital and the second biggest city of the country) the new restorative measures were ordered by juvenile courts and prosecutors in very few cases between 2003 and 2006 (Papadopoulou 2008b: 3) (see the text highlighted).

3.5.3.3 Preliminary evaluation

The introduction of restorative programmes in the country is part of an effort to reduce court case loads and simplify criminal litigation.⁴³ It also corresponds to recent trends [Hoyle and Zedner 2007; see also CoE – CM R(2008)11]. Similarly, the improvement of victims' rights within the context of the penal procedure has been largely affected by the country's EU commitments [CoE – MJU-26 (2005) Resolution 2; CoE – CM R(2006)8].

It is said that restorative justice schemes have been put into use without a previous thorough study on the forms and the structure of their implementation, and how the local conditions could assist or counteract the measures' implementation (Papadopoulou 2008b: 4). This is true, but it is dubious that even if such a study had been carried out, the implementation of the measures would be any different, since the country does not take an active part in the creation of measures in the European forums. Therefore, the schemes have encountered various (practical/technical and substantial) difficulties, resulting in their limited use. Similarly, up to now penal mediation has rarely been applied in cases of domestic violence (Artinopoulou 2009).

While ADR operates in other fields of law (civil, commercial, company law), several legal professionals are very sceptical about the concept of restorative justice in criminal law (Efstratiadis 2003). Some reasons are mentioned in the beginning of this article (part 3.5.2.1). Greece as a civil law country does not consider jurisprudence as its main source of law, although this is changing (cf. Kormikiari 1994: 296). Instead, the *Constitution* is the supreme law of the land. Law enforcement falls within the exclusive authority of professional judges and prosecutors who are supported by the police and similar bodies. Extra-judicial settlements fall beyond the logic of the law; this is the reason why the measures are available only in the case of court and extra-court agreements between the parties. Furthermore, the court-based schemes available for the adjudication of minors have been criticized for their compelling style

Out of 1.288 educational measures imposed on minors by the juvenile courts of Athens, only 9 (0.7%) were VOM, restitution and community service, while during the same year, diversion from prosecution (Sec. 45A GPPC) was only ordered in 15 cases. Between 2005–2006 only community service was imposed, and that only in one case (0.1%) out of 933 educational measures applied during this year. The situation in the Juvenile Probation Service of Thessaloniki is presented by the research as being a little better, although no statistical data is provided. (Papadopoulou 2008b)

⁴³ According to an old CoE – CM R(87)18 on simplification of criminal justice; also CoE – CEPEJ(2007)13.

⁴⁴ In December 2008 the first group of Greek mediators certified by the Greek Society of Mediation and Arbitration, established by the Association of Joint Stock and Limited (Liability) Companies in 2006, see at www.sae-epe.gr/; see more in Dikaiorama, 17, 2009.

⁴⁵ Athens, the capital, has a population of 789.166 in the city itself and 2.8 million with Greater Athens (Athens prefecture); 10 probation officers for Piraeus (181.933 inhabitants) and Greater Piraeus (553.450 inhabitants; Piraeus Prefecture), while in total 80 probation officers for the whole country (population of 10.9–11 million), NSSG 2001/09; see also Kathimerini 2006.

undermining the purpose of restorative justice (Acorn 2004; cf. Braithwaite 2006; also Giovanoglou 2007a: 409–412; 2007b; Papadopoulou 2008a).

As far as it is known, no training or educational programmes on restorative justice have been offered to public prosecutors and (juvenile) probation officers. Recently legal practitioners (mostly lawyers) have participated in courses for mediation run privately.⁴⁴

The most serious problem is the lack of guidelines and information about the procedure. There are no bylaws or circulars that clarify the process to be followed, the aims and objectives of the new schemes and their relationship with the formal criminal justice system. This creates scepticism and unwillingness on the part of the judges and prosecutors who have to justify their decisions without access to evidence on the basis of the plaintiff's statements and the social inquiry report of the probation officer. In this respect their unwillingness to rely on the use and effectiveness of mediation for criminal cases can be understood.

Funding issues in relation to organisational infrastructure problems, lack of staff and trained staff are serious obstacles and cannot be ignored. Even if the new schemes have the support of several criminal justice practitioners and academics, there is still a long way to go before they operate in a satisfactory manner.

The attitude of probation officers towards the schemes also seems to be positive, although at a conference in 2008 the juvenile service stressed among others the need for training and infrastructural support and their extreme overload (17 officers for Athens and Greater Athens).⁴⁵

In a personal interview with a juvenile supervisor who has been working for over 10 years in the Probation Service of Athens, the increase in the severity of the crimes and the high number of foreigners without permanent residence was also underlined, a situation which makes their supervision very difficult and it makes less and less sense for the officers to suggest light measures instead of a punishment. Moreover, in the case of extra-judicial forms there is no way of making sure that measures will be followed or that the minors can be made to follow them.

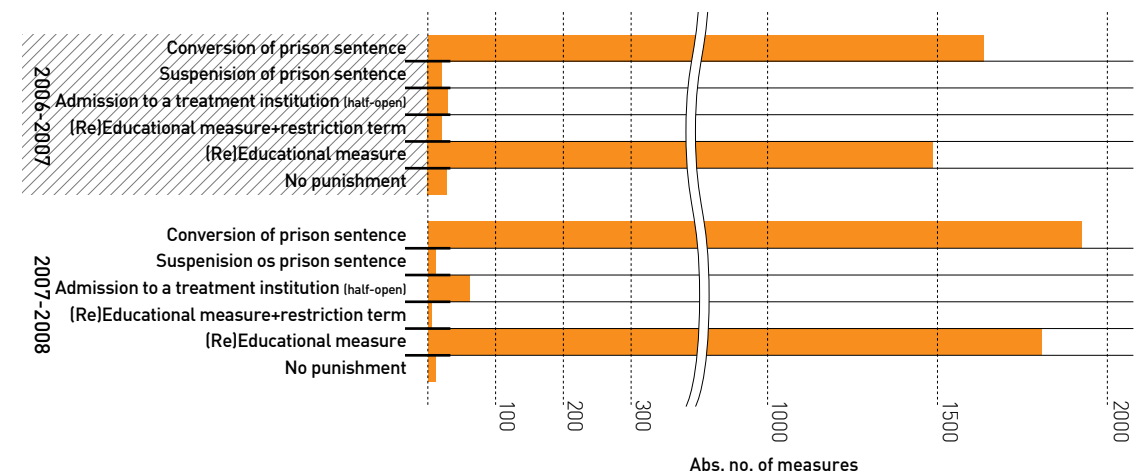


Figure 9
Treatment measures and punishment of juveniles, Athens–Greater Athens (2006–08)
[Source: Statistics of the Juvenile Probation Service of Athens (and Greater Athens) 2006–08]

Figure 9 depicts the treatment measures and punishment applied to juveniles during 2006–2008. The time span is very short, nevertheless the increase of institutional measures (admission to treatment institutions) is evident, doubling from 1.7 to 3.1% while the suspension of prison sentences declined fourfold, from 0.4 to 0.1%. The most frequently imposed measures are educational ones (cautioning, advice, service's supervision, etc. ADR) (92.8%), followed at a lesser extent by the conversion of imprisonments into fines (3.2%) and admissions to juvenile prisons (2.5%).

The reluctance of prosecutors to apply diversion can be justified by the following causes. Firstly, their offices are overloaded with cases and they receive no support from juvenile probation officers (Pitsela 2004: 270; Dimopoulos and Kosmatos 2006: 121), the juvenile probation officers only being brought in felony cases, and not in cases of petty offences or misdemeanours. Secondly, they only fulfil their post as probation officers for a short period of time (2–4 years). Thirdly, assessing the personality of juvenile offenders is a highly demanding task for the prosecutors. The reason for this is that they have inadequate experience and training in the psychology of juveniles and therefore do not feel confident about conducting swift procedures. The fourth reason is the principle of legality ruling the prosecutor's office – together with the principles of opportunity and discretion (see also Giovanoglou 2008b). The principle of legality goes further than in Anglo-Saxon law. It does not only mean the legal ideal that requires all law to be clear, ascertainable and non-retrospective (Gallant 2008). In Greek criminal law, as in other continental countries of Europe, it also means that the prosecutor is compelled to prosecute a criminal act, when he/she becomes aware of it: when the victim files a complaint or refers the act to the prosecutor or if he/she, suspecting a violation of criminal law, collects evidence and discovers a crime.

This, in addition to the increase in the amount and intensity of crime and the people without a stable residence referred to previously render prosecutors very cautious in their proceedings as they try to avoid making wrong findings. Also, if the offender (in our case the juvenile) on whom the alternative sanction has been imposed commits another violation of the law, the prosecutor shall be responsible to the Head of the Prosecution Service.

Figure 10 reflects the situation referred to with a complex pattern of ups and downs over the examined period. There is a striking increase in admissions to juvenile prison after 1993. While educational measures and admission to juvenile prison went through a similar fluctuation between 1978 and 1989, the trend subsequently changed and the number of educational measures constantly decreased, while imprisonment rates became unpredictable, reaching a peak in 1996, 1999 and 2004. Even though the total numbers are low, they range from 13 to 179 admissions per year.

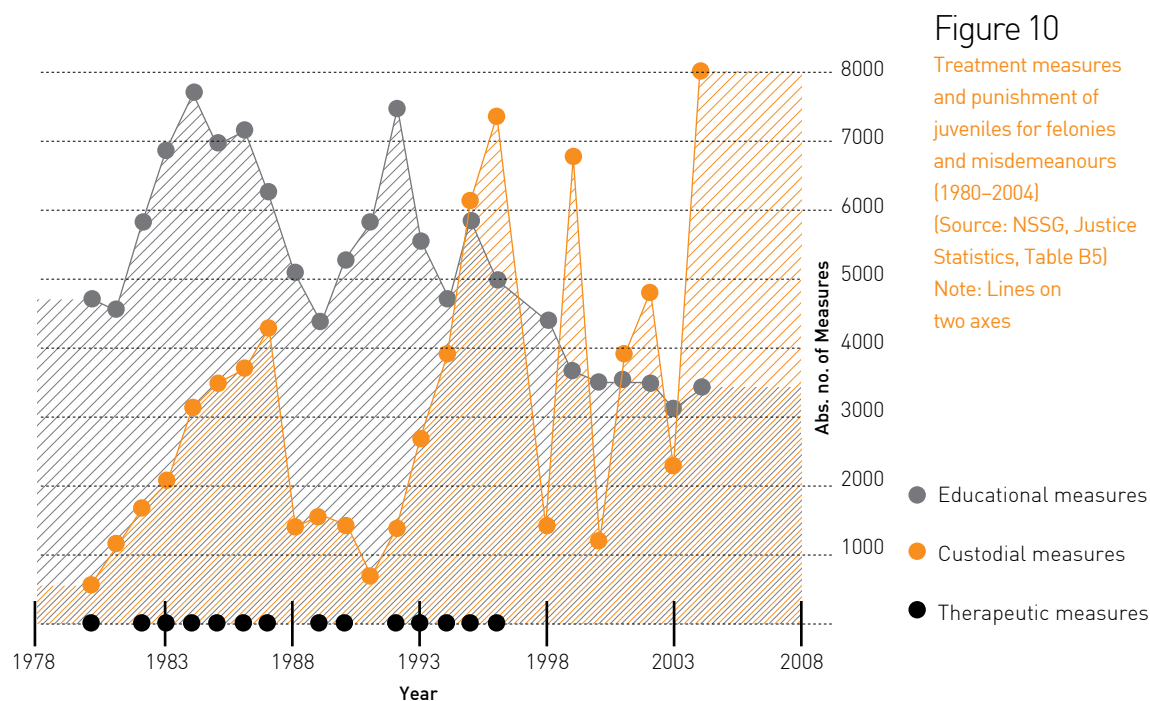
3.5.4 Conclusions and perspectives

Restorative justice is a large and complex undertaking (Gavrielides 2008). Scarce means and nebulous methods undermine the success of the measures. As mentioned previously, legal guidelines are needed to encourage the judicial system and other practitioners to familiarise themselves and feel safe with the new measures. Juvenile justice is an ideal area for their application, but only in careful steps. Failure due to high expectations without the necessary support to achieve them has an adverse effect on the target group as well as on the success of the measures (OIJJ, O'Mahony 2009; cf. Braithwaite and Mugford 1994).

There have been suggestions that mediation should be handed over to the police, because of the extra-judicial character of their proceedings. This idea is however for the time being incompatible not only with the GPPC but also with the principles of the *Constitution*.

While prosecutors are in exceptional cases entitled to discontinue cases without a trial, there are no such options for police officers. A strict principle of legality applies to the police and obliges them to investigate every single crime they have noticed and, subsequently, to send all their investigations to the prosecution service (Jasch 2004; Sakkali 1994: 223–224). Cautioning and advice (educational measures) can only be applied by courts, these measures are however informally also used by police officers, because they believe this would be better for the minor (and occasionally for the adult offender). If these rights are to be granted to the police, a basic mechanism of experts (psychologists, social pedagogues, sociologists, criminologists, social workers) should support them. Otherwise the police would be likely to reject the idea, because, apart from them being overburdened with cases, they also lack training in consulting and working with juveniles.

I would suggest making maximum use of the possibilities offered by the law combined with adequate support. For the juvenile system I recommend a step by step implementation examining the pros and cons of the models; otherwise it would be once more the case of a "foreign suit" that does not fit the particular system's and society's needs. Furthermore, a group of trained practitioners working alongside the prosecutor and the police is also necessary.



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3.6

Juvenile Criminal Mediation in Italy: Current and Future Perspectives

3.6.1 Introduction

The history of juvenile criminal mediation in Italy's judicial system is especially fragmented and complex. Instead of retracing this history as a chronicle, an overview of its main features is provided below, because it accounts for the special nature of the Italian model and must be taken into account when envisaging future developments and new perspectives – not only in respect of juvenile mediation, but regarding restorative justice in general in Italy.

In 2002, the Juvenile Justice Department of the Ministry of Justice started supporting and systematizing mediation practices in this area. The department also started disseminating information on conceptual and operational tools enabling those affected to meet, to monitor and orient their activities and ultimately to become aware of the fact that they are members of a group sharing common practices.

It is fundamental to highlight one of the key issues related to juvenile criminal mediation in Italy – namely, the lack of any legislation explicitly regulating it.

This partial regulatory gap has actually not prevented the analysis and use of juvenile criminal mediation; however, it has not enabled a unified practice of mediation to develop. Also, it has meant that at a national level, no in-depth changes could be made in terms of judicial culture and social policies concerning deviant youths.

Therefore, it is evident that our country needs to take steps to comply with the European regulatory framework so as to give due recognition to the experimental activities that have been carried out for over ten years.

Indeed, the Juvenile Justice Department has taken advantage of the gap in relevant legislation and has been providing momentum to these activities over the past few years.

Results of the department's activities include – in particular – a systematic survey of current initiatives and the setting up of a database of information on the organisational characteristics of juvenile criminal mediation services. A particularly significant outcome of these activities is the availability of quantitative information, i.e. of figures on juvenile mediation in Italy – which has finally made local experiences known at a national level. However, reference should also be made to the following:

- as regards local policies, local agreements were drawn up via ad-hoc inter-institutional protocols between juvenile justice services and regions based on the support and participation of juvenile judicial authorities;
- wide-ranging training and awareness-raising activities targeted at professionals working in the sector were carried out in co-operation with both public and private institutions;
- a glossary of terms was created, in Italian as well as in English to gather relevant terminology;
- an e-learning platform was developed to enable e-learning;
- national and international projects were organized in order to further enhance the exchange of experiences;
- workshops were organised for mediation services;
- a seminar on mediation practices was held at the *Centro Europeo di Studi di Nisida* with the participation of experts from France, North America, Spain and Sweden;
- provisions on prison mediation were included in the bill on the organization of the juvenile correctional system that was submitted to the cabinet of the minister of justice on 15 January 2008.

These activities dealt with various issues, like building up shared practices; exchanging experiences and highlighting best practices; increasing skills and information via meetings with European experts; developing integrated approaches at a local level; carrying out legal analysis and putting forward regulatory proposals.

A common aim of all the above activities is to promote the culture of mediation and to thus contribute to transforming the judicial and social system.

3.6.2 The Italian model

The attention that mediation has attracted in recent years has allowed the distinctive features of the Italian model of mediation to come to light.

Juvenile criminal mediation is initiated mainly on the basis of the assessment of the (alleged) offender's personality as per Section 9 of *President Decree 448/1998*, whilst it is implemented less frequently in



connection with probation. This different approach actually has major consequences. As a method of assessing the offender's personality, mediation can be used from the pre-trial phase of investigation, i.e. it may be requested at the pre-trial stage by the public prosecutor. Mediation can also be ordered by the competent judge during the court proceedings. Conversely, during probation, mediation can only be ordered by a judge. The survey of the Juvenile Justice Department showed that mediation is often thought of as a last resort. More widespread application of mediation during the proceedings or in connection with probation would enhance its social effect.

Mediation services can be various different types of entities. They are usually either public entities managed by local authorities or private welfare bodies working in agreement with local authorities. The latter set up is more frequent. Accordingly, they are funded by different sources. The sources are often temporary, although sometimes regional laws set up permanent sources. Financial insecurity causes instability and often mediation services are terminated as soon as funding is discontinued. This mixed funding framework based on local agreements also applies to training schemes. As a result, very different training courses are established, varying in duration and content. Some courses deal with juvenile criminal mediation and others with other types (family, etc.) as well. Accordingly, a complex organizational structure is built up to suit this varied structure of training themes. This is one of the special characteristics of the Italian model.

This varied structure was developed simultaneously with the reshaping of the welfare policies in Italy. According to the reformed *Constitution* (Title V), regions are now exclusively competent to bring decisions on the provision of welfare services. A shift has taken place from state provided to locally provided services. This shift enables the growth of local welfare networks suited to cater for local needs, using local resources. Due to the direct contact, local networks are much better suited to cater for local communities. Decisions on allocation of funding are also brought on a local level. A risk of this arrangement however is that different welfare systems are established, which affects the equal enjoyment of social/welfare rights within the different regions of the country. No regulatory framework has been developed for criminal mediation, although considering constitutional principles; this would fall within the competence of the State. The schemes set up by local communities are strongly affected by relationships with local juvenile judicial authorities, and therefore often place the emphasis on the prevention and reduction of crime instead of promoting projects that are community based and that focus on rebuilding social relationships, such as mediation.

3.6.3 The 2008 guidelines

The need to regulate this issue was reflected by the *guidelines* drafted in 2008 by the Juvenile Justice Department. The aim of the guidelines is to complement and amend the provisions of the

Circular Letter of Service II – Studies, Legislation and Documentation dated 9 April 1996 (40494) by incorporating the experiences accrued to the present and by taking into account the fast-paced evolution of the theory and practice of juvenile criminal mediation in Italy.

The starting point is that the Italian practice of mediation is particularly focused on victim offender mediation programmes; accordingly, this is the area of restorative justice that is addressed in the guidelines. The 2008 guidelines, which will be further discussed in this article, provide clarification and guidance in the following areas: systematization of practices; mediation services; the mediation process; documentation; co-ordination.

3.6.3.1 Systematization of Practices

Regarding the systematization of mediation practices, the guidelines describe mediation as “[...] an innovative approach to handle conflicts. In mediation, the parties in the conflict are made to accept their responsibility and are enabled to conduct the process in accordance with their feelings and in mutual acceptance of their respective motives. Mediation helps to form solidarity between individuals and to develop a dialogue on the specific area of criminal justice.”

The guidelines highlight and clarify a significant issue in respect of juvenile criminal mediation, namely the “educational” element inherent in mediation. Therefore, mediation is suitable whenever either party to a conflict is a juvenile, irrespective of whether an offence has occurred or not. It is applicable in any area of social interaction (family, school, friends). Therefore, mediation is an educational measure available in juvenile criminal justice. The guidelines also reaffirm the particular features of mediation practices. Participation in mediation takes place on a voluntary basis, mediation only being possible if the parties freely agree to take part in it. The principle of voluntary participation is based on the assumption that the parties are in a position to give their free, informed consent without being bound by such a consent – which may be withdrawn at any time. The parties should be informed in detail about their rights, the nature of the mediation process, the contents and significance of mediation, and the possible consequences resulting thereof.

Based on the guidelines, the applicability of mediation does not depend on the severity of the specific offence and/or the extent of the damage caused to the individual victim and/or society. In fact, the key factor is whether mediation can be carried out between the parties involved. From this standpoint, fundamental importance should be attached to the assessment – carried out by juvenile judges and mediators – of the feasibility of mediation. Lacking specific legislation in the area, mediation in juvenile criminal proceedings may be initiated at any stage of procedure and at any instance – which means that mediation may also be used in connection with the enforcement of sentences.

It is the task of the juvenile justice services to promote mediation and to inform the judge or public prosecutor, as appropriate, if there



“The mediator’s independence is essential to ensure free and consistent decisions. This is true in both ethical and cultural terms, biases and external influences need to be avoided at all costs. The collaboration between the judiciary and mediators is purely functional and is not based on any hierarchical relationship, and therefore any influence from the judiciary is also unacceptable. Mediators must keep any statements or testimonials rendered by the suspect, the defendant, the defendant’s parents or by the victim and related to the mediated conflict confidential. If this rule were not kept, the right to confidentiality and the requirement of creating a safe environment would be jeopardised, which are both preconditions for successful mediation. The mediator should limit the scope of mediation and take care not to gather information and/or data related to other offences that might have been committed by the parties – if such information is irrelevant to the object of the current mediation – nor should the mediator carry out investigations or take evidence. If this does happen and such information or data are gathered, a mediator acting in his/her quality as a public official and/or as a person in charge of official duties would be required to act upon such information – under the current laws – only if the offence at issue is prosecutable *ex officio*” [see secs. 200 and 249 of the *Criminal Procedure Code*; see also Sec. 1 subsec. (2) of Act 19 of 2001].

is a possibility of carrying out mediation. Expanding the range of entities entitled to propose mediation will empower the culture of mediation within the community.

3.6.3.2 Mediation services

The guidelines point out that it is necessary to keep separate, at least in structural terms, any mediation activities that are to be carried out in non-judicial settings. This is important due to the differences among mediation services. It is of fundamental importance to establish a network of mediation services via agreements between the state and the regions that can ensure equal access to services as well as unified standards in terms of the quality of the service provided.

The guidelines envisage a mediation service network covering multiple areas (family, school, neighbourhood, ethnic relationships, criminal matters, juvenile matters, etc). The underlying assumption is that mediation should be a widespread, non-sectoral practice. At the same time, this view is also due to the lack of specific legislation and the resulting development of feasibility-oriented attitudes.

The guidelines support the current set-up of public bodies as well as private entities providing mediation on the basis of ad hoc agreements. Staff of mediation services may include – either on a part time or a full time basis – adequately trained staff from the Juvenile Welfare Office. Inter-organizational interaction and the use of flexible models are also promoted. In consistence with the public nature of mediation services, mediation is free of charge.

The premises where mediation is carried out should be as welcoming as possible and must not have any ideological, religious, cultural and/or ethnic nature whatsoever.

The guidelines propose the possibility of mediation services setting up teams whose task it would be to disseminate information on the culture and practice of mediation at different locations within the area and to ensure that requirements are being met. The logistical recommendations mentioned above will obviously apply to such de-centralised services as well.

3.6.3.3 Mediators

The guidelines clarify the position of the mediator. The mediator is a “third party” who fulfils his/her tasks impartially and who is “equally close” to both parties. This wording is taken from relevant literature to express that the mediator stands close to both parties in order to promote mutual recognition and rebuilding communication channels (see the text highlighted).

The guidelines refer to the *legislation on Criminal Jurisdiction of Peace Courts* [Sec. 29 subsec. (4) of Legislative Decree 274/2000]: “The statements rendered by the parties during conciliatory procedures may not be used on whatever grounds for the purposes of adjudicating the case”. This principle was considered to also be applicable to juvenile penal mediation. As well as reiterating

the rule the statements rendered by the parties during mediation may not be used as evidence, the guidelines also set forth that not only the mediator but also the parties are bound to confidentiality during the mediation process. Obviously, emphasis is put on the need for mediators to be adequately trained and skilled in their activity.

3.6.3.4 The Mediation Process

The mediation process is described as follows in the guidelines, thereby unifying standard practices.

Referral to mediation

A case may be referred to mediation upon request of a juvenile judicial authority, court and/or prosecutor’s office. A case may also be referred by the autonomous decision of the juvenile services if mediation is necessary in order to investigate the youth’s personality. In this case, the judicial authorities also need to be informed, because the court may need to notify the mediation service of possible impediments to carrying out mediation, including impediments related to taking evidence, e.g. whenever mediation may be used to intimidate the victim in cases where the juvenile offender is a member of an organised criminal group.

The referral is basically a request addressed to the mediation service for assessing the feasibility of a mediation process concerning two individuals involved in a conflict that has resulted in the commission of an offence.

Currently, referral to juvenile criminal mediation takes place mainly in the context of assessment of a youth’s personality under the terms of Section 9 of *President Decree 448/1998*; accordingly, referral is permitted at any time during a judicial proceeding, and also during the pre-trial phase. Referral to mediation may also take place within the framework of probation as per Section 28 of *President Decree 448/1998*.

Mediation should become one of the most significant items in intervention projects developed by juvenile justice services in co-operation with local authorities; such projects should also envisage “implementing arrangements aimed at remedying the consequences of an offence and promoting reconciliation between youth and victim” as per Section 27(3) of *Legislative Decree 272/1989*.

Preliminary phase

The preliminary phase involves analysing the conflict and interpreting its origins in order to assess whether the case is suitable for mediation. The parties are also contacted in person to provide the mediator with an opportunity to acquire further information on the conflict and also to explain the significance and consequences of the mediation process, which is considered to be a forum for the parties to listen to one another and express themselves in a confidential, consensual environment. Having collected the necessary information and obtained the parties’ consent to the mediation, the mediator will have to plan the face-to-face meeting.

Meeting

The meeting is at the very heart of the mediation process; it can take the form of one or several interviews in which one or several mediators may participate as well as the victim and the offender. Generally speaking, the mediator is the first to take the floor to introduce the rules of the dialogue and chair the meeting. At the end of this phase, the various options for reconciliation/reparation are described; this is followed by the final considerations to be made by the mediator(s), whilst the final reparation/reconciliation agreement, if any, is signed by both parties.

The guidelines envisage the possibility of including the parties’ family members or other entities in this phase, since practice has shown quite clearly that the involvement of these persons in the conflict – which may antedate the given offence or not – often makes it necessary for them to take part in the mediation process. Additionally, the possibility of extending the scope of participation in the meetings provides a further opportunity for disseminating the culture of mediation and of peaceful conflict resolution.



Indirect mediation is also possible. In some cases, the mediator works as a channel of communication between the parties by making it possible for them to get closer also in situations where there is a marked resistance towards meeting “the other” in person. The favourable outcome of the mediation is often reflected by the written apology addressed to the victim, whilst the injured party at times decides to withdraw the complaint lodged with the police.

Indirect mediation plays an especially significant role in sexual assault cases, where a face-to-face meeting with the offender is not appropriate or else not accepted by the victim.

Reparation

Mediation may be aimed and lead, inter alia, to reparation. Reparation can be regarded as an approach with the aim of restoring and/or rebuilding damaged social relationships. Symbolic reparation would appear to be most consistent with this objective as well as the overall purposes of the juvenile justice system. Symbolic reparation means, in this context, any reparation opportunity other than the payment of damages – without ruling out concrete commitments such as carrying out socially useful work for free.

Conclusions and formalization of the outcome

The conclusions represent the formalization of the end phase of the mediation process. The outcome of mediation can be considered to be favourable if the parties manage to reach an understanding they find to satisfactorily meet the respective requirements – after restoring genuine, non-instrumental communication channels. Mediation may obviously entail the reconciliation between victim and offender as well as instances of reparation, which at times are symbolic in nature.

Conversely, the outcome is negative if no understanding can be reached and/or no change takes place in the relationship between the parties.

Additionally, reference is made to “unperformed mediation” whenever it is found during the preliminary phase that the parties have already settled their conflict or else do not acknowledge that such a conflict exists – even in if there is a threat of criminal proceedings. Mediation is “unfeasible” if either party fails to consent thereto, if the parties in question cannot be contacted, or if the mediator considers it inappropriate to initiate the mediation process due to the specific nature of the case.

Having concluded the meetings, the mediation service informs the judicial authority and the competent services on the outcome of the mediation process. If the mediation was “unfeasible” because either party (or both) failed to give their consent, the information provided to the judicial authority will not contain any details that might allow identification of the party that refused to consent thereto.

3.6.3.5 Future Perspective

The guidelines urge the individual mediation services to evaluate and follow-up the work carried out. The guidelines also clarify the role played by the Juvenile Justice Department, which is currently in charge of carrying out studies and monitoring activities to turn mediation from an exceptional, experimental activity into standard practice, as well as of fostering the development of a code of practice along with training standards for mediators. The Juvenile Justice Department is also required to analyse current practices in order to monitor their impact, including their effect on the recidivism rate.

Another interesting call was made in the guidelines, namely to promote and launch new mechanisms to ensure that the victim and the offender can meet, including – in co-operation with juvenile detention centres and the Juvenile Welfare Offices – in-prison mediation along with group conferencing and/or the setting up of peacemaking groups.

Initiating restorative justice processes that are focused on the victim and/or groups of victims as well as on society during the detention phase might also become part of treatment programmes: their favourable outcome would become thereby one of the items that the court/judge responsible for enforcement might take into account as a basis for mitigating the sentence.

The handling of conflicts via tools such as peacemaking groups and conferencing is especially interesting because it is close to the special nature of juveniles since these programmes call a larger group into play, foster social inclusion, and strengthen social bonds – which in turn contributes to feeling of safety and well-being, especially in juveniles. Unlike victim offender mediation, where the offender and the victim meet in the presence of a mediator, conferencing relies on the participation of persons other than the victim and the offender, such as family members and “supporters” of either party.

Reference is also made to the desirability of setting up group meetings with the participation of victims and offenders who are not directly related to one another, i.e. groups concerning the same types of offence and/or crime.

The guidelines also call for expanding the scope of mediation within the framework of the many projects implemented every year by juvenile justice services – so as to reaffirm that mediation is a valuable tool to make juvenile and young adult offenders accountable.

Special importance is attached to the co-operation between juvenile judges, Bar members specialising in this sector, and local authorities including law enforcement bodies, all of whom are required “to attempt the amicable settlement of disputes”.

3.6.4 From guidelines to reality

Whilst the history of juvenile criminal mediation in Italy is especially complex and fragmented, the guidelines are an attempt to systematize and highlight the distinctive features of the Italian model. From this standpoint, they mark a significant milestone in the history of juvenile criminal mediation in Italy both in respect of regulating practice and bringing Italian practice closer to the implementation of restorative justice in European countries. Additionally, the guidelines promote the involvement of juvenile judges and recognise the role the Bar and law enforcement bodies can play in this area.

In Italy there are currently 19 Juvenile criminal mediation centres – namely, in Ancona, Bari, Bozen, Brescia, Cagliari, Caltanissetta, Catanzaro, Firenze, Foggia, Genova, Latina, Milánó, Nápoly, Palermo, Salerno, Sassari, Torino, Trento and Reggio Calabria. They were set up following institutional agreements between local authorities (regions, provinces, and municipalities), juvenile justice services, the judiciary and voluntary organizations. These mediation centres have different characteristics, and some of them have only just started their activities.

This uneven quality of mediation services is also significant. Additionally, if one compares Italy with some other foreign countries, the number of cases mediated does not seem particularly considerable.

It is necessary to take into account that there is currently no regulatory framework providing a baseline for mediation. This has a significant effect on the Italian practice of mediation. The lack of specific laws and the ambiguities potentially resulting thereof point to the need for establishing as



rapidly as possible whether mediation should be regarded as a new approach to criminal offences which may lead to overcoming the penalty-focused approach that relies on the imposition of sanctions.

In an effort to examine the experiences implemented so far and in order to ensure that they may continue in the future, there are several issues to be considered and investigated.

It is fundamental to support the existing mediation services via meetings and exchanges of experience; to raise the awareness of regional and local authorities and juvenile judges; and to develop a follow-up system that can monitor to what extent mediation impacts on the decrease in the recidivism rate.

Furthermore, it is necessary to focus more on the role of victims by launching programmes that can let them be heard and obtain redress. In Italy, restorative justice practices have not been the outcome of the activity of grass roots movements, i.e. they were not the result of initiatives waged by victims' groups and movements; in fact, they have been and are being developed based on the professional and cultural influence that is exerted by experts and professionals working within the juvenile criminal justice system. Above all, it is necessary to raise widespread social awareness of the issues related to conflicts and their settlement.

Exchanges of views and contacts at a European level should continue. Currently, the Office for International Studies, Researches and Activities (*Ufficio Studi, Ricerche ed Attività Internazionali*) at the Juvenile Justice Department is contributing to several European projects including, in particular, *"Tools in Network"* – which envisages the use of an e-learning platform for restorative justice – and *"Restorative Justice and Crime Prevention"* – which is a project developed jointly with the Psychoanalytic Institute for Social Research of Rome (*Istituto Psicoanalitico per la Ricerca Sociale*) and the European Restorative Justice Forum of Leuven in order to examine the links between restorative justice and crime prevention.

The activities and analyses undertaken are far from negligible; in fact, they mirror the unrelenting attention paid to the multi-faceted world of restorative justice.

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3.7

Restorative Practices and Juvenile Offenders in Ireland

3.7.1 Garda Síochána Diversion Programme

There are two methods of juvenile diversion in Ireland. Depending on the particular circumstances of a case, they are conducted by *An Garda Síochána* (the Irish National Police Force) and by the Probation Service.

A Juvenile Liaison Officer (hereinafter JLO) scheme had been in existence since 1963, under which *Gardaí* had been diverting juveniles on a non-statutory basis. The *Children Act* (2001) placed the *Diversion Programme* on a statutory basis and became operational from May 2002. It created the position of director of the Diversion Programme at Garda superintendent rank and assigned statutory functions to Juvenile Liaison Officers.

Section 18 of the *Children Act* 2001 provides that every child aged under 18 years shall be considered for admission to the *Diversion Programme*, provided that the juvenile accepts responsibility for the offending behaviour and consents to participation.

The purpose of diversion is to provide a means of dealing with offending children other than by way of prosecution and by diverting them from further offending.



Options available under the programme include

- no further action, where the offence does not warrant either diversion or prosecution;
- an informal caution by a JLO, against a repetition of the offending behaviour;
- a formal caution by a JLO, including supervision of the offender by the JLO for a period of 12 months.

The *Diversion Programme* may not be considered as a suitable response to an offence, if

- there is no acceptance by the offender of responsibility,
- the juvenile is a habitual repeat offender,
- the offence is very serious,
- it is not in public interest.

In these circumstances, the cases are returned to the local *Garda* superintendent for prosecution.

3.7.1.1 Restorative Caution

Section 26 of the act allows for the presence of a victim when a formal caution is being administered by the JLO. Where a victim is present, the legislation requires that there shall be a discussion among those present about the child's criminal behaviour.

The JLO administering the formal caution may invite the child to apologise, orally, or in writing or both, to the victim and, where appropriate, to make financial or other reparation to the victim.

3.7.1.2 Restorative Conference

Section 29 allows JLOs to bring together family and relatives, as well as relevant agencies, to discuss the offending behaviour and to formulate an action plan for the child.

3.7.1.3 Main features of the Diversion Programme

Salient features of *Garda Síochána model* include:

- consideration of the victim's needs as well as the offender's needs;
- protection from double jeopardy: once the decision has been made to divert an offender, no prosecution will be initiated in relation to that offence;
- proceedings are confidential;
- diversion practices are conducted by specially-trained personnel;
- intervention can occur early, following the detection of an offence;
- high level of training in restorative justice facilitator skills, mediation skills and victim awareness skills;
- offender accountability.

The offences most frequently encountered in the diversion process include: offences against public order, robbery, assault, harassment, supply of drugs, criminal damage, burglary.

The total number of offending incidents in 2007 amounted to 27,853 and the total number of children referred to the *Diversion Programme* was 21,941. Of these, 16,753 (76%) children were admitted to the programme and 12,485 (57%) received informal cautions.

Year	Total no.
2002	29
2003	118
2004	177
2005	262
2006	307
2007	378

Table 7

Number of restorative events during the period from 2002 to 2007

3.7.2 Family Conference

Where a juvenile has not been diverted from prosecution, but a court considers that a conference may be appropriate, Section 78 allows the court to direct the Probation Service to convene a Family Conference to consider such matters as the court considers appropriate in the case.

3.7.3 Conference Models

A restorative conference or family conference involves a meeting of persons concerned with the child's welfare and has the following functions:

- to bring together the child, the parents or guardian, other family members, relatives and other persons as appropriate, to
 - establish why the child became involved in the behaviour that gave rise to the conference;
 - discuss how the parents or guardian, family members, relatives or any other person might help to prevent the child from becoming involved in further such behaviour;
 - where appropriate, review the child's behaviour;
- to mediate between the child and the victim;
- to formulate an action plan for the child;
- to uphold the concerns of the victim and have due regard to his or her interests.

The meeting process usually involves the following steps, although each conference adapts to the needs of the participants:

- introduction of the participants and an explanation of the procedures adopted;
- the offender usually speaks first, explaining the circumstances of the offence;
- the victim explains the impact of the offence;



- the offender's and victim's supporters contribute to the general discussion;
- agreement;
- a plan (apology, reparation).

Between October 2004 and January 2009, 173 Family Conferences were referred by the court. In 145 of these referrals, conferences took place. Ninety-seven of these conferences were successful, with the completion of action plans and the disposal of the cases concerned. The remaining 48 conferences were unsuccessful and criminal proceedings in court were re-activated.

The court-referred Family Conference, conducted by the Probation Service, is similar to the Garda conference model. The Probation Service is required to convene the conference within 28 days and it generally follows the same set of procedures in the convening and running of the conference.

3.7.4 Experiences

According to a survey of participants:

- over 93% of victims were satisfied with the *Garda Diversion Programme*;
- it is not easy for young people to explain their actions to their family and to apologise to a victim;
- RJ forces offenders to examine their actions and the consequences of their actions;
- attending traditional court process is far less demanding on young people than the diversion process;
- RJ works well and is considered effective by JLOs and *Gardaí*;
- RJ is not suitable for every case;
- it is time-consuming and resource-consuming;
- it requires training for it to be effective;
- it is an additional tool in crime prevention;
- it can be powerful and effective in the right place.

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3.8 Mediation as a Restorative Approach to Dealing with Juvenile Crime in the Czech Republic

"Justice can be understood as restoration and reconciliation rather than retribution. If crime hurts, justice should repair the harm and assist recovery."

Howard Zehr

3.8.1 Introduction

The Czech Republic has a population of approximately 10 million people. The Probation and Mediation Service of the Czech Republic (hereinafter PMS) was founded in January 2001. In 2009, the PMS had 340 probation officers and assistants. The PMS operates with approximately 28.000 cases per year, 14% of the cases are connected to juveniles. In the Czech Republic the judicial system is divided into 8 court regions with 74 court districts (and 74 PMS centres). Each PMS centre has one specialized officer who focuses on issues related to juveniles. According to the Czech *Youth Justice Act* (hereinafter YJA) this specialized officer has to receive special training on methods of working with juveniles, their families and on cooperating with other professionals (social workers, teachers, psychologists, lawyers etc.).

The new specialized YJA introduced new methods of addressing juvenile delinquency. It came into effect on 1 January 2004. This means that now there is 5 years of experience in this field.

According the YJA, criminal liability starts at the age of 15 and a juvenile is a person who is between 15 and 18 years of age. Children under 15 are not criminally liable, but they may be subject to measures specified under the YJA (such as probation supervision). Measures (educational, protective and penal measures) were



introduced to replace punishments. During the pre-trial criminal proceedings, educational measures can be ordered only with the juvenile's consent. Educational measures (see the text highlighted) can be imposed by the state prosecutor – PMS prepares the materials necessary for this type of decision.

The educational measures are the following:

- supervision under the Probation and Mediation Service;
- probation programme as a specialized programme for juveniles which has to be accredited by the Ministry of Justice;
- educational obligations (living with parents, financial contribution to the Victim Fund, community service, settlement with the injured party, reparation, addiction treatment);
- educational restrictions (prohibitions on visiting certain places and contacting certain people, living in a certain place, possessing certain things, using addictive substances, gambling, change of domicile or employment must be discussed with a PMS officer in advance);
- cautioning.

The PMS is the first to be informed by the police about cases concerning juveniles. The probation officer is the first to make personal contact with the juvenile offender and his/her family and also with the victim. The officer offers them the possibility of victim offender mediation. If they refuse to take part in the mediation process the probation officer offers to cooperate with them in order to prepare the pre-sentence report.

Protective measures can be used instead of penal measures (see the texts highlighted).

The protective measures are the following:

- compulsory treatment (in relation to alcohol or drug addiction);
- placement in a juvenile institution (may be imposed upon a juvenile, as well as a child under 15 who has committed an act that is otherwise considered a criminal act);
- seizure of a thing (for example, something which might have been used to commit a crime).

The penal measures are the following:

- community service;
- suspended sentence with supervision;
- financial compensation (with suspension);
- forfeiture of a thing;
- prohibition of professional activities;
- imprisonment.

In the YJA it is written that “[...] the proceedings must aim to provide compensation or other adequate remedy for the losses suffered by the victim [...]”. Thus, a principle of restorative justice is incorporated into Czech legislation concerning juvenile offenders. Accordingly, the PMS’s activities are focused on:

- arranging victim offender mediation;
- preparing a report on the juvenile’s background (this pre-sentence report includes for example the juvenile’s attitude to the victim, to the crime and to the consequences of the crime – also the possibilities of redress);
- ensuring the execution of court-imposed measures, in particular educational measures;
- activities related to the juvenile’s family and school;
- cooperating with authorities (schools, child protection board etc.).

Activities of PMS with a restorative approach include: creating and managing Multidisciplinary Youth Teams in each Czech court region, carrying out victim offender mediation as a structured process of conflict resolution between the juvenile offender and the victim and other activities aimed at settling harms arising as a consequence of crime.

3.8.2 Multidisciplinary Teams

Multidisciplinary Teams (hereinafter MUT) are inspired by the British Youth Offending Team (see article 4.7 in this publication) and the Canadian Youth Commission. Creating such teams is one of the PMS’s priorities. The report submitted to the government by the Crime Prevention Board in 2007 recommends further developing and implementing these teams in the practice of youth justice – we currently have MUT at 59 of 74 court regions. The members of the MUT are: probation officers, judges, public prosecutors, policemen, social workers from the Child Protection Board, local government officials, the crime prevention coordinator, service providers (of social, health and educational services) and other agencies. The activities of the Czech MUT are:



- organizing “case conferences” as one possible way to work with juvenile offenders;
- monitoring current practice, collecting relevant information and data on juvenile delinquency in a given location;
- negotiating conditions of cooperation among individual bodies, exchange of information on individual juvenile cases.

Case study

Three boys (a 16-, a 17- and a 16-year-old) were accused of burgling a small shop. According to the recommendation of the probation officers, the state prosecutor imposed on them the obligation of 40 hours community work at the local retirement home. After 20 hours of very good work the boys attempted to steal the car of one of the employees of the retirement home. The boys’ plan was to steal the car and then to go abroad with it. The probation officer had been cooperating with the retirement home for six years, and there had never been any behavioural problems with the juveniles who were on community service there. This was the first time that PMS had to solve such a situation. There was a lot of tension at the retirement home, ranging from anger at the boys to fears that the offence may be repeated. Employees were more worried than residents. MUT discussed the case and they recommended that a community meeting should be organized at the retirement home. The participants of the meeting were: the boys and their families, the probation officer, the state prosecutor, the director of the centre, the employees of the centre and the Child Protection Board’s worker. The community meeting gave the offenders a chance to explain what happened and to apologize to the employees. It also provided the victims with the chance to explain their emotions, feelings and needs and it explored the reasons for offending and how those reasons might be tackled.

Case study

Martin (17 years) and Michael (21 years) started fighting at a party a few minutes after midnight. Both of them kicked and hit the other, and both suffered slight injuries. The police detained both of them and Michael was accused of starting a fight and after a few days Martin was also accused of wounding Michael. Both of them were victims and also offenders in this criminal case. The two young men knew each other a little, as Michael and Martin’s older sister had been friends at school. The probation officers invited Martin to a personal meeting and offered him mediation. After that, he had a personal meeting with Michael. Martin and Michael agreed to take part in mediation. Mediation between Michael and Martin took 1 hour. Martin and Michael could explain their feelings, opinions and ideas about how to solve their personal conflict. The mediation between Michael and Martin achieved the following results:

- it improved the emotional well being of both young men;
- it improved their relationship;
- it persuaded both of them to behave differently in the future;
- it made it possible to reach an agreement – Martin and Michael apologized to each other (Martin apologized for the provocations and Michael for the unsuitable response), they agreed on no compensation for harms because they accepted that they were both partly responsible for the conflict.

3.8.3 Victim offender mediation

Victim offender mediation is a personal meeting between the victim and the offender, which is chaired by the mediator – probation officer.

The PMS offers the opportunity to participate in victim offender mediation already during the pre-trial proceedings, but can also be made available during court proceedings. According to the *Criminal Code* and the *Act on the Probation and Mediation Service*, the probation officer can mediate all types of juvenile offences; there are no legal limits or restrictions. At the PMS, mostly cases of traffic accidents, thefts, burglary, deception, drunk and disorderly offences and offences against the person are mediated.

Table 8 shows the statistical data concerning victim offender mediation during the period between 2006 and 2008.

Table 8
Statistics on VOM during 2006–2008
[Source: PMS statistical data]

Year	The total number of cases in pre-trial proceedings	The total number of victim offender mediation in all cases	The total number of victim offender mediation in juvenile cases
2006	5.169	577	142 – 25%
2007	5.802	614	130 – 21%
2008	5.092	480	129 – 27%

3.8.4 Settlement of harms

The PMS uses Activities aimed at the settlement of harms when mediation can not be carried out. These activities, for example, can be part of the preparation of the pre-sentence report or of ensuring the enforcement of measures imposed by the court.



Case study

Honza, a boy of 16 years, was charged with vandalism committed in the Jewish cemetery together with two adult accomplices. They destroyed a number of gravestones, knocked down some benches and dustbins and destroyed a memorial plaque dedicated to the victims of the Holocaust. Honza was the only one who plead guilty and was willing to find ways to rectify damage caused by the offence. The probation officer agreed with Honza to arrange a personal meeting with the rabbi, where Honza explained the reasons for his behaviour and also had a chance to hear how his behaviour affected the Jewish community: people were afraid that similar violent acts would again occur, they did not know how to repair the damaged tombs, they feared a possible increase in extremist behaviour in society. After this meeting, Honza decided – as a form of community service – to help repair the damaged property belonging to individuals and to the Jewish community. Although the victims did not want to meet Honza personally, the rabbi told them about his own feelings on meeting Honza and the mood in the community gradually calmed down.

3.8.5 Conclusions

As justice professionals, by accepting and applying the principles of restorative justice, we commit ourselves to developing new ways of addressing crime. This is not easy, given that the traditional approach to justice is so deeply rooted in society. However, if we experience how offenders try to make right the harm they have caused and we are told by the victim and the offender how beneficial this process has been to them, then it becomes evident that restorative justice is the way forward.

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3.9

Mediation in Cases of Juvenile Offenders in Croatia

3.9.1 Introduction

Although victim offender mediation is not a brand new idea it exists in Croatia only since 2001 and only as a pre-trial procedure for juvenile offenders. Its development was enabled by multiple changes happening simultaneously both globally and locally. During the nineties, Croatia was going through war and post-war problems. Transition to a new type of society included processes like democratization, differentiation, privatization, Europeanization and revitalization of religion. These processes created new needs and opportunities for citizens, as well as new personal and social problems. One of the problems was that existing strategies were not able to reduce new and old types of juvenile crime. On the other hand, this created an opportunity to get to know and to try

to follow the world-wide changed perspective on juvenile justice. Focus was especially placed on restorative justice trends in Europe, children's rights movement as well as changes regarding trends of law and treatment in neighbouring countries, especially Austria and Slovenia.

A separate area of law concerning juvenile crime and a separate juvenile justice system has been in existence in Croatia for over 50 years. The new trends were included in the *Juvenile Court Act* passed in 1997 (see *Narodne novine* 1997, 1998 and 2002). The act contains provisions of substantive criminal law, provisions on courts and criminal procedures and provisions on enforcement of sanctions. It is applicable to two types of young perpetrators of criminal offences: minors (persons whose age at the time when the offence was committed was between fourteen and eighteen) and young adults (persons whose age at the time when the offence was committed was between eighteen and twenty one). The rules on the criminal law protection of children and minors are provided within this act as well.

Three types of sanctions for the offences committed by minors or young adults are defined by this act: educational and correctional measures, juvenile imprisonment and safety measures. For the offences committed by young minors (fourteen to sixteen years of age) only educational and correctional measures can be imposed. Educational and correctional measures are the bases of the juvenile justice system in Croatia. There are three types of such measures: cautioning (court reprimand, special obligations and referral to an educational centre), intensive supervision (probation) and referral to different types of reformatories.

Regarding the legislative background for victim offender mediation, special obligations are the most important sanction. As a new sanction, special obligations enable integration and implementation of *international standards*⁴⁶ in Croatian juvenile criminal law and the juvenile law enforcement (justice and welfare) systems.

3.9.2 Development of mediation in cases of juvenile offenders in Croatia

With the purpose of solving problems arising from juvenile offences out of court, the *Juvenile Court Act* introduced a pre-trial procedure based on the principle of opportunity. According to this principle, the public prosecutor for minors may decide not to request criminal proceedings to be instituted for a criminal offence punishable by a prison sentence of up to five years, even though it may reasonably be suspected that the minor committed that offence. Such a decision should be based on the public prosecutors' estimation that it would not be purposeful to conduct the proceedings against the minor (having in mind the nature and circumstances of the offence, as well as the perpetrator's personal characteristics and life circumstances). More specifically, according to Section 64 of the *Juvenile Court Act*, the public

prosecutor may make his/her decision not to institute criminal proceedings on the condition that the minor is willing to fulfil one of the following four special obligations:

1. to repair or provide compensation for the damage done by the offence, according to the offender's abilities;
2. to get involved in the work of humanitarian organizations or in activities related to the community or the environment;
3. to undergo, with prior consent of the offender's legal representative, medical treatment for drug addiction or any other addiction;
4. to get involved in individual or group work of youth counseling services.

It could be said that the special obligation to repair or provide compensation for the damage done by the offence provides the legal framework for victim offender mediation (VOM).

On the basis of the *Juvenile Court Act*, criteria for applying victim offender mediation in cases of juvenile offenders in Croatia are as follows:

- reasonable suspicion that the minor concerned committed the offence should be established;
- the offence concerned should be punishable by a prison sentence of up to five years or by a fine;
- petty offences that could result with charges being dropped are excluded;
- first time offenders are a priority;
- recidivists are not excluded;
- offender has to provide his/her free consent to participate in the VOM process;
- victim has to provide his/her free consent to participate in the VOM process;
- the public prosecutor for minors is the only person entitled to make a decision on imposing obligations prescribed by article 64, as well as deciding if they have been successfully carried out.

Per year, there are approximately 3.000 to 3.500 offences committed by minors in Croatia. Since 1998 (the year in which the *Juvenile Court Act* came into force) between 35% and 45% of cases referred to the office of the public prosecutor for minors were being resolved out of court via pre-trial procedures. Considering yearly statistics, up to 25% of these procedures is victim offender mediation.

On these grounds, victim offender mediation was promoted by the project "*Alternative Interventions for Juvenile Offenders – Out-of-court Settlement*" which was developed by the Ministry of Health and Social Welfare, the Office of the State Attorney and

⁴⁶ For example: the Beijing Rules of 1985; the UN Convention on the Rights of the Child; the Riyadh Guidelines of 1990; etc.



the Faculty of Education and Rehabilitation Sciences of Zagreb University. The project started in the years 2000 and resulted in 24 professionals being educated and certified by Austrian mediators and educators from "Neustart Graz" – Johann Schmidt and Brigitte Power-Stary. The three year course covered approximately 450 hours of supervised practice and various theoretical approaches to mediation. Through the project, the Croatian model of out-of-court settlements for juvenile offenders was developed. The book describing the model was published in the year 2003. The Croatian Association for Out-of-Court Settlements was established the same year. Seventeen of the professionals who received training in the project started to work, and are still working on victim offender mediation for juveniles in three small victim offender mediation services in Zagreb, Osijek and Split. They operate as independent services, but carry out their activities in collaboration with the local prosecutors' offices and the local centres for social work.

The Croatian model of victim offender mediation is presented in Figure 11. After an offence has been committed and police investigation has been carried out, the public prosecutor for minors is informed who then makes a decision to put the case through a pre-trial procedure. During the pre-trial procedure which is conducted in the office of the public prosecutor for minors, the victim and the juvenile offender are offered to participate actively in the process of resolving issues arising from the offence. Before the process of mediation starts, both parties have to give their free consent to participate to the public prosecutor for minors. The process of mediation is carried out in one of the three mediation services in Croatia by a licensed mediator. After the process is completed, the public prosecutor for minors is informed about its results. A report to the public prosecutor is made and if the mediation is pronounced successful by the mediator, the public prosecutor may decide not to institute criminal proceedings.

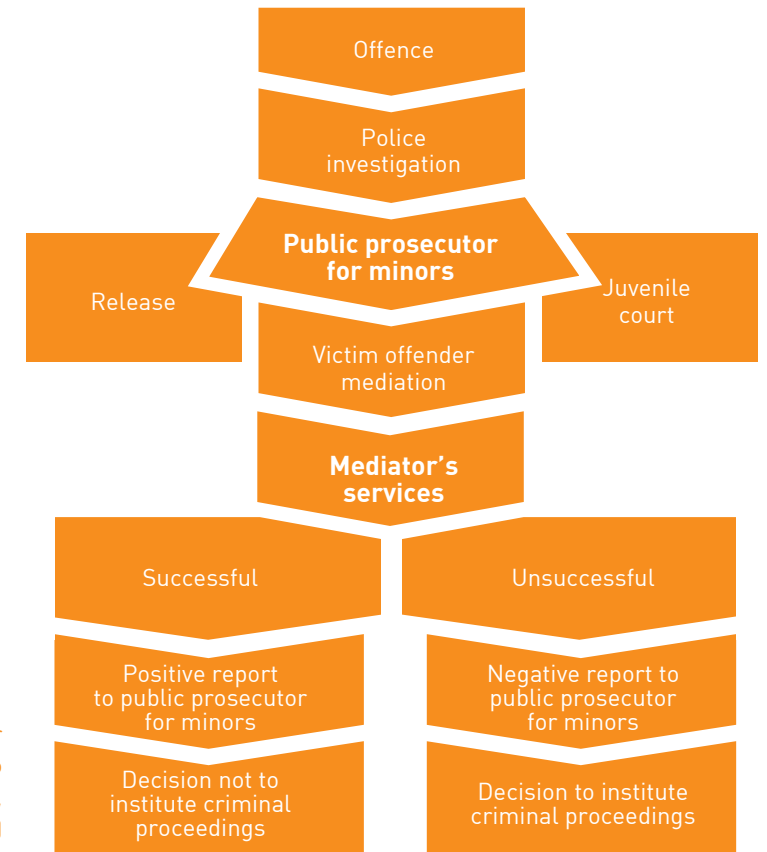


Figure 11

Model of juvenile victim offender mediation (adapted according to *Aussergerichtlicher Tatausgleich*, 1997; Koller-Trbovic et al. 2003)

3.9.3 Evaluation

Generally, evaluation has shown that the recidivism rate for juveniles who participated in victim offender mediation processes was significantly lower (10%) than for other types of sanctions for juvenile delinquents (30%). Also, all statistics and evaluation carried out until now in Croatia have demonstrated that this informal, educational and correctional measure aimed at solving problems arising from juvenile crime out of court is very successful and efficient.

Criteria for successful victim offender mediation are:

- the juvenile offender accepts responsibility for the offence;
- victim and offender give their informed consent to participate in the mediation process;
- an agreement is reached and signed by both parties;
- fulfilment of the agreement;
- fulfilment of the agreement by both parties;
- report on the success of the mediation to the public prosecutor for minors;
- the public prosecutor decides not to institute criminal proceedings;

Here are some of the results of evaluation (Kovačić 2008) carried out in 175 cases of victim offender mediation completed between 2001 and 2006 in Zagreb:

- mediation processes lasted up to 3 months in 80% of cases;
- at the time, most offences were: burglary (35%), aggravated assault (24%), theft (19%), violation of property (7%) and other, mostly violent behaviour of some kind (15%);
- almost 70% of offences were violent offences of some kind;
- most offences (61%) were committed by one offender;
- characteristics of victims included: 94% of victims were private persons, predominantly male, aged 21 or older;



- characteristics of offenders included: 95% were male; 60% minors (14 to 18 years of age) and 40% were young adults (18 to 21 years of age); 93% of offenders had not been previously known to the local centre for social work;
- most mediation outcomes were: in 58% of cases – apology to the victim and financial compensation; in 26% cases – only an apology; in 16% cases – other (financial compensation, humanitarian work, returning stolen things, joining treatment for drug addicts, symbolic compensation, etc.);
- victims were satisfied with the mediation process and the agreement in 95% of cases and offenders in 94% of cases;
- for 86% of cases, the public prosecutor for minors made a decision not to institute criminal proceedings;
- the rate of recidivism was 9.7% (17 offenders committed offences again – mostly in the case of possession of drugs).

3.9.4 Conclusion

All conclusions that can be made regarding victim offender mediation in Croatia bring us to a paradox. Although this out-of-court sanction which is also a service to the community is very successful it is not developing in the sense that new mediation services are not being established in Croatia. It can only be hoped that in the next decade already existing plans for training new mediators, establishing new mediation services in all Croatian regions, developing the model of victim offender mediation to suit adult offenders and joining the European VOM network will be fulfilled.

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3.10

Victim Offender Mediation in Cases of Domestic Violence – the Greek Experience

3.10.1 Introduction

Domestic violence, an issue that has been studied for over 30 years, is defined as a kind of abuse and a violation of human rights which affects the more dependant members of the family, such as children and women. It is an issue addressed not only by the national authorities in Europe, USA, and other countries, but also by the European and International Organizations (European Union, Council of Europe, UN, etc). Its various aspects (physical, sexual, verbal, psychological domestic violence) have been widely recognized. Research into the field also discloses the hidden aspects of domestic violence such as victimization, offender’s profiles, as well as the

post traumatic impact on victims. Domestic violence prevention strategies have been implemented at national, regional and community levels and have mainly produced favourable results. According to the evaluation of the implementation of the Beijing Platform for Action, most European countries have already reviewed their laws or created new laws on domestic violence. The latest was Greece, where the Parliament passed a new law on domestic violence in 2006, *Act 3500 of 2006 on Confronting Domestic Violence and Related Issues*, which entered into force in 2007.

Restorative justice as a current trend in criminology addresses the issues of dealing with offences outside or within the borderlines of the criminal justice system, with the participation of offenders, victims and their community, aiming both at healing the harm and/or damage done to the victims and at restoring and/or strengthening the social bonds of the community. Restorative justice either as a social movement or as a trend in criminology has also been of interest to European and international organizations and to the national authorities in Europe, USA, and Australia etc. A large number of restorative justice programmes have been implemented and evaluated as being favourable for juvenile offenders, minor offences and offences against property, as well as decreasing the workload of the criminal justice system (Bazemore and Walgrave 1999; Johnstone 2003; Bazemore and Schiff 2005; Fattah and Parmentier 2001; Roche 2003; Braithwaite 2002). Victim offender mediation, social mediation, alternative dispute resolution schemes, peer mediation, conferences and other forms of conflict resolution strategies are among the restorative justice practices that have been used widely during the last 15 years. In Greece, penal mediation as a form of victim offender mediation is also allowed by law in minor cases of domestic violence, as we will analyze in the following. (For more on restorative practices in Greece, see also article 3.5 in this publication).

Gender perspective is important to take into account in domestic violence as well as in restorative justice issues (Curtis-Fawley and Daly 2005; Hudson 2002). Gender inequalities and imbalances affect the victimization potentials and the risks to families and the society as well (Daly and Stubbs 2006). Gender issues are also discussed in the present article, with particular emphasis to the debate concerning the appropriateness of victim offender mediation in cases of domestic violence.

Last, but not least, some suggestions are included for the improvement of penal mediation in domestic violence cases and for areas where further evaluation research is needed.

3.10.2 Restorative justice in Greece: an overview

The debate on restorative justice has recently been opened in Greece, in legal and social circles. The introduction of penal mediation, or more precisely, victim offender mediation caught the interest of judges, public prosecutors, lawyers, criminologists, and social workers. It is beyond this article's scope to discuss the reasons why Greece has not corresponded to (or better followed) the restorative justice movement which evolved in Europe, USA and Australia. We suppose that the difference in legal systems and cultures are the key factors in determining whether the demands and guidelines of trends and/or movements shaped abroad are adopted or not.

Restorative justice practices are widely implemented in the field of juvenile offending. Greece has special laws for juvenile delinquency, focusing mostly on social support and social services rather than on retributive and punitive treatment of juveniles. *Act 3189 of 2003 on the Reform of Criminal Legislation for Juveniles and Other Regulations* strengthens this perspective by reducing reformatory measures for young offenders and introducing restorative justice practices, such as compensation, victim offender mediation and community service. Strengthening the young offender's feeling of responsibility, addressing the victim's needs and promoting a non stigmatizing attitude are the main elements of restorative justice in dealing with juvenile delinquency, as implemented in Greece. Increased responsibilities and duties have been assigned to the Juvenile Probation Service, which supports the preparatory work, as well as the decision making process of the Juvenile Courts. There are constant requests from professionals in the Juvenile Probation Service either to be trained as mediators or to collaborate with the social mediation centres where the reported cases are

being dealt with. We suggest that both propositions have to be realised, depending on the number and nature of the cases of youth delinquency and the needs of the community as well.

Restorative justice practices for adults include the victim's compensation, community service and victim offender mediation. These measures are clearly provided by laws. But, at the level of implementation there are still problems arising from the lack of social services' coordination, and the lack of evaluation and follow-up strategies as well as the shortcomings in the reporting system.

Alternative dispute resolutions (hereinafter ADR), victim offender mediation by police officers in civil law cases and victim offender reconciliation are the most prevalent informal restorative justice practices in Greece, implemented by lawyers during the pre-trial criminal process. Attempts to mediate and/or reconcile can also be carried out by judges before the trial.

Furthermore, there are restorative justice programmes implemented at a local level, namely *community mediation programmes* (e.g. the Social Mediation Centre at the Municipality of Korydallos, West Attica, since 2000) and *peer mediation programmes* at certain high schools in Athens (such as the *Ionideios School Mediation Programme* and the *Varvakeios Mediation Programme*).

However, the need for strengthening and empowering restorative justice practices is addressed not only by criminologists in Greece, but also by European programmes on restorative justice, such as the AGIS project "*Restorative Justice: an agenda for Europe. Supporting the implementation of restorative justice in the South of Europe*" (European Forum for Restorative Justice 2008).

3.10.3 Victim offender mediation – penal mediation in Greece

Victim offender mediation (VOM) is described in the *explanatory memorandum* of the Council of Europe Recommendation R(99)19 on mediation in penal matters. The following are also part of the European legal background concerning penal mediation in member states: Resolution 2002/12 on the *Basic principles on the use of restorative justice programmes in criminal matters* of the Economic and Social Council, and the *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters* by the European Commission for the Efficiency of Justice [CEPEJ(2007)13].

3.10.3.1 VOM in general

Victim offender mediation is a face to face meeting that usually involves the immediate parties (there may be more than one offender or more than one victim) meeting in the presence of a specially appointed mediator (who may be a volunteer or a paid professional). The mediation process may be conducted with both parties present (direct mediation) or if the victim is not willing to meet the offender, in separate meetings with each party (indirect mediation). There are many variants of this model (Miers 2001; Wall et al. 2001).



In some of these programmes the mediators are criminal justice personnel specially trained to carry out mediation, usually social workers or probation officers, but they may also be police officers, or staff of courts and public prosecutor's offices. In some programmes, independent mediators (professionals or volunteers) without a judicial function are used.

Victim offender mediation may also be run by a special agency or authority, such as the police, the probation service, the public prosecutor, the court or an independent community-based organisation. In the case of independent programmes, these may be based on organisations involved in victim support or on community-based treatment programmes for offenders, or may be set up specifically to carry out mediation. In some cases, the programme is run by a number of agencies through an inter-agency steering committee.

This type of mediation may be used at any stage of a case. It may be associated with diversion from prosecution, or be used in conjunction with police cautioning, it can be ordered parallel to prosecution, constitute part of a sentence or happen after sentence. An important difference is whether or not the mediation will affect judicial decisions, as for example in cases where the discontinuation of prosecution depends on an acceptable settlement, or the agreement is put to the court as a recommended order or sentence. The need for control or judicial supervision is much greater if mediation has an impact on such decisions.

Some victim offender mediation programmes are applicable to any type of offender, whereas others work only with juveniles or with adults, while a few work only with one type of offence, for instance shoplifting, robbery or violent offences. Some programmes are mainly aiming at minor offences or first-time offenders yet others target more serious offences or even repeat offenders.

3.10.3.2 VOM in Domestic Violence Law

Penal mediation was introduced in Greece by the *Act on Confronting Domestic Violence* (Act 3500 of 2006) which regulates several issues. Introducing mediation in criminal matters was necessary for Greece in order to harmonize its national laws with the *Council Framework Decision* (2001) and European law before the deadline for the compliance expired. Research also pointed to the fact that in cases of misdemeanour of domestic violence, mediation had previously already been informally implemented by police officers or lawyers to a large extent. Regulating the process and the rules of mediation was a step towards the legality and legitimization of restorative justice in the Greek criminal justice system.

The *Act on Confronting Domestic Violence* covers several maltreatments such as marital rape, dating violence, and the violating the prohibition of children's corporal punishment. It also recognizes the vulnerable situation of pregnant women, children and persons with special needs, either as victims or as witnesses of violence (see Sec. 6, subsec. 3).

Also civil law consequences derive from the criminal law

provisions. Violence constitutes evidence of marital breakdown, and bad exercise of taking care of children and juveniles.

The law also provides support measures for the victims, social and psychological support is provided to the victims by relevant agencies and organizations (Sec. 21). The victim's right to be informed by the police authorities about the progress of the case is also mentioned. According to Section 22, if the victim of domestic violence faces financial difficulties, the state must fund his/her legal representation.

The obligation of reporting cases of domestic violence is also regulated by the new law. The role of teachers in reporting domestic violence is pointed out (Sec. 23). More specifically, it is set out that teachers, when they are informed of or when they realize that a crime of domestic violence has been committed against a pupil, have the obligation to inform the director of the school unit, who thereafter reports the crime to the public prosecutor and the police.

However, the law excludes certain forms of violence (i.e. verbal, psychological) and intervenes to punish only the "more serious and repulsive forms of violence" (as reported in paragraph 2 of the "rationale of the law report"). Furthermore, further structures to help victims of domestic violence need to be created, as described in the law. Existing structures are not sufficient for meeting the needs of all the domestic violence victims. Although the *Act on Confronting Domestic Violence* does mention support structures for the victims and therapy programmes for the offender, no such structures have been implemented so far.

Victim offender mediation is provided only for misdemeanours. It is the task of the public prosecutor to bring the victim and the offender of the domestic violence together, aiming at restoring the harm/damage done to the victim.

Sections 11–14 regulate the victim offender mediation process (see the steps of the process in the text highlighted). Thus mediation is possible only in cases of domestic violence that qualify as misdemeanours, and not felonies. The public prosecutor is responsible for carrying out the mediation process. The process takes place before pressing charges or before trial and is used as part of the criminal process. Depending on the mediation's results the case is either fully dropped (alternative/diversion procedure) or the formal criminal

More specifically, the steps of victim offender mediation are the following.

1. For the VOM procedure to begin, the consent of both the victim and the offender is required.
2. The offender declares his/her willingness to:
 - to stop any further act of victimization,
 - to attend a therapeutic counselling programme provided by a public health institution, and
 - to repair/restore any harm/damage done to the victim of the violence (compensation to the victim is also included).



3. If the actions mentioned so far have been carried out, then the public prosecutor drops the case, does not press charges and deletes the case from the records [Sec. 43 subsec. 1 and Sec. 47 *Greek Penal Procedure Code*]. The criminal procedure is discontinued.
4. If any of the previous conditions are violated within a three-year's period, the case is brought back to court and the criminal procedure continues at the stage before mediation (as if mediation had never taken place).
5. No other attempt to mediate is permitted for the same offence. egyenél több mediációs eljárás.

procedure is resumed.

When discussing the legal regulation of penal mediation we postulate that introducing VOM in the legal tradition of the Greek criminal justice system – even only in cases of domestic violence – was an innovation. However, at the same time a series of problems and contradictions have arisen. The “grey zones” of implementing penal mediation in domestic violence are discussed below.

The lack of a wider dialogue on mediation and restorative justice

Being aware that legal tradition changes slowly, penal mediation and other possible changes within the Greek criminal justice system presuppose a dialogue on restorative justice issues and the implementation of pilot programmes as well. This did not happen in Greece prior to the legislation, only as an aftermath of the legislation and the introduction of VOM.

Professionals in the criminal justice system have distinct, clear and specialized roles (including the public prosecutor). They have – mostly – a legal and judicial background. The adoption of restorative justice (as a system of both values and practices) challenges the flexibility of the criminal justice professionals’ attitudes, ideology and training. So, there is a need not only for training, awareness campaigns and public dialogue in order to prepare the ground for implementing restorative justice programmes, but also for social and criminological research to explore the “space” for restorative justice changes within the criminal justice system (e.g. a complementary or alternative role to the criminal justice system).

Potential role diffusion when the public prosecutor mediates

The public prosecutor’s profile is different from the mediator’s one. The prosecutor is a judicial functionary, with a status similar to that of a judge. He/she “guards the law” and is present throughout all the stages of the criminal procedure i.e. in the beginning and the end of the criminal process (police, investigation, trial, supervision of sentences). He/she acts under the principle of legality and has no discretionary power to charge someone for a less serious crime than the one he/she has sufficient evidence for. Charging the suspect with a less serious crime would be a violation of the prosecutor’s duty. In the case of VOM in minor offences of domestic violence, he/she acts under the principle of opportunity as an exception to his/her duties otherwise.

The mediator on the other hand is a trained professional, who is familiar with social, psychological disciplines and human sciences. He/she should be recruited from all sectors of society and should generally possess a good understanding of local cultures and communities. A mediator should be able to demonstrate the sound judgment and inter-personal skills necessary for mediation. His/her conduct is regulated by the Code of Practice and Ethics.

We suggest that the prosecutor needs to receive training on mediation techniques and procedures or should be assisted by a mediator (trained in family mediation).

The appropriateness of adopting a gender perspective when applying restorative justice practices in domestic violence cases

Domestic violence and abuse lies in gender inequalities and power imbalance. Gender and race discriminations are reflected in cases of domestic violence. In the abusive relationship, the husband/partner often apologizes and asks for forgiveness, promising that violence will stop and never happen again. Every time, it is promised that that was the last time that violence happened. However, research findings verify that the events of domestic violence escalate and usually will not stop until the abused woman leaves her home and her husband.

In Greece, domestic violence research attests these findings (Artinopoulou 2006). So, the main questions are: Is the “trauma of victimization” restorable through the offender’s forgiveness and reconciliation? Or, is there any space to restore the violent relationship? These are the questions raised by women’s rights organizations and NGOs in Greece concerning the implementation of penal mediation in minor offences of domestic violence. According to their views, the priority should (or must) lie in the protection of human dignity, in the victim’s rights and women’s rights, as opposed to family, as a social institution. Feminists seem to insist on the offender’s punishment through the criminal justice system in cases of domestic violence and sexual offences, pushing victim offender mediation to the margin of the criminal justice system. Such a debate has been reflected in press releases and publications of organizations such as the National Committee on Human Rights, the Feminist Network, the Greek Department of International Amnesty, the Greek Observatory for Violence against Women, etc.

Trying to relate the issues of domestic violence, VOM and the gender issue is like skating on thin ice. The debate on the appropriateness of restorative justice for violence between partners, sexual and domestic violence, reflects the gap between restorative justice’s defenders and opponents. Research findings do address a number of risks of gender discrimination in restorative justice procedures (Daly and Stubbs 2006: 17), such as:

- the victim’s safety, reinforcing abusive behaviour and possible re-victimization;
- gender power imbalances in the mediation process (VOM, conferencing cycles);
- regressing by turning the issue of violence against women from a public issue into a private incident (re-privatization of the issue).

It is argued that apart from the offender’s punishment, apart from the real and the symbolic functions of criminal law, the victim’s rights and welfare status need also to be protected. The plurality of alternative procedures and practices within (or on the borders of) the criminal justice system should offer the victims an opportunity to choose the appropriate programme/intervention/strategy of conflict resolution that meets their own needs.

If we are really interested in empowering the victims’ voice, we have the obligation to provide them with multiple choices. Dichotomies, such as retributive vs. restorative justice constitute a kind of pseudo-dilemma rather than real questions.

3.10.4 VOM Evaluation in domestic violence cases

The filtered reporting of domestic violence cases in Greece, the problems of implementing the mediation process, and the lack of follow-up evaluation are some of the problems in the evaluation of this type of restorative justice.

3.10.4.1 Filtering the cases of domestic violence

How many cases of domestic violence come into the criminal justice system, which of them are misdemeanours, which are liable to victim offender mediation according to the provisions of law



mentioned above?

We are aware of the hidden facets of domestic violence and women's abuse. A lot of such crime remains in the dark. Findings from a large-scale victimological research conducted in Greece show that only 9.4 % of domestic violence incidents are reported to the police (Artinopoulou 2006). These are mostly cases of physical and/or sexual abuse where the victims suffer severe injuries for which hospital treatment was necessary.

Minor cases of domestic violence (misdemeanours) are usually not reported to the police, so information concerning these incidents is very limited in the criminal justice system. Psychological and verbal abuse within the family is not included in the legal definition of domestic violence, according to Act 3500 of 2006. However, these types of domestic violence are the most prevalent according to research findings in Greece: 1 out of 2 women of the population sample (56%) report have suffered these types of abuse from their spouse or partner (Artinopoulou and Farsedakis 2006). These cases could have been well suited for family mediation and/or victim offender mediation, but at the time no such opportunity existed.

3.10.4.2 Problems in implementing VOM

VOM is a new institution and practice in the Greek criminal justice system. An interesting debate began amongst the judicial and legal communities. Symposia and conferences have been held in Athens addressing the issue of penal mediation. A circular was published by the General Prosecutor of the Supreme Court (*Areios Pagos*), clarifying implementation issues arising from the application of penal mediation to domestic violence cases. Furthermore, in each region of the country a prosecutor is specifically appointed for penal mediation. Findings from qualitative research conducted among public prosecutors (interviews) show that supporting attitudes are more prevalent than opposing ones. The need for special training in penal mediation is also mentioned as well as the support of the mediation procedure by both experts and mediators. Addressing the content of the therapeutic/counselling programmes for offenders and the need of accreditation is also emphasized.

3.10.4.3 Is evaluation and follow-up provided?

During the three-year period needed for completing the mediation, continuous evaluation concerning the offender, the victim and the family members has to be provided. The impact of the therapeutic/counselling programme on the offender's behaviours, the victim's recovery and the restoration of the relationship are key issues to be evaluated. Follow-up research – after the three-year period – contributes to further evaluate the mediation process. However, no evaluation and follow-up is provided during the course of the mediation.

Given that, two years after the introduction of penal mediation in minor offences of domestic violence, only very few cases have been reported to the police (a large amount of offences remain

in the dark) and even fewer have proceeded to the next stage of criminal investigation. Victims of domestic violence do not trust the (punitive) responses of the criminal justice system. Two years after the enactment of the law, only a small number of domestic violence cases have been reported, and have been found appropriate for victim offender mediation, as set out by relevant law. However, measures for better implementation of penal mediation have been applied focusing mostly on the prosecutors' awareness of penal mediation procedures. A code of practice is also necessary.

3.10.5 Conclusion

It was a rather "risky" choice to select the law of domestic violence as the first area of law in which victim offender mediation (VOM) was introduced in the Greek criminal system. The appropriateness of mediation and restorative justice in gender issues, such as domestic violence, has been questioned even in countries with a long tradition in restorative justice and alternative dispute resolutions programmes.

The compliance with European law constitutes a *sine qua non* condition for the harmonization of the legislation in the context of European integration. However, preparation is needed before major changes can actually take place and the introduction of new institutions such as penal mediation in the criminal justice system is also crucial. Adopting restorative justice programmes at a national level presupposes research, preparation and information with regard to the possible changes both in the criminal justice system and in society as well.

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3.11

Restoring Relationships: Hate Crimes and Restorative Justice

3.11.1 Introduction

Violence in all its forms is a matter of concern. However, violence that also corrupts our ability to function and live together as a society, and denies our humanity and value as human beings is a cause for even greater concern. Hate crime is one example. It is defined as “a crime where the perpetrator’s prejudice against any identifiable group of people is a factor in determining who is victimised”.⁴⁷

Hate crimes have long been ignored by policymakers, but from the 1990s and especially after the 11 September tragic events, they have become a significant area of concern for public policy. For example, only one year after 11 September, Human Rights Watch warned the US government that its officials should have been better prepared for the hate crime wave that followed the terrorist attacks. For example, an increase of 1.700% was recorded with regards to anti-Muslim bias crime.⁴⁸ The hate crimes that followed the 9/11 events included murder, beatings, arson, attacks on mosques, shootings, vehicular assaults and verbal threats. This violence was directed at people solely because they shared – or were perceived as sharing – the national background, or religion, of the hijackers and al-Qaeda members deemed responsible for attacking the World Trade Centre and the Pentagon.

In the United Kingdom, the 2000 British Crime Survey estimated that there were 280.000 racially motivated incidents in England and Wales. In 2005, the Crown Prosecution Service (hereinafter CPS) prosecuted 4.660 defendants for racially aggravated offences, up

⁴⁷ See Association of Chief Police Officers (ACPO) 2007. Also see Recommendation 12, Stephen Lawrence Inquiry Report (1999).

⁴⁸ See at <http://www.hrw.org/campaigns/september11/>.



by 29% from 3.616 for the previous year. The Metropolitan Police alone reported 11.799 incidents of racist and religious hate crime and 1.359 incidents of homophobic hate crime in the 12 months to January 2006. In October 2006, one year after the London bombings by terrorists, the Greater London Authority (hereinafter GLA) published a thorough report on Muslims in London. It noted: "There were 269 incidents of religious hate crime across all faith groups in the Metropolitan Police area between 7 July and 31 July 2005, compared with 40 incidents over the same period in 2004. Increased attacks were primarily directed against Asian and Muslim people. In 2005–2006 there were 1.006 reported faith hate crimes, an increase of 469 (87%) since 2004. At the same time, reports from Metropolitan Police Service (hereinafter MPS) community contacts continue to note the possibility of a large gap between reported and experienced incidents" (GLA 2006). In addition, the homophobic crime is still highly prevalent in the capital.⁴⁹ In April 1999, three people died and many more were injured as a result of the bombing of the Admiral Duncan pub; in November 2004, David Morley was killed as a result of a homophobic attack; in October 2005, Jody Dobrowski was beaten to death in Clapham. A 2003–2004 study by Stormbreak showed that 45% of people from lesbian, gay, bisexual and transgender (hereinafter LGBT) communities had experienced a homophobic crime and 20% had been a victim of actual physical assault. According to a 2006 study by Victim Support, between half and two-thirds of LGBT people have been victims of hate crime, with LGBT people from Black Asian and minority ethnic (hereinafter BAME) groups 10% more likely to be victims of hate crime. Ageism, disabilism and sexism can also lead to hate crime. For the purposes of this article, the analysis will now focus on racist behaviour that leads to hate offences.

In the search of practices and policies that can bring balance to community tensions, and address integration questions and inequalities, restorative justice principles and practices might appear appealing. The use of restorative justice in resolving international tensions such as those that followed the Rwanda genocide – otherwise called *gacaca* justice – make restorative justice topical for western democracies (Tiemessen 2004).

Criminal justice practitioners and victim support workers are keen to explore the prospects of the restorative justice (RJ) paradigm with more serious crimes such as hate crime. However, RJ practices,⁵⁰ both in the United Kingdom and internationally, are largely being used for minor offences and juvenile offenders. According to the RJ theory, the new paradigm can provide alternatives that can either complement or replace the traditional criminal justice system (Gavrielides 2005: 84–106). Therefore, a gap seems to appear between the theoretical claims of RJ's potential and its actual delivery. However, little legislative or political support has so far been given for the use of restorative practices with hate crime cases. The objective of this article is to explore the gap between RJ's theory and practice with hate crime, and start a debate that will inform policymakers and criminal justice practitioners about the potential use of alternative dispute resolution processes with race related violence.

The article has been split into five parts. First, it will attempt to deconstruct hate crime to understand its causes and effect, as well as the definitional issues surrounding it. Second, it will identify the gaps of the extant literature on hate crime and proceed with recommendations for further work that needs to be done in the area. Third, it will aim to understand why RJ practices with hate crime have not been favoured by the legislator and policymakers despite the theoretical proclamations and research evidence that are backing them up. Fourth, the article will provide a list of international case studies where RJ practices have been used to address hate crime successfully. This analysis will provide the basis for the last part of the article which will posit some recommendations as to how the alleged gap can be bridged and how criminal justice agencies can be supported to work collaboratively with community-based programmes and practices to combat hate crime offences.

3.11.2 Deconstructing hate crime

3.11.2.1 Defining race hate crime

Although hate crime, and in particular race hate, are considered ancient phenomena, they have arrived relatively late on the political and policy agendas, and then onto the agenda of various

statutory agencies. It is not until recently that criminologists started to seriously think about the definitional issues surrounding this type of crime. The lack of consensus, for example, around what constitutes a "racial attack" or "hate crime", made the studying of this phenomenon even more difficult.

In addition, varying definitions also lead to problems in real-world application, such as inconsistency in public policy and judicial decisions. For example, in the UK, John Laidlaw, a 24-year-old British National Party (hereinafter BNP) supporter who vowed to "kill all black people" and shot several others, was found to not have been motivated by racial hatred. The Times reported that "Judge Samuel Wiggs, sentencing Laidlaw at the Old Bailey, made no finding that the shootings were racially motivated" (Bird 2007: 31). However, this was not the man's first hate offence. In May 2008, Laidlaw opened fire on two black men in the space of half an hour in North London. In that incident, one man was left fighting for his life after being shot in the neck, while another individual was hit in the back. Laidlaw had been shooting at Evans Baptiste, 22, who recognized him as the man who had attacked him with a hammer earlier that year. Less than three weeks before the attempted murders, Laidlaw was given an 18-month supervision order for aggravated bodily harm and abuse towards Ayandele Pascall, a black man, who had beeped his car horn at him.

In the United Kingdom, 1993 was a critical year for the theoretical and legislative development of race hate crime including its definitional challenges. Stephen Lawrence, a black teenager, was attacked and stabbed by a group of five white youths while he was waiting for his bus in Eltham, South London. The investigation that followed as well as the processing of this case became the focus of a special inquiry. Among other things, it showed that there is institutional racism not only in the police force, but also in other public services.

In 1998, the Chief Constable of Greater Manchester acknowledged that his police force possessed a degree of institutional racism. Giving evidence at the Stephen Lawrence inquiry, he said: "We have a society that has got institutional racism. Greater Manchester Police therefore has institutional racism" (Cathcart 1999). At the same time, a spokesman for the Metropolitan Police was arguing that the two police chiefs were using different definitions. "The commissioner was talking about institutional racism as being a matter of policy which means that all police officers go to work with a racist agenda" (Green and Grieve 2000). Sir William Macpherson, who was responsible for the *Lawrence inquiry*, said: "There is a reluctance to accept that racism is there which means that it will never be cured" (Cathcart 1999). As a result, the inquiry produced what is now commonly accepted in the UK as the definition of a racist incident: "any incident which is perceived to be racist by the victim or any other person". This is the definition that will be used throughout this article.

⁴⁹ The MPS reported 1.359 incidents of homophobic hate crime in the 12 months to January 2006.

⁵⁰ E.g. face-to-face and indirect mediation, family group conferencing, restorative circles and boards.



3.11.2.2 Understanding race hate crime and its causes

Hate crime – a different type of crime

Research on hate crime is relatively underdeveloped and hence that aspect of criminological knowledge is limited.⁵¹ However, from the 1990s and onwards, hate crime has come to the attention of policymakers and criminologists who most of the time reacted with little knowledge about its causes. Hate crime is different from other types of crimes. There are several key distinctions between hate crimes and “ordinary crimes”.

While most hate crimes involve relatively minor offences, including graffiti, propaganda, harassment, intimidation and vandalism, their impact can be much greater and long lasting. For example, hate crimes are more likely to be directed at individuals than property, often involve patterns of repeat victimization, evoke a large amount of fear, and the emotional impact of hate crime is much higher than crimes without a specific motivational element. The International Centre for the Prevention of Crime report on preventing hate crimes states that: “The most likely offender is an adolescent or young male, living in a poor area with a high level of unemployment and economic instability, and in a country where there are rapid changes in population. On the other hand, the people most at risk of being victimized are racial and ethnic minority groups or individuals, religious minorities, gays and lesbians, children and young people, and those living in poor areas with high levels of unemployment and economic instability” (ICPC 2002).

The major underlying distinction between “ordinary crime” and hate crime is an element of personal enmity (or motive) absent in other crimes. Robert Kelly in *Hate Crime: the Global Politics of Polarization* claims: “Hate conveys that behind a crime is an aversion for the victim or an attraction to a potential crime victim, precisely because of his or her perceived individual or social attributes. Sometimes an offender’s motive for violence and murder may result from the tacit approval of an audience of “respectable citizens”. Attacking Jews, blacks, homosexuals, and politically proscribed groups may be driven by the key consideration that these people cannot defend themselves and are therefore vulnerable” (Kelly 1998). Kelly goes on to say that motives may be further complicated by offender ideas that include “audience approval” and the “ratification of complex emotional needs” quite apart from practical considerations, including whether potential victims are likely to be affluent.

With hate crime, inferring a motive is often difficult by looking at the known facts of a crime. In the United States, most interracial crimes are not hate crimes. The fact that the offender and the victim are of different races does not have a direct correlation with the motive. It is usually a chance occurrence that a certain victim was chosen, and nothing more. For example, a group of young Hispanic men leave a party and want to get in a fight with the first person they see. It could be anyone: another Hispanic kid, an old black couple, a south-Asian store owner, or a white male jogger. The target is selected by random occurrence. The symbolic status (e.g. race, religion, and ethnicity) of the victim is irrelevant; one target is as good as any other.

Causes of hate crime

The criminological, sociological, psychological and biological theories around hate crime tell us that this phenomenon is attributed to a number of factors, some of which seem to be more prominent than others. The limited scope of this article does not allow to elaborate on these theories but merely to refer to them for critical reflection.

One of the main theories behind why hate crime happens is based on the role of economics. While ethnic tensions are thought to increase during economic downturns, a study done in the late 1990s by an American political scientist attempted to refute this analysis (Green 1997). In this study, Green argued that a weak economy precipitated by a drop in cotton prices did not directly lead to an increase of hate crime activity. However, the study also found that tensions are easily inflamed when a new racial group moves into an ethnically homogenous area, and levels of violence were often directly correlated with the speed of racial integration.

According to Richard Berk, “The fact that people of one race may steal from people of another race may simply be a function of differences in wealth that happen to be associated with race. Indeed, the race of the victim may be unknown to the perpetrator even after the crime is committed (e.g. in a burglary)” (Hamm 1994). Professor Berk uses this example to show the difficulty of finding specific hateful motivation behind certain offences.

Criminologists have argued that the elevated rate of victimisation among BAME communities arises to some extent because their members fall into demographic groups that are at higher than average risk. They also tend to aggregate in areas where victimisation risks are relatively high. The tendency of ethnic minorities to aggregate in this way also triggers effects of “non-mixed multiculturalism”. Examples include: Harlem in New York City (USA), Sabon-garis in Northern Nigeria and Tower Hamlets in East London (UK).⁵² It could be argued that this form of “human ecology” encourages social exclusion, stereotypes and prejudice of residents therein rather than social and community cohesion.

For instance, Kushnick argues that racial violence became an issue in England when African and Caribbean communities, along with other Commonwealth minority ethnic groups were invited to undertake unfilled low paying jobs in the booming post-war era. (Kuschnik 1998; Higginbottom and Serrant-Green 2005: 662-686) Kushnick argues that what followed these groups of various ethnic origins were increased prejudice, neighbourhood segregation, discrimination, and racism in the work place and other spheres of life. It should not come as a surprise, therefore, that in the United Kingdom the phenomenon of racist violence started to be discussed only after the Notting Hill Race Riots of 1958.

However, it would be naive to think that hate crime is simply due to demographic factors. It is far more complex than that. Hate crime is a phenomenon that is largely due to a “non-mixed multiculturalism”, political and religious bigotry and social intolerance. Hence it could be argued that re-socialising social class, religious bigots and racial fanatics could impact the society’s conceptual orientations, and influence the social lens through which we view and understand the “Other”.

For instance, taking the example of Nigeria, it could be argued that the persistence of inter-ethnic and religious violence – especially among the Lgbos and the Hausa communities – is largely due to religious fanaticism and “non-mixed multiculturalism”. Hence it is not uncommon to hear an Hausa person calling an Lgbo man *iyamiri* – which connotes a starving man looking for water to drink – and an Lgbo man calling an Hausa man *aboki* – meaning a fool or a cattle rearer – when social interactions degenerates in quarrels. These derogatory terms go as back as Nigeria’s 1960s civil war where they were used to consolidate the negative assumptions each ethnic group had about each other.

It could also be argued that the politicisation and the occasional unethical use of crime statistics, and the role of the media contribute to the negative held assumptions of the “Others”. Members of

⁵¹ In the UK, for instance, the first major report on hate crime was published in 1978 by Bethnal Green and Stepney Trades Council and was titled Blood on the Streets. The report was then followed by the Home Office first official study on statistics of racist incidents recorded by the police.

⁵² However, some have argued that London should be treated as a separate example because despite aggregation in certain areas, diversity is still maintained.



Radstas, an advocacy group responsible for statistical data, are concerned at the extent to which official statistical data reflect governmental rather than social purposes. Thus, the lack of control by the community over the aims of statistical investigations, the way these are conducted and the use of the information produced, the power structures within which statistical and research workers are employed and who control the work and how it is used is of concern if hate crime is to be effectively addressed around the world. Similarly, the fragmentation of social ecology into “mono-ethnic communities” because of the fear of the “Other” and the obscuring of human connectedness are issues worthy of evaluation if racial violence is to be controlled.

The difficulties with statistical recording of hate crime do not stop there. According to the British Crime Survey, less than half of racist incidents are reported to the police. In addition, the CPS found that despite efforts to boost confidence in the system, an additional 5% of hate crime charges were dropped because there was no witness testimony (of 6,200 charges brought, 2,506 were dropped). Moreover, in 2004–2005, the CPS reported that 8% fewer charges than last year were dropped because of insufficient evidence. Conviction rate for all race offences charged dropped by 2%. The Commission for Racial Equality said the figures suggested a “difficult social problem that continues to blight the lives of many of Britain’s ethnic minorities [...] Until all victims and witnesses of these crimes have full confidence that the justice system will deal with them, we will never know the true extent of the problem”.

Carr-Hill claimed that official/governmental statistics contribute to the exacerbation of hate crime in the United Kingdom (Carr-Hill 2006: 16–17). He argued that perhaps the seed of racial violence against the British minority ethnic groups might have been sown in 1965, when McClintock brought out one of the Cambridge studies apparently showing that the Afro-Caribbean population was much more likely to be convicted of violent crime than the native white population. This report, Carr-Hill argued, was at the Home Secretary’s desk when the first “*Race Relations Act*” was passed by James Callaghan, limiting the number of Commonwealth immigrants. Reporting the work of Hall et al., Carr-Hill further noted that in the 1970s, when there was a “mugging” panic in London, the Daily Mail over-exaggerated the Metropolitan Police crime statistics, saying that victims were “reporting their assailants as black”. However, this was “because the Daily Mail had already told them that muggers were black” (Carr-Hill 2006: 17).

Furthermore, social exclusion and the phenomenon of “non-mixed multiculturalism” have often been encouraged by political figures. Examples include Enoch Powell’s *Rivers of Blood* in 1968, and Margaret Thatcher’s “swamping” statement of 1978. There she noted: “People are really rather afraid that this country might be rather swamped by people with different cultures [...] the British character has done so much for democracy, for law, and done so much throughout the world, that if there is any fear that it might be swamped, people are going to react and be rather hostile to those coming in” (Ohri 1988: 15).

The speech of Roy Harttersley about black immigrants is also relevant: “Integration without control is impossible, but control without integration is indefensible” (Ohri 1988: 14).

3.11.3 Gaps and scope for further work

It becomes apparent that hate crime has implications not just for the victim and the offender, but also for the community. In fact, it has been argued that prevention of hate crime cannot be achieved without involving the community. According to a 2005 research study by Runnymede Trust, the following will need to be achieved at a community level, if hate crime is to be addressed.

- Work with potential perpetrators needs to take full account of the wider social context as well as the local situation in order to be able to intervene in the most effective way.
- Work should also take place to challenge the attitudes of wider society when it condones the racist attitudes of young perpetrators, and in so doing, explicitly or tacitly, gives dangerous support to their intolerance.
- Agencies that work primarily with offenders, should consider how they could have an impact on potential perpetrators and the wider community. For example, how can probation work best engage with a preventative strategy?
- Working together to tackle the racist attitudes of potential perpetrators calls for the building of strong partnerships between different sectors, especially between those who work with potential perpetrators and those who work with black and minority ethnic communities.
- Prevention projects that bring together potential perpetrator and victim groups can be particularly successful if they are clear that one of their objectives is to challenge racist attitudes. (Isal 2005)

The significance of communities as parties in hate crime, suggests that RJ might indeed be well suited for a holistic approach. According to RJ’s theories, the restorative norm has the philosophical potential to address sensitive and complex crimes such as hate crime. Undoubtedly, victims of hate crime experience a range of effects which can have a long-lasting or sometimes life-lasting impact. These include fear, particularly of repeat attacks, anger, illness including depression and physical ailments, trauma in children, restrictions in lifestyle and substantial financial loss. Statistics have shown that for various reasons nine out of ten victims had not gone to court although three-quarters said that they would be prepared to give evidence if the perpetrator were prosecuted (Victim Support 2006). Research has also shown that victims are often keen to move beyond “victimhood” and take a role in supporting other victims or changing/engaging their communities. Survivors also want to see action taken to tackle the root causes of hate crime.



However, the available evidence suggests that the current criminal justice system and the available victim support services often fail communities and victims in addressing hate crime and its effects successfully. For instance, the Runnymede study showed that criminal justice officials, probation officers, community organisations and individuals are lacking the knowledge and the confidence to deal with potential perpetrators of hate crime.

For victims of hate crime, the main source of support is family and friends, although a minority reports that their families were the least supportive (especially victims from LGBT communities). Other sources include the police, Victim Support and other voluntary, community and faith-based organisations. However, a number of barriers often prevent effective delivery of services to victims of hate crime. These include: language barriers, absence of services where victims may be referred to due to a lack of understanding by mainstream service providers and difficulties in providing practical solutions.

Many services are planned and delivered in partnership. However, those voluntary and community sector organisations whose main area of work is not providing support directly to victims are often outside partnerships, and the capacity of agencies to work together is often compromised by competition for funding. Community-based projects, such as RJ practices, could be used to address some of the challenges that the traditional criminal justice system is facing in addressing hate crime.

According to the Home Office, the typical hate offender is a young white male who lives locally close to the victim. In particular, according to a 1997 study carried out by Sibbit for the Home Office, factors of deprivation and youth inactivity can encourage racist responses in those who are frustrated or insecure in their physical and social settings.⁵³ “The views held by all kinds of perpetrators towards ethnic minorities are shared by the wider communities to which they belong” (Sibbit 1997). This “wider perpetrator community” as well as the young population that is exposed to hate crime philosophies are two groups that RJ has addressed successfully in the past.

Restorative practices are founded upon the principles of inclusion, respect, mutual understanding and voluntary and honest dialogue. One could argue that these are core values, which, if ingrained in society, could render hate crime almost virtually impossible. Hence, bringing people face to face with their fears and biases may help dispel myths and stereotypes that underlie hate attitudes. It may also allow perpetrators to see victims as people rather than “the Other”. In fact, it could be argued that the RJ encounter is fundamental to building cross-cultural bridges and integration. Thus, Umbreit suggests that “the continuing movement toward adaptation of the restorative justice paradigm could be enhanced only if practitioners, advocates and policymakers become increasingly sensitive to and knowledgeable about cross-cultural issues and dynamics that impinge on the practice and

on the very notion of justice” (Umbreit 2001: 66). However, the lack of legislative, policy and financial support for these services should make us wary and seek for concrete evidence before any recommendation is made.

3.11.4 Playing devil’s advocate: RJ – a viable option for hate crime?

Many have argued that RJ might indeed not be the best alternative for serious offences including hate crime. For example, some have claimed that RJ practices, such as face-to-face mediation, could expose victims to further victimisation and trauma. In addition, the ability of hate crime perpetrators to engage in an honest dialogue has been questioned. After all, why would a racist criminal whose attitude towards others has so far been consistent suddenly agree to engage in an honest dialogue? Furthermore, what guarantees can RJ practitioners give to victims that their racist attackers will not hurt them further, or change their minds and retaliate?

Similarly to sexual offenders, perpetrators of racist violence fall within a special category of criminological interest, where criminal behaviour and activity is examined as a phenomenon that is attributed to deep-rooted causes. Racist perpetrators might not be easily susceptible to rehabilitative and community-based approaches, while victims may be exposed to further victimisation if brought in contact with them (irrespective of how remorseful the perpetrator may seem).

The reluctance on the part of victims and offenders to participate in restorative justice is also seen as another challenge. For instance, participation in victim offender mediation requires that both parties are willing and able to participate in the process. Moreover, there is always a feeling of apprehensiveness for the victim when they are going to encounter the offender. This is particularly true if the offence is a hate crime since there is a specific intent to attack an individual because he or she belongs to a specific community.

A further difficulty with RJ in addressing hate crime is the concept of restoration of the status quo ante. Like tort law, RJ is concerned with restoring the parties to the status quo ante through restitution and payment, i.e. the position they would have been in, had the crime not occurred. In cases that deal with property crime – or even some crimes against the person – this is attainable. But when it is concerning a hate crime, this may be more difficult. Prejudicial attitudes are deeply rooted within a person. Victim offender mediation may not have the thrust of causing an offender of hate crime to experience remorse. In fact, it has been argued that in most cases, victim offender mediation will meet an arrangement that suits the vengeful victim and the middle-class mediator. This arrangement will lead to ganging up on the young offender, exacting the expected apology, and negotiating an agreement to pay back what has been taken from the victim by deducting portions of his/her earnings from his/her minimum wage job. Therefore, it has

⁵³ According to the same study, most homophobic offenders are aged 16–20, and most race hate offenders under 30.



been said that little social transformation is likely to arise from utilitarian transactions of this sort.

However, RJ practitioners claim that they can balance, or counter, inequalities among the parties. It is argued that instead of breaking down the barriers and prejudices that the offender and victim bring to the table, mediation practices are apt to compound pre-existing power and status differences even more systematically and seriously than formal judicial processes. Specifically in terms of hate crime, RJ practices may alienate both the victim and offender in its attempts to bring community cohesion. They may alienate the victim in the sense that after the crime, community cohesion is not a “live” prospect; they may also alienate the offender for the same reason. It has been argued, therefore, that RJ practices conceivably maybe more successful in dealing with hate crime if they were implemented post-imprisonment because at this point heightened emotions have somewhat subdued.

Additional criticism of the use of RJ with hate crime includes its limitation with dealing with cross-cultural orientations where decidedly different ideas of what is required for restoration continue to prevail. For instance, Umbreit argues that in a multicultural society the cultural background of victims, offenders and mediators are often different which, if not carefully handled, “carries a risk of miscommunication, misunderstanding, or worst of all, re- victimisation” (Umbreit 2001). Smith also argues that, “for RJ to work, a broad moral consensus must exist on what is good and bad conduct, on right and wrong” (Smith 1995: 157). So can a restorative justice process work if the parties involved have different conceptions of restoration, or typification of others? Whose idea of “restoration” or “person typification” should prevail? For example, if a conflict occurs within African-Caribbean communities, or African-American communities, restorative processes might seem appropriate, as these communities tend to share similar sense of what is required for relationships of social equality to exist – although “within-group” culture dynamics should not be underestimated. But what if one of the parties is not African or Caribbean? Are the prospects of a successful restorative justice process lessened in the absence of a shared understanding of restoration?

A further challenge facing RJ in dealing with hate crime is the unlikelihood of inspiring moral reflection and development. “In theory, bringing the offender to the table to confront the victim face-to-face will enable him to realise the cost of his actions in human terms and to resolve to lead a better life” (Delgado 2000: 765). However, it is said that it is very unlikely that the offender will have a crisis of conscience upon meeting the person he or she has victimized in a hate crime. Most often hate crime is premeditated and is caused from long-lasting negative images of a particular group of people. A forty-five minute meeting is unlikely to have a lasting effect if the offender is released to his/her neighbourhood immediately afterwards. Delgado claims that this example demonstrates that RJ may be apt to make an offender a better person, but lacks the long-lasting effect to inspire moral reflection (Delgado 2000).

Furthermore, it is said that RJ does not have the capacity to address public interest in the way criminal law would. “Mediation pays scant attention to the public interests in criminal punishment, particularly retribution” (Delgado 2000). In particular, the symbolic element of a public trial is an opportunity for society to reiterate its deepest values; loss of that staged public event is a major concern. In a trial where an offender is indicted for a hate crime offence, the community at large has a chance to express its deepest emotions either to the media or among their own communities in mutual dialogue. Yet, if this process is done behind closed doors in which there are sworn testimonies signed by the offender, victim and mediator there is a minimal chance that it will have a significant impact in the community because it is individualized and kept in the dark. There is also less of an opportunity for public outcry surrounding a mediation dialogue than a public trial, and for the hate crime, it is a poor outlook to be benighted by the community at large. This paradox is more likely to occur in large cities such as London than smaller towns, villages or hamlets.

All in all, it is argued that the traditional criminal justice system aims at uniformity, employing a system of graded offences and sentencing guidelines designed to assure that similar cases are treated alike. The absence of a formal adjudication process is a gap that RJ practitioners must fill. However, at this moment there is no obvious metric because RJ practices have not been applied on a systematic level towards hate crime.

The weaknesses of the current criminal justice system are the theoretical strengths of RJ. Proponents of RJ claim that, the new paradigm offers a balance between the needs and rights of both offenders and victims regardless of race, gender or religion. Essentially according to advocates of restorative practices, if the theoretical version of RJ is applied to hate crime it should bring about positive results. To understand the gap that is created between theory and practice, instead of engaging in further detailed theoretical discussion, the article will proceed with an account of case studies where RJ is used successfully to address hate crime in various countries and within different cultural contexts.

3.11.5 Restoring relationships through RJ: some success stories

3.11.5.1 Case study from Israel⁵⁴ – intercommunity relations

In Israel and the occupied territories, there is a significant amount of mistrust and dislike between the resident Jewish and Arab populations. This case study involves two young Arab offenders who committed an armed robbery against a Jewish victim. The Jewish victim experienced the offence as hate crime and an act of terrorism.

The young perpetrators, Mohammed and Sami, were interrogated and detained in a juvenile facility for fifteen days. Afterward, they returned to their houses and were under partial house arrest, enabled only to attend school. A charge was brought against them for attempted robbery and conspiracy to commit felony. Mohammed’s father had a heart attack after hearing the news of what his son had done. Sami’s father was immensely embarrassed by his son’s actions which he saw as a terrible injury to the honour of the family. Since the event, the victim, Sarah avoided passing through Arab villages. She left her job and other projects that deal with the Arab community; relations with Arab friends became strained due to the trauma she experienced.

Although the young offenders and their families expressed a strong desire and willingness to correct the damage they had done, the victim expressed her absolute reluctance towards any contact. The young offenders tried to contact her around the time of the crime, and in different ways they tried to convey their message of *sulha*⁵⁵ (forgiveness), as is customary in Arab culture. Failing this, the juvenile probation officer for the boys consulted with the Restorative Justice Unit of the Juvenile Probation Services to check out the possibility of mediation between the participants involved. Initially, Sarah expressed reluctance, but after a thorough explanation from the RJ team, she decided to go ahead with family group conferencing. This was attended by Sarah, her husband, her eleven year old son, her brother, and her social worker; Mohammed, his father, and his mother; Sami, his father and his brother; the juvenile probation officer for the case; and the case mediator. At the beginning, the atmosphere was filled with tension and suspicion.

⁵⁴ Taken from Umbreit and Ritter (2006: 99–109).

⁵⁵ In Israel, as in other Middle Eastern countries, traditional informal processes of restorative justice exist alongside the criminal justice system. The most commonly known is called Sulha (peacemaking). Today it is used much less than before the establishment of the state of Israel 58 years ago, yet it still prevails among the Arab, Druze and Bedouin minorities. Sulha is used in cases as simple as small disputes, as well as in the most difficult criminal offences, such as murder or severe corporal damage. In severe cases, Sulha is put into motion to prevent a blood feud. See also at www.realjustice.org/library/beth06_goldstein.html.



Sarah retold the events she had experienced. The boys and their parents listened carefully to her words. They then spoke about their involvement and accepted responsibility. Mohammed and Sami explained that they had no real intention of physically hurting Sarah. They expressed sorrow and deep regret for their deeds and explained that they had not considered the difficult consequences of their actions. When they heard Sarah's words, they understood the serious implications of their actions.

The atmosphere allowed the parties to speak directly about the injuries to parent-child relationships, education, and neighbourly relations between Jews and Arabs. During the process Sarah and her family expressed understanding and compassion toward the boys and their families, even a will to affect their lives in a positive way. For Sarah, the retelling of the story allowed her to vent her feelings of anger and fear, and this was actually part of the process of healing. The mediation process fulfilled her need to be in a safe place, emotionally and physically, without feeling judgmental or guilty. For the boys and their families, this meeting fulfilled the need to live in a society without social and cultural injustice, to distance the boys from the criminal subculture, and to reintegrate them into the community by renewing trust in their place in society.

The meeting ended with a settlement written by the participants, which was later accepted by the juvenile court in lieu of a conviction. At the end of the mediation session, which lasted three and a half hours, all the participants expressed feelings of satisfaction and relief that the process had given them, allowing them to bridge the conflict, hurt feelings, and thoughts that had disturbed them. The impact of restorative justice dialogue offers a glimmer of hope to serve as a bridge toward greater understanding and tolerance among all diverse populations in the region.

3.11.5.2 Case study from London, England – Southwark Mediation Centre

The *hate crime project* at the Southwark Mediation Centre in London, UK is a community-based RJ project, which uses a multi-agency approach to the rising levels of hate crime in the community. The project trains and empowers community members to address issues of anti-social behaviour and crime in partnership with the education authority, the police and local and national Government agencies. It provides a conflict resolution service that works in partnership with enforcement agencies. It is a service which is accessible to all members of the community in order to resolve conflicts, reduce aggressive behaviour and assist the community to improve their quality of life, enabling them to feel safer by reducing crime and the fear of crime. It enables those who are involved in anti-social behaviour and crime to take responsibility for their actions so that victims feel the conflict has been dealt with in a constructive way.

Cases are either referred to the mediator by another agency (police, local housing association etc), or are self-referred. Originally, the project was funded by the Home Office, and then by the Local Authority and other independent funding. This will soon come to an end, and the mediation service will be challenged.

A 2003 evaluation of the project by Goldsmith University showed that it reduces incidents of repeat victimisation from 1 in 12 to 1 in 4. The project was also included as a best practice example in the 2004 Runnymede Trust *“Preventing Racist Violence”* handbook and the 2005 Office of the Deputy Prime Minister *Toolkit on hate crimes*.

Parents who experienced racial harassment and attended the project commented: “Nobody could deal with this issue until you came along. Now the children are talking. My children can come out now and play without being harassed. The young people are even waving hello rather than hauling abuse. The constant feedback over the phone (from the mediators) was very helpful...” (Southwark Mediation Centre 2006)

3.11.5.3 Case study from Oregon, US – Post 11 September hate crime⁵⁶

This case study concerns an incident that took place when an individual twice phoned the Islamic Cultural Centre in Eugene, Oregon, US proclaiming death on the Muslim community in retaliation for the 11 September terrorist attacks.

The police were able to trace the call and arrested the individual. The man who first received the messages at the Islamic Cultural Centre, Mr. Adi, feared for his and his family's safety and thus a police officer was assigned to protect them. The police officer looked after the family's wellbeing, opened their mail, and routinely checked their car for suspicious activity. In the wake of the attacks, Mrs. Adi gave up wearing her traditional head scarf, and her daughter was harassed by a boy who claimed all Muslims should be shot.

After negotiations with the police, the offender indicated a desire to apologize for his actions and make amends. The prosecuting attorney, who had previous experience with the Community Accountability Board that operated in the offender's neighbourhood, initiated efforts to seek a mediated dialogue. Three mediators first met with the offender. He acknowledged that he had been enraged by the pictures and stories of the Twin Towers attack and had made the threatening phone calls to scare the Muslim leader. After the calls, he claimed that he was mortified by his actions and wanted to restore what was done. A week later, the mediators met with the Adis who had expressed interest in meeting the individual who had upset their lives. In addition to wanting to know why the man had committed the hateful act, they voiced concern for the pain caused to the entire Muslim community.

Soon thereafter, the Adis met the offender face-to-face. The Adis wanted the dialogue to take place in a public way in order to educate and promote healing across the broader community. In addition to the mediators, over 20 persons were present representing the community and the justice system. The meeting lasted for roughly two and a half hours, in which the offender made an apology followed by an attempt to explain his emotions and his ongoing anger issues. The Adis asked questions about why the offender had made the calls; and pointed out that death threats in Middle Eastern culture are very serious. Throughout the meeting, Mr. Adi was aware that the offender never made eye contact with him. Community participants expressed sympathy for the Adis and made clear their willingness to help hold the offender accountable while supporting his efforts to change. Tension prevailed at the meeting's conclusion. Although the Adis remained unsatisfied with the offender's level of candour, they agreed to carry out the initial plan of meeting a second time. Mr. Adi believed there was still potential for healing.

During a debriefing, a mediator learned that the offender had felt “overwhelmed” by the District Attorney's presence, and under extreme pressure to provide the right response. Also, the offender said that he had been deeply offended by a community member's comment that he wasn't fit to raise children. What people did not know is that the man had lost a baby son. His grief remained turbulent and he had experienced bouts of depression. Therefore, the mediator encouraged him to share his story at the next dialogue session.

The second meeting began with the Adis asking their questions. They received clear assurance that the man would never commit the act again. Community members detailed the ongoing impact of

⁵⁶ See Southwark Mediation Centre (2006).



the crime on the larger community. Further, the offender informed the group of his counselling progress and of his new job. He also spoke directly about his own loss of his baby son. Sharing that grief developed a connection with the victims, and the man became more humane and genuine. After a series of additional questions, Mr. Adi was satisfied with the progress, and explained that they were ready to move forward. At the Adis' request, the offender agreed to make a public apology. If that action jeopardized the man's job, Mr. Adi was prepared to speak to the man's employer. The Adis also wanted the offender to attend two upcoming lectures on Islam. He was also encouraged to cooperate with news coverage of the case, continue his counselling, and speak about his experience to teens at a juvenile detention centre. As the meeting ended, Mr. Adi reached across the table and shook the man's hand.

The offender's apology letter to the Adis and the Muslim community appeared on the editorial page of the Register-Guardian on 18 November. A front page story also appeared covering the Adi's story. After attending the first two lectures on Islam, the offender decided to attend more. In this case, RJ served to humanize both the victim and the offender. If the man was punitively sanctioned, it is unlikely that there would have been an understanding as to why the crime happened. The community, the offender, and the victim were satisfied by the use of restorative justice to address the initial hate crime

3.11.5.4 Case study from Slough, England – Aik Saath

Following racial tensions between Sikh and Muslim communities in the mid-1990s in Slough, the local council set up a project whereby a mediator/peacemaker brought the perpetrators together for mediation or conflict resolution sessions. This led to the setting up of *Aik Saath*, a programme that provides conflict resolution training for young people through peer education. The project aims to promote racial harmony and encourage young people to understand each other in a positive way.

Referrals are usually achieved through a variety of agencies including schools, youth offending teams and youth clubs. These involve groups of young people among whom conflict is identified as a problem. Sometimes the requests come from the young people themselves who have seen the *Aik Saath* in action through films and fliers. The project is based in the locality and hence young people who watch the informative films can identify with the locations, with the characters in the film as well as with the conflict.

The outcome of their work can be best appreciated in an anecdotal rather than a purely quantitative way. There are clear signs of changes in attitudes by some young people after just a few weeks of working with the organisation. Monitoring comes in the form of a questionnaire given to young people, asking what the sessions do for them. The project is funded by the Big Lottery Fund, but faces serious capacity issues and core funding challenges.

3.11.5.5 Case study from Southwark, England – Police, Partners and Community Together in Southwark (PPACTS)

PPACTS was set up as a *Targeted Policing Initiative* to look at innovative policing. It is a multi-agency partnership of both statutory and voluntary organisations with the aim of reducing racist and homophobic crime and incidents in a particular area of Southwark that had been identified by the police as a hotspot. This project brought together the local Police Force, Victim Support, a Youth Project from the area and various local mediation services that were offered by community-based organisations.

The project used both a problem-solving and a partnership model to tackle racism and homophobia in the area. The partnership model involved taking time to build strong linkages between different agencies and the BAME communities in the area. The problem-solving approach involved asking all partners in the project to look at what they could do in relation to three intervention strands: supporting the victims, dealing with the perpetrators and impacting on the location.

This approach allowed for the different agencies involved to share intelligence and examine the incidents in a wider context. For example, the project found that the young people it engaged with, in response to their racist attitudes, were already known to the police for other non-racially motivated crimes and anti-social behaviour. Such information was vital in successfully working with the perpetrators. Also, such open support for victims of racist violence and harassment and their families, in a particular setting, acted as a deterrent to perpetrators and potential offenders.

Following this project, the police recorded a large reduction of racist incidents in the area. Although these figures are always treated with caution, community intelligence developed by the partnership model pointed to the conclusion that there had been a tangible reduction in incidents. The project received *Demonstration Status* from the Home Office, a sign that this was an example of good practice that should be replicated in other settings.

3.11.6 Concluding remarks and recommendations

Gene Griessman said: "Diversity is part of the natural order of things [...] as natural as the trillion shapes and shades of flowers of spring or the leaves of autumn. Believe that diversity brings new solutions to an ever-changing environment, and that sameness is not only uninteresting but limiting. [Because] to deny diversity is to deny life [...] with all its richness and manifold opportunities". He thus affirmed his citizenship "in a world of diversity, and with it the responsibility to [...] [be] tolerant. Live and let live. Understand that those who cause no harm should not be feared, ridiculed, or harmed [...] even if they are different. [But] look for the best in others [and] to rise above prejudice and hatred" (Umbreit and Coates 2000).

Race hate that leads to violence is a lethal virus which if not treated can lead to the demise of the community that hosts it. It is fair to



be sceptical about the use of innovative approaches to hate crime, particularly when they take away the very essence of adversarial criminal justice procedures, including the principles of openness, proportionality and “just deserts”. This article has provided a balanced analysis of the pros and cons of the innovative approach of RJ with hate crime offences. Through case studies from around the world we put the application of restorative programmes in context and draw conclusions for further analysis, investigation and research. In particular, the following recommendations are posited:

Recommendation 1 – Government

The various types of intervention (mainstream or other) that play a role in preventing racist violence come from a variety of sources. Guidance is needed in order to link their work effectively, adopting a multi-agency approach. Some models of effective partnership between public, private and voluntary organisations have been identified in this article.

Recommendation 2 – Researchers

Hate crime needs to be treated as a special category of crime that lacks a concrete definition, is caused by a number of psychological, sociological and biological factors, and reaches down to the very essence of our humanity as well as the value of our community and co-existence. The way it is being recorded needs to be improved and further research needs to be carried out in relation to potential perpetrators. For instance, additional research should examine race-related violence between different BAME communities or the hostility directed towards recently arrived migrants and asylum-seekers. Further research should also explore the potential for devising a typology around potential perpetrators of racist violence, and examine whether such a typology could be effective in preventing racist violence.

Recommendation 3 – Policymakers

The aforementioned typology of potential perpetrators should not be used in a manner that corresponds to the current punitive/retributive culture of the traditional criminal justice system. Where it is applicable (i.e. there is consent from all parties etc), potential perpetrators and the wider community should be engaged through RJ programmes to understand the long-lasting, deep impact racist violence can have on individuals and community groups. Case studies presented in this article show that by bringing victims and offenders of hate crime together can help them heal, amend and restore.

Recommendation 4 – Legislator

Crime reduction legislation and policy, whether punitive or preventative, needs to be assessed against its impact on reducing or preventing racist violence. RJ practices have been dismissed by mainstream criminal justice agencies without being tested. Community-based organisations offering RJ services may be used

as a source of information. However, it is important that when assessing the value of work to challenge racist attitudes, agencies recognise the validity of anecdotal evidence and soft outcomes.

Recommendation 5 – Funders

Although governmental agendas must set the guidelines for the provision of public resources, funding agencies should support creative implementations of this agenda that respond to the needs, expertise and successful work of grass root organisations. One such innovative approach is found in the RJ movement. Funding agencies could take the lead in developing programmes that explicitly support creative and innovative work with potential perpetrators and victims of hate crime. Finally, funding for work to bring about attitude change should be long-term in order to allow for the change in attitudes to take root. RJ, for instance, does not offer quick-fix solutions. It is a long-term process which can gradually lead to healing and restoration. This needs to be appreciated and supported. Successful intervention projects, therefore, should be able to access ongoing funding beyond the short term.

Recommendation 6 – RJ movement

RJ practitioners and theoreticians from around the world ask, “why are criminal justice officials not letting the restorative movement advance?” However there is little acknowledgement that there may be something wrong with the movement itself. As illustrated in this article, concurrently with the increase of the numerous volumes of theoretical debates around RJ, fears have been created that they might not be in accordance – or at least at the same speed – with the practical development of the restorative notion. More importantly, they seem to pay none, or little attention to the alarming warnings principally coming from experienced practitioners in the field, who become increasingly concerned about a developing gap between the well-intended normative understandings of RJ and its actual implementation. While theoreticians may claim that RJ can provide a new paradigm that can replace or complement the traditional criminal justice system, practitioners are striving to keep their RJ programmes going despite recorded success. The two fields need to complement and inform each other.

Recommendation 7 – Politicians

A firm political commitment is needed to direct work and policy more explicitly towards prevention and long-term solutions that heal the victim and the community and educate offenders. Political figures should be held accountable for behaviour that encourages racist attitudes in the community.

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3.12

The Practice of “Täter-Opfer-Ausgleich” in Germany

3.12.1 The legal basis of restorative justice schemes in Germany

The relevance of Section 46a of the *German Criminal Code* (*Strafgesetzbuch*, hereinafter StGB) in the practice of restorative justice in Germany is of an indirect nature. Section 46a of the StGB gives the legal definition of “Täter-Opfer-Ausgleich” (hereinafter TOA), thereby acknowledging TOA as a legal institution. It obliges the courts to take into consideration whether any form of TOA has taken place in a case. Otherwise the court risks the cassation of its judgement. But usually the referral of cases to restorative justice schemes does not take place on the legal basis described in Section 46a of the StGB (see also article 3.3 in this publication). The majority of the cases are referred to restorative justice schemes by the prosecutor before accusation on the basis of sections 153a of the *German Code of Criminal Procedure* (*Strafprozeßordnung*, hereinafter StPO) and 45 of the *Juvenile Criminal Court Act* (*Jugendgerichtsgesetz*, hereinafter JGG) as a means of diversion.

3.12.2 The practice

Restorative justice has been applied in Germany since 1986, from which year several pilot projects offering victim offender mediation were carried out. These model projects introduced the term TOA as a translation of the expression victim offender mediation. Until now, the term TOA has mostly been used for victim offender mediation. In contrary to the later definition of TOA in Section 46a of the StGB, the emphasis in this kind of TOA lies on the involvement of victims and offenders in a mediative procedure facilitated by a mediator.

The advantage of the outcome-oriented legal definition of TOA is the wide space that Section 46a of the StGB provides to develop and introduce new forms of restorative justice practices and to take these efforts into consideration in the criminal procedure. The problem is that the term TOA has lost its former, clear meaning. This problem became very evident in a case of rape. The offender denied his responsibility until the evidence against him became overwhelming. In this situation he offered during a court session an apology and financial compensation for the pain and suffering that he had caused. This was accepted by the court as a TOA. Following an appeal by the prosecutor, the Supreme



Court refused to accept that a TOA had taken place, because for that to have been the case, the offender should have made clear that he/she accepts responsibility for the crime and should have offered – in an honest and serious way – to provide full compensation for all material and immaterial harms caused. Therefore, in severe cases like rape pleading guilty of the crime is necessary. This goes beyond the wording of Section 46a of the StGB and its use in cases of less severe crimes. In addition, a communicative process between victim and offender is essential. As a result of this process, the victim must be able to accept the restitution and apology offered by the offender voluntarily and inwardly (Supreme Court/BGH on 19th December 2002 – 1 StR 405/02 – published in NJW 2003, 1468). The Supreme Court wanted to ensure that TOA is not used in an instrumental and tactical manner. The judgement of the Supreme Court is understandable but it is not easy for the courts to verify whether a communicative process was honest and serious and the victim was able to accept the offered restitution inwardly. This is another weak point of the outcome-oriented approach of Section 46a of the StGB.

The mentioned case and other similar ones also casted a shadow on TOA. Even specialists in the criminal justice system sometimes have difficulties in separating this kind of TOA applied in court proceedings from TOA in form of victim offender mediation.

As mentioned before, the law also does not secure minimum standards for victim offender mediation. But already in 1989 a first working group of practitioners developed standards for good practice in the field of TOA (used here in the sense of victim offender mediation). These standards have been, since then, further improved (see www.toa-servicebuero.de). Since 1991, the Office for VOM Services in Cologne has also offered basic training courses for mediation in criminal cases. In 1993, the “*Bundesweite TOA-Statistik*” (Federal Statistics of VOM) was established with the aim to evaluate the development of VOM in Germany (for results see Kerner, Hartmann and Eikens 2008; Hartmann and Kerner 2004; see for a detailed description Hartmann 2008). The Office for VOM Services also offers – in cooperation with the “*Bundesarbeitsgemeinschaft der TOA-Einrichtungen*” (Consortium of VOM Schemes) – a certificate of good quality for VOM-schemes on the basis of an auditing procedure.

But it has to be emphasized that the mentioned safeguards for high quality are not obligatory as they were developed and established by private initiatives and organisations. Only a minority of the VOM-schemes in Germany comply fully with the standards for good practice and have undergone the auditing procedure in order to achieve the certificate of good quality. Only a minority of VOM-schemes are included in the Federal Statistics of VOM. Therefore, TOA in the form of victim offender mediation is also not a consistent service throughout Germany. Its use and impact varies from federal state to federal state and sometimes from locality to locality. This is to some extent a consequence of the federalism in Germany

set out, historically, in the *Constitution*. Section 30 of the German *Constitution* provides that organizing VOM for adult offenders is in the hands of the 16 federal states of Germany. Section 28 II of the *Constitution* states that organizing social welfare services for children and juveniles – including the support of juveniles in court proceedings – is a task of the local communities. Therefore the communities are entitled to organize and fund VOM according to their own views and priorities.

This article focuses on the legal framework of restorative justice in Germany. A detailed insight in the practice of VOM in Germany can be found in the above mentioned literature (For further reading, see the bibliography of Kerner at <http://w210.ub.uni-tuebingen.de/volltexte/2003/861/>.)

Regarding future development it should not be missed to mention that due to a European Directive (2008/52/EC), which states standards for mediation in international civil cases that have to be transferred into national law until 2011, the German legislator has very recently started to prepare a general mediation law. This law may include standards for mediative procedures also in criminal cases as well as standards for the necessary training of mediators (see Schmidt 2010 for details).

3.12.3 Conclusions

As a closing word, it can be mentioned that the practical use of restorative justice in German consists largely of TOA in the form of victim offender mediation. Very recently, conferencing has become more popular, the use of circles however is not yet established. Mediators are mainly social workers with a university degree who have also completed the training courses of the Office for VOM Services. Some institutions also work with trained volunteers. Nearly 80% of VOM cases are formally referred by the prosecutors, but in some localities up to 25% of cases come directly from victims and offenders, who ask for VOM. In some places the police also have an important influence on the referral procedure, but they cannot formally refer a case.

About half of VOM cases deal with violence and in some communities one can find high rates of domestic violence among VOM cases. In some problematic urban areas there is also easy-to-access social mediation provided outside of the court system. Restorative approaches other than mediation are also used in some communities, especially in Bremen to deal with cases of stalking (see <http://www.stalking-kit.de/>). *Pilot projects* offer mediation and conferencing for prison inmates and their victims.

According to earlier research about 250 institutions offer VOM in Germany dealing with about 20.000 to 30.000 VOM cases each year. Forthcoming research is however likely to demonstrate that these numbers underestimate the use of VOM and restorative justice in Germany.



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Documents

- Directive 2008/52/EC of the European Parliament and of the Council (21 May 2008) *on certain aspects of mediation in civil and commercial matters*

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3.13

Victim Offender Mediation and Mediators in the Republic of Slovakia

3.13.1 Introduction

The criminal policy in Slovakia, just like in other countries, places stress on the reformative, educational function of punishment. Furthermore, emphasis is placed on the humanisation of the prison system and on the reduction of the use of imprisonment as a punishment. The institutions of probation and mediation occupy a unique position both in the field of criminal law and of crime prevention in Slovakia. We believe that imprisonment should only be ordered in the cases where no other type of punishment can be imposed due to the gravity of the criminal offence or because the person of the offender renders it necessary. This approach may bring with it not only unambiguous economic advantages, but also an individual approach may be applied to the offender and so the chances of real change are enhanced. Alternative punishments are applied on the basis of the concept of restorative justice.

Right from the start, it must be put down that restorative justice practices are relatively new in Slovakia and have no prior history. They have gradually become functional.

Basically, there have been three important stages in the introduction of probation and mediation in Slovakia.

The legal regulation of probation and mediation was preceded by a one-year-long *pilot project* set up by the Slovak Ministry of Justice, and launched on 1 April 2002. This project aimed at pilot testing probation and mediation in selected district courts. The courts were selected according to the content and range of their agenda, the nature of which had to be suitable for probation and mediation.



Criminal cases which were unambiguous from an evidential point of view, which concerned less serious criminal offences and where the method employed was expected to have a positive effect on the accused person were proposed for inclusion in the pilot project.

As the pilot project was performed without changes to the *Criminal Code* or the *Code of Criminal Procedure*, it was necessary to find some operational space for the activity of the probation officers and mediators. At the time, the Slovak criminal law in force did not contain probation or mediation, or their use as punishments (so-called supervisory punishments). However, probation could be implemented within the pilot project because, in compliance with the *Criminal Code* in effect at that time, the judge was in a position to impose adequate restrictions and duties on the convicted person, the execution and observance of which could be monitored by the probation officer and mediator. Furthermore, the probation officer and mediator were in a position to support the reintegration of the convicted person in association with his/her family and the community he/she lived in, to inspect relevant documents, to monitor whether the measures imposed were met by the convicted person, to find out about the family, social and work situation of the offender, to arrange meetings between the offender and the victim, to document the agreement concluded by the offender and the victim on how to resolve the issue, and finally, to cooperate with governmental and non-governmental bodies in resolving the particular social problems relating to the offender. The probation officer and mediator were also in a position to require references from the offender's employer and school.

3.13.2 Mediation in Slovakia

The results and experience related to the introduction of the probation and mediation service in its first stage in 2002 and 2003 were incorporated in a new piece of legislation – the *Probation and Mediation Act*, which determined the conditions for the application and execution of alternative punishments. The probation and mediation services take part in law enforcement, in particular by creating the conditions for diversion from criminal proceedings, guaranteeing the effect of alternative punishments and finding an effective response to the criminal offences committed. The acceptance of the act resulted in the actual establishment of the institution of probation and mediation on 1 January 2004; all the courts introduced the post of probation officer and mediator who, at the time – i.e. until the act came into effect – were active in particular in the field of mediation.

The *Probation and Mediation Act* regulated the activity of the probation officer and mediator, his/her rights and obligations and the professional qualifications required for supervising probation and carrying out mediation.

The Slovak probation officer and mediator is a civil servant who performs public service for the court. These posts are established in 54 district courts in Slovakia.

Nowadays the staff of the probation and mediation service includes almost 100 probation officers and mediators and three assistants (the posts were established in three courts, on the territories where a larger number of marginalised Roma communities live).

However, the probation and mediation procedure itself was introduced following the recodifications in the *Criminal Code* and in the *Code of Criminal Procedure* in Slovakia subsequent to 2006. One of the pressing reasons for the recodifications was the need to modernise and to adapt to the new conditions and trends in society. The concept of restorative justice became the underlying philosophy.

The new legal regulations result from a principle concerning the auxiliary role of criminal repression, namely that coercion must only be applied by the state in connection to criminal measures when there is no other solution to achieve accord between the behaviour of the people and the law. The currently valid criminal law promotes the application of probation and mediation as new methods which belong to the trend of restorative justice.

The offender is at the centre of the activities of the probation officers and mediators, especially in the case of probation.

The term probation can basically be defined as institutionalised supervision of the behaviour of the offender who has committed a criminal offence. Besides supervision, probation also contains advice and consultation which are conditions for the successful reintegration of offenders. So the probation officer supervises the accused person, the defendant or the convicted person, checks whether the punishment (which is not linked to imprisonment) is carried out within the duty or restriction imposed. The probation officer also supervises the behaviour of the person on parole for a probationary period, helps the convicted person to reintegrate into daily life and to comply with the conditions imposed on him/her through the decision made by the prosecutor or by the court in the criminal proceedings.

It should be added that, besides probation officers and mediators, there are also separate networks of parole officers for children and for adults in Slovakia. They are also civil servants – they are social workers, they work in employment agencies, in the bodies for the social and legal protection of children and social guardianship. Their work is focused more on the social dimension and resolution of the problems of the convicted persons. They apply social worker methods and, of course, other methods too, just as the probation officers and mediators do.

As far as mediation is concerned, we aim at an effective settlement or at least at a reduction of the conflict associated with the criminal offence, at the elimination or at least the remedying of its consequences, i.e. at the resolution of the dispute between the injured party and the convicted person out of court, and we try to help to achieve moral satisfaction and financial compensation for the persons affected by the criminal offence. We also support the parties in concluding the mediation process with an agreement.

The facts agreed on by the parties become a part of the written agreement, the implementation of which is supervised by the



probation officer and the mediator within the supervision (control) of the convicted person during the period of probation. We understand every activity which is performed by the probation officer and the mediator – regardless of whether an agreement is concluded or not – and which is aimed at the resolution of the criminal conflict in the mediation to be positive, because such an activity may have an effective impact on the criminal proceedings.

The aim of the probation officers' and mediators' activity is for reconciliation, as provided by law, to be achieved, and for the court or the prosecutor to settle the criminal case through diversion.

The probation officer and mediator carry out the activities as provided by the law in accordance with the instructions of the judge or the prosecutor. Mediation may be initiated on the suggestion of either of the parties of the criminal proceedings, if this is permitted by law or by the verdict reached in the criminal proceedings.

In order to carry out mediation in a particular case, the probation officer and mediator must obtain the consent of the presiding judge and, in pre-trial proceedings, the consent of the prosecutor. If the court orders probation supervision or custodial supervision, the supervision is carried out in accordance with the decision of the court.

In the probation and mediation procedure, the probation officer and mediator collaborate with various people and have the authority to apply to governmental bodies, to the local government of villages and other legal entities and natural persons to obtain necessary data. As described above, it is obvious that the introduction of probation and mediation in Slovakia and the results achieved therewith both on a qualitative and on a quantitative level have been a very significant development in recent times.

The implementation of relevant legislation is monitored and assessed on an ongoing basis. The statistical data are monitored and assessed annually and right at the present a new way of monitoring probation and mediation is being introduced, enabling continuous assessment of performance.

Unfortunately, final evaluation can not yet be carried out in respect of the developments or the actual results of probation and mediation, due to the relatively brief period of time in which they have been implemented. However, the importance of monitoring development and assessing effectiveness on a continuous basis is appreciated.

3.13.3 Future perspectives

In the upcoming period, problems that have arisen and measures for their resolution are to be identified. Probation and mediation activities will be monitored on a continuous basis, with special consideration to probation and mediation tasks in relation to accused teenagers, teenage defendants or convicted teenagers and to the child victims of criminal offences. The Ministry of Justice also wishes to improve the professional qualifications of probation officers and mediators, to offer adequate educational and social programmes for convicted persons and to enhance cooperation with NGOs.

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3.14

The development of victim offender mediation in Sweden

3.14.1 Introduction

Since the year 2008, it has been compulsory for all municipalities in Sweden to offer victim offender mediation (VOM) to young offenders below the age of 21. Work in the area of victim offender mediation was started in the late 1990s and has been expanding ever since. In Sweden, VOM is regulated by the *Act 445 of 2002 on Mediation (Medlingslagen, hereinafter Mediation Act)*. The aim of the act is to increase the offender's level of insight into the consequences of the offence. At the same time, the victim is provided with the opportunity to deal with his/her experiences. The philosophy underlying the Swedish criminal system is retributive justice; and restorative justice can be described as a complementary method. Retributive justice is rooted in the idea that the offender should be prosecuted and punished by the state. Restorative justice provides a very different framework for understanding and responding to crime and victimization. Instead of an offender-driven focus, restorative justice identifies three parties: individual victims, victimized communities, and offenders. Its main purpose is to bring together the parties involved who can meet and deal with the effects of the offence and its future consequences together.

3.14.2 The development of victim offender mediation

Victim offender mediation in Sweden evolved during the second half of the 1980s, independently from political decision making. In 1998, the government requested that the National Council for Crime Prevention (hereinafter *Brå*) initiate, monitor, co-ordinate and evaluate experimental mediation projects. During that year, thirty-two projects in different parts of the country were selected. In the same year, the Commission on Mediation was required to study and analyze the role of mediation in the justice system for young offenders. The Commission was required to propose



legislation based on its findings. In the year 2000 (see SOU 2000), the Commission on Mediation gave some recommendations for legislation based on the evaluation. In 2002, victim offender mediation in Sweden was regulated by the *Mediation Act* which came into effect in July 2002.

Subsequently, the government commissioned *Brå* to develop mediation activities (2003–2007). Their assignment was to distribute financial support to municipalities in order to initiate new or to develop existing mediation projects and to provide training for mediators. In this process they educated about 800 mediators. The other aim of the project was to develop mediation methods and guarantee the consistent quality of mediation projects.

According to reports from the municipalities there were mediation activities in 154 of Sweden's 290 municipalities, covering over two-thirds of the national population at the end of 2007.

3.14.3 The law regulating mediation

The *Mediation Act* is a framework act which means that the law defines the general criteria for victim offender mediation, but it does not regulate mediation in detail. One aim of the law is to support a unified development of mediation in the country. According to the law, mediation should be organized by the state or by the municipalities. The aims of mediation are that

- the offender should get increased insight concerning the consequences of the offence, and to therewith reduce the likelihood of re-offending, and
- the victim should be given the possibility to deal with feelings of fear, anger etc. caused by the offence.

The offenders should be over the age of 12 and have accepted responsibility for the main elements of their offence. Mediation should be optional for both parties. The mediator should be impartial and the meeting should conclude with some form of agreement between the parties.

Other laws that regulate mediation are the *Social Service Act* and the *Young Offenders' Act*. According to the *Social Service Act*, it is compulsory for all municipalities in Sweden to offer victim offender mediation to young offenders below the age of 21 (Social Service Act, Chapter 5 Sec. 1c). Victim offender mediation is also mentioned in two sections of the *Young Offenders' Act* (*lagen om unga lagöverträdare*, Act 167 of 1964, secs. 6 and 17). One Section allows, but does not oblige, prosecutors to take into account whether mediation has taken place when prosecuting a young offender. According to another Section the police should report to the social services in relation to offenders below the age of 18. The report should include information on whether the offender has been offered the opportunity to participate in mediation, and how the offender responded to this information. Mediation can be initiated by the

alleged offender, the victim, police, prosecutor, or social authority. Today mediation in Sweden is governed by the National Board of Health and Welfare. The activities vary both organizationally and in terms of their size. In 2007 (according to *Brå*), 159 mediation activities took place and there were 252 municipalities that could offer mediation, at some level. The mediators are both social workers and lay persons.

3.14.4 Types of crimes

According to the *Mediation Act* it is possible to use mediation in relation to the majority of offences (see the text highlighted), although sexual crimes and serious acts of family violence are deemed to be less suitable.

3.14.5 Mediation in the future

One of the problems in Sweden today is that many municipalities do not have a sufficiently large population to be able to conduct a mediation project on their own. In order to produce a high-quality and effective mediation organization, it would be necessary for small municipalities to collaborate with each other. It is also important to find organizational routines and sustainable structures. In one ongoing study of victim offender mediation (financed by the Crime Victim Compensation and Support Authority 2008–2010), the authors have recorded and are now analysing pre-mediations and mediations. The focus of this study is on how the victim, in the dialogue with the offender, deals with his/her experiences and how mediators act in relation to the parties. What does it mean to be impartial? The results of this study answer some questions and raise others. Victim offender mediation in Sweden is, as in many other countries, here to stay. But the main questions are: where do the weaknesses lie and how can those be eliminated?

The most common offences in victim offender mediation (between 2003–2007) are shoplifting (30%), assault (18%), vandalism and graffiti (16%), different kinds of theft and burglary (12%), and threats and harassment (9%). The offender's age varies between 6–54 years, especially between 14 and 17 years old. Most of the offenders are males. There are individuals as victims in barely half of the cases. The other half constitutes various institutions such as shops, schools, public buildings etc. The age of the victims ranges between 4 and 91 years (*Brå* 2007).

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4.

Restorative practices implemented during the enforcement of sentences

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4.1

Symbolic Restitution: Community Sanctions in the Practice of the Hungarian Probation Service

4.1.1 Introduction

Due to lifestyle changes, new patterns of crime, a deterioration in the feeling of personal security and an increased fear of crime following the change of political regime, it has become necessary to reconsider the criminal law responses to crime in Hungary. The American and the Western European developments were available as models for transforming crime control, especially double-track criminal policy and the concept of restorative justice. Legal developments in Hungary rearranged the sanction system and introduced a new institutional background for the effective enforcement of new, alternative sanctions.

A broader concept of alternatives to prison includes not only the criminal law sanctions not resulting in the offender's imprisonment, but also the various forms of diversion, compensation and reparation. Reparative justice is closely connected to the new forms of alternatives to prison. In spite of this connection, there is one key difference: while in traditional criminal justice the offender is the "passive subject" of retribution and is required to suffer the punishment, under the community concept the offender is a "responsible subject" and the community thus expects the offender to take responsibility for the crime.

As a result, the sanction system was expanded and modified, and new, alternative, diversionary and restorative methods were introduced in Hungary. The first examples came as early as during



the 1990s. Community service and postponement of accusation (the latter as a diversionary measure first applicable to juvenile offenders and then extended to adults) were the first such measures to be incorporated into the Hungarian legal system.

In Hungarian mediation practice, there are efforts made to accomplish more agreements on immaterial (symbolic) reparation in addition to the efforts to mitigate the harmful consequences of a crime through the payment of material compensation. This article will not analyse the symbolic forms of reparation. Instead, it will focus on other measures in the Hungarian criminal system that help implement the concept of restorative justice.

4.1.2 Statutory changes

For legal changes to be implemented effectively and in order to make progress, there was a demand on the part of the legal profession at the beginning of the 21st century to create an institutional background for the implementation of legislation. Probation services are professional organisations responsible for the enforcement of alternative sanctions and for preparing the inmates to be released for reintegration. Probation services have been in existence for decades in Western Europe and they are in constant development in Central and Eastern Europe. In Hungary, the Probation Service was set up as a result of the comprehensive criminal law reform carried out in accordance with the restorative and reparative principles and as one of the organisations responsible for the enforcement of community sanctions and restorative justice measures, in line with the new, redefined roles of probation service activities.

Probation services have been in existence in Hungary for almost 30 years, but until 2003 they operated without uniform professional guidance and control. In 2003, the services were finally given an appropriate, modern and consistent professional and organisational background. The Probation Service is under the control of the minister of justice. The Probation Service's objective is to be present in and influence the criminal procedure within the traditional systems of crime control, criminal justice and prisons.

In 2003, the basic tasks of the Probation Service were as follows:

- assisting the prosecutors and the judges in decision-making through expert professional services;
- carrying out social inquiry report and issuing pre-sentence report;
- enforcing diversion measures and punishments carried out within the community (postponement of accusation, probation, deferred sentence, release on parole, temporary release from a reformatory institution under the supervision of a probation officer, and community service work);
- providing prison support services in penal and reformatory institutions in order to prepare inmates for release and after-care services on a voluntary basis.

The key items of the comprehensive criminal law reform implemented from 2003 were the extension of community sanctions, the concept of restorative justice and the strong representation of the victim's and the aggrieved community's interests.

A number of international documents have provided guidance for the types, content and enforcement of community sanctions, such as *Recommendation R(92)16* and *Recommendation R(2000)22* of the Council of Europe (see the texts highlighted).

According to *Recommendation R(92)16* of the Council of Europe on European rules on community sanctions and measures, the definition of a community sanction includes the following elements:

- a community sanction reserves the offender in the community;
- involves some restriction of the offender's liberty (through the imposition of conditions and obligations);
- is implemented by bodies designated by law for that purpose (the probation service);
- supervision combined with various levels of restriction of liberty provides assistance for reintegration.

The key characteristics of community sanctions are that

- the main goal of the sanction is not to deprive the offender of his/her liberty;
- the sanction does not separate the offender from the community, which means that the person will remain a responsible member of the community;
- a key element of a community sanction is that it does not require the offender to suffer some form of deprivation of liberty; instead, it requires the offender to fulfil obligations, to have a positive attitude and to be active (behaviour rules, mediation, active repentance and reparation);
- instead of a one-sided (passive) relationship it necessitates a two-way (active) relationship between the offender and the organisation implementing the sanction;
- it involves some form a restriction of personal liberty (control) and at the same time provides assistance;
- it relies on the integrative power of a community;
- the enforcement of the sanction requires continuous and personal contact between the offender and the implementing official (mediator or probation officer);
- the organisation implementing the sanction must ensure that the local community is involved;
- a failure to meet the terms of the sanction has legal consequences.

Recommendation R(2000)22 of the Council of Europe promotes the implementation of the rules on community sanctions and measures and includes guiding principles for achieving wider and more effective application of community sanctions and measures. The Recommendation lists the available community sanctions and the cases in which they can be applied in order to increase the number of cases in which a wide range of community sanctions and measures are implemented. These examples include unpaid work (community service work) and treatment orders for drug and alcohol abuse. It appears that aspects of restoration and reparation are becoming more prominent as the Recommendation determines the introduction of the restorative element to community sanctions as a possible way of progress in criminal policy. Also, the Recommendation specifies victim offender mediation as a possible community sanction.

The Hungarian reform of probation services introduced restorative elements to the concept of state victim support and to the state organisation of victim assistance. The restorative justice approach gained a central role in the theoretical background to the *National*



Strategy for Community Crime Prevention (2003). In this document, restorative justice was considered a principle that should be used in horizontal community crime prevention and in primary, secondary and tertiary crime prevention efforts.

The Hungarian Probation Service applies the principle of restorative justice as a horizontal principle. This is reflected in the organisation's mission statement (see the text highlighted).

The objective of the Probation Service is to reduce the risk of re-offending. The probation officer promotes the full implementation of the imposed criminal law sanctions and the protection of the community through supervising the offender consistently to the necessary extent. The assistance provided by the officer also increases the offender's chance for reintegration. The Probation Service operates on the basis of the principle of restorative justice. Its objective is to make the offenders realise the consequences of their crimes and to reduce the damage caused by the crime by mediating between the aggrieved community and the offender.

The philosophy of restorative justice is directly applied during the work of the Probation Service through various restorative techniques and procedures. Penal mediation was introduced in 2007 in Hungary and the Probation Service was appointed to carry out the mediation procedures and a system of training and supervision was also established. Penal mediation is available in the phases before the prosecutor and the court. It can be applied for both adult and juvenile offenders if the crime is not punishable by more than five years of imprisonment.

The Probation Service provided mediation services in 2,451 cases in 2007 and in 2,976 cases in 2008. New data that were not yet available at the time of the conference (April 2009): the service provided mediation services in 3,984 cases in 2009.

The *Code on Criminal Procedure* regulates mediation as a method of diversion. It is a key feature of the mediation procedure that the person causing the damage must take responsibility for the crime and must offer some form of reparation for the aggrieved persons and communities. Reparations can be made to the victim by providing material or immaterial compensation.

The Probation Service is experimenting with the use of other restorative techniques and procedures in the case management work of probation officers in order to complement mediation, which is a direct procedural form of restorative justice. One of these experimental projects is family group conferencing carried out during the after-care phase. The use of family group conferencing may help the inmate to prepare for release, it may mobilise community and family resources and thus assist the work of probation officers providing after-care services (see article 4.8 in this publication).

In addition to incorporating restorative techniques in the "toolkit" of probation officers, it is also the aim of the service to encourage the application of forms of symbolic restitution. Naturally, symbolic restitution may be used as a result of some restorative procedure, but it may also be an element of a community punishment even if no restorative technique is applied.

Symbolic reparation can be combined with community sanctions in many ways. The most typical form is the sentence of community service work, which is a sanction of reparative nature. In Hungary, it is the obligation of the probation officers to organise and monitor community service work.

When the offender carries out community service work, he/she typically does some useful work that the given state or local government organ would otherwise have no funds to pay for. During the enforcement of this punishment, special opportunities of reintegration arise, given that many of the offenders have a low willingness to work and are not used to hard labour. Through community service work, these people can be brought back to the job market in a non-conventional manner. They have a chance to gain employment at the institution where they worked during the period of their community service. The Probation Service has to carry out their activities in such a way that the local community should enjoy the result of the community service work. The most visible forms of community service work are when the offenders develop or maintain the natural or the built environment in the area. Such efforts are visible and bring positive results to the life of the community and therefore the community will be more likely to feel appeased and its open attitude may be strengthened. Community service is not the direct reparation of the damage caused by individual crimes. Instead, it is about symbolic restitution to the community through unpaid work. If community service is organised in a way that makes the enforcement and the results visible for the community, the punishment is much more capable of decreasing the general fear caused by the crime within the community and it develops trust that the reintegration objective of the sanction will be reached.

While restorative justice expects the perpetrator to take personal responsibility, it also requires the community to show a receptive attitude. The phenomenon when the restorative method makes the perpetrator realise the consequences of his/her actions is called reintegrating or receptive shame by restorative justice literature. The offender takes responsibility for the crime due to the shame resulting from the realisation of the consequences. The offender will not be left alone with the shame as the offender and the community will help the offender digest it by offering him/her the opportunity of restitution, as well as reintegration/reacceptance as a result of the restitution. From the aspect of social reintegration, the active contribution and the receptive attitude of the community is also significant (in addition to the needs of the offender). This factor must be taken into account when sanctions are enforced.

As already mentioned, active responsibility is a key element of sanctions enforced in a community. Active responsibility is more than just compliance with the rules accepted by the offender. It must involve active repentance and the offender must keep the individualized behaviour rules.

Symbolic restitution may also be made as part of the activities required under the behaviour rules specified by the Probation Service. Alternative sanctions are much more effective and the chance for reintegration is significantly higher if the sanctions are combined with individualized behaviour rules.

The main types of behaviour rules are the following.

1. The offender may be ordered to discontinue a form of conduct or activities related to the crime (such as visiting clubs or similar venues) or an obligation similar to a restraining order may be imposed on the offender (typically for offenders of domestic violence).
2. The offenders may be ordered to participate in treatment, trainings or counselling related to character or behaviour problems, addictions etc., for instance they may be required to undergo medical treatment, or to attend aggression management training, social skills improvement training, labour market training and job counselling.
3. Obligations to make up for missing education; for instance the juvenile offenders can especially be ordered to continue or complete their studies or to attend learning assistance programmes.



4. Behaviour rules related to restitution; if such rules are prescribed, the offender may be required to pay compensation or provide symbolic reparation for the damage caused by the crime.

Reparation is specified as a behaviour rules in the *Criminal Procedure Code* in relation to the postponement of accusation. Under this rule, the prosecutor may require the suspect to

- compensate the victim for the damage caused in full or in part;
- make reparations to the victim in some other form;
- make a payment for a specific cause or carry out work for the community (reparations made to the public).

Although the *Criminal Code*⁵⁷ does not specify reparation in express terms, it does make a reference to the possibility of reparation as it declares that the court and the prosecutor may specify behaviour rules, with special regard to the nature of the crime, the damage caused and the possibilities of the offender's reintegration.

It is a key precondition of implementing behaviour rules and related symbolic restitution programmes to ensure that the courts and the prosecutors prepare sufficiently. The fact that the tasks of the Probation Service were redefined in 2003 meant significant progress regarding the introduction of individualized behaviour rules. For instance, in a criminal procedure against a juvenile, the probation officer must prepare a social inquiry report early in the procedure (during the investigation phase). In the prosecution and sentencing phase, the court and the prosecutor (or, before release on parole, the court responsible for the enforcement of sentences) asks the probation officer to prepare a pre-sentence report evaluating the individualized conduct-related aspects of the criminal behaviour, the attitude of the offender to the action, the harmfulness of the offender on the basis of the crime committed and the risks related to the personality and the environment of the offender that may lead to re-offending. Through the report, the probation officer informs the court or the prosecutor of any job opportunities available on the basis of the offender's skills, of possible treatment in health and social institutions, and the officer makes a recommendation for imposing special individualized behaviour rules on the offender (such as participation in various treatment, prevention or restitution programmes). The officer must include in the report whether the accused is willing and able to comply with the behaviour rules and to carry out the agreed obligations. The preparation of the report provides an opportunity for the probation officer and the offender to establish a bond early on in the procedure. As a result, the information is available basically in the form of an expert's opinion at the time of sentencing or when the prosecutor decides whether a diversionary measure may be applied and its content may be taken into consideration when the sanctions/measures are imposed.

The behaviour rules may only be enforced effectively if the probation officers are provided with modern equipment and if the institutional background is up to date. Such modern institutions include the so-called *community employment programmes*, which offer special programmes prescribed as behaviour rules for those offenders that are under supervision due to a criminal law sanction or measure. *Community employment programmes* may allow the development of special restitution programmes.

With the financial support of the National Crime Prevention Board, the Probation Service launched a project "*Community restitution programmes in Budapest*" in 2007 for the promotion of behaviour rules with symbolic restitution content. The project was modelled after an English restorative justice programme. An Oxfordshire-based working group called Youth Offending Team (YOT, see article 4.7 in this publication) always consults with the victims and offers them a chance to establish contact with the offenders and to define the form of compensation they accept. Those victims that do not want to meet the juvenile offender or do not accept the form of restitution offered by the offender may choose a programme from a list of restitution programmes available in the area. The working group's aim is to ensure that restitution is part of each juvenile offender's sentence.

The aim of the project managed by "*Jóvá-Tett-Hely*", a community employment organisation run by the Probation Service of the Budapest Office of Justice, was the establishment of a similar system. Our goal was to set up a network of organisations capable of providing symbolic restitution opportunities to youth offenders. The original plan was to make use of the list of symbolic restitution opportunities already during the project, in criminal mediation. However, this plan fell through, mainly because mediation in Hungary is used less frequently for youth offenders than for adults (see the text highlighted) in spite of the fact that in most countries restorative justice methods are applied particularly in the case of juveniles.

As a result, symbolic restitution activities under the project were carried out instead as part of the probation service's behaviour rules within the given project period. After the project was over, progress was made in introducing its results in the mediation procedure.

During the project, we interpreted symbolic restitution as follows:

- the sanction is combined with symbolic (non-material) compensation;
- symbolic restitution is not necessarily a result of a restorative procedure;
- symbolic restitution is not necessarily made to the benefit of the victim (there is no specific victim or there is no criminal mediation);
- the decision is not made with the involvement of the affected parties, but the victim may still participate in the decision-making process (if the victim chooses this option during mediation).
- while reparation is made to an individual, symbolic restitution is made to an entire community;
- the offender must voluntarily agree to make reparation;
- the form of reparation has little direct connection with the crime.

In the programme, we contacted potential recipient organisations that deal with young people themselves or that work for specific community goals and values (for instance, environmental protection). Finally, we managed to invite four organisations: a foundation for entertaining sick children (*Gyermekvilág Ágyszínház Közhasznú Alapítvány*), an environmental foundation (*Rügyecskék Ember- és Környezetvédelmi Közhasznú Alapítvány*), a family help centre and its institutions (*Ferencvárosi Egyesített Családsegítő Központ és Intézményei*) and an organisation providing leisure services for children (*Csillebérci Szabadidő Kft*).

The *Gyermekvilág Foundation* organises games and playful activities for sick children in hospitals around Budapest. A so-called "animation training" was organised for the youth offenders before they made visits to hospitals. The training focused on playing games in groups and on learning communication skills. The young offenders learnt to play

In 2007, mediation was used for 279 youth offenders out of the total of 2.224 offenders participating in mediation procedures. In the first half of 2008, mediation procedures were started in 277 juvenile offenders' cases while adult offenders participated in mediation procedures in 1.990 cases. New data that were not available at the time of the conference (April 2009): in the full year of 2008, a total of 3.669 mediation procedures were conducted but only 425 of them involved a youth offender. In 2009, there were 3.984 mediation cases in total but mediation was only initiated in 438 juvenile cases.

At the start of the project, 16 juvenile (between 14 and 18 years of age) and young adult (between 18 and 24 years of age) offenders participated. Two of them left before completion. Three participants (boyfriends and girlfriends of some offenders) participated in the programme as volunteers. The young offenders were under probation service supervision for the following crimes: public nuisance (misdemeanour: 2 persons, felony: 4 persons), misdemeanor of vandalism (4 persons), aggravated assault (4 persons), theft (misdemeanour: 1 person, felony: 1 person). Age: 9 of them were between 16 and 20, 10 were between 19 and 20. The youngest participant was 16 and the oldest was 24.



⁵⁷ Act IV of 1978

various games, they were told about the psychology of games and they were prepared for the meeting with the sick children. The family help centre provided tasks for the youth offenders in a youth club (*Aluljáró Ifjúsági Klub*) and an elementary school (*Dominó Általános Iskola*). In the club, the young offenders either tutored elementary school children needing help or provided assistance in administration. In the elementary school, they assisted in carrying out leisure time and sports events organised for the kids. At the *Rügyecskék Foundation*, they cleaned and collected waste in forests and public spaces (the woods near the village Kistarcsa and the Small Danube cove at Csepel). Also, they repaired damage caused along an “adventure trail”. At Csillebérc, the young offenders had an opportunity to carry out lawn maintenance, they cleaned the native tree park, collected branches from the ground, removed fallen leaves etc. and they also carried out repair works on wooden houses and garden furniture.

As an experiment, we invited peer-helpers to the programme. Each young offender was paired up with a peer-mentor who assisted the young offender in the restitution process. We had 13 mentors altogether. They were all members of the “Students’ Academic Society” (hereinafter TDK) of the Criminology Department at Eötvös Loránd University Faculty of Law. The Criminology Department’s TDK has a long history of social support work; university students have helped in providing after-care support to young offenders after their release from prison as early as in the 1960s.

The programme continued after the expiry of the period in the call for proposals. Also, a restitution network started to be developed in the city of Miskolc on the basis of the model. One of the key goals of the project was to motivate the community and to increase the receptiveness of society.

From this aspect, the projects can be considered a success as all participating organisations said they would gladly take part in the programme in the future. We would like to involve new network members in the programme, such as state organisations responsible for social responsibility issues, charity organisations and environmental NGOs as the approval of both the local and the broader community is indispensable for the effective application of restorative justice methods. In Hungary, it is an issue how restorative justice can work, given that the level of social cohesion is too low. At this point, it is unknown whether the low level of social cohesion will distort the development of restorative justice or whether restorative justice can improve social cohesion and help the emergence of effective forms of social coexistence.

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4.2

Restorative Justice in Belgian Prisons

4.2.1 The Belgian prison system

For the moment, Belgium has around 10.348 inmates. 9.944 of them are men and 404 are women, for a total Belgian population of over 10 million and a half. These inmates are divided over 31 prisons. Some prisons only have very few inmates (the smallest prison only has 60), while others have over 700 inmates.



⁵⁸ Stefaan De Clerck.

Belgian prisons can be divided into 3 types.

1. Closed prisons have a permanent security regime which is clearly shown by, amongst others, constant camera-surveillance and high walls surrounding the prison.
2. Half-open prisons are characterized by a secured regime during working hours and at night.
3. Within an "open" prison, the emphasis does not lie on severe security measures; the daily management depends rather on the voluntarily accepted discipline of the inmates. In these types of prisons, for example, one can not see high walls surrounding the building, nor barbed wire etc.

4.2.2 The origin of restorative justice in Belgian prisons

In 1996, the Minister of Justice⁵⁸ emphasized, for the first time, the importance of introducing the victim in the stage of detention. This led to the set up of an *action research*. This research, which ran in 6 Belgian prisons from 1998 till 2000, was carried out in cooperation between the Catholic University of Leuven and the University of Liège. Its purpose was to examine the different possibilities, difficulties, chances and risks of a restorative justice orientated detention-system and to experiment with different kinds of activities and programmes.

In 2000 the positive evaluation of this research led to the decision of the federal government that all Belgian prisons should evolve towards a restorative justice-oriented detention system. In order to guide this process of change one restorative justice adviser was appointed in each prison. An important remark here is that the size of the prison was not taken into account. Small prisons (with for example only 60 or 100 inmates) as well as bigger ones (with a few hundreds of inmates) all got one adviser. The reason for this was that the advisers were hired to work at the management level of the prison. They were supposed to work at the policy level of the prison, their task not being to work individually with the inmates. The restorative justice advisers started working at the end of 2000. A *circular letter* of 4 October 2000 set up the framework within which the task had to be developed and which described, amongst others, the role of the restorative justice advisers.

4.2.3 Tasks and activities of the restorative justice advisers

Although the circular letter should have served as a basis for the advisers, it did not give them very concrete information on how to guide the process of change towards a restorative justice-oriented prison within their prisons. The document only stated the importance of making the structure and culture within the prison more restorative justice-oriented. But what was meant exactly by a restorative culture and restorative structures was not at all explained, nor were the means to obtain these goals made clear.

So the only basis for the advisers was the experience accrued in the action research.

It is important to get a clear picture on the context in which the advisers had to work at the time. The culture within the prison system focused on the offender. The victim hardly got any attention, the damage caused by the crime was almost totally neglected and most of the people within the prison had never heard of restorative justice before. Thus, it very soon became clear to the advisers that the first thing that needed to be done was to inform people and to make them receptive to the new approach of restorative justice. Two important questions arose here: which people had to be informed and how were they to be informed? The first question was easy to answer: it was necessary to inform all the

people who were involved in the phase of detention, namely all the prison personnel and of course the inmates themselves. The second question, how this should be done, was answered differently in each prison. A lot depended on the specific context of each prison: large prisons with a lot of inmates and personnel, a small prison, an open regime, a closed regime etc. The means by which people were informed ranged from spreading flyers to organizing information sessions and setting up working groups within prison-personnel. In the beginning there was considerable resistance and scepticism against this "new method" and this "new model". This attitude is not so difficult to understand. The prison system has always had a culture of its own, a culture that has existed for a long time and that can even be considered necessary for the safe and clear daily management of everyday life within prison. Thus new ideas and efforts to renew the system are easily seen as a threat. Informing people took a lot of time and patience, but it was a necessary step to take.

A very important remark to make here is that informing people and making them open to the idea of restorative justice was not only necessary in the beginning. It is something that had to be done throughout the whole process. Changing the culture within a prison is not something that can be done by one person. Restorative justice advisers needed the support of all the different groups within the prison. Therefore, informing these groups was of crucial importance.

After this first necessary step of informing was done, the first activities could be launched. A range of different activities were set up: activities for personnel or for inmates, or activities that involved people from outside the prison etc.

Among others, the following activities were developed.

- Information sessions for inmates on the topic of the civil party.
- Sessions with inmates on the consequences of crimes to victims
- Setting up a so called "compensation fund". This fund allows inmates, in some prisons, to do voluntary work for a charity organisation. The money they earn with this work goes directly to the victim in order to pay the sum due to the civil party. Only half of the sum due to the civil party can be paid in this way, the other half has to be paid by the inmates themselves. This program is a nice example of how the three parties of a crime (the victim, the offender and the community) can be involved in one project. Practice has shown that this project is satisfying for all three parties. Offenders can take responsibility and pay a part of the sum due to the civil party, and victims get money to pay for part of their loss and also get to see that the offender is willing to take responsibility. The charity organisations not only get someone who works for them, but they often also realize that inmates are not so different from other people, that they are also "human".

This is only a small sample of the programmes that were set up by restorative justice advisers.

As it is very determinant for the work of restorative justice advisers, emphasis should be put on the fact that the work of the advisers must be situated on the policy or management level of the prison (see the text highlighted below).

The “manager profile” of RJ advisers can be made clear by the following examples.

- The restorative justice advisers cooperate with organisations or persons from outside the prison. One of these important partner organisations is the mediation service (in Belgium this organisation is called *Suggnomè*). This cooperation makes it possible to organise mediation at the stage of detention (see article 4.3 in this publication). Another important partner organisation is victim support. Since restorative justice advisers work in a context where the focus is mainly on the offenders, it is important that they work together with these organisations to keep a broad view.
- Inmates in Belgian prisons hardly have any information about their civil parties: who they have to pay and what amount, that is why each adviser set up, in his/her prison, a procedure that defines how inmates should be informed about these facts. This procedure defines who the inmates can go to for more information concerning the civil party; and it outlines the procedure on how payments are made.

4.2.4 Difficulties and things to keep in mind concerning the implementation of restorative justice in prisons

One of the most crucial things in order to give the implementation of restorative justice a good chance of working is to inform all the people involved. People want to know what restorative justice is about, what it will mean in practice, what will change etc. This really is a first necessary step in implementing restorative justice and should not be underestimated.

Another problem was the fact that, in the beginning, restorative justice advisers really had to emphasize the additional benefits of implementing restorative justice in prisons. This is due to the fact that the prison system has an “all hands on deck” approach. There was resistance to the appearance of a restorative justice adviser whose only task was to focus on restorative justice in prison when at the same time there were so many other important tasks to be done. Therefore it is very important to inform people about what restorative justice means and what its additional benefits are.

The next point has also been mentioned earlier. The context of each prison took a great part in defining the framework in which the restorative adviser could work. In comparison with a large and closed prison, it is a lot easier for the adviser to communicate in a direct way in a small and open prison, where he/she knows all the personnel and inmates by name. It is important to be aware of this and to give the adviser the space to create his/her own way of working according to the specific context.

Also something to be aware of is that a prison is a place where the focus lies on the offender. This is a possible risk for the advisers as they can get too caught up in the offender’s story. They have to be aware of this risk and make sure that they keep a healthy balance between the offender’s side and the victim’s side.

As a prison is a very enclosed place with a culture of its own, separated from the outside world one of the problems faced was the difficulty to involve people from the “outside world”. There are no clear contact persons or people to turn to. In the beginning, and also later on, it kept on being a challenge to find the right people for the right project or activity.

Finally, the willingness of inmates to participate in activities was also causing difficulties. It is very difficult to find inmates that are willing to participate in restorative justice oriented activities. Why would he/she, voluntarily, spend his/her time on reflecting on the consequences of his/her offence?

Can inmates be forced to participate in restorative justice activities? In some cases, like for example in the case of mediation, it is clear that voluntary participation is indeed needed. In other cases, like for example attending an information session, arguments can be raised to, to some extent, obliging the person to participate. It is not an easy balance to find and in Belgium this was handled differently in the different prisons, but it is an important issue to be aware of and to give some thought to.

4.2.5 Current developments in Belgium and future expectations

In mid-2008, changes were made, and restorative justice advisers no longer exist. There is still, in each prison, one person responsible for implementing restorative justice, but the main difference is that these persons are now members of the management staff and also have other tasks beside those related to restorative justice (like personnel management, logistics, finances etc.).

Making a member of the management responsible for restorative justice must be seen as ensuring the future of restorative justice in prisons. Of course, only time can tell if this will really be the case or if the persons responsible for restorative justice will get caught up by other, more urgent things to do in everyday prison life.



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4.3

Victim Offender Mediation in Severe Crimes in Belgium: “What Victims Need and Offenders can Offer”

4.3.1 Situation in Belgium

Mediation programmes are operated on several levels within the Belgian judicial system.

In the late 1980s a first *pilot project* was set up for juvenile delinquents. Right now mediation is offered for young offenders in each judicial district of Belgium. Files are referred by the prosecutor service while the case is being prosecuted or during the court procedure. Also, family group conferences are carried out.

In the 1990s *criminal mediation projects* were first introduced for adults in minor crimes. If mediation is carried out, the public prosecutor can drop the case and not prosecute under certain conditions. Victim offender mediation (VOM) is one of the possible forms of mediation, which can also be used in the case of serious crimes and in cases where the prosecutor has already decided to prosecute and a trial will be held. The mediation process itself takes place independently from the judicial system, but its result can influence the further judicial procedure since the judge can take its outcome into account. Both forms are regulated by legislative acts: the *Act of 10 February 1994 on Criminal Mediation* and the *Act of 22 June 2005 on Victim Offender Mediation*.

Mediation is also used at the level of the police, but only in a few cities. Here, cases of minor crimes are selected by the police, and most of the time the cases are not prosecuted afterwards, but there is no guarantee.

Last but not least, mediation is also carried out in prison when the punishment is being served. In 2000 the Minister of Justice decided that restorative justice practices should be used in prisons. Since November 2000 restorative justice advisers have been working in almost every Belgian prison and one of their tasks has been to facilitate communication between victims and offenders (see article 4.2). Mediation was first started to be used in prisons in 2001 for convicted offenders and their victims. Mediation sessions were located outside the prison system in order to keep in line with the principles of restorative justice. Mediation started on an experimental basis; the inmates of three prisons and all the victims in the Flemish part of Belgium were offered the possibility to join a *mediation programme*. We did not want to discriminate the victims whose offender was in another prison. Since the *Act on Victim Offender Mediation* each party involved in a crime can ask for mediation.

4.3.2 The philosophy of restorative justice

The philosophy of restorative justice is to bring victims and offenders into contact. It is about giving the conflict back to them, communication about the crime and its effects on both sides. Communication can be indirect (through the mediator as a go-between) or direct (in a face-to-face meeting).

⁵⁹ Suggnomè (it is an old Greek word which means looking at the same reality from different sides) is recognized as an umbrella and forum organization for victim offender mediation in the Flemish part of Belgium.



4.3.3 Why VOM was started to be used after sentencing?

Sometimes it is not possible to offer mediation before the trial. Often, the offer to mediate came too early. It was too soon for even considering contact with the other side. This is connected with the process of coping with the crime.

Sometimes, the victims are also afraid that mediation might result in benefits for the offender and that is why they do not wish to participate in mediation before the trial. Also, it is recommended to offer mediation in all stages of the criminal procedure. But if victim and offender want mediation before the trial, it is possible even in severe cases.

Mediation programmes have three main principles.

The mediator is neutral. He/she is not ethically neutral and not only because in severe crimes it is impossible, but also because mediation in general starts with the recognition of one party harming the other and accepting responsibility for his/her acts. However, the position of the mediator is neutral. The mediator takes care of the interests of both parties; he/she shows respect for both sides and treats them as equals. To ensure the neutrality of the mediator, it is important for the mediator's actions to be transparent.

The participation is voluntary for both parties. There will always be victims who do not want contact with their offender, and there is no reason why they should. One shall not try to convince them, their opinion shall be respected. It is the other way around; the need of those victims shall be answered who do wish to establish contact. To avoid re-victimization, victims must not be pressured to participate in any way.

It neither has any use to force an offender into dialogue with the victim. Although it can be argued that in serious cases, offenders should be coerced into participating in mediation if the victim wishes so, but in reality this would never work.

One of the consequences of this principle is that both parties can discontinue the mediation whenever they want. The mediator can only ask the offender to reconsider his/her decision as it could harm the victim again.

Mediation is confidential. The *Act on Mediation* guarantees confidentiality. Communication to courts is only permitted if both parties consent. In case of prison mediation, the prison is of course informed about the mediation process. It is prohibited to enter a prison with a victim without the consent of the prison board.

4.3.4 Mediation in practice

Mediation in prison almost always means mediation in "severe crimes". Long sentences are imposed for serious crimes like homicide, murder, manslaughter, armed robbery and sexual assault.

There are two questions that arise most. Is it possible to carry out mediation in these kinds of crimes? Even if it is possible, do parties want to participate in mediation? The answer to both questions is "yes". It is possible, mediation can be applied in such cases for over five years of imprisonment, and yes, people do wish to participate in mediation in these severe cases as well.

The following figures prove this:

- over eight years the *Suggnomé* has had 630 demands for mediation;
- the *Suggnomé* had 343 mediations processes (with the participation of one victim and one offender) with 84 face-to-face meetings;
- mediation was carried out in respect of 124 property crimes, 108 homicides/murders and 111 sexual offences.

The bigger the impact of the crime, the bigger the need for mediation is. Victims will be re-victimized if these types of crimes are excluded from mediation.

4.3.4.1 Why do parties want to participate in mediation?

The victim's side

- There can be lots of questions about the crime, remaining especially in cases of homicides where the victims are the deceased person's relatives. They want to know details that are sometimes really small (but that are very important to them). For example: "Where was the car parked?" "Where is the other shoe, why was the key at that side of the door?" "Where exactly did you throw his body in the river? Because I can't find the place and it is important to me..." They also almost always want to ask the question: "Why did you do it?" To ask that question is even more important than to get an answer, because there is never ever a right answer. But they want to know how the offender reacts to this question.
- Victims also often want to know if the offender is still thinking about the crime. "Does it still keep him/her awake?" "Does he/she regret it?"
- Sometimes victims also want to express something. They want to tell the offender what has happened to them; how they have been affected by the crime; what the offender took away from them. It can be very important to express feelings of hurt, sadness, anger, just to come clear with it.
- Sometimes victims also want more information about the offender: "In which prison is he/she?" "Does he/she work there?" "When will he/she be released?"

An example from the practice a man's son was killed for his car. The offenders needed a car to do a robbery. For them it was just the driver of a car, for the father it was his son. He came to the prison with pictures (a full album) and stories about his son, so that the offenders would know what they took away from him.



In one case a man killed his wife and later on wanted to re-establish contact with his children. In another case, a man put fire to his house after an argument with his girlfriend. She was in hospital for several months and she wanted to participate in mediation in order to end the relationship peacefully.

- Sometimes (but rather rarely) they want a meeting in order to reconcile. This usually happens when offender and victim know each other or are relatives.
- Financial compensation is only very rarely the topic of mediation. Even if an arrangement is made for compensation, it is mostly symbolic.

The offender's side

- The offender may feel the need to explain things, why he/she committed the offence (although in cases of murder this is the most difficult thing to do).
- Often they want to apologize to their victims for the harm they caused to them. E.g. frequently some inmates want to write a letter to their victim, but they are not always encouraged to do so.
- Sometimes they just want to restore, they want to do something, anything, for the victim, to answer their questions, listen to them, or to pay some form of compensation to them.
- In crimes between people who know each other or who are related to each other, they want to restore contact.
- Sometimes they want to settle practical issues.

An inmate wanted to visit the grave of his victim, but this was not possible as he was not allowed to visit the city where the victim's mother lived. The victim's mother was asked if he could visit the cemetery once. She said yes...

As mentioned above, either party can initiate mediation. Mostly offenders contact the mediation service because mediation is well known in prisons. They are together in one building so it is easier to inform them about the possibility of mediation. It is a lot more difficult to inform the victims. Victims initiate mediation in only 10% of the cases. This is a problem in the *Suggnomé's project* which needs a solution. Victim support organizations are informed, a book is written on the issue, and attempts are made to work together with the media to publish stories. Hopefully with the new law, which will oblige the judicial authorities to inform every party linked to a crime that they can ask for mediation, the number of demands from victims will increase. But at the moment, mediation is mostly requested by offenders.

There is a first conversation with the applicant to explain the concept of mediation and its principles to see if mediation is what he/she wants. We ask what the crime is but they are not requested to tell all the details. This is to protect their privacy, since it is not necessary to know all details of the case the parties decide not go along with the process of mediation.

Getting known their motivation is very important, not in order to select, but to inform the victim of the offender's motive to seek to participate in mediation. It is very important not to decide in their place! A mediator can never do the selecting.

Afterwards the mediator contact the victim by letter. If he/she is also interested in mediation, the mediator makes an appointment and then the mediation process can begin.

The parties decide how the mediation process will be carried out. Sometimes the mediator is a go-between, but face-to-face meetings usually prove to be the most interesting option. Within this project there have already been 84 face-to-face meetings.

4.3.4.2 Face-to-face meetings

Two things are very important at a face-to-face meeting. One is careful preparation. The mediator has to prepare both parties for what they will be confronted with, what they will see: anger, sadness, minimalism, questions, remorse and other emotions and then to let them choose whether want to go through the mediation process. If they do decide to take part in mediation, they can deal with a lot in the process.

The mediator has to take all the necessary time to prepare the meeting.

Preparation sometimes means also very practical questions like for instance the size of the table. Support is as well very important. What do parties need for the meeting? What kind of support do they need, somebody sitting next to them, or somebody sitting opposite them, as well as care afterwards. The mediator has to balance the needs of both parties. And a good mediator can never forget about – the coffee... This could help a lot with breaking the ice.

A mediation process can last for several months.

The result of the mediation may be taken into account for ordering of release on parole.

It is also very important to provide support for the participants after the face-to-face meeting. For the mediator it is important to sometimes mediate with another mediator or at least to be able to contact a colleague after such a meeting.

4.3.5 Results

It is indeed very difficult to measure the results. How can it be proven that the fact that people sleep better, have less fear, dare to walk alone on the street again, have better school results is the outcome of a mediation? Because this is what people are telling the mediator?

According to the personal notice of a therapist, one mediation session has the effect of one year of therapy.

"As mediator, I myself have conducted 25 face-to-face meetings, all in very severe crimes, most of the time in cases of murder, armed robbery or sexual assault. The shortest meeting lasted 45 minutes; the longest took four hours and a half. The youngest victim was 7, the oldest 75. I had one meeting with a female offender.

These face-to-face meetings are the reason why I am doing this job. Face-to-face meetings concerning severe crimes are special, frequently touching, with much depth sometimes even touching an existential level. Each time one can be surprised by the serenity of those meetings. One can also be surprised about the capacity of people to talk about those things."

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4.4

Mediation in Prisons and Restorative Justice in the Republic of Slovenia

4.4.1 Mediation in prisons and restorative justice around Europe and beyond

There are two documents of particular international importance. One of them is a document of the United Nations entitled *Basic principles on the use of restorative justice programmes in criminal matters* (2002) and another was published by the Council of Europe with the title *Recommendation R(1999)19* concerning mediation in penal matters. The Recommendation provides a definition of mediation, which states that mediation in penal matters is: “[...] any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”.

The definition of the Council of Europe tries to establish a common ground, but on the other hand we can see a great diversity in approaches and legal regulations concerning mediation around Europe. Beside victim offender mediation being the predominant model for the resolution of issues arising from crime through the active participation of persons involved, there are other possibilities such as restorative justice conferences and circles, which include communities in the process more intensively.

4.4.2 The principles of mediation according to the Council of Europe’s Recommendation R(1999)19

The recommendation of the Council of Europe provides some guidelines for mediation. The first and the second articles stress important elements – voluntary participation of all participants and confidentiality, ensured by the mediation service. As well as confidentiality, the recommendation also stipulates the mediator’s impartiality in

mediation. A sufficient degree of autonomy has to be provided for the mediation service. Mediation ought to be a service that is generally available to all that would like to use it. Therefore, legislation should facilitate mediation and find solutions for its wide application. Mediation should also be available as a possibility at all stages of the criminal justice process – as is the case, for example in Belgium according to relevant legislation (see articles 4.2–4.3 in this publication).

4.4.3 Victim offender mediation in Slovenia

The *Code of Criminal Procedure* in 2000 provided a nationwide programme for the introduction of an alternative procedure for resolving petty crimes. Over the year 2000, a total number of 837 cases were successfully resolved through victim offender mediation. This also means that 837 less court hearings were held, which is the equivalent of the caseload of 5 judges and 7.5% of the total number of solved cases. From all the cases referred to victim offender mediation, 48% of them were resolved successfully and 52% of them were unsuccessful. This result might be regarded as satisfactory given that this form of mediation was still a new practice at the time and a lot of people were not familiar with it. The most frequent outcomes of mediation are the following: apology, compensation for damage and a combination of the previous two. The most frequent offences are theft, damage to property, fraud (which is unusually high in comparison to the European average), endangering safety and maltreatment.

According to relevant legislation, the State Prosecutor’s Office is obliged to organise compulsory training courses for mediators in criminal matters. The first Introductory Training Course started in December 1999 and over the year 2000, 194 mediators dealt with an average of 8.6 cases each. In the same year the Supervisory Board was established in order to prevent misuses of mediation. A year later, in 2001, the first organization of mediators was set up – the Association of Slovenian Mediators. Now *Medios* is another active organization of mediators.

4.4.4 Development of the practice of mediation in the prison system of Slovenia

As already mentioned, in the year 2000, the *Criminal Code* introduced victim offender mediation as an alternative method for resolving criminal cases. The purpose of this solution was especially to achieve settlements between victims and offenders and between juvenile offenders and their victims. In the year 2007 the first training for mediators in prison was organised, which was attended by seventeen employees of the Prison Administration of Slovenia. An advanced training programme for mediators is also being prepared. All the trainings qualify workers in prisons to use mediation in formal and also informal ways in particular cases. Last year another introductory training for mediators was organized and eighteen prison administration employees attended and successfully completed it.



4.4.5 Cases suitable for mediation

Mediation in prison can be useful for different types of conflicts. One of the most suitable cases is when two prisoners are in a dispute. Prisoners are officially on the same status level, and therefore usually mediators do not need to put much effort into ensuring that there is a feeling of equality between the parties during the process. Conflicts between prisoners can range from petty disputes, for example if somebody's belongings have gone missing to more serious cases such as assault. Addressing a conflict between a prisoner and a guard is more difficult because of the differences in their statuses. Even if officially there is no hierarchy between them, an informal notion of separation and inequality is still present. The situation is similar when a conflict breaks out between a prisoner and a member of the pedagogical team who is, from the prisoner's perspective, a part of the disliked "system". Mediation can also be a useful tool in conflicts between prison administration and employees. The mediator can facilitate a mediation process between the prison and the prisoners in cases such as strikes, especially hunger strikes. The mediator can also use his/her skills to mediate between prisoners and their relatives who are not necessarily involved in the conflict, but are having communication problems.

4.4.6 Uncertainties and dilemmas

There are a few uncertainties and dilemmas concerning the use of mediation in prisons. One of the obstacles lies on the side of the staff, because guards and the pedagogical team are usually not in favour of new methods being forced on them. Some of them also think that mediation would mean extra work for the same salary. Some degree of fear from the unknown is also present, usually because of superficial knowledge on mediation. Prisoners on the other hand have difficulties trusting the process as such and they especially question the notion of confidentiality. The structure of the penal system is not too elastic and willing to accept innovations such as mediation. The fear that prisoners will abuse the service is also present sometimes. All those fears and uncertainties are mostly connected with the concept of mediation not being presented in a clear way to prison staff and prisoners. Many fears and obstacles could be eliminated through further clarification of the concept of mediation and further practice.

Providing appropriate mechanisms for the full establishment of mediation in prisons still remains a challenge. Additional funding, trainings and staff are necessary in order to provide better services. There is also a lack of supporting legislation for the use of mediation in prisons. Successful cases are needed as examples to be able to better promote mediation. In fact, examples of successful mediation processes can be the best tools for establishing mediation services in prisons. On the other hand, we do have to be aware of the fact that there have been cases where mediation was misused, and these can cause much harm to all parties involved. Training and supervision is therefore essential.

4.4.7 Further plans

Organizing trainings for mediators in prisons and attracting new prison administration employees are planned to be continued. In cooperation with NGOs, trainings in the field of restorative justice, especially victim offender mediation, are being organized for mediators. Organizations of mediators actively participate in shaping legislation concerning mediation. Setting up suitable mediation services inside and outside of prisons still remains a great challenge for mediators in Slovenia.

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4.5

“Active Citizenship Together” – Integrating the prison into the lives of the local community in the United Kingdom

4.5.1 Introduction

When managing a prison with low security levels it is important to create a positive relationship with the local community whereby the prison is integrated with the community and vice versa. HMP Stanford Hill is an open prison with 464 male prisoners who are serving sentences ranging from a few weeks to a “life” sentence. Most of the prisoners are not from the local area but as an establishment the prison is part of the local community.

“Active Citizenship” is about being involved in the community, having one's say and taking part in decisions that affect one. It is essential that it involves the governor, senior managers, the prison

staff, the offenders and the local community outside. With this in mind the vision statement for Standford Hill Prison is "Together we make Standford Hill a Safe, Decent and Positive Community".

The following examples will show how to work toward integrating the prison into the lives of the local community.

4.5.2 Active Citizenship Together for Swale (ACT Swale)

ACT Swale is a partnership project formed under the banner of the *Swale Community Safety Partnership* in March 2007. Key partners include Amicus Horizon, who are a housing trust providing homes for the elderly and disadvantaged people, and Swale Borough Council. The project is jointly funded by these two organisations and managed by staff from Standford Hill Prison.

ACT Swale are a team of five serving offenders on temporary release from HMP Standford Hill, a supervising prison officer and supporting departments within the prison (Working Out Scheme, Gardens Department, Offender Management Unit). In addition operational project leads are assigned from Amicus Horizon and the Council.

The Working Out Scheme within the prison identifies and risk-assesses suitable candidates for the work. Once selected, the offenders sign a compact to agree to work on the project and abide by certain rules. They receive training in the use of garden tools and general health and safety before starting on the project. Amicus Horizon and Swale Borough Council co-ordinate and primary risk assess jobs and the prison officer supervisor conducts secondary risk assessment for hazards on site.

Outcomes are measured by Amicus for customer/resident satisfaction, Swale Borough Council for cleaner, greener targets and reduced fear of crime, and HM Prison Service for change in offender behaviour. In addition, outputs are measured for value for money. It is far more cost effective to use the *ACT Swale* team than to use contractors for the work being completed.

Swale area organisations have been the sole contributors for the two years of the *pilot project*, Canterbury City Council now buying in for 2009/2010. Amicus use the project to clear gardens for vulnerable, disabled and elderly clients and also for project work in the Swale Borough (and some further afield). The Council uses the team for public open spaces and community requested work.

The Community response has been extremely positive, letters of thanks, e-mails, photos have been sent in by residents. Media response has also been very positive – numerous write ups and some high profile visits over the two years. Awards for Environmental Excellence as well as other awards have been won. Offenders on the scheme are better behaved in the establishment and more positive about their life after prison.

4.5.3 Island Sports College

The purpose of the Physical Education Department (hereinafter PE Department) within Standford Hill Prison is

- to address the offending behaviour of prisoners, to tackle the criminogenic factors and reduce the likelihood of re-offending upon release;
- to provide a high quality physical education programme which includes structured classes and activities designed to meet the needs, abilities and aptitudes of prisoners and offer support and advice to prisoners and staff on issues relating to physical recreational and lifestyle activities;
- all activities in the PE Department will as far as possible reflect the activities on offer in the community which people can expect to participate in on release;
- to encourage social responsibility through the medium of sport and recreation and offer relevant vocational training to assist in rehabilitation.

A *Peer Tutor Scheme* is well used across the PE Cluster using selected offenders who are trained to help and advise their peers. They help to run courses passing on their knowledge to other prisoners, increase learning and teaching across many areas. The use of peer tutors helps to build self esteem and confidence and many of the peer tutors have gained employment in the leisure industry on release from prison.

Many links with employers have been built up including various health clubs, companies and sport teams such as Virgin Active, Fitness First, David Lloyd, Serco Leisure, Greater London Leisure, Charlton Athletic and Leyton Orient Football Clubs, and London Towers Basketball Club.

The Island Sports College has developed positive links with the local community such as Health and Fitness Solutions which is a social enterprise scheme set up with prisoners trained and delivering courses for the Island Partnership which is a local charity based in Sheerness.

They have also created links by bringing the local community inside with many community groups visiting the PE Department, including access to the swimming pool where life guards and swimming lessons were provided and, along with the Working Out Scheme prisoners were provided to help at some of their centres.

Team building and healthy living schemes are also provided for local schools. The Minster College and the Borden Grammar School have co-operated in the programme, this latter one has provided £6.000 towards our mobile team challenge kit.

Community liaison has been further developed by raising charity for the local community and over £5.000 have been raised for the local community charities.

Year 1 pilot project saw 23 offenders go through the scheme, 19 (83%) demonstrated a decrease in their likelihood of re-offending. 199 jobs were completed and 130 tonnes of waste cleared from the borough. Amicus customer satisfaction rates rose 12% and the value for money assessment showed project worth double its actual cost (based on the market price of work carried out). Year 2 saw a second "landscaping" team established for a four month pilot project from December 2008 to April 2009 with 300 more jobs completed by team 1 and several large project jobs completed by team 2 and over 160 tonnes of waste collected. 40 offenders have gone through the project and 32 (80%) have demonstrated sustained improvement in skills and a reduced risk of re-offending.



4.5.4 Conclusion

“Active citizenship” is, above all, about people making things happen and giving serving prisoners a real chance to give something back to the community by way of reparation for the offence that they have committed. But also, as a result of this, they are able to improve the quality of life of residents in the local community and positively enhance their personal confidence and self esteem.

This all helps towards achieving the joint vision that “Together we make Standford Hill a Safe, Decent and Positive Community!”

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4.6

“Restorative Prison” Projects in Hungary

4.6.1 The paradigm of restoration, crime prevention and restorative prisons

In Hungary, the paradigm of restoration is closely connected to the objective of crime prevention: *the National Strategy for Community Crime Prevention* (hereinafter strategy) in 2003 was the first government-level paper that included the goal to use restorative practices more extensively. The strategy specifies five priorities of community crime prevention⁶⁰ and defines long-term goals for each. The strategy’s goal is to apply the principles of restorative justice primarily for the purpose of reducing juvenile delinquency, preventing re-victimisation, protecting victims and avoiding re-offending.

The strategy’s philosophy is that effective restorative procedures also have a preventive effect by nature. Restorative justice focuses on the offender, the victim and the community: they are the parties who can work out a settlement to resolve the conflict caused by the crime. During the settlement procedure, the offenders may realise the consequences of their crimes and they also have the opportunity to agree to make amends to the victim (the party injured directly by the crime), and to the community (the party affronted indirectly by the crime, that is, through the violation of law). Ideally, this generates some kind of commitment to the interests and values of society, and this may prevent the criminal from re-offending in the future.

The implementation of the strategy’s objectives is coordinated by the National Crime Prevention Board (hereinafter NCPB).⁶¹ The NCPB is an inter-ministerial body embracing all relevant actors of community crime prevention. In addition to its task of coordinating the government’s crime prevention efforts, the NCPB also provides financial support (through calls for proposals) to local initiatives that provide practical and appropriate solutions to local problems with the involvement of a wide range of local stakeholders. The programmes supported by the NCPB are pilot projects that may be used extensively.

⁶⁰ Community crime prevention is a professional/NGO movement controlled and supported by the state, which seeks to improve public safety by enhancing the self-defence capacity of communities.

⁶¹ For its members and operation, see Government Resolution no. 1002/2003 (I. 8.) on certain government tasks related to increasing the efficiency of crime prevention efforts.



The NCPB has been issuing calls for proposals each year since 2004.⁶² Initially, the programmes were funded directly from the budget. Since 2006, however, the NCPB's only resource has been the so-called "second 1%" of the personal income tax that people can choose to offer in their tax returns for public benefit (in this case, for community crime prevention).

For the prevention of re-offending, the NCPB has been supporting reintegration projects for prison inmates since 2004. The themes of these projects have mostly been skills development and vocational training programmes. Inspired by good practices in the United Kingdom (Stern 2005), the NCPB started to issue calls for proposals in 2006 for restorative activities that contribute to the integration of prisons with the life of local communities and thus support the reintegration of prisoners into society. The model projects developed and implemented with the NCPB's support represent the practice of the "restorative prison" concept in Hungary. These projects attempt to integrate the prison into the local community through the provision of restoration and restitution services to the community.

4.6.2 The general features of restorative/community prisons

The Hungarian "restorative prison" projects has nothing to do with the procedure-oriented restorative practices. Instead, these programmes do not involve the party directly injured by the crime but offer a chance to convicts who show remorse to make amends while they serve their prison term. The inmates make reparations to the local community, which is indirectly affected by the crime (due to the violation of the law), and not to the specific and directly injured party, the victim. This means that instead of providing compensation for the specific injury they caused, the criminals improve the local community's life by producing useful and visible results.

The common qualities of good practices that enable the prison to be a part of the host town's or area's life are presented below.

4.6.2.1 Vocational training and skills improvement element

Each project involves vocational training and skills improvement programme in some form. The purpose of vocational training is to prepare the prisoners for the work they are to do for the benefit of the community. As a result, the vocational training phase is always the first step in the programme, serving as a foundation for the further programme steps and items. Ideally, the knowledge gained by the prisoners will be useful for them in their life after their release. In the course of planning these restorative prison projects, it is advisable to find services that are needed/undersupplied in the community. This also means that, in an ideal case, there is a demand in the labour market for the given special vocation.

According to the recent practice, the skills improvement element of the project is a permanent item that is present throughout the entire project and provides competence and skills that help reintegration after release (for instance, job search, labour market, self-awareness and non-violent conflict resolution skills). Ideally, within the scheme of skills improvement, the opportunity should be taken to make the inmates understand that the service they are to deliver is an active means of accepting responsibility for the crime, conscious about the mental aspect of the restitution service. However, in Hungary, restorative prison projects so far have very often lacked the effort to make participating inmates conscious about this mental aspect, namely to improve their ability and willingness to live the experience of repentance and restitution. (Missing this goal might lead to practice when restitution service is considered by the inmates as any other means of killing time.)

4.6.2.2 Restitution service

A key element of these programmes is an activity that is to the benefit of the community, the so-called "restitution service", carried out with the active involvement of the offenders. All other programme items (vocational training, skills improvement, partnership) are meant to support the implementation of the restitution service. There are two requirements that must be taken into consideration as factors when the "restitution service" is selected.

1. According to the requirement of usefulness, the service to be provided must be a need, a missing item for the local community. For this reason, the prison must identify the "niche service" for the given town or area's community.
2. The restitution service addressing the need must be easy to communicate: it must be marketable and visible in order to challenge the prejudice the local community may have against prisoners.

4.6.2.3 Communication

Each and every programme includes a communication element in order to establish a human relationship between the prisoners and the various communities of the local population (at joint events, for instance) and to inform as much of the local population as possible of the restitution service's results.

4.6.2.4 Partnership

Due to the above mentioned objectives, all programmes have been carried out with a wide range of relevant partners involved. Prisons took a leadership role and in the majority of cases they were able to establish cooperation with local governments, education and training institutions and NGOs active in the area.

Table 9 (see at the end of this article) summarizes the key information related to each specific restorative prison projects carried out with the financial support from the NCPB since 2006 in Hungary. In the following sections, those characteristics of individual projects will be discussed that are good examples of how the principles of restorative prison projects are implemented in Hungary and adapted to local circumstances.

4.6.3 The specific characteristics of the Hungarian "restorative prison" projects

In Hungary, the practice of restorative prison includes wide-ranging and diverse projects. This is partly due to the call-for-proposals system which is flexible enough to accept initiatives with local characteristics but it is also a result of the creativity and innovativeness of project owners who have found appropriate content for "restorative prison" schemes in accordance with local and domestic challenges.

In two projects at the National Penal Institution of Állampuszta (*Állampusztai Országos Büntetés-végrehajtási Intézet*) all general elements were successfully implemented within the framework of the town improvement activities in the area of the two settlements, Harta and Solt, that host the prison for the general features of the projects see (for the general features of the projects see *Table 9*). A particularly unique element in these projects was the way in which the organisers reacted to the special needs of Roma minority

⁶² The list of the calls for proposals is available at: <http://www.bunmegelozes.hu/index.html?pid=94>.



prisoners, a significant group of the prison's population. In the 2007/2008 project, Roma prisoners had the opportunity to attend specialist training in order to learn a traditional handicraft. Also, they could practice and show their musical talent and practice their traditions.

Another distinctive characteristic of projects at this institution was that the organisers were creative enough to organise joint events and programmes with the local population. In most projects in Hungary, this programme element was missed out in spite of the fact that this is of key importance in the original British versions of the projects. The choir and the theatre company of the inmates performed at various events organised by the local communities and institutions in Harta and Solt.

The Balassagyarmat Penitentiary and Prison (*Balassagyarmati Fegyház és Börtön*) successfully implemented the general elements of the concept (see *Table 9*) in both in its projects. The projects were aimed at cleaning and reconstructing various neglected public spaces to allow the local population to start using these areas again. The results exceeded expectations in both cases. As early as after the first project, the prison and the local government signed a cooperation agreement to allow the inmates to participate in further urban planning activities. As a result of the first project, efforts were made to facilitate the inmates' "self-help" activities: the self-awareness and conflict resolution group continued to operate after the end of the project but the majority of the participants were new. However, a number of "group veterans" agreed to attend the new phase of the meetings to help the new members become accustomed to the group. By the time the second project was being implemented, the prison had become a significant player in the local community. It had become a factor in organising the community as it activated a number of non-governmental groups and involved both the local population and the students of the elementary school near "Palóc-liget" (the park that was reconstructed) in the reconstruction work. Active cooperation developed between the elementary school and the prison. Teachers confirmed that the behaviour of evening class students of the elementary school noticeably improved after their visit to the prison and their discussions with some of the inmates. The pupils of the school who were trained as peer-helpers will make efforts in the future to prevent their schoolmates from damaging the park or from using it improperly while the classes of the school will each "adopt" a part of the park and will take responsibility for maintaining the good condition of that part.

The Sátoraljaújhely Penitentiary and Prison (*Sátoraljaújhelyi Fegyház és Börtön*) implemented the general elements of the concept (see *Table 9*) in its two projects with specific objectives: the establishment of a prison museum and the reconstruction of "Hősök temetője" (*Heroes' cemetery*), a cemetery of historical significance. The projects therefore aimed at meeting the local population's demand for preserving and popularising cultural, scientific and local history-related values. The second project has some special features that are not expected to work in Hungary in spite of the fact that they are implemented in the original British projects. For instance, the

project involved inmates who were also local citizens, that is, they were expected to go on with their lives in the area of Sátoraljaújhely after release. Therefore their restitution services were provided to the community they were to reintegrate into following their release. Another element of the project rarely implemented in Hungary (due to the short term of financing and lack of methodology) was follow-up evaluation. The project inmates are given follow-up care with the assistance of the probation service for a period of two years after their release, which is a tool of evaluation at the same time.

A project at the Heves County Penal Institution (*Heves Megyei Büntetés-végrehajtási Intézet*) included general elements combined with town improvement objectives (see *Table 9* for details) but it also had a special characteristic: activities were organised that allowed the participation of both male and female prisoners inside and outside the prison. While the female inmates worked in public spaces of the town in a manner visible and recognisable to the public, the male prisoners repaired, within the prison, the mobile parts and equipment of the playground the local government had selected to be reconstructed in the project.

4.6.4 Conclusions

On the basis of three years of restorative/community prison projects we can conclude that it is definitely a step forward that the penal institutions receiving support under the scheme now implement the philosophy of restorative justice much more consciously. They follow the projects of other prisons and they discuss their ideas and problems with each other when they plan their new projects.

It is also a positive development that a number of symbolic restorative projects have been implemented in the past two years without the support of the NCPB at the local governments' or the prisons' own initiative (see the text highlighted).

However, the lack of resources and capacity is a recurring problem as it can significantly limit the opportunities of the institutions to run such programmes. The "territorial scope" of the programmes is also strikingly limited. It is the same 8-10 penal institutions that apply good practices year in and year out in spite of the fact that the programmes could be easily adapted by other prisons also.

It is still a challenge to spread good practices at a national level, to provide intensive personal care for the inmates participating in the projects (to help them experience the restitution they carried out) and to establish a balanced relationship between the institution and the local community.

In conclusion, it can be said that the implementation of the restorative prison concept is progressing slowly but surely, but there are still a lot of opportunities to exploit. It is quite simple to recognise that the application of restorative justice principles – with its potentially useful objectives – is common sense. The rationale is that the offenders will

Regardless of the fact that the first project had ended and the financing period had expired (in 2007), the Sátoraljaújhely local government decided to contract the penal institution to secure the public work of inmates for town improvement purposes. In Eger, female inmates of the Heves County Prison Carried out restitution work in public spaces as early as in 2007, that is, before its first supported projects were launched (in 2008). In 2008, the female inmates of the Pálhalma Prison performed a puppet show they had practiced at their puppetry club to sick and disabled children. In addition, another group of female inmates carried out public space reconstruction work at the local cemetery. In 2009, the inmates of the Győr-Moson-Sopron County Penal Institution performed restorative work at the local zoo, at the playground of a local kindergarten and in the building of a foundation that takes care of children with birth disorders.



not evade punishment, but while they serve their terms, they will also carry out an activity that can be valuable for the local community, which is also injured by the crime committed. The supply is therefore provided by the inmates ready to show their remorse by providing services, and the demand is provided by the community's various needs (for instance, public spaces needing development).

The penal institution may also be motivated to establish a link between the demand and the supply as there is evidence that tension can be relieved if appropriate activities are organised for the inmates. It is a significant factor that programmes that are both successful and well-communicated may change the popular misconception that inmates' have a better quality of life than many of tax-paying citizens.

This common sense-based approach of the restorative prison concept may be the factor that can persuade penal institutions and local governments to become more active in organising restitution services even in these days when there is a lack of staff and resources. It has been proven in this article that the necessary know-how is available. All we need now is the more extensive application of these restorative methods.

Table 9

General features of the Hungarian restorative prison projects carried out with financial support from the NCPB

Project name "Complex model programmes for the implementation of restorative justice principles" (National Penal Institution of Állampuszta)

Period 2006/2007
Cooperating partners Harta local government
 Office of Justice, Bács-Kiskun County
Specialist training Park caretaker training
Skills development Presentations by NGOs on the protection of the environment and local historical values
Restitution service Landscaping and reconstruction
 Removing litter
 Reconstructing the old cemetery
Communication A publication on the institution, a film on the project implementation
 News and reports for the media on the progress of the project

Project name "Integrating the prison with the life of the local community" (National Penal Institution of Állampuszta)

Period 2007/2008
Cooperating partners Solt local government
 Harta local government
 Office of Justice, Bács-Kiskun County
Specialist training A course on growing and weaving willow
Skills development Music and cultural programmes
 Roma ethnic music and dance course
Restitution service Town improvement and maintenance work
 Reconstruction of a local archaeological artefact (a boat)
Communication A documentary film on the project
 News and reports for the media on the progress of the project

Project name "Give me a chance to make it right"
(location of the institution) (Balassagyarmat Penitentiary and Prison)

Period 2007/2008
Cooperating partners Balassagyarmat local government
 Office of Justice, Nógrád County
Társadalmi Visszailleszkedést Segítő Egyesület
 (Association for Social Reintegration)
Magyar Iparszövetség Oktatási és Szolgáltató Központ
 (Hungarian Industrial Association Education and Service Centre)
Specialist training Park caretaker training
Skills development Self-awareness and conflict resolution training
 Labour market skills, job search training
Restitution service Cleaning and landscaping around the new coach terminal
 Repairing damaged public structures
 Reconstructing the military cemetery
Communication Official ceremony of opening the park
 News and reports for the media on the progress of the project

Project name "Joint effort for protecting the natural environment at the Palóc-liget"
(location of the institution) (Balassagyarmat Penitentiary and Prison)

Period 2008/2009
Cooperating partners Balassagyarmat local government
 Police Station, Balassagyarmat
Társadalmi Visszailleszkedést Segítő Egyesület
 (Association for Social Reintegration)
 Kiss Árpád Elementary School
Polgárőr Egyesület (Civilian Police Association), Balassagyarmat
Specialist training Park caretaker practice scheme
Skills development Museum visit
 Work with students and local citizens
Restitution service Palóc-liget reconstruction
 Weed removal
 Rebuilding trails, steps, removing obstacles
 Repairing public benches
Communication Flyers about Palóc-liget
 Citizens' forum for the citizens living in the neighbourhood for the purpose of identifying problems and for raising a sense of responsibility
 Establishing a peer helper group
 A documentary film on the project
 Official ceremony for opening the reconstructed park
 News and reports for the media on the progress of the project



Project name "Learn from your past – this is not your destiny"
(location of the institution) (Sátoraljaújhely Penitentiary and Prison)

Period 2006/2007

Cooperating partners Sátoraljaújhely local government
HM Hadtörténelmi Intézet és Múzeum
 (Ministry of Defence Military History Institute and Museum)
 Eötvös József Club

Specialist training Practice scheme for those prisoners that have attended computer training over the past few years

Skills development Improving cooperation skills through work with civilian employees

Restitution service Establishing a prison museum
 Construction
 IT tasks: Digitalising and editing
 Museology-related and other tasks
 News and reports for the media on the progress of the project

Communication Welcoming visitors to the museum (operating the museum)

Project name "Heroes' cemetery: crime prevention and the building of a valuable community"
(location of the institution) (Sátoraljaújhely Penitentiary and Prison)

Period 2008/2009

Cooperating partners Sátoraljaújhely local government
Zempléni Hadtörténelmi Egyesület (Zemplén Military History Club)
Sátoraljaújhelyi Városvédő és Szépítő Egyesület
 (Sátoraljaújhely Town Embellishment and Protection Association)
Zemplén Térségi Katasztrófa és Polgári Védelmi Szövetség
 (Zemplén Disaster Preparedness and Civil Protection Association)
 Eötvös József Club

Specialist training Park caretaker training

Skills development Improving cooperation skills with the help of citizens and teachers

Restitution service "Cemetery of Heroes" reconstruction
 Reconstruction
 Weed removal
 Repairing fallen/broken tombs
 Replacing the ornamental plants

Communication Providing information on the cemetery's significance in local history and on the reconstruction efforts of the prisoners (temporary exhibition at the prison museum)
 A documentary film on the project
 Opening ceremony
 News and reports for the media on the progress of the project

Project name "Reintegration and a new chance"
(location of the institution) (Heves County Penal Institution)

Period 2008/2009

Cooperating partners Secondary School of Agriculture, Commerce and Catering
Városgondozás Eger Kft. (Town Maintenance Ltd.)
RÉV Szenvedélybeteg-segítő Szolgálat (RÉV Addict Helper Service)
 TV Eger

Specialist training Park caretaker training

Skills development Self-awareness and conflict resolution groups

Restitution service Landscaping and flower planting
 Removing waste and snow ploughing
 Reconstructing four playgrounds

Communication A publication and a documentary film on the project
 News and reports for the media on the progress of the project

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4.7 Restorative Practice for the Social Re-integration of Offenders in the United Kingdom

“Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.”
 Tony F. Marshall

4.7.1 Introduction

“Justice” in the traditional punitive sense, does not always fulfill a victim’s view of what “justice” means. In the United Kingdom, the criminal justice system is based on retributive justice and this idea of working out the harm caused by the offender, and then sentencing him/her the with appropriate level of “harm” back does not always meet the needs of the victim, or the offender, like restorative justice can. If one contrasts the terminology of criminal justice: punishment, zero tolerance, criminal personality, with that of restorative justice (RJ): empowerment, social justice, healing; the difference is clear.

As a set of values, restorative justice offers great promise in regard to promoting healing and strengthening community bonds by addressing the criminal harm done to victims and communities. The context of personal negotiation allows flexible adjustment of agreements to the parties’ needs and capacities and a greater level of creativity than court processes.

Table 10
 Main features of retributive and restorative justice

Retributive Justice	Restorative Justice
Harm by offender balanced by harm to offender	Harm by offender balanced by making right
Focus on blame and guilt	Focus on responsibility and problem-solving
Action from state to offender; offender passive	Victim/offender/community roles recognized: collective response
Focus on offender; victim ignored	Victims’ needs central
Punishment (along with rewards)	Education
Extrinsic motivation – doing something because other people want them to	Intrinsic motivation – doing something because they want to
Victim–offender relationships ignored	Victim–offender relationships central
Offender’s ties to community weakened	Offender’s integration into community increased
Response based on offender’s past behaviour	Response based on consequences of offender’s behaviour



4.7.2 Restorative justice and young offenders

The *Crime and Disorder Act of 1998* set up the Youth Justice Board to oversee work with young offenders and introduced Youth Offending Teams (hereinafter YOT). Targets were set to ensure victims participated in restorative processes in 25% of relevant cases and 85% of these victims were to be satisfied. There are a number of different types of sentencing disposals that all allow for a restorative element. The *Youth Justice and Criminal Evidence Act of 1999* introduced a new primary sentencing disposal – the Referral Order – for 10–17-year-olds pleading guilty and convicted for the first time by the courts. The disposal involves referring the young offender to a Youth Offender Panel (hereinafter YOP). The work of YOPs is governed by the principles “underlying the concept of restorative justice”: defined as “restoration, reintegration and responsibility” (Home Office 1997). A Referral Order is compulsory in all cases where the juvenile is convicted for the first time and pleads guilty. Courts may make referral orders for a minimum of 3 and a maximum of 12 months depending on the seriousness of the crime (as determined by the court) and must specify the length for which any contract will have effect. YOPs consist of one YOT member and (at least) two community panel members. The purpose of their inclusion is to engage local communities in dealing with young offenders. Other people may be invited to attend panel meetings (any participation is strictly voluntary). Those who may attend include:

- the victim or a representative of the community at large;
- a victim supporter;
- a supporter of the young person;
- anyone else that the panel considers to be capable of having a “good influence” on the offender;
- signers and interpreters if required;
- surrogate victims.

The aim of the initial panel is to devise a “contract” and, where the victim chooses to attend, for them to meet and talk about the offence with the offender. If no agreement can be reached or the offender refuses to sign the contract, he/she will be referred back to court for re-sentencing. The YOT is responsible for monitoring the contract and is expected to keep a record of the offender’s compliance with the contract.

The panel is expected to hold at least one interim meeting with the offender to discuss progress – the first such review is recommended to be held after one month followed by at least one progress meeting for each three months of the contract. Additional panel meetings will be held if the offender wishes to vary the terms of the contract or to seek to revoke the order, or where the YOT feels that the offender has breached the terms of the contract. Once the period of the referral order is successfully completed the conviction will

be considered “spent” for the purposes of the *Rehabilitation of Offenders Act* of 1974, so they do not have a criminal record.

4.7.3 Does it work?

4.7.3.1 Pros

- Offenders are part of the process – part of the negotiation (not directed).
- Victims feel heard.
- Any unresolved difficulties between them can be settled – e.g. how to behave should they meet one another in the street.
- Deal with victims’ emotional as much as material needs.
- Some victims experience satisfaction from influencing the offender away from crime – transforming a negative experience into something positive.
- Offenders more affected by the experience than by formal prosecution and punishment
- Positive motivation to reform and a feeling that society is ready to offer re-acceptance.

4.7.3.2 Cons

- Short time scale for victim contact between sentence and first panel.
- Resources for victim contact.
- Is it truly restorative if offender has no say in whether a victim attends?
- Training for panel members is short (7 days) with 1 session on RJ – is this adequate? (Practitioners have 4 days on RJ.)
- Panel members are not involved in the preparation of each party for the panel – relying on our assessments/missing vital rapport for building opportunities.

Participant Satisfaction: For both victims and offenders satisfaction is consistently high ranging from 73-90%. Fairness in mediation and conferencing processes is also consistently high – ranging from 75-95% (Umbreit, Coates and Vos 2006).

Re-offending: The Restorative Justice Centre has reported on 41 studies where RJ has been proven to reduce re-offending. One meta-analysis looked at 14 studies with over 9,000 juveniles and indicated that participation in VOM had led to 26% reduction in re-offending. When the VOM youth did re-offend, they often committed less serious offences (Nugent, Williams and Umbreit 2003).

Statistics from the Ministry of Defence on juvenile re-offending rates for 2006 cohort indicated that over a one year period re-offending rates were 43% for Referral Orders compared to 55% for Fines; 62% for Action Plan Orders, 77% for Custody.



4.7.4 Prospects for the future

Restorative justice continues to be at the heart of the youth justice agenda, but there is still a long way to go to ensure that every team is working to their best ability to achieve the targets set out. Revised *National Standards* are due to be published and implemented during 2009, with an increased focus of YOT resources directed at the highest re-offending risk cases called the *Scaled Approach*. This will also require that YOTs have a range of restorative processes for victim participation with the aim of putting right the harm which victims and the community have experienced.

Guidance called the *Key Elements of Effective Practice* have been revised and advise that practitioners prioritise face-to-face restorative justice cases where there are direct, personal victims and the victim and offender are both willing. In preparation for restorative justice processes, victims and offenders should have the opportunity to meet with a restorative justice worker and restorative justice processes should be arranged in consultation with victims, taking into account their convenience, their views and their experiences. Satisfaction of victims should be regularly monitored.

A case example

A young male had broken into his local youth club and caused lots of damage including smashing up the television. The young person was charged with Criminal Damage and was sentenced to a 6 month Referral Order. An assessment was made of the young person and it came to light that he had just received some bad news about a family member and had gone out and got drunk with his friends. Out of boredom and frustration, he had broken into the youth club and caused the damage. In hindsight he felt very remorseful for his behaviour and was ashamed that he had damaged his own local youth club. He knew the Youth Worker well and she had always been kind to him. He really wanted an opportunity to meet with her face to face so he could explain and apologise and also offer to do something to put things right. The Youth Worker was keen to be involved in the process and attended his Youth Offender Panel. The young person had the chance to explain, whilst hearing from the Youth Worker about the impact of the crime for the youth club. An agreement was made that the young person would work with the other youth club members on a fundraising project to get a new television. Both the young person and the youth club were happy with this outcome, and the young person was able to put right the harm that he had caused.

In the United Kingdom, restorative justice is used in all types of crime across the youth justice system, from pre court proceedings and diversion from prosecution through to the more serious offences for which there is a sentence of imprisonment.

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4.8

The Use of Family Group Conferencing/ Decision-making with Prisoners in Prison Probation and During After-care in Hungary

4.8.1 The possibilities of the prison probation services in using family group conferencing

For years now, the Hungarian Probation Service has considered it one of its main tasks to use the methods of restorative justice more extensively in their work with offenders. These efforts were supported by the fact that the probation service is now responsible for the tasks related to mediation and as such mediation in criminal cases has become an institutionalised form of restorative justice. The Probation Service is working on the implementation of restorative justice principles in other types of cases also, and is trying to ensure that the various techniques and procedures become integral parts of the probation officers' case management methodology. To this end, various experimental projects were launched. One of these was a project of which the purpose was to include the method of family group conferencing/decision-making in the case management of probation officers.

As a target group for family group conferencing/decision-making, we chose the inmates that were to be released from prison soon. The probation officers start their work with the inmates already prior to their

release. Prison probation starts in penal institutions at least six months before the scheduled date of release. In reformatories, it is begun at least two months prior to the expected temporary release date.

Work with those already released involves two types of case management depending on whether or not the offender is under probation supervision after release. It is obligatory to order probation supervision if the offender is released temporarily from a reformatory but it is only optional when an offender is released from prison on parole. Probation supervision is imposed on the offender by the court responsible for the enforcement of the sentence.

Those offenders who are not placed under probation supervision may voluntarily request the help of probation officers to help them manage their life after release. These cases are referred to as "after-care" cases.

The following persons may be provided after-care services:

- persons released from prison on parole, if the prison judge has not placed them under probation supervision;
- persons released after serving their full prison term;
- persons released from the reformatory permanently – the after-care services are prepared and then provided by the after-care officer of the institution with the assistance of the probation officer.

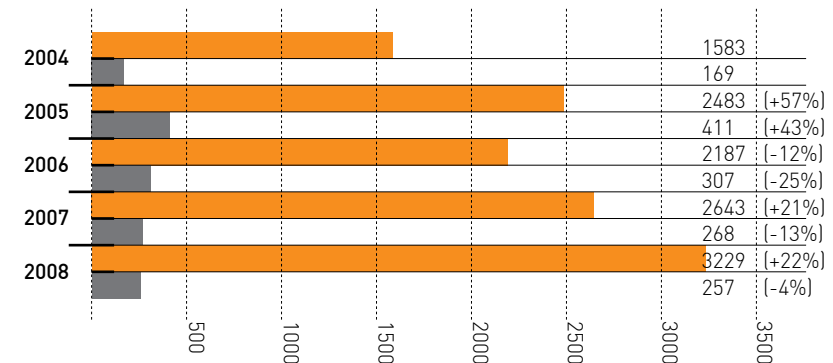


Figure 12
 The number of pending after-care cases in the given year and changes therein from one year to the other between 2004 and 2008

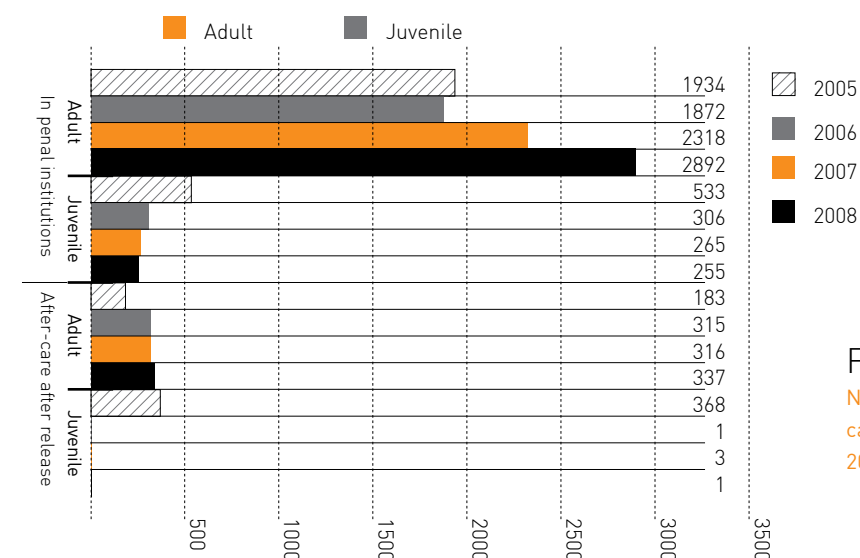


Figure 13
 Number of after-care cases between 2005 and 2008



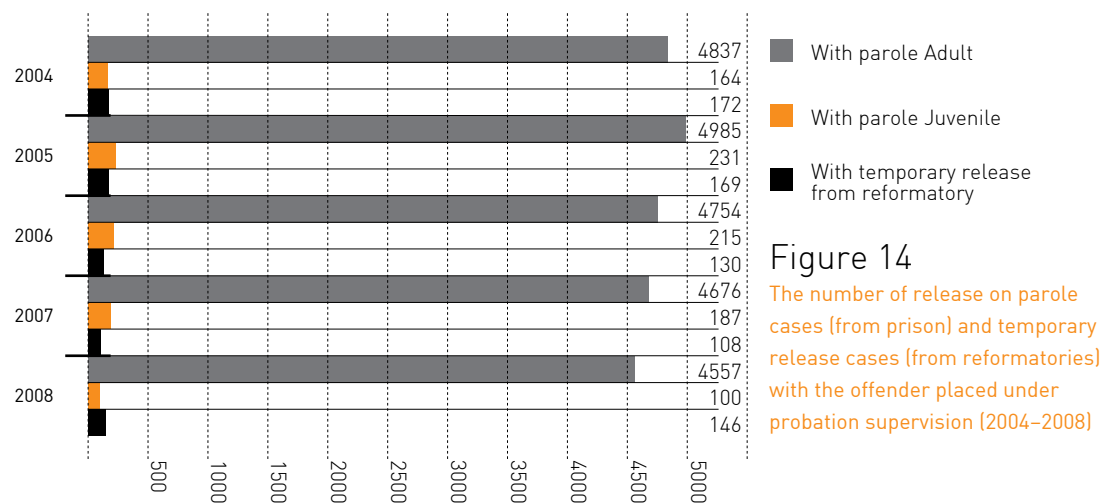


Figure 14
 The number of release on parole cases (from prison) and temporary release cases (from reformatories) with the offender placed under probation supervision (2004–2008)

Apart from the official element, after-care is the closest in nature to social work from those activities carried out by probation officers that are collectively referred to as judicial social work. After-care is the process of providing assistance to those requesting it. After-care focuses on the needs of the offender and is developed jointly by the provider of the assistance and the offender. The difference between after-care and probation supervision is that after-care has no function of control over the offender because in after-care no behaviour rules are imposed on the offender. The relationship between the person providing the assistance and the offender is a contractual one and therefore there are no criminal law consequences if the contract is breached. The length of the after-care relationship, and also its beginning and end dates are defined in accordance with the characteristics of the case.

Although case management methods differ depending on whether the relationship is mandatory or voluntary, the goal of the process is always the same: the ultimate goal is to prevent re-offending and to help the offenders manage their lives after release.

The areas of intervention for probation officers are as follows:

- family and community relationships;
- employment;
- housing;
- administrative tasks (such as the replacement of missing documents);
- studies/training;
- medical treatment;
- developing skills and changing behaviour.

The most common methods used for identifying the problems:

- questionnaires;
- information provided to individuals or groups while still in prison;
- management of individual cases;
- administration of social issues;
- group activities aimed at skills development.

We launched a programme in 2007 with the purpose of extending the scope of these methods. The programme was supported by the National Crime Prevention Board. The goal of the project was to test restorative techniques on offenders already released or close to release and to supplement

the methodology of probation services and after-care by adding new methods. We decided to focus on one specific group of those to be released soon: those with addiction issues. We wanted to put more emphasis on family relationships and on securing family and small community resources for reintegration purposes. Our goal was to bring up the issues of alcohol consumption and drug abuse, to raise the offenders' and their families' awareness of these problems and to make the offenders willing to change and in the process to rely on their families as the number one source of support.

The method of family group conferencing/decision-making seemed to be an appropriate tool for this purpose. In the pilot project, we trained probation officers for the use of the method and we tried to see to what extent the method can be integrated with the after-care or the probation supervision of the released. The programme entitled "For a Free Life in Harmony. The Involvement of the Family, the Immediate Community and Professionals in the After-care of Offenders Struggling with Addictions" was implemented between September 2007 and April 2008.

Our partners and other participants in the programme included penal institutions, a foundation providing trainings on the family group conferencing/decision-making method, and professionals/organisations specialised in the study and treatment of addictions.

Partners:

- Budapest Penitentiary and Prison
- Juvenile Penal Institution of Tököl

Participants:

- Vidia Negrea, an expert of the family group conferencing/decision-making method at Community Service Foundation of Hungary (*Közösségi Szolgáltatások Alapítványa*);
- Ákos Topolánszky and Dr. Edina Kósa from the National Drug Prevention Institute (*Nemzeti Drogmegelőzési Intézet*);
- Borbála Paksi, researcher and presenter from *Viselkedéskutató Kft.* (a behaviour research organisation);
- Dr. József Zelenák from the Peer Helper Workshop Foundation (*Kortárs-segítő Műhely Alapítvány*).

4.8.2 The implementation of family group conferencing/decision-making in the project

4.8.2.1 Reporting and preparation

As a first step in the application of family group conferencing/decision-making, the probation officers working in penal institutions acting as case managers identify the cases in which it is possible to apply the method. Prison officers may also inform the prison probation officer when they feel it is plausible to organise such a conference in the case of a prisoner. The prison probation officer has an interview with the prisoner and informs him/her of the method of family group conferencing/decision-making and identifies the prisoner's motivation and needs. If the person to be released seems motivated and is willing to cooperate, the prison probation officer prepares a report for the facilitator indicating the demand for a group conference to be organised. The next phase is the preparation of the conference. The facilitator contacts the prisoner, records information of the person's family and friends, and also of any supporters or institutions the prisoner has had contact with. Then, the prisoner and the facilitator start to discover problems that may arise after release. It is the prisoner soon to be released who specifies together with the facilitator who he/she wants to be invited to the conference. The facilitator calls the family members and friends or sees them personally and invites them to the conference. The facilitator also gathers information about their needs and opinions. The case manager probation officer,

the prisoner to be released, the family members, the friends and the affected institutions (school, family welfare organisation etc.) may also bring up problems that they want to be solved at the conference.

4.8.2.2 The procedure of the family group conferencing/decision-making

At the family group conference, the invitees discuss the problems identified in the preparatory phase. The conference is led by the facilitator, a neutral party present at the conference.

After the participants introduce themselves, information is exchanged. First, the case manager probation officer shares with the participants of the conference the reason for convening the group conference. The participants have a chance to respond to the probation officer's ideas and may bring up additional problems. After the information exchange phase is complete, the list of the problems to be solved is compiled, and the family has to be informed of the resources and assistance available. The professional helpers can draw attention to the consequences of unsolved problems, offer solutions, and they can inform the family of how they can provide assistance to them in the process.

When the participants have reached a consensus about what the problems are, they can start developing the family plan. A part of the family plan is the so-called "private time", when the family must attempt to draft a plan on their own. The plan must be as specific as possible. It must list concrete deadlines, undertakings and responsibilities.

After this, the family presents the plan to the other conference participants, and each participant must approve it. The plan is then put in writing and is signed by all participants. The implementation of the plan is monitored by the facilitator. At the conference, the family and the professional helpers may also schedule the next meeting to discuss the results. If the implementation of the plan is hindered, or if there is a risk of failure, a new conference may be convened to modify the plan. It is advisable to carry out a follow-up procedure six months or a year after the plan has been implemented. The follow-up procedure's goal is to check what has happened to the family since the introduction of the plan and whether the results have been permanent.

4.8.2.3 Results

The problems brought to the surface by the family and the professional helpers included deteriorating or destroyed family relationships, family backgrounds burdened with conflicts, child custody and housing issues, alcohol and substance abuse, pending criminal cases, lack of motivation and indifference. In response to these problems, the family plans usually addressed housing problems, debts, financial issues, job search, vocational training, intimate relationships, relationships with parents and children, and issues related to how leisure time should be spent.

It is a key result that communication in general was resumed between family members and that the family members actually put in words what they needed. At the conference, the family members had an opportunity to communicate with professional helpers directly. The personal meeting and the honest and open atmosphere built trust between the participants and contributed to establishing a long-term relationship with the helpers. It is an important advantage of the method that the professional helpers have a chance to share their views and expectations with the other professionals, and this also promotes cooperation between professionals.

4.8.2.4 Experience

We experienced that those families and prisoners had been the most cooperative where the family was glad that the prisoner was coming home and where the family had not fallen completely apart. Where the family had suffered for a long time due to the convict's serious alcohol or drug problems, or his/her lifestyle, it had been a relief for them when the convict was in prison. It was therefore particularly difficult to motivate such families. Family group conferencing/decision-making is the most effective when it is applied before the convict's release from prison, as both the offender and the family lose motivation after release.

Those fighting addiction tend not to realise the gravity of their problem. They often refuse to admit that they have a problem and will not discuss it, and therefore they will not attend the family group conferencing/decision-making or they say that they do not believe that their addiction is a problem. Sometimes it happens that the family refuses to acknowledge the difficulty. In conclusion, family group conferencing/decision-making is not suitable for settling unresolved, complex conflicts with a long history, not even after thorough preparation.

4.8.2.5 The project's future

We won funds through another call for proposals, and as a result we were given a chance to continue the project. This second part of the project finished in May 2009. Although new elements were added to the second part on the basis of the experience we had gained from the first project, we otherwise kept on practicing the method of family group conferencing/decision-making in the second phase also.

One of the most important lessons we learnt was that the real challenge is to generate and sustain motivation in the implementation phase. The members of the potential target group usually showed little interest. Moreover, some of those few who were curious about the possibility changed their minds later. Another problem that may arise is that some of the undertakings are not kept after release as the motivation of the released prisoner may change. We therefore added a new method to the case management "toolkit" of the probation officer: we decided to use the motivational interviewing method with substance abusers while helping them. Another group of 51 probation officers and 2 prison educators were given training on how to lead a motivational interviewing and family group conferencing/decision-making. The probation officers attending the training were offered a chance to discuss cases and receive supervisory help during the programme. An educational film was prepared of the family group conferencing/decision-making which we would like to use for future trainings.

In the future, we would also like to follow certain past cases, and to evaluate the efficiency of the method, and its role in the reintegration of the released. However, it is safe to conclude that family group conferencing/decision-making already appears to be an efficient tool for probation officers. The majority of those probation officers who were involved in family group conferencing/decision-making as case managers said that the method is excellent for identifying the family relationships and friends of the offender, that is, those resources that the probation officer will be able to use while managing the case. The family group conferencing/decision-making method helps discover the dynamics and the structure of the family, and this is useful information even if no family plan is adopted or if it is not implemented.

The project was carried out during 2007 and 2008. 20 probation officers attended the family group conferencing/decision-making training and 12 of them actually participated in conferences as facilitators. 33 soon-to-be-released offenders signed a statement of cooperation and agreed to attend the conference. 17 conferences were organised in the period mentioned above. A total of 74 family members and friends and 15 professional helpers attended the 17 conferences altogether. 21 persons undertook specific obligations at the conferences.



5.

General Perspective

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5.1

Why Restorative Justice Needs Research

5.1.1 Introduction

Before we consider how restorative justice tries to make the criminal justice system work better, we can take a step back to consider how restorative practices can create a society in which people are less likely to harm each other; but when it happens, we would help the victim, and look for ways to prevent further trouble.

5.1.2 How to reduce the crimes and other harms which people inflict on each other?

Hungary has followed this logic, by introducing the *National Strategy for Community Crime Prevention* in 2003. This includes non-violent conflict resolution, enhancing small-community integration and control and other social measures (Lévay 2007–2008). Criminologists have suggested many ways of reducing the pressures towards crime. Most of them are part of social policy, and have little to do with criminal justice policy.

A comprehensive policy for reducing the amount of harm, which citizens cause to each other, would ideally start in schools, and the *Zöld Kakas Líceum* (a Hungarian high school, see article 2.5 in this publication) has shown how this can be done even with students who had not been successful in other schools. Among other things they



were encouraged to make their own rules; but soon they found that they had so many rules that many of them were broken. They therefore concentrated on the essential rules, and at the end of the year they summed up their achievement: “We’ve learned punctuality. We’ve learned to respect our fellows. We’ve learned to cooperate. We’ve learned to be serious in serious situations.” (Kerényi 2006)

Schools in Hull, in northern England, have adopted restorative practices, with striking results for improving behaviour and the school’s performance generally; there are plans to give restorative training to everyone in the city who works with children, and to make Hull into a “restorative city” (IIRP 2008; Mirsky, n.d.).

Another version of this method is “discipline that restores” (hereinafter DTR). The principle is that the teacher remains in charge of the framework of the student–teacher relationship, but respects the student by offering choices at every stage. After analysing how attempts to control through punishment can make matters worse, Roxanne Claassen, the main author, invites each new class at the beginning of the school year to agree on their own ground rules and to set their own targets for the year. A “flowchart” of increasingly serious but non-punitive interventions is explained. When a conflict arises, the first step is a “constructive reminder”. The next time, the teacher will “actively listen”, and talk to the student. If there is a further problem, the student can choose between four options for dealing with it (I impose on you, we go to an arbitrator, we go to a mediator,⁶⁴ we agree between ourselves); usually they choose the third or fourth option. For uncooperative students there may be a spell in a “thinkery”, a place where another teacher helps the student to think through what happened, who was affected, and plan for working together. If the problem is still not resolved, a “family conference” is held. Only then, if necessary, will the school authority structure be used (Claassen and Claassen 2008). Methods like these have the potential to teach children respect for each other, animals, and the environment.

Research in schools is also reported by Sherman and Strang (2007: 53–4) in a wide-ranging review of published research, reporting reduction in anti-social behaviour and increased feelings of safety among students, though not all the findings were statistically significant. Belinda Hopkins (2009: 187–8) reports research showing similar benefits in a school for residential care of young people in Hertfordshire, England.

The next step towards a restorative society is to create a network of community mediation centres, as in Finland (see article 2.2 in this publication), Norway, and parts of the United Kingdom. They can deal with civil disputes and those which can be privately prosecuted in continental legal systems; they could also extend their work to include victim offender mediation.

5.1.3 How to respond when crimes are committed?

The traditional justice system, as we know, is based on confirming that a crime was committed; that the accused is guilty of committing

it; and imposing a punishment (or sometimes another sanction). This gives the accused an incentive to deny or minimize what he or she has done. Although restorative processes are only used when the accused accepts responsibility, it is claimed that they make offenders more likely to do so. They ask different questions:

- What happened?
- Who was affected?
- What is needed to put it right?
- Who should do it?
- How can members of the community be involved?
- What would make it less likely to happen again?

The task of fundamental research is to ask whether these are good questions; practical research asks whether they were asked in the right way and led to the repair of the harm.

5.1.4 How well are we doing?

Just as, when we were considering how to respond to crime, we began by considering how to prevent it, when we now consider the response itself, we begin by considering how the response is designed. So, we have to explore what the qualities of a good justice system are. We do not go straight to the outcome; we look first at the structure and the process. In this context, research could be compared to an audit.

5.1.4.1 Structure

Researchers, then, should be involved in the design of the system (in German this is called *Begleitforschung*, accompanying research), although this is not always possible for political reasons: it can be difficult to explain to senior lawyers and politicians the relationship of restorative justice to criminal justice. Mediation in criminal cases has only recently been introduced in Hungary (Act CXXIII of 2006, quoted by Lévy 2007–8), so there is still time to influence the direction in which it develops. Researchers may begin by looking at the preventive policies mentioned above, and how widely restorative practices are used in schools and communities. As regards criminal cases, if it is accepted that restorative justice should include participation of the community, as supporters of victims and offenders, as volunteer mediators, and managers of NGOs, researchers with their knowledge of the theory and practice in other countries can advise on legislation that enables this to happen; evaluate how well it is working, both numerically and qualitatively; and recommend changes later if necessary. They can assess whether there is full use of volunteers, and whether these represent all groups of society, including ethnic minorities: for example, how many Muslim mediators are there in the United Kingdom, how many Roma mediators in Hungary? Some programmes have used police officers as mediators; research has found that some do it very well, and the experience can broaden the outlook of the officers, but there are problems such as under-preparation, coerced participation and lapses in neutrality, “particularly in the case of the more experienced facilitators” (Hoyle et al. 2002: 66).

If we accept the principle of minimum state intervention (“as much state as necessary, but as little state as possible”), researchers should look at the extent to which cases which do not need the full power of the state are “diverted” (kept out of the system); for example, do prosecutors refer cases to be assessed for mediation rather than prosecution? Can people go straight to mediation, for civil or privately prosecutable cases? It is helpful if the legislation is designed so as to make this possible.

The response to crime is a matter of public concern, and researchers would want to see what arrangements are made for public accountability. Is an annual report published? Are some resources of staff time allocated to explaining the restorative concept to the public and to professionals?

⁶⁴ Terms such as “mediator” and “facilitator” will be used interchangeably in this paper.



5.1.4.2 Process

Then researchers can see whether the process is being operated according to restorative principles. This is because in restorative justice the process is important, as well as the outcome. So researchers will look at how well it was carried out, and whether it involved victims, offenders and members of the community? Since restorative justice is concerned about victims as well as offenders, they will also ask if support is available for victims whose offenders are not caught. In Hungary, for example, this would mean examining the operation of the *Act CXXXV of 2005 on Victim Support and State Compensation* (Lévay 2007: 8), but many victims need emotional support as much as, or more than, compensation, so this should also be part of a restorative system.

Participation by victims will never reach 100%, since it is a voluntary process, but if it is well explained and becomes well known, the level should rise. There is a presumption that the take-up will be higher if the process is explained to victims (and offenders) by mediators, who understand the process well. The way in which they are contacted also makes a difference: by letter, phone or visit. Mediators may also discuss with victims whether they would prefer one-to-one mediation, or indirect mediation, or a “conference”. One reason for low attendance can be that victims are not consulted about the time when the meeting will be held. Research in the early days of youth offender panels in England found that only 22% of victims attended meetings (Crawford and Newburn 2003: 185), although (partly as a result of this research) efforts are being made to improve this.

Research into the process will include questions such as:

- percentage of victims contacted;
- percentage of victims agreeing to mediation;
- percentage of cases enabling victim and offender to meet in a mediation/conference.

There has been criticism of the conferencing process, especially for young offenders, on the grounds that they may be intimidated by “a roomful of adults”. With this in mind the English legislation allows a young person to be accompanied by an adult supporter (invited by the young person with the panel’s agreement) and anyone else whom the panel considers to be capable of having a good influence on the offender, in addition to parents or guardians. The early research found that only in 15% of panels was the young person accompanied by more than one adult (Crawford and Newburn 2003: 122).

The supporters need not be lawyers – some would say that lawyers should not take part in the mediation, because the restorative meeting is not a trial. It does not take place unless the accused has already accepted some responsibility for the harm caused. Advocates of restorative justice argue that the prospect of a restorative process, rather than a punitive one, encourages the admission of guilt; the presumption of innocence until guilt is proven “means no accountability, and it sets the conditions for re-offending” (Sawatsky 2009: 120). It is common for defending

lawyers to advise their clients to plead “not guilty” and say nothing, in the hope that in some way, perhaps a procedural technicality, they can escape punishment. The accused is of course entitled to legal advice, under Article 6 of the *European Convention on Human Rights* (Right to a fair trial), but the lawyer should be aware of restorative principles. When the outcome is a restorative one, the accused has an incentive to admit his or her involvement in causing harm, and “wipe the slate clean”. It will be interesting to see if researchers can find a way to explore this hypothesis. It is supported by the experience at Hollow Water, Manitoba, Canada where considerable sexual abuse was admitted, in two cases without a victim even coming forward. Of 107 cases, only 2 were found to have re-offended (Sawatsky 2009, chapter 4: 99). Further evidence is provided by research in England, where the use of restorative justice doubled (or more) the offences brought to justice as diversion from criminal justice. In an experiment in Brooklyn, a crime was twice as likely to be brought to justice where restorative justice was used, as compared with the court process (Sherman and Strang 2007: 4 and 82–3).

Any good system needs some form of follow-up and feedback, to assess its performance. Research is an investigation in depth, which can usually only be carried out every few years; monitoring is routine record-keeping, including asking the participants how well they thought the process was conducted. In both cases the results should be given to the mediators, and included in the training of future mediators. It may be possible to establish a practice review group, including practitioners, administrators and researchers, to consider issues that arise in day-to-day practice and consider whether changes are needed. These may be local arrangements, or may be passed to the national organization which supervises restorative work. It is suggested by Sherman and Strang that this organization should be an official “Restorative Justice Board” (2007: 88), but there is also a case for an organization that is independent of government and can even press the government to make changes when necessary.

Researchers will also want to look at the training of mediators, both for their skills in listening and leading the meeting, but also to ensure that they learn to recognise their own prejudices and treat everyone with respect, including ethnic minorities. They will also want to consider whether arrangements are in place to make sure that the process is conducted fairly. In addition to the basic skills, such as active listening, and condemning the act but not the person, mediators need to learn what to avoid, such as dominating the discussion and imposing opinions. There are also more complex issues: has the facilitator used subtle techniques to persuade the victim and offender to follow a “script” of forgiving and apologising, which may not be what they really want (Zernova 2007)? Or is that the correct thing for the facilitator to do, in the interests of individual well-being and social harmony?

Even a restorative process, however, can be conducted well or badly; in addition to the routine monitoring, researchers will want to discover whether there is a grievance procedure (a restorative one, of course!), and whether the principles of restorative justice



are correctly explained to the participants – otherwise they may mistake bad practice for normal practice, and not realize that they have grounds for complaint.

Research by Lawrence Sherman and Heather Strang (2007: 44–5) examines questions of this kind, and finds that restorative justice in general, and the programmes which they studied in particular, comply with legal principles and those of the United Nations (2006: annex II). Other standards which researchers may want to use as a basis for assessment include those of the Council of Europe (1999) and CEPEJ (European Commission for the Efficiency of Justice 2007).

Finally, a detail which may be unexpected: researchers may want to ask whether refreshments are offered to the participants after mediation. In some models of mediation and conferencing, this is normal practice; it may for example fill the time while an agreement is being written out, and sharing food and drink is a profound way of symbolizing reconciliation (Costello et al. 2009: 36; Hopkins 2009: 139).

5.1.4.3 Outcome

Having looked at the structure and the process, let us now turn to the outcome. At this point the research becomes more numerical. But with these numerical data, and the ones I mentioned earlier, it is important to remember the dangers. Firstly, numerical research, and randomized controlled trials (hereinafter RCTs) in particular, are not necessarily the best method for all purposes. They need large numbers in order to achieve statistical significance, and therefore it is often not practicable to explore in depth the quality of the services being studied. Was it good restorative justice, indeed was it restorative at all? With smaller numbers, statistically conclusive findings are less likely to be achieved, leading to disappointment all round. There is a tendency to focus on a primary outcome of interest to the funder, which is often the reconviction rate. Aidan Wilcox and other researchers (2005) have pointed to several problems. Drop-out rates can be as high as 33 to 68%, and there is then a danger that the remaining cases are no longer representative. RCTs originated in medical research, but in social research the important element of double-blind is not possible.

Offenders may have received other treatments in addition to the victim–offender meeting, so the latter may not be responsible for the “success”. (Conversely, Wilcox and colleagues might have added, if additional measures which the offender needs are not provided, this lack rather than the restorative justice process may be responsible if he or she re-offends.) As for victims, their satisfaction may be simply because someone has listened to them, rather than resulting from the restorative meeting itself (Wilcox et al. 2005). In one case, when the random allocation method was used, satisfaction was lowest among the victims who were promised restorative justice but were then allocated to the control group and consequently did not receive it (Sherman and Strang 2007: 63–4).

Qualitative research, despite its necessarily smaller samples, can complement the findings of RCTs. Action research or “accompanying research” has already been mentioned, and was used by Carolyn Hoyle and colleagues (2002). It does not merely tell us about restorative justice in general, but indicates whether this restorative programme is being well conducted; and it tells us not after the project but during it, and can (as these researchers did) propose improvements while it is still running. The relatively small numbers of such studies may be criticized; but research such as that of Hoyle and colleagues, and Zernova (2007), can at least draw attention to issues, suggesting that other projects should be on the look-out for them. If they turn out to be widespread, changes may need to be made in the practice – and even the theory – of restorative justice.

Secondly, there can be undesirable side-effects of basing policy on statistics. This has been a particular problem in Britain. People do things to make the statistics look better, which do not necessarily make people feel better. One example among many: the efficiency of the police is judged by the number of arrests they make, so they arrest people who are easy to arrest, or people for whom a warning would be quite sufficient. Some more serious offenders, whose cases are more difficult to investigate, remain free; others are not referred to mediation, although their cases might be suitable. There are other examples of the harmful effects of statistical targets, from the National Health Service and schools.

A question that will naturally be asked is the percentage of agreements fulfilled fully or partly. An interesting finding is that an agreement to make reparation may be at least as effective as enforcement by the threat of punishment (Sherman and Strang 2007: 58–9). However, in those cases where reparation is not completed, some form of enforcement will be necessary, and researchers will want to see whether it is carried out in a restorative way, and how effective it is.

5.1.4.4 Reparation

Reparation can take different forms. Some victims want no more than an apology, or ask that the offender should do some community work; for others the priority is that he or she should not offend again, and should undertake training, education, therapy, anger management, or other programmes that will help to avoid re-offending. Therefore researchers should ask whether there were adequate opportunities for community work, perhaps offered by NGOs, and appropriate rehabilitative programmes. If these are not available, and there is a high rate of re-offending, it cannot be said that restorative justice has failed – it is the supporting services that were not provided. In one English prison mediation was carried out between a burglar and three young women who shared a flat which he had broken into. The session was observed by a former Chief Inspector of Prisons, who was impressed. It went well, they expressed their feelings, and the offender told them how and why he became a burglar. He had had a typically



disadvantaged upbringing, had missed school and had not learnt to read and write, he had other problems including drug addiction. He agreed to attend programmes including literacy classes and addiction therapy. Afterwards the former Chief Inspector spoke to the prison governor, and asked if those programmes were available in the prison; he was shocked to hear that none of them were (Lord Ramsbotham, personal communication). If that young man fails to keep his agreements, who is responsible?

Researchers may also ask whether young people who have made reparation by community service receive thanks and perhaps a certificate; this symbolizes the fact that they have not been punished as outcasts, but have made a contribution to the community and are part of it. Even better, they may work alongside volunteers who are not offenders, and a plaque can be installed giving them credit for their work. Programmes in prisons, for example in the United Kingdom and Hungary (see articles 4.5–4.6 in this publication), show ways of developing the good qualities of offenders. The current practice in England of making offenders work in public places, stigmatized by wearing distinctive coloured jackets, is completely contrary to this principle.

A common criterion is “victim satisfaction”, which in almost all research is found to be very high and significantly higher than courts when this comparison is made. Victims who experience restorative justice are less likely to suffer post-traumatic stress, and return to work sooner. But research has its pitfalls: in one study there were so many restrictions on cases that could be included in the programme that the numbers were insufficient (Sherman and Strang 2007: 83).

When people, especially politicians, ask whether restorative justice “works”, they commonly mean “Does it reduce reconvictions?” Sherman and Strang found (2007: 68–71, 88) that reconvictions were often reduced, not always significantly, but were almost never increased. In the controversial field of violence within families, they cite Canadian research finding a reduction by a half in emergency visits to the home, compared with an increase of 50% in comparison families (citing Pennell and Burford 2000).

A study of three groups of programmes in different parts of England looked at the question of reconvictions. Results varied, but in total offenders who participated in restorative justice were reconvicted statistically significantly fewer times than those in the control group. It may be relevant that the programme which did best was the one (in Northumbria) which used conferencing rather than one-to-one mediation (Shapland et al. 2008: 66–7).

Restorative justice can save costs in courts, in prisons, and in health care for victims, according to Sherman and Strang (2007: 86). They could have added that at least some of the savings could be used to provide more restorative justice and other non-custodial measures, if there were a simple method of transferring the funds. The research by Shapland et al. (2008: 67) found significantly lower

costs in one group of programmes, although in the other two the difference was not statistically significant.

5.1.5 Conclusions

This article began by referring to the aim of reducing crime, for which social policy is more important than criminal policy. But can restorative justice contribute to it? When many offenders tell their stories, there are bound to be indications of societal pressures that lead to crime. This is not to deny that individuals have choices about resisting those pressures; but even a healthy plant cannot grow well in poor soil. New Zealand, once again, has shown the way: some facilitators, when they notice clusters of cases from a particular geographic location or school, gather a number of people from social services, police and so on to consider whether there can be a plan to tackle the pressures that affect young people (MacRae and Zehr 2004: 56–64). Similarly in South Africa, the *Zwelethamba programme* links “peace-making” with “peace-building”, and includes a system for transferring funds to it (Froestad and Shearing 2007; Sawatsky 2009: 59). This does not address major problems, including inadequate funding of essential services such as education, or inequalities in society, but it is a step in the right direction. The involvement of volunteers in the process helps to spread public awareness of social needs. If similar schemes can be introduced in other places, they will need to be researched to assess their effects.

I have tried to go back to first principles, and have suggested that we should begin by thinking about prevention. If young people learn to resolve their differences and misunderstandings in a respectful way, we shall be building a society in which people respect each other’s humanity. Research on such programmes can show how well it is working and how it can be improved, and can inform others so that the pioneering examples can be followed. Similarly, the extent and quality of community mediation can be assessed.

Some of these proposals are based on a particular view of restorative justice, believing in the value of involving members of the community, and where possible resolving conflicts by agreement, without the imposition of authority.

Of course some people will still harm each other, and the restorative movement proposes that we should respond with a different set of questions, based on putting right the harm and looking for ways to avoid more of it happening in the future. This response needs research into its structure, its process and its outcome, and I have suggested that researchers should be involved at the design stage, to assist the legislators (and to avoid excessively detailed legislation). I suggested some of the points which researchers could consider.

May I end by stressing three particular points which researchers should look for.



1. When offenders agree to make reparation, are arrangements in place to enable them to do so?
2. Are the circumstances regularly discussed, to see how pressures towards crime can be reduced?
3. Can a system be introduced by which money saved on prisons could be transferred to non-custodial ways of dealing with offenders?

If research is focused on these questions it will help us to achieve more effective restorative justice and to build a more restorative society.

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5.2

The Hungarian Experience of Introducing Mediation in Criminal Procedures

5.2.1 The introduction of the mediation procedure in Hungary

From 1 January 2007, mediation was introduced in criminal procedures, and as a result, since then, victims and offenders have had the possibility to resolve their issues through mediation (see also article 3.4 in this publication). Mediation is a method of alternative conflict resolution in which the parties at dispute settle their conflict with the assistance of an external, neutral third party. The settlement is an agreement providing a solution that is acceptable for both parties. Mediation has become widely used in various fields over the past few decades. In Hungary, mediation was applied in minority, education, family and labour conflicts before 2007. Also, there have been attempts in the past to put the method into practice in business life and in the healthcare system.

Mediation has been used in the criminal justice system since 1 January 2007. As a result, the previous, offender-centred and retributive approach has changed and the victims' needs have gained more focus. Criminal mediation is made possible by a set of rules in

the *Criminal Code* (hereinafter CC)⁶⁵ and the *Criminal Procedure Code* (hereinafter CPC)⁶⁶ while the more practical side of the procedure is regulated in the *Act on Criminal Mediation* (hereinafter ACM).⁶⁷

Under the relevant regulations, mediation is available for both adult and juvenile offenders if the crime is a crime against the person, a traffic offence or a crime against property not punishable by more than five years of imprisonment. Mediation is only available if the parties voluntarily agree to participate, if the crime has a victim and if the offender pleads guilty. The offender is not eligible for mediation if he/she is a habitual offender committing a similar crime for the second time or he/she is a third-time offender, he/she is serving a term of imprisonment or is under probation at the time of the crime. Mediation is excluded by law if the crime has resulted in death. The prosecutor or the court of first instance makes a decision on whether mediation should be used in the given procedure. The mediation procedure is carried out by the probation officers of the Office of Justice.

The method of mediation generated interest within the profession, particularly on the part of mediators, and Office of Justice officials. Those interested considered the emergence of mediation in criminal justice such a paradigm shift that could fundamentally change the attitudes to punishment and compensation, the relationship between these, and also the role and the place of the victim and the offender in the criminal procedure.

The Office of Justice had limited time and financial resources to prepare for the use of mediation. In 2006, the office, in cooperation with Partners Hungary Foundation,⁶⁸ completed the mediation training of sixty probation officers through a call-for-proposals procedure. The office launched a mentor programme to provide professional support and assistance to those mediators who started their work on 1 January 2007.

At that time, it was uncertain how often prosecutors and judges would use mediation. At first, the Ministry of Justice and Law Enforcement estimated that the number of mediation cases would be around 500 in the first year of application. However, the actual figures and the success rate exceeded all expectations. In 2007 alone, mediation was initiated in 2,451 cases. This meant a workload for probation officers that was larger than expected, especially since probation officers carry out their mediation-related tasks in addition to their original tasks. That is partly why attorneys have also been allowed to act as mediators in criminal cases since 1 January 2008. For this, they have to apply to the Office of Justice, and if the application is accepted, then a contract is concluded with them.⁶⁹

5.2.2 Research summarising the experience of the first year

In the first and almost full year of application, a lot of experience was collected about mediation in practice and a number of questions arose that needed to be answered for a more efficient application of the programme in the future. In the spring of 2008, the Ministry of Justice and Law Enforcement committed Partners Hungary Foundation to complete

⁶⁵ Sections 36, 107 and 342 of Act IV of 1978 on the Criminal Code (CC).

⁶⁶ Sections 221/A, 224, 114/A, 215, 272, 459 and 485/C of Act XIX of 1998 on the Criminal Procedure Code (CPC).

⁶⁷ Act CXXIII of 2006 on Criminal Mediation (ACM).

⁶⁸ Partners Hungary Foundation was established in 1994. The main goal of the organization was to prevent and manage conflicts stemming from the democratisation process of the country. Its original objective was to use, hold trainings on and popularise such methods of cooperation and conflict resolution that had been unknown in Hungary before then. The Foundation is a member of Partners for Democratic Change International, an international network.

⁶⁹ Section 3 (1) of the ACM allows attorneys to act as mediators in criminal cases.



a research project for the collection and the analysis of the experience gained so far in Hungary regarding the application of criminal mediation.

Our research was based on the presumption that mediation is in the interest of the parties to the criminal procedure, and we also presumed that mediation is an effective new tool of criminal justice from an economic and social aspect. Before the research, our expectations were that the parties would use the opportunity when a mediation procedure was offered, and the rejection rate would be low as we felt that mediation is in the best interest of both parties. We therefore did not expect a significantly higher proportion of rejection among victims.

We assumed that the agreements made in the procedure would be acceptable for both parties, meaning that all affected parties would consider the agreement a satisfactory conclusion of the case, and therefore that the affected parties would be pleased with both the outcome and the procedure itself. We also presumed that creative solutions would be reached that take the actual needs of the parties (as discovered in the procedure) into consideration. We presumed that the solutions would be much more than merely a punishment or compensation and as such they would increase the satisfaction of the participants. In a traditional criminal procedure, no such solutions are available, that is, the court cannot include such solutions in the sentence.

Despite the relatively higher case number that definitely exceeded the initial expectations, we felt that mediation could be applied more extensively. In connection with this, it was our presumption that the prosecutors and the judges would refer minor and simple cases to mediation and that they would not use mediation regarding all crimes in which mediation would be possible by law. We thought it probable that restitution/compensation would be considered equivalent to the payment of (full) damages, and that the other statutory forms of active repentance would not be used.

The statistics showed that there were vast differences between counties in the frequency of applying mediation. We thought that this was due to the judges' and prosecutors' attitudes to mediation, and we also felt that the types and numbers of mediated cases depended on the amount and quality of information courts and prosecutors had available.

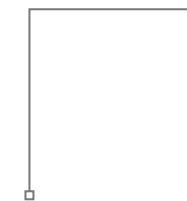
In the research, we examined the data we had available and the experience collected during the first year of criminal mediation in Hungary to see whether the hypotheses specified above were correct. We wanted to find out what characteristics the mediated cases shared, what the probability of reaching an agreement was, what happened after the agreements had been made and how they were used in the criminal procedure. We were also curious about the proportion of cases in which mediation was initiated by a participant but refused by the authorities and we wanted to collect information about the reasons of refusal. The attitudes of the authorities were also examined in the research. We wanted to find out about the judges' and the prosecutors' views on mediation.

The subject matter of the research was to identify the areas where it was possible to apply mediation as a tool of restorative justice, especially with regard to the possibilities under the statutory rules and the legal practice developed since 1 January 2007. The research

did not focus on the wider use of the principles of restorative justice.

During the research, we processed the data available about the mediation procedures conducted in 2007 and we carried out an attitude analysis of judges and prosecutors. In the attitude survey, we wanted to find out what the opinion of judges and prosecutors is about mediation, what they know about the method and what information they have available. For the attitude analysis, we chose three counties with high and three counties with low mediation rates. We also included Budapest in the sample. With the assistance of *Medián Közvélemény-és Piackutató Intézet* (a public poll and market research institute), we interviewed 202 prosecutors and 99 judges in six counties and in the capital with the help of questionnaires. All judges and prosecutors were selected from town courts and town prosecutor's offices.

5.2.3 Basic data from the first year



According to the Office of Justice's statistics, the Office received 2.451 referrals by the end of 2007. 1.529 of these were made by the prosecutors and 922 by courts (62.4% and 37.6%, respectively). 85% of the mediation procedures resulted in an agreement between the parties. There are 298 potential organisations in Hungary that can refer a case for mediation. 214 (72%) of these actually took the opportunity. From the 50 county-level organisations with the power to refer cases for mediation, 18 ordered mediation, while out of the 248 local organisations 196 took the opportunity to refer cases for mediation.

From the 214 organisations that ordered mediation, 156 (73%) referred less than 10 cases for mediation. This means that the potential users of the method hardly took advantage of this alternative way of resolving criminal cases. There are 47 potential users (22%) who referred 10 to 50 cases for mediation and 11 prosecutor's offices/courts (5%) who referred over 50 cases for mediation.

Type of crime	%	number
Crimes against property	56.1	1.375
Traffic-related crimes	27.9	685
Crimes against the person	15.9	389
Unknown	0.1	2
Total	100	2.451

Table 11
Cases referred to mediation by type of crime

The results are quite mixed if we calculate the ratio of mediation procedures and the total number of indictments for each county (see *Figure 15*). The 2.451 cases referred for mediation represented 1.28% of all indictments. Interestingly, there are significant differences between regions (and counties): the maximum ratio is 4.52% in Baranya county while the lowest is 0.5% in Nógrád county. This means that a case in Baranya is more than 9 times more likely to go to mediation than a case in Nógrád. These diverse data prompted the main questions of our attitude survey: what are the causes of these differences? Is there an explanation for the considerable differences between the counties' data?



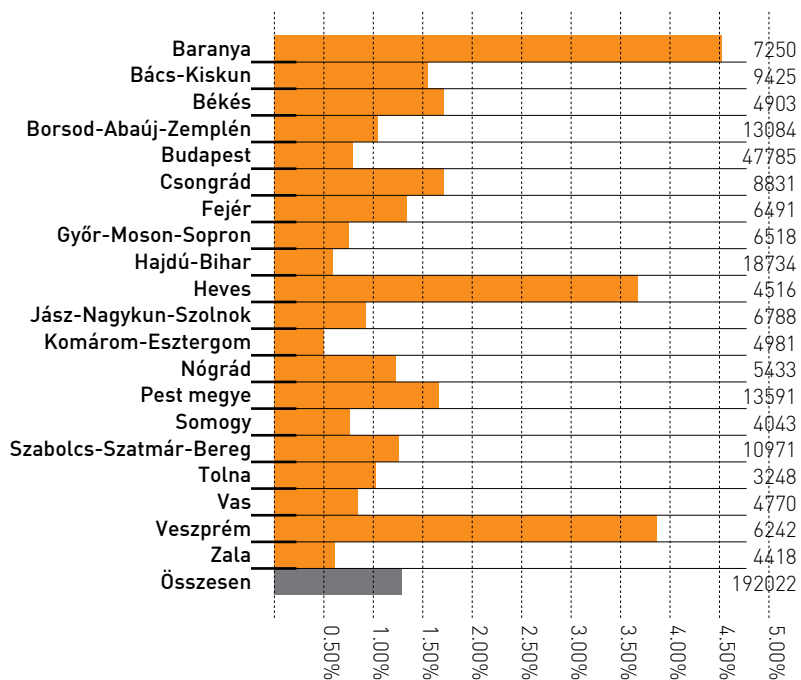


Figure 15
The share of cases referred to mediation in all indictments in each county (2007, %)

5.2.4 The attitude analysis

The objective of the questionnaire-based survey was to find an answer to the following question: is there a link between the attitudes of criminal law professionals and the proportion of mediation referrals in the given county? In other words: what is the connection between the vast differences in the results above and the opinions of professionals on mediation?

The survey was designed in a way that it included equal numbers of participants from three counties where mediation referral rates are very high (Baranya, Veszprém and Heves) and from three counties where referral rates are lower than the average (Nógrád, Zala and Tolna). In the end, 100 prosecutors and 50 judges participated in the survey from both low referral rate and high referral rate counties. In order to acquire the necessary number of survey items, we later made interviews in Budapest as well, where the proportion of mediation procedures compared to the number of indictments is also lower than the national average.

The interview questions can be classified in four categories:

- the role and the tasks of criminal justice;
- the operation of criminal justice;
- preventive, retributive and restorative justice;
- views on mediation;

We therefore tried to check whether there are large differences regarding these fundamental issues between counties with higher and counties with lower referral rates.

5.2.4.1 The objective of criminal justice

Our basic goal in examining the objective of criminal justice was to collect information on what proportion of judges and prosecutors supports the restorative justice paradigm and what proportion of them supports the retributive paradigm. We asked various categories of questions to find an answer.

When the 8 objectives listed below were evaluated one by one by the participants, the differences between the weights given to each objective were not massive but they were definitely quantifiable.

The professionals participating in the survey considered prevention and restitution the most important objectives of criminal justice and they saw retribution the least vital objective of the possible objectives. There were no significant differences between the institutions that refer a higher proportion of cases for mediation and the institutions that have lower referral rates. Consequently, the criminal philosophy behind mediation is accepted by a large majority of professionals everywhere (see Figure 16).

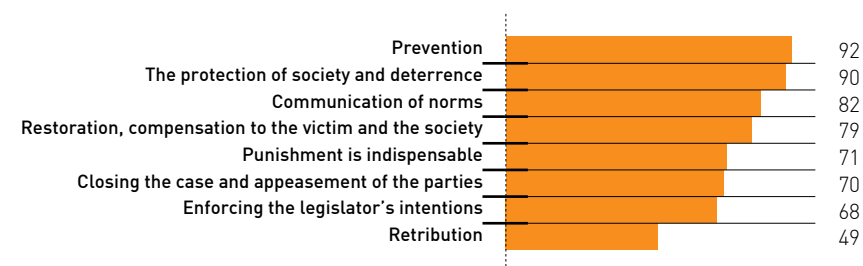


Figure 16
Views on the objective of criminal justice – average on a scale of 0 to 100 (100=very important, 0=not important at all)

5.2.4.2 The tasks of criminal justice

In the survey, we presented the possible objectives of criminal justice with a focus on restorative justice [we applied a similar list as the one used in an earlier study conducted by Klára Kerezsi⁷⁰ (2006) and we added two new possible objectives] to the participants and they were asked to grade to what extent they agreed with these objectives.

Almost all participants agreed that the victim's interests should be taken into consideration and represented in the procedure, and a similar proportion agreed that the offender should be encouraged to compensate the victim for the damage caused. The victim's compensation was included in five statements but the participant's level of agreement differed depending on the context. The participants tended to agree more with the need to encourage the offender to compensate the victim than with the statement that the parties should be encouraged to come to a settlement directly. The statement that the offender should primarily be convinced (and not forced) to cooperate in making amends is less accepted than the previous statements. The fourth most popular statement is the one in which restitution is obviously classified as the task of criminal justice, and the least popular is the one in which the punishment of the offender is given much less importance than the compensation of the damage.

In conclusion, it is clear that for professionals the punishment is by far the least important objective, and they give priority to restitution and the interest of the victim (see Figure 17).

⁷⁰ We would like to use this opportunity to thank Klára Kerezsi for permitting the use of her list of objectives.



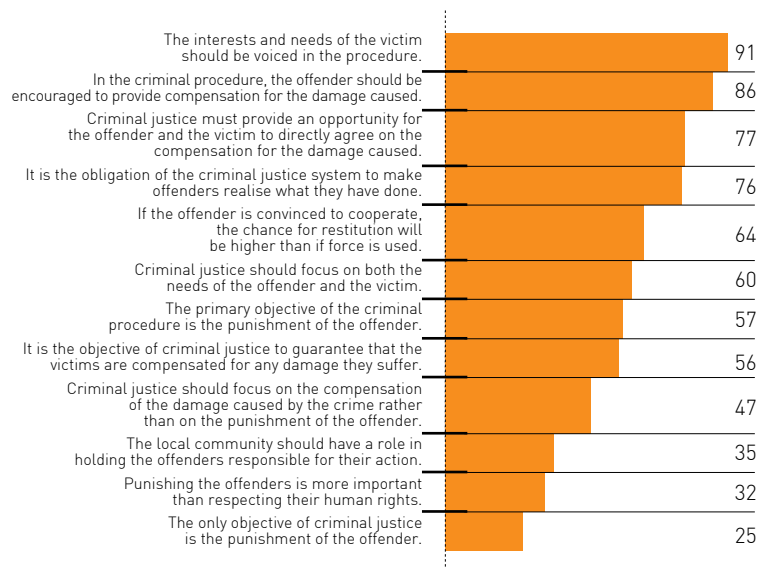


Figure 17
The importance of the various tasks of criminal justice – average on a scale of 0 to 100 (100=very important, 0=not important at all)

5.2.4.3 The operation of the criminal justice system and the participants of the criminal procedure

At this point, our aim was to find out whose interests are represented the most in the criminal procedure according to criminal law practitioners, and we also collected information on what participants think their role is in the procedure and how they would change these roles.

The answers suggested that the judges have the most important role in the procedure. The second most essential role is that of the prosecutors', while the suspects are a close third. The interests of the victims are currently at the least important (fifth) place. Interestingly, when the participants were asked about what the ideal situation would be, the victims' role changed the most when compared to their actual position. According to the participants, in an ideal case, the victims' interests moved up to the third position, "beating" offenders by a narrow margin, and defence attorneys were last in the line (see Figure 18). On the basis of a comparison between the "actual" and "ideal" situations, it can be concluded that according to the research participants only the victims should be given a role relatively larger than their current role, that is, the participants thought that the interests of the victims should be represented better.

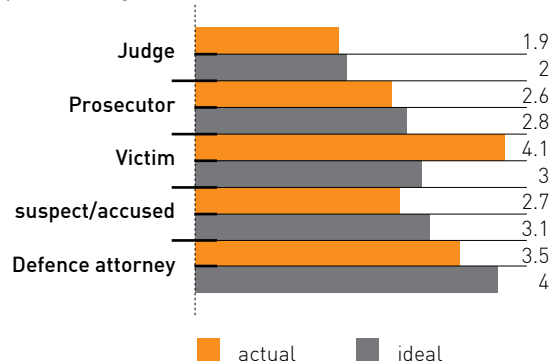


Figure 18
The importance of the party's role in the criminal procedure currently and in an ideal case – average rank (1=the most important role, 5=the least important role)

5.2.4.4 The practitioners' opinion of the mediation procedure

Below I listed a few key data on the role, the significance and the future of the procedures and also on some opinions about it (see Table 12).

	agrees/ is satisfied (%)
Punishments are effective in reducing crime rates	48%
Satisfied that mediation has become a method of criminal justice	92%
Mediation is an appropriate method for increasing the efficiency of criminal justice in terms of achieving its goals	75%
Mediation simplifies the work of prosecutors and judges (see below)	
Percentage of judges that agree	62%
Percentage of prosecutors that agree	31%
Satisfaction with the results of the procedures	80%
Satisfaction with the work of the Office of Justice and the probation officer mediators	95%
The number of procedures will increase short term	69%

Table 12
Opinions on the mediation procedure from certain aspects

Only a half of the professional staff of penal institutions think that punishment is suitable for reducing crime rates. Most of them are glad that mediation is now available in the criminal justice system because mediation can help criminal justice in achieving its goals.

About twice as many judges than prosecutors said that mediation makes their work simpler. One reason behind this may be that prosecutors come into contact with criminal cases first and refer them to mediation twice as often as judges, which means that judges have dealt with a smaller number of cases since the procedure was introduced.

Legal practitioners are very satisfied with the results of mediation and the work of the Office of Justice, and this can be interpreted as a sign that mediation will be applied more extensively. 70% of those who replied said that the application of the procedure is likely to grow.

5.2.5 Some key conclusions of the research

Criminal justice in Hungary has a unique double character as both the restorative paradigm and the retributive paradigm enjoy support among criminal law practitioners. However, it is clear that the restorative philosophy is in a more favourable position, as retributive reactions are less supported by the profession. This is because the current practice of punishment is regarded as a system of mediocre effectiveness and this in itself is not sufficient to reduce crime rates efficiently.

75% of judges and prosecutors believe that mediation improves the criminal justice system's efficiency in achieving its goals and they generally believe (95% of them) that the Office of Justice is doing a good job in mediation procedures. It is an important finding of the research that, according to the profession, the local court practice, the prosecutors' practice and custom all have an influential role in referring cases for mediation (in addition to the relevant legal regulations), which means that the local effect of mediation is the most significant factor. We also learned that low numbers of referrals for mediation in certain counties do not necessarily mean that a lot of mediation requests were rejected by the authorities but rather that the initiation of mediation was also low. This is most probably because in these counties the legal profession does not have enough information about mediation to apply it routinely.

There is a clear-cut difference between the attitudes of practitioners in counties where mediation is often applied and the attitudes of practitioners in counties where referrals are rarely made. The practitioners in counties with higher rates of mediation

- believe in restorative justice more,
- trust mediation more,
- have a better opinion of the method and its application,
- support retributive responses less,
- find agreements made in the procedures appropriate.

On the basis of the first year's experience, it is safe to declare that mediation is a success and criminal justice professionals are generally satisfied with the developments.

The method still offers a lot of opportunities to exploit. Mediation could be applied much more frequently than it is applied today, even if the applicable statutory rules are not modified. Prosecutors, judges and mediators should cooperate closely to achieve a more widespread use of mediation.

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Methodology

This publication contains articles on restorative practices presented at the European conference “European best practices of restorative justice in the criminal procedure” held between 27–29 April 2009 in Budapest within the framework of Project JLS/2007/ISEC/FPA/C1/033 of the same title.

The subject of the conference was based on the information on restorative practices applied in the specific member states provided by national experts of the EU member states reached and involved through the European Crime Prevention Network.

The contents and the structure of this publication differ from that of the conference (see at www.bunmegelozes.hu/index.html?pid=1672&lang=en) in an extent justified by the need to preserve the unity of content of articles by certain authors. While at the conference, it was possible to give presentations (even more by some speakers) emphasising specific aspects in separate plenary and workshop sessions on practices implemented

- in crime prevention (outside the criminal justice system),
- in the criminal procedure before the accusation,
- in the criminal procedure during the trial, and
- during the enforcement of sentences,

the articles in this publication are systematized according to Crime prevention – Pre-trial phase and Court procedure – Enforcement of sentences. The reason for this is that articles on restorative practices in the criminal procedure may contain certain practices applicable both before and after the accusation under almost the same conditions and with almost the same rules.

A further difference in comparison with the content of the conference is that the speeches and presentations given only for the reason of the formal and networking characteristics of the conference are not included in this publication.

Despite the title of the publication, we found it reasonable to include experiences on “bad practices” in certain articles in order to share the lessons learned.

The Subject Index attached to this publication gives an overview on the terminology of restorative justice and practices.



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The responsibility for the accuracy of the information rests with its authors, the views expressed in the publication can not be regarded as the official point of view of the European Commission or the Ministry of Justice and Law Enforcement of the Republic of Hungary.



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